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THE
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SUPREME COURTS OF CALIFORNIA, COLORADO, KANSAS,
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(83 Cal. 111)

PEOPLE *ex rel.* MORGAN *v.* HAYNE *et al.*
(No. 18,660.)

(Supreme Court of California. Feb. 6, 1890.)

SUPREME COURT COMMISSIONERS—CONSTITUTIONAL
LAW.

1. Act Cal. Feb. 15, 1889, (St. Cal. 1389, p. 13.) to provide for the appointment by the supreme court of five commissioners of the supreme court, to relieve the court, and which provides that they shall be appointed by the court, to "assist" in the performance of its duties, is constitutional.

2. Such commissioners do not exercise judicial functions, or usurp those of the judges of the supreme court, by receiving from the secretaries of the court the briefs and transcripts assigned to them by the court, and reporting the result of their examination thereof and of the authorities cited by counsel, with their opinion thereon, to the court; such reports and opinions never reaching the clerk of the court, nor being of any legal efficacy until approved by the court.

3. An objection that the reports and opinions of the commissioners may unduly influence the court in the rendition of judgments does not affect the constitutionality of the act.

In bank. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

George A. Johnson, Atty. Gen., for the People. S. M. Wilson and John Garber, for respondents.

FOX, J. This case comes to us on appeal from the superior court of the city and county of San Francisco. It is one of such commanding public importance, involving, as it does, the course of procedure in, and validity of, many of the judgments rendered by this court, that upon motion it has been advanced on the calendar, and is given precedence in the order of determination. It is a proceeding against the defendants; R. Y. Hayne, H. S. Foote, I. S. Belcher, J. A. Gibson, and P. Van Clief, the commissioners of this court, to inquire "by what authority they claim to exercise any judicial powers within the state of California, and particularly of considering and determining cases on appeal to the supreme court of said state." The complaint charges: (1) That the defendants are exercising the office of judges of the supreme court of the state of California, and as such claim

the right to and do pass upon cases appealed from the superior courts of the state to the supreme court, and decide the same by virtue of their appointment as supreme court commissioners; (2) that the act of the legislature creating the commission, approved March 12, 1885, and the acts amendatory of and supplementary thereto, are contrary to the provisions of article 6, §§ 1-4, of the constitution of the state of California, and are null and void; (3) that the only authority of the defendants to consider and pass upon appeals to the supreme court is by virtue of their appointment as commissioners, and the authority conferred under and by virtue of said acts; (4) that they and each of them are usurping the office of supreme judge of the state of California, and exercising the judicial powers of the state, vested solely in the supreme court by the constitution and laws of the state; and (5) that their only claim so to do is by virtue of their appointment under the acts of the legislature aforesaid.

The defendants answer, denying that they or either of them claim, or have ever claimed, or that they or either of them have ever exercised, or are now exercising, the office of judges of the supreme court; that they or either of them, as such or otherwise, claim the right to or do pass, or have ever passed, upon cases, or any case, appealed from the superior court to said supreme court, or to decide, or have decided, the same, by virtue of their appointment as supreme court commissioners or otherwise; deny that they or either of them claim, or have ever claimed, the right or authority to hear or determine causes, or any cause, on appeal from the superior court to the supreme court; deny that they or either of them do claim, or have ever claimed, the right to exercise any judicial power within the state; and deny that they or either of them are or ever have been usurping the office of supreme judge of the state of California, or exercising any judicial office or function whatever. They further aver that they are commissioners appointed under the act of the legislature approved February 15, 1889, to provide for the appointment by the

supreme court of five commissioners, to be known as "commissioners of the supreme court," etc., and that the only work which they or either of them perform, or claim the right to perform, or have ever performed, or claimed the right to perform, by virtue of their appointment or otherwise, consists in the preliminary examination of the records and briefs in cases referred to them by the supreme court, or the justices thereof, and of the authorities cited in such briefs, and in the making to the court, and the justices thereof, of written suggestions and opinions of the defendants, or some of them, as to the proper disposition of said causes, so referred as aforesaid, for the consideration of the said court and justices in the determination and disposition of said causes by said court and the justices thereof; that said suggestions and opinions have no force or effect whatever as judgments or decisions, nor are they filed or recorded as such; that neither of the defendants or any of them ever enter or direct any judgment or decision whatever in any case whatever, or ever have entered or caused to be entered any judgment, order, or decision whatever, in any case whatever, or ever claimed the right so to do; that neither they nor any of them do perform or exercise, or ever have performed or exercised, any other function than as above stated. They further deny that they or either of them hold or claim to hold their positions as such commissioners under the said act of March 12, 1885, or any act amendatory thereof or supplementary thereto.

On the issues thus framed trial was had, resulting in a judgment in favor of the defendants, and dismissing the action. Motion for a new trial was made, and heard upon a statement of the case, and denied, when plaintiff appealed from the judgment, and from the order denying the motion for new trial.

Upon the record, and as the case is presented in this court, there are but two questions for consideration: (1) Is the act under which it is conceded that these defendants were appointed—the act entitled "An act to provide for the appointment by the supreme court of five commissioners, to be known as 'commissioners of the supreme court,' and to appoint a secretary therefor, to relieve said court from the overburdened condition of its calendar, and to provide for the compensation of said commissioners and secretary, and to appropriate money therefor," approved February 15, 1889, (St. 1889, p. 13)—in conflict with the constitution? (2) Are the defendants usurping powers not conferred by the act?

1. The first section of the act is the only one which needs to be considered in the discussion of either of these questions. It reads as follows: "Section 1. The supreme court of the state of California shall immediately, upon the expiration of the term of office of the present supreme court commissioners, appoint five persons, of legal learning and

personal worth, as commissioners of said court. It shall be the duty of said commissioners, under such rules and regulations as said court may adopt, to assist in the performance of its duties, and in the disposition of the numerous causes now pending in said court undetermined. The said commissioners shall hold office for the term of four years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of said court, payable at the same time and in the same manner. Before entering upon the discharge of their duties they shall each take an oath to support the constitution of the United States and the constitution of the state of California, and to faithfully discharge the duties of the office of commissioner of the supreme court to the best of their ability. The said court shall have power to remove any and all members of said commission at any time, by an order entered on the minutes of said court, and all vacancies in said commission shall be filled in like manner."

This section contains all that there is in the entire act on the subject of the powers or duties of the commissioners. Every presumption is, as is the case with all legislative enactments, in favor of the constitutionality of the provision. It was enacted by a senate and assembly, every member of which was sworn to support the constitution, and is presumed to have passed his judgment to the effect that it is not in conflict with that instrument. It was approved by the chief executive, who was under like obligation, and whose judgment is usually exercised with even more deliberation than can be had in the hurry and confusion often attending upon the action of legislative bodies. The judgment of these two great departments of the government is not to be lightly disregarded or turned aside. Yet it is the province of the judicial department to finally determine the question of the constitutionality of this or any other statute law, whenever a litigant shall challenge the judgment of the other departments, and appeal to this for that final determination. It is also the duty of the judicial department, of its own motion, to pass upon and determine this question for itself, whenever it is called upon to act, in the exercise of its own jurisdiction, under a statute like the one under consideration. This court was so called upon to act when, on the 13th day of May, 1889, it appointed these commissioners, under and in conformity with the provisions of said act of February 15, 1889. By the very act of appointment it, by necessary implication, if not by direct ruling, held the act to be a valid law under the constitution; and this holding was not without direct precedent, even in this state and under the present constitution. Under a similar act, approved March 12, 1885, this court as then constituted appointed a commission for a like purpose, and with like powers, consisting of three members, and by such appointment

recognized the act as a valid law under the constitution. From that time until the creation of the present board, under the act of 1889, the commissioners so appointed exercised all the functions that are authorized to be exercised, or are in fact exercised, by these defendants under the said act of 1889. That commission and the present one have, unchallenged, assisted the court in the examination and preparation for decision of over a thousand cases wherein the judgments were *coram non judice*, if it be true, as claimed by the relator, that the act authorizes the commissioners to exercise functions, and they have exercised functions, judicial in their character, and which, by the constitution, are conferred alone upon the justices of this court. To reverse a construction which must of necessity have been given to these statutes before or at the time of the appointment of these commissioners, and which has been acquiesced in for so long a time, and thereby produce such a result as would follow such reversal, is a thing which ought not to be done by any court, unless there is found the gravest necessity for doing it. If the question of the constitutionality of the act was even doubtful, after such a lapse of time and such a practice under the act, the doubt ought to be resolved in favor of its validity, and the case be left to rest on the doctrine of *stare decisis*.

But to our minds there is no doubt about the validity of the statute. In the language of the court below: "The act in question is not open to objection of a constitutional character. In order to bring it into conflict with the constitution, a strained construction of its words becomes necessary, as well as an utter disregard of the natural import of those words. * * * The phrase 'assist the court' must, for the purpose of creating a conflict, be understood not merely to facilitate the court, which is the natural import,—to lessen its labors,—but, beyond this, to assume the exercise of, or a participation in the exercise of, the appropriate function of the court to decide causes; that the commissioners are to take part in that decision as the members of the court themselves take part in it; in short, it is necessary to say that 'assistance' means 'supersession.'" Nothing in the language used, or in its context, will justify any construction which will bring the provisions of this act in relation to the powers or duties of the commissioners in conflict with any provision of the constitution. If the language employed was capable of two or more constructions, any one of which would be in harmony with the constitution, it would be our duty to give it that construction. But, fortunately, we are not driven to the selection of one of several possible constructions. There is but one "warranted by the natural import of the language employed." One who attacks the constitutionality of such an enactment must not only overcome the strong presumption in favor of its validity, but he must show that, by the

natural and necessary import of the language, it is clearly in conflict with the supreme law. That has not been and cannot be done in this case. Not only is there an entire failure to confer judicial power upon these commissioners, but there is also an entire absence of an attempt to interfere with the exercise of the power conferred by the constitution upon and belonging to the judicial department of the government. The legislature has provided for the appointment and compensation of these commissioners. They are given no power except to "assist the court," under such rules and regulations as it may adopt in the performance of its duties. The great burden of the work of this court is that which is necessarily done in sifting the causes, to ascertain, from the mass of matter brought here in each case, the truth and the law bearing upon it, preparatory to the processes of adjudication and judgment. To say that the court cannot be assisted in this preliminary work by men sworn to fidelity, learned in the law, unconnected with and unbiased in the causes, is to deny us unbiased assistance in the very direction in which we are bound to receive it, and do receive it, in every cause that comes before us, from counsel not equally free or likely to give us unprejudiced opinions and statements; and to deny us such assistance as courts of every grade have been accustomed, time out of mind, to receive, without objection, in this country and in England. It is no more unconstitutional for this court to receive such assistance from commissioners designated by itself, or from *amici curiæ*, than to accept similar assistance from the statements of fact and arguments of the counsel in the cause. As well might it be said that section 266 of the Code of Civil Procedure, which provides that the secretaries and bailiffs of this court shall hold their offices at the pleasure of the justices, and "shall perform such duties as may be required of them by the court or the justices thereof," is unconstitutional, and conferred upon those officers judicial power. "The power to hear (examine) causes, and report facts or conclusions to the court for its judgment, is not judicial, within the meaning of the constitution." *Shultz v. McPheeters*, 79 Ind. 378. "No action which is merely preparatory to an order or judgment to be rendered by some different body can be properly termed judicial. * * * It is the inherent authority not only to decide, but to make binding orders or judgments, which constitutes judicial power; and the instrumentalities used to inform the tribunal, whether left to its own choice or fixed by law, are merely auxiliary to that power, and operate on persons or things only through its action, and by virtue of it." *Underwood v. McDuffee*, 15 Mich. 361.

The only case cited by the relator in support of his argument against the constitutionality of this act is that of *State v. Noble*, decided by the supreme court of Indiana, and reported in 21 N. E. Rep. 244. While this

case, or that of any other state court of last resort, is not binding as authority upon this court, it would be strongly persuasive, if the act of the legislature under consideration was not so unlike our own as entirely to defeat the purpose for which it is cited here. There, as here, the legislature provided for the appointment of a commission to assist the supreme court in the performance of its duties. But there it provided that the legislature should appoint the commissioners, and in case of vacancy in the commission the same should be filled by appointment made by the governor; thus taking away from the judicial department the power to select its own assistants, and thrusting upon the court men selected by the political and executive departments of the government. Chief Justice ELLIOTT, who wrote the opinion, is widely and favorably known, not only for his legal learning and ability, but for the tenacity with which he insists upon the independence of the several departments of the government, and resents any encroachment upon the powers and rights of the judiciary. The only question which he was called upon necessarily to decide in the case was as to the right of the legislature to appoint, or to provide for the appointment of, by any other officer than the court itself, commissioners who should act as assistants to the court in the performance of its duties. This question he discusses ably, and finally declares: "It cannot be doubted that judicial power includes the authority to select persons whose services may be required in judicial proceedings, or who may be required to act as the assistants of the judges in the performance of their judicial functions, whether they be referees, receivers, attorneys, masters, or commissioners. * * *

As the judicial power embraced the authority to select 'assistants and ministers' at the time the constitution was adopted, that right was sanctioned and confirmed, for it was the power then existing that was so carefully and fully vested in the courts. It was, as we have shown, a well-known and fully recognized principle that courts should, as part of the judicial power, have the right to choose their own assistants, and the constitution has secured and confirmed that principle beyond the power of the legislature to shake it." The court then discusses other features in the act, not found in our own, conferring upon the commissioners certain powers not conferred by our act, and which in their nature constitute a part of the judicial power of the court; and, in view of these several features, holds the act to be unconstitutional. But, as we read it, there is nothing in the decision to indicate that the act here under consideration would have been held by that court to be in conflict with the constitution, or that the legislature might not provide for the court itself appointing commissioners to assist it or its justices in the preliminary and preparatory work necessary to the final adjudication and determination of the causes before it.

2. In the investigation of the second question involved, one of the justices of this court longest in commission,—one who has been upon this bench ever since the organization of the court under the present constitution,—and one of the commissioners longest in service, were called and examined as witnesses, and it was agreed that the other justices and commissioners would testify substantially the same way. From the testimony thus elicited it was distinctly and clearly shown that the answer of the defendants was and is true; that they do not usurp the functions of judges of this court, and do not exercise any judicial power whatever. They receive, not from the clerk—for they have no communication with him,—but from the secretaries of the court, such of the transcripts and briefs as the court shall have assigned to them, and make a critical examination of the transcripts, briefs, and of the authorities cited by counsel, and report to the court the result of such examination, with their opinion thereon, accompanied with a citation of the authorities, and also with frequent references to folios of the transcript, to aid the court in its investigations. These reports and opinions have no force or effect whatever as judgments of the court, do not go to the clerk, but through the secretaries come back to the judges, and they never reach the office of the clerk of the court, or become in any manner public, unless, upon examination by the justices themselves of the record, the briefs, and the opinions so furnished by the commissioners, they are approved and adopted by a constitutional number of the justices, and the judgment of the court is ordered in conformity therewith. Many of these reports and opinions are never approved and never see the light. Others of them are used in part, and only in part. In every case, when the judgment is rendered, it is the judgment of the court, and not of the commissioners. Nothing originates before these commissioners, and nothing terminates with their labors or their opinion. The conclusions to which they arrive are but opinions submitted for our adoption, if we think they are founded in reason and law. Hence their reports and opinions are neither decisions nor infallible guides, but they are serviceable instrumentalities to aid us in performing our functions. The commissioners exercise no power *proprio vigore*. The court acquires the jurisdiction, and the court renders the judgment upon the controversy. Therefore the whole exercise of the judicial power is by the court, the commissioners acting only in an intermediate capacity, as auxiliary to the court in the ascertainment of certain facts and law necessary to its enlightenment in giving the proper decision and judgment.

Another objection urged against this commission is that the reports and opinions of the commissioners are likely to or may have an undue influence on the court, or the justices thereof, in their subsequent considera-

tion of the cases, and in the rendition of judgments thereon. A complete answer to this, so far as this action is concerned, is that, if it has any force as an objection, it is not the fault of the act, but of the court. It does not go to the question of the constitutionality of the law, nor does it tend to show that the commissioners are usurping judicial power. Neither do we see any good reason to apprehend that a careful and impartial collation of the facts and points in a case, with references to the transcript for the verification thereof, made by men skilled in that service, and entirely unbiased and uninterested in the cause, accompanied by an expression of opinion as to the law and reference to the authorities to sustain it, as well as a reference to the authorities claimed to be adverse to such opinion, is any more likely, or even as likely, to improperly influence the court in arriving at a judgment, as a similar service rendered by retained counsel, acting under the spur of retainer, and in the direct interest of their clients. And such assistance the court is constantly bound, under the law, to receive, and give to it most careful consideration. If this objection has any foundation in fact, it addresses itself to the legislature, and not to the court. The judgment and order appealed from are affirmed, and it is further ordered that the *remittitur* herein issue forthwith.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.; PATERSON, J.

BEATTY, C. J. I concur in the judgment of affirmance, and in most of the reasoning of Justice FOX's opinion, but I do not think that a determination now that the act in question is unconstitutional would have the effect of invalidating judgments heretofore rendered in cases referred to the commission, and based upon their opinion or report. Therefore I do not rely at all upon the doctrine of *stare decisis* as a ground of my conclusions. And I do not agree that there is nothing in the opinion of Judge ELLIOTT, in the case of *State v. Noble*, to indicate that he would have held our act unconstitutional. On the contrary, he expresses views from which, in my opinion, such a conclusion must follow, but I do not assent to his views. It seems to me that the point at which he goes wrong is where he declares that the duty of writing its opinions is specifically imposed upon the supreme court by the constitution. If I held to this view, I confess I could see no escape from the conclusion that the duties we assign to our commissioners, and which are performed by them, involve a delegation by us, and a usurpation by them, of judicial functions. But I see nothing in the language of the Indiana constitution, as quoted by Judge ELLIOTT, and nothing in the language of our own constitution, to warrant the conclusion that the writing of opinions is specifically imposed upon the members of the court. The pre-

cise language of our constitution is as follows: "In the determination of causes, all decisions of the court in bank or in departments shall be given in writing, and the grounds of the decision shall be stated." Article 6, § 2. In order to comply with this injunction, it is undoubtedly necessary that the court, or some member to whom the duty is assigned, shall in most cases prepare a written opinion; but there may be, and in fact are, many cases in which the labor of formulating a statement of the grounds of the decision has been performed in advance, or may be properly delegated to others. It not infrequently happens that the judge of the superior court prepares an opinion fully covering every proposition involved in a case, and that his opinion is found to be in all respects correct. In such cases there is certainly no necessity for the preparation of a new opinion here, which could differ in form only from the opinion of the trial judge. On the contrary, this court may, and frequently does, adopt the opinion of the trial judge as its own, and for the reasons therein stated affirms the judgment or order appealed from. *Burrell v. Haw*, 48 Cal. 223; *Meredith v. Supervisors*, 50 Cal. 433; *Williams v. Williams*, 73 Cal. 101, 14 Pac. Rep. 394. Many similar instances might be cited from the reports of this and other states, and in this case we might well have adopted the opinion of Judge WALLACE of the superior court as the grounds for affirming his judgment. Sometimes a proposition covering the whole or one or more branches of a case is found to be so aptly and correctly stated in the printed argument of counsel that the court can do no better than to adopt it as the ground of its decision. *Sneath v. Griffin*, 48 Cal. 438; *Brown v. Burbank*, 64 Cal. 101. Can it be said that this is a violation of the constitution? I certainly think not. The object of the constitutional requirement is not to compel the judges to formulate opinions in their own language, but to put upon record the grounds of their decisions, for the guidance of the public in their business transactions. The cases which are referred by us to the commission are those which are fully presented on the papers. The object of the reference is to obtain a report containing a brief and logical statement of the material facts exhibited by the record, and of the legal propositions upon which the judgment depends. When that report is submitted in the form of an opinion by one or more of the commissioners, with a suggestion that for the reasons stated a particular judgment should be given, it then becomes the duty of the court to compare the report with the record, and with the printed arguments of counsel, and to determine for itself whether the reported opinion ought to be adopted, modified, or rejected. If upon such examination the court finds that the facts and the law have been correctly stated by the commission, and it adopts the opinion as its own, the case is not different from those in which

the opinion of the trial judge is adopted. The court, though not the author of the opinion, by adopting it makes it its own. "But," it is asked, "if the court, after receiving the report of the commission, re-examines the case for itself, what is the use of the commission? It saves the court no labor, and does nothing to facilitate the disposition of causes." This a wholly mistaken assumption. The examination of the record of a case and the argument of counsel, for the purpose of ascertaining the material facts and the law bearing upon them, is a very large part of the labor of decision, but it is by no means all. There are some persons in whom the literary faculty is highly developed, to whom the writing of opinions may be a trifling task, but I apprehend that, according to the experience of most judges, the putting of their opinions in form, even after their minds are fully made up, is a very serious labor, requiring the expenditure of a large portion of the time at their disposal. By the labors of the commission this time and much serious labor is saved to the court in a large proportion of the cases referred to them, without any abdication or delegation by the court of its constitutional functions.

(32 Cal. 96)

MORAN v. GARDEMEYER et al. (NO. 12,197.)

(Supreme Court of California. Dec. 18, 1889.)

EXECUTORS AND ADMINISTRATORS—MORTGAGES—ATTORNEY'S FEES.

1. Under Code Civil Proc. Cal. § 1497, providing for the filing and allowance of claims against decedents' estates; and section 1500, providing that no holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except that an action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint,—the presentation to, and allowance by, the personal representatives of a deceased mortgagor of a claim founded upon the note which the mortgage was given to secure does not bar the right to proceed on such mortgage by foreclosure suit.

2. Where a mortgage is conditioned as security, in addition to the principal sum named, "for all further advances to the mortgagor by the mortgagee that may exist, arise, or be contracted before the satisfaction hereof," a subsequent note, indorsed by the mortgagor, and by him transferred to the mortgagee, is not secured by the terms of the mortgage.

3. Where a mortgage provides for counsel fees in case of foreclosure, it is in the discretion of the court to make a reasonable and just allowance therefor without regard to the amount specified in the mortgage.

Department 1. Appeal from superior court, Alameda county; E. M. GIBSON, Judge.

Action in foreclosure against the executors of a mortgagor. Plaintiff had judgment, from which defendants appeal. Code Civil Proc. Cal. § 1497, provides for the filing and allowance of claims against decedents' estates; and section 1500 provides that "no holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or adminis-

trator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint."

Naphtaly, Friedenrich & Ackerman, for appellants. *George M. Shaw* and *A. M. Rosborough*, for respondent.

FOX, J. This is an action by a mortgagee against the executors of a mortgagor for foreclosure. December 29, 1882, Johanne C. F. Gardemeyer, otherwise called and usually writing his name Christian Gardemeyer, made to plaintiff his promissory note for \$3,000, due two years after date, with interest at the rate of 9 per cent. per annum, payable semi-annually, and, if the principal or interest was not paid at maturity, then the same was to bear interest at the rate of 1 per cent. per month until paid. To secure the payment of this note according to the terms thereof, he at the same time made and executed to plaintiff a mortgage of certain real estate situate in the county of Alameda, which was duly acknowledged and recorded. This mortgage expressed on its face that it was to be security, not only for the promissory note aforesaid, but also "for all further advances to the mortgagor by the mortgagee, and other indebtedness to the mortgagor by the mortgagee that may exist, arise, or be contracted before the satisfaction hereof, such further advances and indebtedness not to exceed the sum of \$500, exclusive of interest." Nothing was ever paid on the said promissory note, except the interest to December 28, 1884. According to the allegations of the complaint, on the 11th of October, 1884, one P. D. Gardemeyer made his promissory note, payable to the order of the mortgagor above named, for the sum of \$750, due one day after date, with interest at 7 per cent. per month from date until paid; that on the 22d of November, 1884, the mortgagor, holder of said note, indorsed and transferred the same to plaintiff; and that no part thereof, principal or interest, has been paid. It further appears that on the 25th day of May, 1885, the mortgagor died, and in due course his will was admitted to probate, and three of the defendants herein were appointed and qualified as executors thereof. The other defendants are minor heirs of the deceased, and devisees under his will. In due course the plaintiff presented his claim upon both these notes to the executors for allowance, and both were allowed and approved by the executors, and by the court in probate. The claim as presented particularly specified that the first-named note was secured by the mortgage above referred to, reciting it by date and place of record; but as to the second-named note the claim so presented did not make any pretense that it was secured, or that any part of it was secured, or claimed to be secured, by said mortgage or otherwise. The mortgage provided, among other things, that in case of

foreclosure there should be allowed, and secured by the mortgage, a counsel fee of \$100, and 5 per cent. upon the amount found due. The complaint was in two counts,—the first upon the note for \$3,000; and the second upon the note of P. D. Gardemeyer, so indorsed to plaintiff as aforesaid, and claiming that as to \$500 of said last-named note, and the interest on said \$500 at the rate of 7 per cent. per month, it was secured by said mortgage. Each count was full and complete as to form, and each count averred that \$100 and 5 per cent. upon the amount of the judgment was a reasonable amount to be allowed to plaintiff as counsel fee in the case. The prayer was that plaintiff recover judgment for the sum of \$3,000, with interest thereon at the rate of 1 per cent. per month from December 23, 1884, interest payable semi-annually, with interest upon unpaid installments of interest at 1 per cent. per month; also for the sum of \$500, with interest thereon at the rate of 7 per cent. per month from October 11, 1884; and for the sum of \$100, and 5 per cent. upon the amount of the judgment as counsel fee, and costs of suit, and for a decree of foreclosure in the usual form, directing that the mortgaged property be sold for the payment of such judgment, etc. To this complaint, and each count thereof separately, the defendants demurred. The demurrer was overruled. The executors made default for want of answer. The minor heirs answered by their guardian *ad litem*, denying all the allegations of the complaint except as to their own *status* to the case and relations to the property. The case was submitted to the court upon the pleadings, the default of the executors, and the proofs made in open court, and decree entered declaring that there is now (March 16, 1887) due to the plaintiff, upon the debts and mortgage set forth, the sum of \$3,500 principal, with the further sum of \$728.74 interest, \$300 counsel fees, and \$31.50 costs of suit, and ordering foreclosure and sale of the property to satisfy the same, and that judgment be entered against the estate for deficiency, if any there be. It will thus be seen that the judgment was for the principal sum claimed in both counts of the complaint. Presumptively interest is allowed upon the sums claimed in both counts as prayed, as no point is made on that subject. The appeal is from the judgment, and the case comes up on the judgment roll.

The point made against the first count of this complaint is that the plaintiff is not entitled to maintain this action to foreclose, for the reason that he had already presented his claim against the estate for the amount of the indebtedness represented by the said \$3,000 note and interest, and the same had been allowed and approved, and stood as an admitted claim against the estate, to be paid in due course of administration, and he, therefore, no longer had a right to proceed for the collection of the same by foreclosure, and to subject the estate to the costs and counsel fees in foreclosure. Counsel contend that,

having filed his claim under section 1497, Code Civil Proc., a mortgagee is, under the present constitution and statutes, thereafter barred of the right to proceed by foreclosure, unless the right is given by section 1500, and that under that section it is only given where he declines to file his claim under section 1497, and elects to look to the mortgaged property alone for the recovery of his money, and expressly waives all claim against the estate for deficiency and all claim for counsel fee; also claiming that when his claim is once filed and allowed he is amply protected by the provisions of section 1569, *Id.* We cannot concede, as counsel contend, that this is now an open question in this court. The point made was directly decided, against the position taken by appellants here, in *Society v. Conlin*, 67 Cal. 180, 7 Pac. Rep. 477. This case was followed by *Society v. Hutchinson*, 68 Cal. 52, 8 Pac. Rep. 627, and *Wise v. Williams*, 72 Cal. 544, 14 Pac. Rep. 204, both of which were cases of foreclosure after presentation and allowance of the claim, and where, but for the presentation and allowance of claim, the debt would have been barred by the statute of limitations, and mortgage extinguished; and in both cases the court held that the action could be maintained, and that the debt, by reason of the fact that it had been presented and allowed, did not and would not become barred pending administration. On the authority of these decisions, we must hold that this point is not well taken, and under the statute we see no reason to doubt the correctness of this conclusion.

To the second count of the complaint the defendants made the same point, under the cause of demurrer that the same did not state facts sufficient to constitute a cause of action, and specially demurred for that it affirmatively appeared on the face of the complaint that the indebtedness therein set forth was not secured by the said mortgage, that it was not presented to the executors as a claim secured by said mortgage, and did not rank as a secured claim against said estate. The court overruled this demurrer, and in its decree, as already shown, allowed \$500 of this note, with the interest thereon, as secured by this mortgage, and ordered foreclosure therefor. In this we think the court erred. By no fair construction of the terms of that mortgage can it be held that the plaintiff could go out and buy up the notes of third parties, upon which his mortgagor was a simple indorser, and hold the same as secured by that mortgage. Besides, in presenting his claim thereon to the executors, and to the court sitting in probate, he did not present it as a secured claim, but it was presented and allowed as an unsecured claim against the estate, to be paid in due course of administration. Respondent, however, claims that it was averred in the complaint, and admitted by the demurrer, that the claim, to the extent allowed in this decree, was secured by that mortgage, and that consequently the decree in that regard is in accordance

with the admissions of the pleadings. We have looked in vain for any such allegation in the complaint, and, if there was such an averment in one part of the complaint, it was contradicted by the copy of the sworn claim, as presented to the executors, which copy was annexed to and made a part of the complaint.

The mortgage having provided for counsel fee in case of foreclosure, it was and is in the discretion of the court below to make such allowance as in its judgment was reasonable and just, without regard to the amount or percentage specified in the mortgage. The court seems to have acted on this understanding of the law, and we cannot say that there was any abuse of discretion in the allowance made. The judgment and decree must be reversed as to so much of it as is based upon the cause of action set out in the second count of this complaint, and the cause remanded for further proceedings in accordance with this opinion. So ordered.

We concur: WORKS, J.; PATERSON, J.

(82 Cal. 102)

MORAN v. GARDEMEYER *et al.* (No. 12,198.)
(Supreme Court of California. Dec. 18, 1889.)

MORTGAGES—DEBTS SECURED.

A mortgage containing the condition that, in addition to the principal sum secured, it shall be security for "all further advances to the mortgagor by the mortgagee that may exist, arise, or be contracted before the satisfaction hereof," does not cover a subsequent note given to the mortgagee, containing this clause: "This note is secured by crop mortgage," so that the holder may sue the mortgagor's executor without presenting the claim, as provided by Code Civil Proc. Cal. § 1500, in case of claims secured by mortgage.

Department 1. Appeal from superior court, Alameda county; E. M. GIBSON, Judge.

Naphtaly, Friedenrich & Ackerman, for appellants. *George M. Shaw* and *A. M. Rosborough*, for respondent.

FOX, J. With the exception that the amounts are different, and the mortgage is upon different property, this case is exactly like No. 12,197, ante, 6, between the same parties, (decided this day,) in all that relates to the cause of action set out in the first count of the complaint, and in all that relates to the course of procedure in the cause, and the judgment and decree therein rendered. Without repeating the history of the case in detail, on the authority of the decision in said No. 12,197, we hold that the objection to the judgment and decree is not well taken, so far as the same relates to the cause of action set out in the first count of the complaint. The mortgage was exactly the same as the other on the subject of future advances and indebtedness. Long after the date of the mortgage and of the note therein set out (the subject-matter of the first count) the mortgagor made and executed to the mortgagee, plaintiff herein, his promissory note for the sum of \$1,803, payable on the 1st of September, 1884, with interest at the rate of 1 per cent. per month, which note contained these

clauses: "In case of suit to collect this note, or any part thereof, I agree to pay attorney's fees and costs of court, which shall be included in the judgment. This note is secured by crop mortgage." In due course plaintiff presented his claim against the estate of the mortgagor, upon this note, asserting that it was secured by crop mortgage, as shown upon its face, but making no pretense that it or any part of it was secured by the mortgage now in suit, or otherwise than by such crop mortgage. It was regularly allowed as presented. Now, in this foreclosure, he sets it up as a separate cause of action, in a second count to his complaint, and prays that it be decreed that as to \$500 of the amount, with the interest thereon, it is secured by this mortgage, and that it be included in the judgment of foreclosure, with judgment docketed against the estate for the deficiency, if there be any. As before, there is no direct averment in the complaint that this note was secured by this mortgage to any extent, and the note itself, and the claim as presented to the executors, negative the proposition that it was so secured, by showing affirmatively that it was otherwise secured. If the note had been silent on the subject of security, under the well-established rule in regard to mortgages given to secure future indebtedness we should have been constrained to hold that it was secured by the mortgage in suit to the extent of the limitation therein prescribed. But as to this note the plaintiff has accepted it, expressing upon its face that it is otherwise secured as to its entirety, and with no expression indicating that it is secured by this mortgage, either in whole or in part. He has failed anywhere to advise the executors that it is so secured. We must hold that, if he could resort to this security at all upon that note, it could only be for the deficiency, after exhausting the other security. And it is by no means certain that he could do that; that as to such deficiency, if there should be one, he would not be remitted to his established claim against the estate, to be paid in due course of administration. It is unnecessary to decide that question here, for in this case he has made no attempt to show that he has exhausted the direct security given for the payment of that note. It follows that the judgment and decree in this case must be reversed, so far as it is based upon the cause of action set out in the second count of the complaint, and the case be remanded for further proceedings in accordance with this opinion. So ordered.

We concur: WORKS, J.; PATERSON, J.

(82 Cal. 104)

MILLER v. PRENTICE. (No. 12,239.)
(Supreme Court of California. Dec. 18, 1889.)

SCHOOL LANDS—CERTIFICATE OF PURCHASE.

A certificate of purchase of state school lands, issued under Pol. Code Cal. § 3495, requiring an applicant to make affidavit whether the land is or is not suitable for cultivation, and, if it is, that he is an actual settler thereon, is only *prima facie* evidence of the purchaser's title, and

may be impeached by proof showing that he was not legally entitled to purchase the land.

Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Gail & Morehouse, for appellant. *Webb & Sherwood*, for respondent.

SHARPSTEIN, J. Ejectment. Complaint in the usual form, all the allegations of which are denied by the answer. The demanded premises were state school lands. Plaintiff relies on a certificate of purchase as establishing his title and right to the possession of said premises. The court found for plaintiff, entered judgment in his favor, and denied defendant's motion for a new trial. From the judgment and order denying his motion for a new trial defendant appeals. His contention here is that he proved on the trial that the land is suitable for cultivation, and that plaintiff had never been an actual settler on it, and that plaintiff is not a citizen of the United States.

That the plaintiff was never an actual settler on the demanded premises is shown by evidence free from conflict; and by evidence likewise free from conflict it is shown that the defendant was an actual settler on said premises, and that he had applied, in the proper mode, to purchase the same from the state. One of the requirements of the Code is that any person desiring to purchase any portion, not less than the smallest legal subdivision of any of the sixteenth and thirty-sixth sections, make an affidavit stating "whether the land is or is not suitable for cultivation; and, if it is, that the applicant is an actual settler thereon." In this case the plaintiff did not state in his affidavit whether the land was or was not suitable for cultivation, and the evidence on the trial, we think, without material conflict, shows that it was suitable for cultivation. The plaintiff states in his testimony "that the land is what you would call grazing land. Some of it could be plowed, but not more than the smallest legal subdivision at any one place. I don't think you could find more than eighteen or twenty acres at any one place, if you could find that, which you could plow. The land is hilly, and, in my judgment, not fit for agriculture." We do not think that this materially conflicts with the testimony of witnesses who testify that they are well acquainted with the land in controversy, and that it is suitable for cultivation. The evidence as to the citizenship of plaintiff is clearly insufficient to establish that fact. He swears that he was born in France, and was naturalized in the city of New York, but has lost his naturalization papers. We do not doubt that the defendant, who is in the actual occupation of the premises, is in a position to show, when his right of possession is assailed, that his assailant has no title or right of possession in and to the premises. The plaintiff's certificate is only *prima facie* evidence of his title, and may be impeached

by proving that he could not legally purchase the land. As we have before stated, his affidavit is defective, in omitting to state whether the land was or was not suitable for cultivation; and the evidence shows that it was, and that plaintiff was not an actual settler upon it. Therefore, the finding of the court that the plaintiff is the owner of, and entitled to the possession of, the demanded premises, is not justified by the evidence. Judgment and order reversed.

We concur: THORNTON, J.; MCFARLAND, J.

(82 Cal. 174)

RICHARDSON *et al.* v. BUTLER *et al.* (No. 12,454.)

(Supreme Court of California. Dec. 23, 1889.)

EXECUTORS AND ADMINISTRATORS—SALE OF LAND—PROCEEDINGS OF PROBATE COURT—COLLATERAL ATTACK.

1. A petition for a sale of land by an administrator, aided by an inventory which was made part of it, described the land as an undivided half interest in the Sharp and Sproul tract, situate in San Francisco, and then gives metes and bounds, excepting certain parcels heretofore conveyed, which are delineated and marked on a map or diagram "on file herein." This map, at the time of trial, could not be found. It further stated that under certain legislative acts all of said land was reserved and appropriated by the public for a park, except that portion described in Schedule B, and another portion assigned to S, under a decree for partition, which was referred to; that the only real property to which the estate was entitled was that described in Schedule B, and that the condition and value of the same are set forth in said schedule. Schedule B contained full descriptions of all the lands belonging to the estate. *Held*, that the description was sufficient, under Code Civil Proc. Cal. § 1537, requiring the petition to contain a description of the property, and the condition and value thereof.

2. The designation of a city lot as "unimproved" is a sufficient description of its condition, as required by section 1537.

3. In a petition by an administrator to sell land, simply to provide for the family allowance and future expenses of administration, where the prior accounts of the administrator have been settled, an averment that there are no debts or expenses accrued and unpaid is a sufficient statement of the debts, expenses, and charges of administration required by Code Civil Proc. Cal. § 1537.

4. Where it appears from the petition that the amount necessary to be raised is between \$10,000 and \$11,000, and the property consists of several lots and parcels, a provision that the sale shall cease when an amount not less than \$10,000, and not more than \$11,000, shall be obtained, does not invalidate the order of sale.

5. An adjudication by the probate court that a notice of sale had been posted in three public places cannot be attacked collaterally.

6. Where certain schedules were annexed to and made part of the petition, a verification placed before the schedules is not improper.

Department 2. Appeal from superior court, city and county of San Francisco; G. MAGUIRE, Judge.

Jarboe, Harrison & Goodfellow, for appellants. *J. C. Bates*, for respondents.

MCFARLAND, J. Action to quiet title. Judgment for plaintiffs, from which, and from an order denying a new trial, the defendants Kate Dunne and Alice Dunne appeal. Plaintiffs claim title to the disputed

premises as heirs at law of their deceased father, John Sproul. Defendants claim title under a probate sale made to their grantors in the course of the administration of the estate of said Sproul, deceased, upon the petition of his administratrix, Mary Ann Sproul. The court below ruled said sale to be void, and practically the only question in the case is whether or not that ruling was correct. The court below merely found, generally, that "said sale was void in law, and passed no title to said Moxley and Kingwell, (plaintiff's grantors,) or either of them;" and does not find any specific facts upon which that conclusion was based. But the brief of respondent's counsel—waiving, for the present, appellant's objection to the findings for insufficiency—discloses the grounds of the finding, and the main one is that the petition for the sale did not contain a description of the real property of the estate, and a statement of its condition and value, as required by section 1537, Code Civil Proc.

It is no doubt the settled rule here that the application of an administrator for the sale of lands belonging to the estate is an independent proceeding; that the jurisdiction of the probate court over it does not come from its general jurisdiction over the administration of the estate, but from the petition for the sale; and that the petition must comply with the requirements of the Code. *Pryor v. Downey*, 50 Cal. 398, and cases there cited. And we apprehend that this rule is not changed by the provisions of the present constitution, which gives jurisdiction of probate business to a court of general jurisdiction; or by the fact that the Code no longer requires a deficiency of personal property to be shown, before there can be any valid sale of real property. But, as was said in *Stuart v. Allen*, 16 Cal. 501: "In order to the exercise of jurisdiction, it is not necessary that there should be a literal compliance with the directions of the statute. A substantial compliance is enough." A court, keeping in view the interests of both heirs and purchasers in good faith for value, (as in this case,) ought not to consider the provisions of the Code as presenting an intricate verbal puzzle which must be worked out minutely, and with extreme exactness, in the petition. Such a view would make grave rights of property dependent upon the doing of mere trifling tricks. Looking at the purposes of the Code provisions on the subject,—gathered, of course, from their language,—a petition should be considered sufficient if it fully and fairly answers those purposes; and the main purpose, clearly, is to inform the court about the condition of the estate, so that it may pass upon the necessity and propriety of the sale. And, with these views, we think that the petition involved in this case was sufficient.

John Sproul died in January, 1869; and the petition was not filed until November, 1874,—nearly five years afterwards. It is quite lengthy, and covers 16 pages of the

printed transcript. With respect to the real property as it stood when the deceased died, the petition states that on March 28, 1870, she returned to the court "a true inventory and appraisement of all the estate of said deceased which came to her possession or knowledge, which inventory and appraisement is hereby referred to, and made a part hereof." It then states that "the only property which came into the possession of your petitioner, as appears by said inventory and appraisement, was" (after mentioning personal property) "an undivided one-half interest in and to the tract of land described in said inventory, and known as the 'Sharp and Sproul Tract,' and owned in common by said deceased and George F. Sharp, appraised as of the value of \$35,000." This tract is further described in the petition as "situate in said city and county of San Francisco, and known as 'Outside Lands.'" The petition further states that, under certain acts and ordinances of congress, the state of California, and the city and county of San Francisco, all of said land was reserved and appropriated by said city and county for the purposes of a public park, the owners being compensated, "except that portion thereof hereinafter described in Schedule B, and another portion thereof assigned to George F. Sharp under the decree of partition hereinafter referred to." It is then stated that, after the administration had commenced, the said Sharp brought an action against petitioner and the heirs of said deceased for partition of all of said remaining land, except that part described in the second subdivision of said Schedule B; and that on April 21, 1874, by a decree in that action, the lands described in the first subdivision of said Schedule B were set apart in severalty to the estate of said Sproul, deceased. Said Schedule B contains—*First*, descriptions of all the various blocks, lots, and parcels of the land thus set off to the estate, and there is no pretense that such descriptions are not full and sufficient; and, *second*, descriptions of the lots and parcels in which the estate and said Sharp were still co-tenants, and these descriptions are also sufficient. And the petition alleges "that the only real property to which said estate is entitled, or which your petitioner, as administratrix of said estate, is in or entitled to the possession, is that described in Schedule B, and that the condition and value of said real property are set forth in said schedule." It is clear, therefore, that the petition set forth full and clear descriptions of all the real property of the estate at the time the petition was filed; and, as it gave the court complete information on that subject, it certainly complied with the main purpose of the Code in that regard.

But it is urged by respondents that the sale, and all proceedings of the probate court with respect to it, should be held absolutely void on this collateral attack, because, as they contend, there is no sufficient descrip-

tion in the petition of the land of the estate as it was when Sproul died; that is, "the real property of which the decedent died seised." The petition, with the inventory which is a part of it, describes the land first, generally, as the undivided one-half of the "Sharp and Sproul tract," situated in San Francisco, and then gives a description by metes and bounds, excepting certain parcels heretofore conveyed, which are delineated and marked with certain specific names on a map or diagram "on file herein;" that is, on file with the inventory. But at the time of the trial—about 17 years afterwards—such map or diagram could not be found on file, or among the papers of the estate, and it is argued that without this map the description is so defective as to upset the jurisdiction. The land, however, down to the decree of partition, was always described as the half of the Sharp and Sproul tract. Now, the averments of the petition are (and the jurisdiction depends on the averments, not upon their truth or falsity) that all of the said land not mentioned in the second subdivision of Schedule B was divided by the partition decree; and the parcels set off in severalty to the estate by that decree are fully described in the first part of said schedule. And the second part of said schedule fully describes all the lots and parcels of said tract in which the estate and Sharp were still joint owners. It seems to us, therefore, that the averments of the petition sufficiently showed to the court what the interest of the deceased in the "Sharp and Sproul tract" was at the time of his death, and contained a full description of all the real property of the estate at the time the sale was asked, and gave to the court all the information upon that subject contemplated by the Code, and that the sale was not void for want of sufficient description of real property in the petition. *Stuart v. Allen*, 16 Cal. 501; *Fitch v. Miller*, 20 Cal. 352.

The other objections made by the respondents are untenable. The designation of a city lot as "unimproved" is, we think, a sufficient description of its "condition," at least, to give jurisdiction to the probate court.

The statement that there were no debts or expenses of administration accrued and unpaid was, we think, sufficient to vest jurisdiction, so far as that point is concerned, where, as in this case, the prior accounts of the administratrix had been settled, and the petition sought a sale, not to pay debts and past expenses, but to provide for family allowance and future expenses of administration.

It appears that the amount necessary to be raised was between \$10,000 and \$11,000; and, the property consisting of several separate lots and parcels, the order of sale provided that "such sale shall cease when an amount not less than \$10,000, and not exceeding \$11,000, has been obtained;" and respondent contends that the part of the order just quoted

makes the whole void. We are unable to see any good reason for that contention.

The probate court, in its order confirming the sale, declared that the notice of sale was posted in three public places. Respondent introduced evidence, against the objection of appellants, with intent to show that one of the places was not a "public" place within the meaning of the Code. But surely the court, having jurisdiction of the proceeding, could, within that jurisdiction, find the fact that the place was a public place; and such finding cannot be attacked collaterally.

The position of respondent that the petition was not properly verified, because the certificate of verification is placed before the schedules which were attached to it, is not tenable. The schedules were a part of the petition, and were as fully included in the verification as were the parts which preceded the certificate.

We see no other attacks upon the jurisdiction of the probate court to order the sale which require special notice. It may be remarked that there is no pretense that the sale under which appellants claim was in fact fraudulent, or without adequate consideration or in any way unfair. To the objections made to it, may well be applied that often abused word "technical;" and we do not think that they are sufficient to overturn, for want of jurisdiction, the solemn judgment of a court, or to destroy a title to realty honestly acquired.

Appellants plead as a defense to the action section 1573, which provides that "no action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after the settlement of the final account of the executor or administrator." Counsel on both sides, in discussing the issue made by this defense, deal mainly with the question whether this section applies to actions to quiet title, and whether, to make the defense good, it must not appear that the purchasers were in the actual adverse possession for three years. We are inclined to hold (although we do not here undertake to definitely settle the question) that section 1573 intended to have settled within the time mentioned all questions about the validity of probate sales; and that the words "recovery of any estate" were intended to and do include all actions which involve an "estate" in the land sold, and therefore include an action to quiet title. But in the case at bar we are not able to see, from the transcript, that the action was not brought within three years after plaintiffs attained their majority, (see section 1574;) nor does the record show the date of "the settlement of the final account" of the administratrix. The point, therefore, cannot be raised on the record which is before us.

These views lead us to the conclusion that the findings of the court below, "that the

proceedings on said administratrix's sale of said estate of said John Sproul, deceased, were irregular, invalid in law, and no title passed under said sales;" that "the claims of said defendants, and each of them, are without any legal right," etc.; that "the plaintiffs are the owners in their own right, as their separate property, of the parcels of land described in the amended complaint herein;" and "that defendants have not, nor have either of them, any right, title, estate, or interest" therein,—are erroneous. This being so, it is unnecessary to inquire if the findings are sufficiently full. But the case is not one where judgment can be ordered for appellants on the findings. All we can do is to order a new trial. Judgment and order reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

Hearing in bank denied.

(82 Cal. 548)

SILVERMAN v. GUNDELFINER *et al.* (No. 13,330.)

(Supreme Court of California. Jan. 14, 1890.)

SALE OF REAL ESTATE BY ADMINISTRATOR.

The petition of an administratrix to sell decedent's real estate showed that the inventory and appraisal were made some five months before the petition was filed, and alleged "that the condition and value of the said real estate are set forth in the schedule marked 'D,' hereunto annexed, and made a part of this petition." *Held*, that it was such a compliance with Code Civil Proc. Cal. § 1537, providing that the petition of an administrator to sell the real estate shall set forth the value thereof, that a sale made thereunder would not be declared void in an action by decedent's heirs to recover it.

Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

W. D. Grady and D. S. Terry, for appellant. Tupper & Tupper and Jarboe, Harrison & Goodfellow, for respondents.

McFARLAND, J. Action to recover possession of an undivided interest in real property described as lots 30, 31, and 32, in block 61, in the town of Fresno. Judgment went for defendants, and plaintiff appeals. Plaintiff claims title as heir of H. D. Silverman, deceased; and defendants claim under probate sale made during the administration of the estate of said deceased. Appellant contends that the probate sale was void because the petition upon which it was based was too defective to give the probate court jurisdiction; and the particular defect of the petition which he specifies is its alleged failure to state the value of the property sought to be sold, as required by section 1537 of the Code of Civil Procedure. The petition, which was made by the administratrix, shows that the inventory and appraisal were made September 25, 1887,—but a little over five months before the petition itself was filed. The language of the petition which bears upon the question here involved is as follows: "That a full description of all the real estate of which the said decedent died seised, or in which he had any interest, or in which the

said estate has acquired any interest, and the condition and value of the said real estate, are set forth in the schedule marked 'D,' hereunto annexed, and made part of this petition." And the property in contest in the case at bar is described in the schedule D as "one undivided half of lots Nos. 30, 31, and 32, in block 61, situated in the town of Fresno, with brick and frame buildings thereon, which is partnership property of the former firm of Silverman & Reinstein. The said one-half interest was appraised at \$7,000." And the point of appellant is that the court was utterly without jurisdiction to order the sale, and the sale entirely void, because the petition does not clearly state that \$7,000 was the value of the property at the time the petition was made. But to hold this point good on a collateral attack would be to enforce a strictness of literal compliance with the statute beyond all reason. Substantial compliance has always been held sufficient. *Stuart v. Allen*, 16 Cal. 474; *Richardson v. Butler*, ante, 9, (No. 12,454, filed December 23, 1889.) Upon a special demurrer, perhaps, a court might require a little more certainty; but there surely was not such a total want of a statement of values as renders the petition defenseless against the attack made here, which is in the nature of an objection, in an ordinary civil action, that the complaint does not state facts sufficient to constitute a cause of action. The averment in the body of the petition may fairly be taken as an averment that the amount named in the schedule was the present value of the property. And at all events, as was said in *Richardson v. Butler*, supra, the petition, on this point, fully and fairly answers the purpose of the provisions of the Code. With these views, it is not necessary to notice the other points discussed by counsel for respondents. Judgment and order denying a new trial affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

(82 Cal. 133)

WAINWRIGHT v. WESKE. (No. 12,436.)

(Supreme Court of California. Dec. 27, 1889.)

CONTRACTS—ACTIONS—RESCISSION—PLEADING.

1. A complaint alleged that for 10 shares of corporate stock at the value of \$1,400 a share, and \$2,500 cash, plaintiff transferred to defendant one-half interest in a liquor business, and notes amounting to \$10,000. That, discovering fraud in the representations as to the stock, he tendered back an assignment of the stock, and \$300 received in dividends, and demanded \$14,000 in money, as value paid for stock. He made no offer to return the \$2,500, nor did he demand a transfer of the business interest, or of the notes. *Held*, that it was insufficient as a complaint to rescind a contract.

2. As the complaint neither alleged the value of the thing assigned, nor damages sustained, it was insufficient to recover on affirmation of the contract.

Department 2. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Action by James Wainwright against Adolph Weske to recover \$14,000 paid to de-

fendant, in value, for stock in the Golden Age Mill Company. The complaint alleged fraud. The court overruled defendant's demurrer to the sufficiency of the complaint. Plaintiff obtained a verdict, and defendant appealed.

John Desbeck, for appellant. *Dunne & Davidson* and *Eugene N. Deuprey*, for respondent.

THORNTON, J The complaint herein sets forth this state of facts: That on or about the 21st of April, 1884, the plaintiff was the owner of one-half interest in a certain liquor business carried on in the city and county of San Francisco under the firm name of Wainwright & Hey, and the holder of \$10,000 in promissory notes against said firm. The Wainwright of this firm was the plaintiff. That on or about said 21st of April the defendant was the owner of 10 shares of the capital stock of a corporation, the Golden Age Mill Company, doing business in the city and county aforesaid. That on or about said 21st of April defendant procured the plaintiff to purchase from him said 10 shares of capital stock through fraud. That the facts constituting the fraud are the following: The defendant desired to purchase of plaintiff the said interest of plaintiff in the liquor business mentioned, and the promissory notes aforementioned. That defendant was unable to pay ready money for the said interest and notes, but proposed that, if plaintiff would accept for this interest and notes, in lieu of cash, 10 shares of the Golden Age Mill Company, he (defendant) would transfer the stock to plaintiff. That plaintiff asked defendant what the stock was worth, and whether it was a good investment; on which the defendant, fraudulently contriving to deceive and defraud plaintiff, did falsely and fraudulently, and knowing the same to be false and fraudulent, represent to plaintiff that the stock was as good as the bank; that it was worth every dollar of \$1,500 a share; that it was as sure a thing as plaintiff could put money into; that his (defendant's) only reason for parting with the stock was his anxiety to redeem a promise which he had made certain persons (naming them) to buy the plaintiff's interest; that the mill of the company was in thorough condition mechanically and financially, and was paying 1 per cent. a month dividend on \$1,500 a share, and that the stock was as good as gold. That before accepting the stock plaintiff made further inquiries concerning it, and found that it had never been on the market, and that there were no quotations as to its value. That he (plaintiff) believed in and relied on the false and fraudulent representations of defendant, and, so believing and relying, agreed, on the 21st day of April, 1884, to transfer to defendant plaintiff's said interest and notes for \$2,500 in cash and the 10 shares of stock at \$1,400 a share. That defendant agreed thereto, and on or about said 21st day of April defendant transferred to plaintiff the 10 shares of stock,

and paid him \$2,500 in cash; and plaintiff thereupon, in consideration of the same, and at the direction of defendant, assigned the said notes and interest to Grauerholz and Fautz. That when the said representations were made by defendant he was a director of said company. That the company was then financially embarrassed, and in a sinking condition. That 70 days after the representations were made the company suspended operations, and closed its mill, because of its inability to meet its financial obligations. That in order to resume operations it was obliged to compromise with its creditors, and did levy upon its capital stock an assessment of \$100 per share. That, as such director, the defendant was cognizant of the affairs of the company, and knew when he made the representations that the company was in pecuniary straits, and in a sinking condition. That the plaintiff, immediately on discovering that the said representations were false and fraudulent, and that he had been duped and defrauded by defendant, demanded of him the sum of \$14,000, "being ten shares of said stock at \$1,400 a share," and at the same time tendered to defendant, and offered to make to him, an assignment of the 10 shares of stock, together with all the dividends received by plaintiff thereon, amounting to \$300, and now offers and tenders into court the stock and dividends; but defendant has ever since refused, and still refuses, to pay said \$14,000, and accept the stock and dividends. The complaint closes with a prayer for relief, as follows: "Wherefore plaintiff prays judgment against defendant, Weske, for fourteen thousand dollars, United States gold coin, with interest and costs of suit."

This can only be regarded as a complaint to rescind the contract above set forth, and to recover on such rescission, or a complaint to recover damages on a contract affirmed by plaintiff. Regarded as a complaint to rescind the contract, it is manifestly insufficient, inasmuch as it does not appear that there was any offer to return the \$2,500 in cash paid to plaintiff by defendant. That this was necessary to a rescission, see *Gifford v. Carvill*, 29 Cal. 592, 593; *Morrison v. Lods*, 39 Cal. 385. Nor does it appear that any demand was made on defendant to retransfer to plaintiff the interest in the firm, and the notes assigned by plaintiff at defendant's request. As an action to rescind and recover of defendant the property sold him by plaintiff, it was clearly demurrable.

Regarding it as a complaint to recover damages for fraud or deceit on defendant making the sale of the 10 shares of stock to plaintiff, it is also insufficient. In such an action plaintiff does not seek to rescind the contract. He affirms it, and seeks to recover damages by reason of the fraud arising out of the circumstances accompanying the entering into the contract. *Gifford v. Carvill*, 29 Cal. 592, 593. The rights of a party who has been defrauded in making a contract are, on the discovery of the fraud, within a reason-

able time, to rescind the contract, and restore the parties to their former condition, or to affirm the contract, and claim compensation or damages for the injury he has sustained by reason of the fraud. The rule is so stated in *Gifford v. Carvill*, supra, quoting the language of the court in *Herrin v. Libbey*, 36 Me. 357. 29 Cal. 592. See, also, *Burton v. Stewart*, 3 Wend. 239, and other cases cited on page 592 of 29 Cal. It is well settled that a party cannot recover damages for a false representation without showing by averment and proving damage. *Morrison v. Lods*, 39 Cal. 385, and cases there cited. The plaintiff here does not aver that he has been damaged at all. The words "damage" and "damages" cannot be found in the complaint. The complaint seems to be framed on the idea or hypothesis that, by reason of the false and fraudulent representations made by the defendant in regard to the 10 shares of stock, the plaintiff, on offering to return the stock and the dividends recovered on it, is entitled to recover the sum of \$14,000, the amount for which, it may be inferred from the complaint, though there is no express averment of such a fact, he received it.

But, conceding it is averred in the complaint that the plaintiff was damaged by reason of the false representations to the amount of \$14,000, there is an entire want of averment showing that plaintiff has sustained any such damage, or any damage at all. There is no averment of the value of the interest in the concern which plaintiff assigned by defendant's direction in exchange for the stock, nor is there any averment of the value of the notes which were assigned by plaintiff as part of the consideration for the stock. It does not appear by averment that the firm was solvent, or that the notes were of any value whatever. *Non constat*, but that the firm was insolvent and the notes worthless. As the complaint shows that the plaintiff received of defendant on the transaction \$2,500 in money, for which he transferred the interest and notes, which do not appear to have had any value, conceding that the shares of stock were of no value, it appears that plaintiff, instead of suffering any damage, was benefited to the amount of \$2,500. It does not appear in any way that defendant warranted the stock to be worth \$14,000; and we know of no rule of law which would justify a court in presuming or assuming or inferring that the interest and notes assigned to defendant by plaintiff were, in the absence of an averment as to their value, of any value whatever. To state it briefly, the complaint in legal effect, shows that the plaintiff exchanged property of no value for valueless stock and \$2,500. It is thus made to appear that the plaintiff, instead of being damaged, was benefited to the amount above stated. Such a mode of pleading cannot be considered as charging defendant with any damage for which he can be held responsible in law to the plaintiff, or any one else. The complaint is not made sufficient by the amendments in it.

If defendant has had to pay \$1,000 for an assessment on the stock, he is still benefited to the extent of \$1,500. The complaint, in our judgment, is insufficient, in any view that can be taken of it. The demurrer of the defendant to the complaint should have been sustained, and the court erred in overruling it. The judgment and order denying a new trial are therefore reversed, and the cause remanded, with directions to the court below to sustain the demurrer to the complaint, with leave to plaintiff to amend his complaint, should he be so advised. Ordered accordingly.

We concur: McFARLAND, J ; SHARPSTEIN, J.

(32 Cal. 214)

HAGENMEYER v. BOARD OF EQUALIZATION.
(No. 12,428.)

(Supreme Court of California. Dec. 28, 1889.)

TAXATION—BOARD OF EQUALIZATION—PROCEDURE.

1. A rule of the county board of equalization, framed under Pol. Code Cal. § 3673, provides that, when it is proposed to increase or lower an assessment, notice of the same must be given by the clerk of the board depositing in the post-office, at his regular place of business, a circular letter, postage paid, addressed to the person whose interests are to be affected, stating the valuation placed by the assessor on the property to be raised or lowered, and the valuation to which said property is proposed to be raised or lowered, and directing him to appear before the board, within seven days from date of notice, to show cause why such change should not be made, but there was no requirement that a return on the letter mailed as ordered should be made to the board. Such notice was sent to plaintiff on July 11th, and on July 18th the board made an order increasing plaintiff's assessment. The board was informed by its clerk, at the time of making the order, that proper notice had been mailed to plaintiff, and plaintiff did not deny receiving the notice. *Held*, that plaintiff had proper notice to give the board jurisdiction.

2. Where the board makes a copy of its rules relative to giving notice to persons interested of an intention to increase or reduce an assessment a part of the return to a writ of review, it is proper to refuse, on the motion of the board, to strike the same from the return.

3. It was not error for the court to strike from the return a copy of the notice and affidavit of proof of mailing, etc., when the same were not considered by the board at the time it made its order raising plaintiff's assessment.

4. As the rules of the board did not require a prescribed manner of proof of giving such notice, any legal testimony, at the time of making the order, was competent to establish the fact.

5. Where a party has notice of the intended action of a board of equalization in regard to the assessment of his property in time to have a full and fair hearing during the session of the board, such notice is sufficient, unless it appears affirmatively that a full and fair hearing was denied him by the action of the board.

6. When the record of a board of equalization does not show affirmatively that the board did not act on evidence before it in raising an assessment, its order in the premises is conclusive that it did act on such evidence as was necessary.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. McGARVEY, Judge.

Application by G. Hagenmeyer for a writ of review to annul an order of the board of equalization of Mendocino county raising his

assessment of taxes. There was a judgment for plaintiff, and the board appealed.

J. M. Mannon, J. Q. White, and Atty. Gen. Geo. A. Johnson, for appellant. *T. L. Carothers*, for respondent.

FOOTE, C. This was an application for a writ of review, the purpose of which was to annul an order of the board of equalization of Mendocino county, increasing the assessment of taxes upon the property of Mr. Hagenmeyer, the plaintiff. The court below seems to have been of the opinion that the board had exceeded its jurisdiction, and ordered that its action in the premises be annulled. From the judgment rendered this appeal is prosecuted.

One question upon which the determination depends, as it appears, is whether or not the plaintiff had due notice that the board proposed to increase or lower his assessment. The return to the writ of *certiorari* showed that, according to a rule made by the board, notice as to such matters was to be given by the clerk of that board, "by depositing a circular letter in the U. S. Post-Office, addressed to each of the persons whose interests were to be affected, at his regular place of business, with the postage thereon prepaid." "Said notice to state the valuation placed by the assessor upon the property to be raised or lowered, and the valuation to which said property is proposed to be raised or lowered by said board, and a direction that the owner of such property appear before the board, within seven days from the date of the notice, and show cause why such change should not be made." It further showed that, according to the minutes of the board, such a notice was sent to the plaintiff on the 11th of July, 1887. The order increasing his assessment was made on the 18th of the same month and year. The affidavit of the clerk of the board showed that such notice had been mailed and sent to the plaintiff on that day by the clerk; but, according to his evidence as a witness on the trial, such notice and affidavit, proving mailing, etc., were not before the board at the time it made the order; and that he appended his affidavit of proof of mailing, etc., some days after the order was made. He also testified that he had told the board, on the day when the order was made, that such a notice had been duly mailed on the 11th of July, 1887. And he thought then, and still thinks, from his memory of the matter, that he had done so as a matter of fact. It is a significant circumstance in this connection that the plaintiff does not appear and testify that he did not receive such a notice.

It is contended that the court erred in not striking out, on the appellant's motion, the copy of the rules of the board with reference to giving notice. As this was made a part of the return, so far as the appellant could make it so, even although it was not properly a part thereof, (*Water-Works v. Schottler*, 62 Cal. 69-100,) it ought not to be allowed to prevail in its contention that the court

abused the discretion vested in it as to such a matter; since the return was made by the appellant's order, and was, so to speak, its pleading in the cause. Besides, as we shall presently perceive, it was to the advantage of the appellant that such was the rule of the board, and it was not prejudiced by the action of the court.

Again, the appellant urges that the action of the court was erroneous in striking out of the return the copy of the circular letter or notice, and the affidavit of proof of mailing, etc., of the clerk of the board. The part of the return thus stricken out was, according to the clerk's evidence, not before the board when the order was made; and the action of the court in striking it out was not prejudicial error. But after it was stricken out it still appears, by the testimony of the clerk, in support of the recitals of the minutes of the board, that such a notice, complying with the rule of the board, was, according to his recollection, mailed on the 11th of July, 1887, the date of the notice, to the plaintiff's address, at his regular place of business.

The rules of the board (framed under the authority conferred by section 3673 of the Political Code) did not require that any return upon the circular letter mailed as ordered should be made by any one to the board that such notice had been given, nor that any affidavit of proof, or any other action, should be taken, of a prescribed character, to inform the board that such notice had been mailed, and when. That proper notice was given by mailing was left to be shown to the board at the time when it might take action as to the raising or lowering the assessment. This fact could be established by any proper legal testimony, either oral or in writing. It seems that the board was by the clerk informed that the notice, as required by the rule, had been mailed; and his evidence on this trial shows that it was so mailed. So that it is clear the proper notice was mailed to the plaintiff, to his address, on the day of its date, the 11th of July, 1887.

But the respondent argues that, as the order sought to be annulled was made on the 18th of July, 1887, it did not comply with the rule, *supra*, as to notice; that it was made before the seven days had expired within which the plaintiff was cited to appear before the board and "show cause," etc. The view entertained by the respondent seems to be that he had all of the time intervening between the 11th and the 18th, and including the whole of the 18th, and up to and on the 19th of July, in which to show cause; and that, as the order was made on the 18th, it was made too soon. This contention is declared to be without merit in *Misch v. Mayhew*, 51 Cal. 516, where section 12 of the Code of Civil Procedure is construed. The rule as to the matter of notice in such cases as that in hand is well stated in *Water-Works v. Schottler*, 62 Cal. 103, as follows: "In our opinion, as intimated in *Patten v. Green*, 13 Cal. 330, such tribunals as the boards of

supervisors ought not to be held to any great strictness of procedure in the matters above discussed herein, and if, under a rule or an order of such boards, a party has notice of the intended action of a board of supervisors, sitting as a board of equalization, in regard to the assessment of his property, in time to have a full and fair hearing during the sessions of the board, we shall hold such notice to be sufficient, unless it appears affirmatively that a full and fair hearing was denied him by the action of the board. Of course, the rule as to time here laid down is not intended to apply to a case where the law requires a notice of a definite number of days to be given, and no such notice has been given." Taking the view that the rule of the board in such a case as this is to be regarded as a law upon the question of the kind of notice to be given, and the time within which the party to be affected may appear and be heard, it is clear that the plaintiff had such notice as the law required, and the board had jurisdiction of his person.

The further point is made in favor of the judgment of the court below that the record does not show that the board took any evidence by which to be guided in raising the assessment, and that, under section 8676 of the Political Code, it could not, without any evidence, raise an assessment. The record does not show by affirmative proof that the board did not act upon evidence before it. Therefore its order in the premises is conclusive that it did act upon such evidence as was necessary. *Humboldt Co. v. Dinsmore*, 75 Cal. 604, 607, 608, 17 Pac. Rep. 710. For the reasons stated we advise that the judgment be reversed.

We concur: **BELOHER, C.C.; HAYNE, C.**

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed.

(82 Cal. 351)

COLTON v. STANFORD et al. (No. 11,983.)

(*Supreme Court of California*. Jan. 2, 1890.)

DEALINGS BETWEEN TRUSTEE AND CESTUI QUE TRUST—FRAUD—COMPROMISE.

1. Where a beneficiary, in negotiating with her trustees for a settlement, renounces all confidence in them, and acts exclusively on the advice of her own personal friends and advisers, specially selected by her to make investigations, and counsel her, a contract of compromise entered into between her and the trustees, who during the investigation acted in good faith, and disclosed everything within their knowledge, will not be set aside on the ground that the trustees did not impart all the knowledge which they might have acquired by diligent and skillful search.

2. Where the trustees furnish a statement of the assets of a company, in which they and the beneficiary are interested, believing such statement to be correct, and stating that they know nothing except what is shown by their books and vouchers, and the beneficiary, not relying on such statement, employs counsel to look into the affairs of the company, and experts to examine the books and vouchers, the trustees offering every facility

for a thorough investigation, and such an investigation being had, the beneficiary cannot have a contract of compromise, entered into on the faith of such investigation, rescinded on the ground that the statement of assets was false.

3. The fact that such company, a few days after the compromise, paid a large indebtedness to another company with bonds of a third company at 90 cents on the dollar, while before the compromise these bonds were represented to the beneficiary to be worth only 60 cents, is not fraud on the part of the trustees; nor does it constitute an equitable estoppel, preventing the trustees from denying that the bonds were worth more than 60 cents at the time of the compromise, where the trustees owned the stock of all three companies, and fixed the value of the bonds arbitrarily.

4. Under Civil Code Cal. § 1568, providing that consent to a contract is deemed to have been obtained through fraud, mistake, etc., only when it would not have been given had such cause not existed, a contract of compromise will not be rescinded on the ground of misrepresentation, where it appears that it would have been executed notwithstanding such representation.

5. In an action to rescind a contract of compromise, it appeared that plaintiff's testator had been associated with defendants in the building of railroads on a large scale, their transactions involving many millions of dollars, and that at the time of his death defendants were much in need of money to carry on their operations. Plaintiff, not wishing to share the risks and continue with defendants in her testator's place, insisted on a settlement, and against the wishes of defendants, who urged her to remain with them, a compromise was made, whereby she was allowed to draw out testator's share. Before making the compromise plaintiff employed able counsel and experts, who thoroughly investigated the affairs and accounts of testator and defendants; the latter doing all they could to aid them in their investigation. At the time of his death testator owed large sums of money in the schemes in which he and defendants were interested, and the railroad securities owned by him were such that they would have brought little had defendants chosen to sell him out, instead of buying his interest, as they did under the compromise. *Held*, that the facts do not show that the compromise was obtained through any fraud or undue influence on the part of defendants.

In bank. Appeal from superior court, Sonoma county; **JACKSON TEMPLE**, Judge.

Stanly, Stoney & Hayes and *E. W. McKinstry*, for appellant. *Creed Haymond* and *Garber & Bishop*, for respondents.

PATERSON, J. From the 5th day of October, 1874, down to the time of his death, David D. Colton was associated with defendants in the ownership, control, and direction of certain corporations. Prior to that time defendants and Mark Hopkins had been the principal owners of the stock of the Central Pacific Railroad Company, the Southern Pacific Railroad Company, and of various other subordinate and connected railroad companies, and also of the Contract & Finance Company. They had associated themselves together for the purpose of securing the co-operation and assistance of all in the furtherance of certain railroad enterprises, and of such others as they should from time to time agree upon. In pursuance of the terms of their association and agreement they had invested, respectively, large sums of money, and were giving their time and labor to the management and direction of the corporations above named, and to the acquisition

and control of other corporations which they desired to operate in furtherance of the general schemes they then had and might thereafter have in view. Being desirous of securing the aid and co-operation of another associate, negotiations were opened with Mr. Colton, whom the defendants had known for several years prior thereto, which ended in an agreement between him and them that he should become associated with them in like manner as they had theretofore been associated with one another. By the terms of this agreement with the defendants and Mark Hopkins, Mr. Colton was to have 20,000 shares of the capital stock of the Central Pacific Railroad Company, and 20,000 shares of the capital stock of the Southern Pacific Railroad Company, in consideration of the sum of \$1,000,000, for which sum he gave his promissory note, with interest at 6 per cent. per annum, payable on or before October 5, 1879. All dividends on the stock were to be applied as payments on the note. It was agreed that Colton was to share, in the proportion that his stock bore to the stock issued, in all responsibilities, damages, penalties, etc., and to share in all the liabilities, of the Central Pacific, Southern Pacific, and Contract & Finance Companies, the same as if he had been associated and connected with them from the time of their organization. On the 15th of December, 1874, they organized the Western Development Company, the affairs of which cut a most important figure in the controversy. The capital stock of this company was fixed at \$5,000,000, of which Stanford, Huntington, Crocker, and Hopkins each took two-ninths, and Colton one-ninth. Gen. Colton's interest in all other properties acquired by the associates came to him through this corporation, except that which he held in the Ione Coal & Iron Company,—which had a capital stock of \$4,000,000, divided equally between the associates,—and that which he held in the Colorado Steam Navigation Company, and in the Occidental & Oriental Steamship Company. He was also one of the original incorporators of the Southern Pacific Company of Arizona, organized in 1873, and held 30,000 shares of the capital stock thereof. In 1876 the parties made and executed a new agreement, which they antedated as of October 5, 1874. This agreement differs in some material respects from the original. A copy of it is annexed to the complaint, and is set out in the statement of facts. By the terms of this modified agreement the stock sold to Mr. Colton was pledged as collateral security for the payment of the \$1,000,000 note, and it was agreed that neither party should sell his interest in the contract thereto. The enterprises entered into and carried on by these associates during the life-time of Mr. Colton were of stupendous magnitude, involving face values amounting to hundreds of millions of dollars. The success of their schemes depended upon many things. In the midst of their most important

operations both Mr. Hopkins and Mr. Colton were taken from the association by death,—the former on March 29, 1878; the latter in October following. The bond of friendship which had bound the five associates together was of the strongest kind, and the confidence which one reposed in another had no limit.

Soon after the death of her husband, Mrs. Colton (this plaintiff) began to make inquiries as to the interest of the estate in the various corporations with which Mr. Colton had been connected. In his last will and testament Mr. Colton had recommended that, if his wife should desire the assistance of any one in the settlement of his estate, his friend S. M. Wilson, and his secretary, Charles E. Green, should be called in as co-executors. Mrs. Colton, being the universal legatee, and entirely ignorant of her husband's affairs, called upon and secured the services of Mr. Wilson to aid her. Negotiations were entered into between plaintiff and defendants for a settlement. During these negotiations the plaintiff became suspicious of the motives and conduct of the defendants, believed that they had manipulated the books to deceive her, and that they were unworthy of trust or confidence. Nevertheless, after a thorough examination of the books and many interviews with defendants, a compromise agreement was entered into on the 27th day of August, 1879, by the terms of which certain stocks, including 408 shares of the Rocky Mountain Coal & Iron Company, were assigned to defendants, the \$1,000,000 note was canceled, and all the liabilities of the Western Development Company and other corporations were assumed by them, and the estate of Colton was released therefrom. About two years after the execution of the compromise agreement plaintiff discovered many errors in the calculations upon which the compromise had been made. She thereupon served a notice of rescission, and demanded a new accounting. A complaint was drawn up charging the defendants with misrepresentation, concealment, etc., and after several interviews, to-wit, on May 24, 1882, plaintiff commenced this action for a rescission of the compromise agreement of August 27, 1879, (referred to as "Exhibit F.") on the ground that said agreement had been procured through false and fraudulent representations made by defendants during the course of the negotiations which resulted in the execution of the compromise. The answer denies the charges of fraud; alleges that whatever statements were made by defendants were made by them in good faith, believing them to be true; and avers that Colton, during the time that he was connected with the Western Development Company, fraudulently appropriated to his own use certain large sums of money belonging to said company and to these defendants. After a trial, lasting nearly two years, before Hon. JACKSON TEMPLE,—who was at that time judge of the superior court of Sonoma county, and who has recently left this court on account

of illness,—findings and judgment were rendered in favor of defendants. From this judgment, and an order denying the motion for a new trial, the plaintiff has appealed.

Although the record herein covers about 12,000 pages of printed matter, there is no substantial conflict in the evidence. The questions involved in this appeal have been debated by counsel upon the assumption that the facts found by the learned judge of the court below are unassailable, and that the decision is correct, except as to the legal deductions drawn from the specific facts found. It is not contended by the appellant that the defendants knowingly made any false statements, or intended to deceive plaintiff in the negotiations, but it is claimed that the facts found show the existence of a fiduciary relation between plaintiff and defendants; that in dealing with plaintiff it was the duty of the defendants to make a full and correct disclosure of the condition of the business in which Colton held an interest, whether the plaintiff was relying upon their advice or upon her own investigation, and the advice and judgment of Wilson and other friends; that it is immaterial whether the parties believed there was in fact any such duty resting upon the defendants, or whether the plaintiff did actually rely upon and confide in them; that, where the negotiations begin in peace and confidence between trustee and *cestui que trust*, it matters not that suspicion, distrust, and fears may lead the beneficiary to make independent investigation during the negotiations, and rely upon independent advice and her own judgment in finally concluding the compromise; that the trustee can shake off the duty referred to, if at all, only by a clear and unequivocal dissolution of the trust relation before the negotiations commence; that the business relation between Colton and defendants was a partnership, and that the surviving partners were bound to know the condition of the business, and impart full information thereof to plaintiff; that in cases of this kind the surviving partners must show affirmatively that the settlement was fair and the consideration adequate, the contract being *prima facie* void; that the court erred in ignoring this principle, and in holding that it was for plaintiff to prove fraud; that the findings show both actual and constructive fraud and threats, and that the representations made by defendants with respect to the ownership of the 408 shares of Rocky Mountain Coal & Iron Company stock are sufficient of themselves to call for a reversal of the judgment; that the judgment should be reversed, and a judgment entered in favor of the plaintiff on account of undue influence, concealment, and fraudulent misrepresentations, although it be conceded that the parties making the contract herein sought to be rescinded dealt as strangers, and that the findings do not cover the material issues; and that the court erred in its conclusions of law, and as to the effect of certain evidence.

Many of the topics discussed by counsel

are involved in the question whether there existed such a fiduciary relation as called for a full, fair, and accurate statement by defendants of the condition of the affairs of the several corporations in which Mr. Colton, in his life-time, had been interested; counsel for appellant contending all the time that such relation did exist, and that by virtue of their superior knowledge and means of information, the duty of making a full disclosure and truthful statement by defendants became imperative and absolutely essential to the validity of any compromise based upon negotiations between the parties. The respondents have claimed at all stages of the litigation that the business relation of the several associates was not that of partners, and that upon the death of Mr. Colton the defendants owed plaintiff no duty other than that which arises from the relation of stockholders in a corporation. In this branch of the controversy the learned judge of the court below sided with the respondents, and upon this subject he expressed his opinion in the following language: "At no time were the defendants Leland Stanford, C. P. Huntington, Charles Crocker, and Mark Hopkins copartners, or associated in any business or enterprise as copartners. Nor did they at any time carry on any business as copartners," etc. "At the death of Colton the association between him and the defendants and Mark Hopkins entirely ended and ceased. There was no property belonging to the associates as such. After his death the plaintiff was merely a stockholder in the various corporations. * * * After the death of Colton the individual defendants had no other power over the affairs of the plaintiff, and occupied towards her no other relationship, than as controlling the corporations in which she was a stockholder, and as creditors and pledgees." "But, if a trust relation of this character existed between these associates, what was the relation of the survivors, upon the death of Colton, to his representative? At his death the association was entirely ended. It was a case where confidence was given for confidence; service for service. There was no property belonging to the associates as such. No power over the affairs of Mrs. Colton or the estate of D. D. Colton survived his death. His position was one of great power over many things, through this mutual confidence. She was merely a stockholder in various corporations. It is true they continued to be virtual directors of these corporations, as they and Colton had previously been. But this no longer depended upon any confidential relations with the holders of Colton's stock. * * * The previous relations with Colton did not affect the question. They and Colton had no vested interests in any new projects not yet begun. * * * There was not then, after Colton's death, any further active duties, as trustees, due from defendants to the estate of Colton." Supp. 8 West Coast Rep. 31. It must be admitted, however, that the arguments of the

appellant upon this question are most persuasive, and make the business relation which existed between the associates look like a partnership for the purpose of organizing, controlling, and operating railroad and other corporations; but, in view of the manner in which the compromise was effected, and of all the circumstances surrounding the settlement of the dispute, we deem it unnecessary to determine this particular question. There is no doubt that the associates occupied towards one another relations of the greatest confidence and trust. This relation of trust and confidence, indeed, was one of extraordinary character,—greater than ever existed in any partnership with which we have been acquainted. The power and authority possessed by each associate over the business, property, and standing of others interested with him never was possessed, perhaps, by a member of any other concern or association. That there was a relation of mutual trust and confidence of high character between the associates, and that such relation was recognized by Judge TEMPLE, is apparent from the following extracts taken from his findings and opinion: "Some of their transactions in the payment and disbursement of money were private and confidential between said associates, the character and reason of such disbursements being known only to and by said associates, and not recorded or entered in any books or writings kept by them, or any of said corporations; and said five associates, until the death of said Hopkins, and said four associates thereafter, until the death of said Colton, had and assumed and sustained relations of intimate and peculiar trust and confidence, each towards and with the others, in regard to their said enterprises, and their management and conduct; and they acquired, obtained, and had confidential information and control each concerning and over the affairs of the property and business connected with, growing out of, and accumulated by and through the enterprises in which said Stanford, Huntington, Hopkins, Crocker, and Colton were associated together. As each new scheme was determined upon, each had his part in the work, though each party then decided for himself whether he would go into each scheme or not, and there was no power in the majority to commit any one to any new enterprise until he approved of it." "Fiduciary relations may exist between stockholders of various corporations, who have associated themselves to control such corporations and make them work in harmony; but they would not be partners. And so I conclude, although the corporations managed by these associates cannot be regarded as partnerships, nor as mere instrumentalities of a partnership, the relation between the parties was nevertheless of a fiduciary character. I think it already appears that the parties to the agreement Exhibit A intended something more than to procure situations for each other as employes in various corporations. They had designs not

stated in that paper, which were the real purposes of that association. The fiduciary relation must have existed under our Code as to these projected enterprises, and the management of the system of roads they had built and acquired. * * * Each had invested his money and expended his labor in reliance upon this fidelity of the others."

It is a nice question whether the trust relation which had existed between the associates continued to exist after the death of Colton, and imposed any active duties upon the survivors as trustees of his estate; but, if any such duties were cast upon the defendants by reason of the death of Mr. Colton, they were waived by the plaintiff herself, and the relation of trustee and *cestui que trust* was so entirely discarded and dissolved during the negotiations that they were not bound by any fiduciary relation to counsel, advise, and protect the plaintiff, or to perform any other duty than to deal fairly by her, and in good faith to disclose all facts within their knowledge material for her to know in conducting the negotiations fairly, and to enable her to make a full and unhampered investigation into the matters in controversy. We have been unable to find a case in which a lump agreement of compromise, entered into by surviving partners and the representative of a deceased partner, or by a trustee and *cestui que trust*,—the latter acting by the advice of experts and able counsel, and renouncing all confidence in the trustees,—after full, fair, and honest investigation, has been rescinded because of actual and unintentional inaccuracies discovered subsequent to the execution of the agreement; nor do we know of any universal rule of equity, or any provision of our Code, tending to establish the proposition that from the mere fact of a prior existing fiduciary relationship everything in the absence of proof must be presumed against the trustee who has entered into a contract with his *cestui que trust*, regardless of the question whether confidence has, in fact, been reposed and abused. Of course, in all trust relations the existence of confidence will be presumed, and, if it appear that any advantage has come to the trustee in dealing with his *cestui que trust*, the burden will be thrown upon him to show that confidence was not in fact abused. But it has always been held, as we understand it, that this presumption might be overcome by proof of the fact that confidence had not been abused, and that the beneficiary acted, not upon any reliance or confidence placed in the trustee, but upon the advice of an independent, professional, disinterested, and competent adviser. There is a distinction to be made between transactions occurring directly between the trustee and his beneficiary, and those transactions in which the trustee deals with himself or another party. Thus, if a trustee in the execution of his trust sells property to himself, the transaction may be set aside by the *cestui que trust* as void, without giving any reason or alleging any fraud, or any disadvantage or

inadequacy of price. In such case there are no two parties to the contract, the trustee dealing with himself alone; but where the trustee deals directly with the *cestui que trust*, the latter having for himself an independent adviser, and the trustee making no pretense of advising him, the transaction is not voidable, at the election of the beneficiary, but it will devolve upon the latter, if he would set it aside, to show some reason therefor. He must show either actual or constructive fraud. Of course, the fraud may be shown in some instances by presumptions.

Section 2219 of the Civil Code provides: "Every one who voluntarily assumes a relation of personal confidence with another is deemed a trustee, within the meaning of this chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires information which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control." Section 2228 is as follows: "In all matters connected with his trust, a trustee is bound to act in the highest good faith towards his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind." Section 2229 is as follows: "A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner." Section 2235 is as follows: "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence."

That these provisions are consistent with the rules of equity, as we have construed them, is apparent, we think, when read in connection with the following provision: "The person whose confidence creates a trust is called the 'trustor'; the person in whom confidence is reposed is called the 'trustee'; and the person for whose benefit the trust is created is called the 'beneficiary.'" Civil Code, § 2218. These provisions show that the fundamental principle of the relation of trustee and *cestui que trust* is that of confidence.

In the case at bar, Mrs. Colton not only did not rest any confidence or reliance upon anything said, done, or omitted to be said and done, by the defendants, or any of them, but she called in and secured the aid of four or five disinterested and competent advisers. Among these was S. M. Wilson, one of the leaders of the bar of this state, a man of irreproachable character, in the prime of life, for 25 years the warm, personal friend of her husband, and the man whom he had recommended on his death-bed, and she was fully informed by him as to her legal rights. She

also obtained the services of Mr. Lloyd Tevis, a skillful and successful financier, to assist Mr. Wilson in his investigations as to the business of the corporations. The investigations made by these gentlemen and the plaintiff lasted for over six months, and were most thorough, careful, and diligent. It is found, as a matter of fact, that they had sources of information other than those possessed by the defendants, and that they were, in fact, more thoroughly acquainted with, and better qualified to form an accurate judgment as to the condition of, the affairs of the company than any of the defendants. Mrs. Colton had also the advice of Mr. Steinberger, an old friend of her husband, and the advice and assistance of Mr. Green, his secretary for many years, and of Mr. Douty, who was a cousin and intimate friend of Gen. Colton, and a business man of great capacity and experience, and a skillful and expert accountant. All the claims preferred by the defendants on their own behalf were fully discussed, considered, and investigated. The subject-matters of the negotiations were of the most complicated nature, consisting in part of accounts running through many years, and recorded in many volumes of books, and thousands of vouchers and papers relating in part to the transactions, some of which had gone out of the memory of the parties thereto. The court found as a fact, and it seems practically undisputed, that during the negotiations defendants were ready and willing to answer, and did truthfully answer, all questions asked them, and submitted freely all the books and accounts in their possession, or under their control, to the inspection and investigation of the plaintiff and her agents. The plaintiff and her agents knew, partly from discoveries they made themselves, and partly from information given by the defendants before the compromise agreement was executed, that there were many inaccuracies in some of the statements furnished to the plaintiff. Among other important matters in dispute between the parties, and which were compromised, was the right to Western Development Company dividends, amounting, according to plaintiff's valuation, to over half a million dollars. At the time the negotiations were in progress the plaintiff saw no justice whatever in the transaction; her heart rebelled against the whole matter. She believed that the defendants were unworthy of any credit or confidence, and were endeavoring, by all the means in their power, to cheat and defraud her. She suspected that the defendants had made some of the charges against her husband knowing them to be false, and that they had manipulated their books to sustain those charges. No source of information was withheld from them. No means of ascertaining intelligently the true state of the accounts were covered up before they acted upon and compromised the matters upon which the controversy arose. Every fact which has since been discovered could have been discovered before

the execution of the compromise agreement, as well as thereafter. The witnesses who could throw any light upon the matters in controversy were within their reach. Mrs. Colton was most anxious to make the settlement. The defendants "insisted that they were not bound to discount the future of their securities for her, thus giving her the benefit of their contemplated enterprises and the expenditure of more millions. She was not entitled to the profits, when she would not share the risks." The property in controversy was of immense value,—chiefly speculative value. Mr. Tevis "was known as a bold, enterprising, and successful speculator. He was intimately acquainted with the railroads, and was a man of great wealth, abundantly able to pick up the burden where Colton had dropped it, and carry it along, without asking any favors from the defendants,"—all of which was known to the plaintiff at the time she acted upon his advice, and accepted the terms of the compromise.

The findings show that the defendants in good faith disclosed every fact within their knowledge. There is nothing in the findings to show that plaintiff or her agents were misled as to any matter except the statement in regard to the number of shares of the Rocky Mountain Coal & Iron Company stock, which they claimed to own, though held by Mr. Colton. Of this matter we shall speak hereafter. Here, therefore, we have a case in which—assuming the existence of a fiduciary relation, and that the presumptions as to confidence and the burden as to proof are as claimed by appellant—the undisputed facts show that there was absolutely no confidence reposed by the beneficiary, but that she acted exclusively upon the advice of several disinterested experts and professional friends, specially selected to investigate and counsel her, because of their ability and familiarity with the affairs of the trustees with whom she was dealing, and who acted towards her in the highest good faith. To hold that, under such circumstances, a contract, entered into by the parties, compromising and settling disputes of the most doubtful character and value, cannot stand, if it subsequently appear that the trustee did not impart to the *cestui que trust* not only all the knowledge of the transactions of which he was possessed, but all that he might have acquired by diligent and skillful search, would be to place an absolute embargo upon all settlements of disputed questions between parties holding trust relations, although equity favors the amicable adjustment of claims which, like those involved in this settlement, bid fair to become a fruitful source of litigation. Under such a rule it would be difficult to find men fit to be trustees who would accept such a trust. There would be no inducement to compromise doubtful matters, however advantageous the settlement might seem to be to the *cestui que trust*; and no trustee, or his sureties, who had settled with his *cestui que trust*, would feel secure in his position

until either time or circumstances had dispelled every possible chance of a successful contest, based upon new evidence or a rise in values. Such a construction of the provisions of our Code would not only place them in antagonism to all the authorities which have explained and applied the rules of equity governing such contracts between trustees and *cestui que trust*,—and the Code provisions are but a digest of these rules,—but would convert a rule intended to prevent fraud into one creating an incentive to, and a cover of, fraud; because it would afford a convenient method for a party who had repudiated any reliance upon or trust in his trustee, and who had acted upon the advice of independent, skilled, and disinterested champions and his own investigations, to turn around, when subsequent facts showed that the bargain was to his disadvantage, and say, in effect: "It is true I did not place any confidence in your statements, and told you that I should not, but should rely on my trusted agents. It is true I acted only in my own interest, being sole legatee. It is true you laid before me all the means of information, and I and my agents assumed to act upon them. We had the means of information, and might have discovered the truth, but were not fully informed. It is sufficient to say that you did not correctly represent the condition of the business. It was your duty to do so. I admit that you acted honestly and fairly; that you did not intend to misrepresent any fact, or any value; and I admit that my means of information were as good as yours were. It matters not that I gave you notice, in advance, I should not trust you in anything you said or did, but should rely upon the investigations and advice of my friends, because your representations were not correct. It was your duty to make them full, fair, and accurate. I claim a rescission upon the representations you made, although I did not believe them." If there is a case in which a court of equity has decreed a rescission under such circumstances, it has not been called to our attention. Whatever may have been said as to the presumptions arising out of proof of a fiduciary relation, the fundamental principle upon which rescission is granted is always, and under all circumstances, the claim and consideration that confidence has been reposed, and that confidence has been abused. No such claim can in reason be made where the party seeking the rescission—being of competent age and understanding, and acting only in his own interest—has undertaken to investigate for himself, called in experts, been given free and fair means of ascertaining the truth, acted upon his own judgment and the advice of friends, and repudiated any confidence in or reliance upon the parties with whom he was dealing. It matters not what the relations of the parties have been prior to, or are at the time of, the negotiations for a settlement and compromise of their disputes, the principle is one of universal ap-

plication, and it is a principle of common sense and of good policy.

It is unnecessary for us to review the authorities on this subject. They will be found, we think, to fully support the views we have expressed; and in order to make as brief as possible this opinion, which, perhaps, is already unnecessarily extended on this question, we simply cite some of the cases, without commenting upon the peculiar features of any of them. We have examined the cases cited by appellant, and find nothing in them which conflicts with what is said herein. *Kimball v. Lincoln*, 99 Ill. 578; *Gage v. Parmelee*, 87 Ill. 330; *Casey v. Casey*, 14 Ill. 113; *Farnam v. Brooks*, 9 Pick. 213; *Knight v. Marjoribanks*, 11 Beav. 324; *Morse v. Royal*, 12 Ves. 355; *Hunter v. Atkins*, 3 Mylne & K. 113; *Hager v. Thomson*, 1 Black, 80; *Courtright v. Burnes*, 2 McCrary, 532; *Geddes' Appeal*, 80 Pa. St. 460; *White v. Walker*, 5 Fla. 478; *Hall v. Johnson*, 41 Mich. 289, 2 N. W. Rep. 55; *Bowman v. Carithers*, 40 Ind. 90; *Turner v. Otis*, 30 Kan. 1, 1 Pac. Rep. 19; *Murray v. Elston*, 24 N. J. Eq. 310; *Korn v. Becker*, 40 N. J. Eq. 408, 4 Atl. Rep. 434; *De Montmorency v. Devereux*, 7 Clark & F. 188; *Hough v. Richardson*, 3 Story, 690; *Loesser v. Loesser*, 81 Ky. 139; *Motley v. Motley*, 45 Ala. 558; *Kissling v. Shaw*, 33 Cal. 425.

It is claimed, however, that the trustee cannot, after negotiations are begun between himself and his *cestui que trust*, dissolve the trust relation, "and place the parties at arms-length," and that "the rights of these parties and the rules by which they are to be investigated should be determined by the relation of the parties when their negotiations commenced." We see no reason for such distinction. Sugden's definition of the rule applicable in such cases is expressed in the following language: "It must not be understood that a trustee cannot buy from his *cestui que trust* where he is *sui juris*; the rule is that he cannot buy from himself. If the *cestui que trust* clearly discharges the trustee from the trust, and considers him as an indifferent person, he may purchase; but it must clearly appear that the purchaser at the time of the purchase had shaken off his confidential character by the consent of the *cestui que trust*, freely given after full information and bargaining for the right to purchase." 2 Sugd. Vend. 417, bottom p. 693. There is nothing in this text, or any decision we have seen, requiring a contract, preceding the contract to purchase or compromise, giving the trustee permission to purchase as a basis for a second contract, in which the terms of the sale or compromise may be lawfully agreed to. If, at the time of the purchase or compromise, the trustee has shaken off his fiduciary character, and the confidence which is presumed to result therefrom, it matters not what has occurred immediately preceding or long prior to the final transaction. In other words, if the transaction is one in which the trustee may lawfully deal with his *cestui que*

trust by first dissolving the trust relation, it is not too late for him to do so at any time before the *cestui que trust* is prevented from making a full and fair investigation and consideration of the business in hand, and before he executes the contract.

Other points discussed at the bar are involved in the question whether plaintiff was induced by fraud, actual or constructive, to enter into the compromise agreement, whether there were false representations, concealments, threats, or any unconscionable advantages gained by defendants through their superior opportunities and power. Upon every material issue of fact the court below found in favor of defendants, except as to a part of the 408 shares of Rocky Mountain Coal & Iron Company stock, and its finding of fact upon that issue was, in the opinion of the court, insufficient, in view of other findings, to support a decree of rescission. Since it is claimed, however, that the specific facts found do show fraud, concealments, and undue advantage, notwithstanding the general findings of the court, which negative the charges thereof, it becomes necessary to look into the circumstances under which the compromise was effected.

So far as the exhibits of the condition of the Western Development Company (Exhibits D and E) are concerned, the facts found show that there was no fraudulent representation by defendants as to anything contained therein, and that plaintiff did not rely upon them. She relied upon her own judgment, and the advice of those who were assisting her, and entered into the compromise agreement after a careful and thorough examination of all the books and vouchers. The court finds that she was not ignorant of any fact or circumstance material to her rights; that there were no misrepresentations or concealments by defendants, but, on the contrary, they answered truthfully all questions relating to the affairs of the company, repeatedly went over the subjects under investigation with Mr. Wilson, and gave him free access to all the books, and secured for him all the assistance and information in their power. The defendants did not pretend to know anything of the condition of the affairs of the Western Development Company outside of what was shown in its records. Mr. Wilson knew this. They told him so. They gave him every facility in their power of ascertaining the true state of the accounts. They instructed their employees to aid him as best they could. With their consent and approval, he had the books carefully and thoroughly examined by experts,—men who had been trusted friends of Gen. Colton,—one of them his cousin, another his secretary. In no part of his testimony does Mr. Wilson indicate that he or the plaintiff placed any reliance upon the statements contained in Exhibits D or E, or upon any information furnished by the defendants with regard to the affairs of the Western Development Company. Mr. Wilson was active,

alert, self-reliant, and zealous in the cause of his client,—the widow to whom he had been recommended by his friend Colton as the one man worthy of entire confidence and trust in case of trouble. Spurred on by a keen sense of the trust which had been reposed in him, he devoted his entire time and energy for a period of about six months, laboring with clerks and book-keepers, until, as he says, he had exhausted and tired himself out, sacrificed his own interests, and had “abused these people to the extremity, almost, of fighting personally.” In connection with his deposition in this case, there was introduced in evidence his memoranda, taken during the investigations which he and others were making into the affairs of the Western Development Company, which show the most unmistakable care, and a painstaking and minute consideration of the subject. Upon this showing, no doubt, it was that Judge TEMPLE was induced to believe and find that plaintiff and her advisers were ignorant of no material fact or circumstance of which she ought to have been informed. The presumption would follow from the fact of investigation that everything material was discovered; but the presumption is fortified by the introduction of these memoranda, and by proof of the fact that many others had been made which at the time of the trial were lost.

Under such circumstances, is plaintiff entitled to a rescission of the contract thus deliberately entered into? We think she is not. Her counsel claim that there was actual and constructive fraud, and cite sections 1571, 1572, Civil Code. They say that defendants furnished a list of the assets of the Western Development Company; that this was equivalent to a positive assertion that the list contained all the assets,—an assertion not true, not warranted by the information of the parties making it, and therefore fraudulent, although they believed it to be true; that where a party, acting without belief or without information, makes a representation which is not true, the law imputes to him a knowledge of its falsity, and makes him as fully responsible as if he had such a knowledge. This is true, as a general proposition, where the other party has acted upon the representation, relying upon it as correct; but the rule as stated is not, upon authority or principle, applicable where such party, discarding the representation as unworthy of belief, proceeds to inquire for himself, is given full and fair facilities of informing himself, takes independent counsel, and finally acts upon his own judgment and that of his advisers. Misrepresentations cannot be predicated upon such a state of facts. 2 Pars. Cont. 770; *Percival v. Harger*, 40 Iowa, 289; *Matthews v. Bliss*, 22 Pick. 53; *Van Trott v. Wiese*, 36 Wis. 439; *Hall v. Johnson*, 41 Mich. 289, 2 N. W. Rep. 55; *Light v. Light*, 21 Pa. St. 413; *Smith v. Kay*, 7 H. L. Cas. 775; *Development Co. v. Silva*, 125 U. S. 258, 8 Sup. Ct. Rep. 881, *Bigelow, Frauds*, 7, 8.

We do not find anything in the authorities

cited by the appellant which is in conflict with the views we have expressed. Extracts from a few of them will show this to be the case. Thus, in *Taylor v. Fleet*, 1 Barb. 475, the court said: “If the purchaser has acted upon his own judgment, and has not been influenced by the misrepresentations, however untrue they may have been, he has no right to be released from his bargain. But I cannot concur with the counsel for the vendor in his position that the purchaser examined the land with a view to test the accuracy of the representations made by Fleet. On the contrary, all the witnesses agree that no personal examination of the land would enable any person, not previously acquainted with its capabilities, to determine whether the statements made by Fleet were true or not. The only means of knowledge within his reach was information to be obtained from those whose experience enabled them to speak from actual observation with respect to the material question which constituted the object for which the purchase was made.”

In *Rawlins v. Wickham*, 3 De Gex & J. 312, the books showed so plainly the fraud that any man of ordinary capacity could have detected the fraud. The court there says: “During the negotiations for the partnership a paper was produced, which has been kept by Mr. Rawlins from that time, giving an account of the assets of the concern. The amount due to the customers of the bank was there stated to be £11,000 and a fraction. Upon examination of the books it appears that the real amount exceeded this by many thousand pounds,—a fact which an examination of the books by any person of the most ordinary competency would have shown.”

* * * Was there any excuse for such a misrepresentation? As regards Mr. Bailey, there was none. He was a professional man, taking an active part in the affairs of the bank, and it was his duty to know them, whether he did or not. Mr. Wickham was an inactive partner, knowing but little of its affairs, attending only occasionally at the bank, not meddling with the books, and probably knowing little or nothing of what they contained. * * * He joined with Mr. Bailey in producing the statement of accounts which I have mentioned, and in ascribing accuracy to it. Now, he ought not to have asserted what he did not know to be true. He ought to have said: ‘It may be true. I have a good opinion of Mr. Bailey and Mr. Gattrill, but I am not acquainted with the books, and, as far as I am concerned, you must look at them for yourself.’ He did not do so, but joined in a representation which was not true, and, for every purpose of pecuniary liability, the case is the same as if he had known that it was not true. * * * Mr. Rawlins might have inspected the books. * * * He, however, did not examine them, and, improbable as it may appear, I must hold that Mr. Rawlins entered into the partnership in complete ignorance of the contents of the books, and continued so for four

years. * * * He was entitled to believe their representations to be accurate without looking at the books. He was entitled to continue in that belief until ground for suspicion arose, or information was given him by one of the partners. No such information was given. They did not complain that he did not look at the books, and there is reason to believe that they would not have liked him to examine them." The difference between this case and the case at bar is too apparent for comment.

In *Higgins v. Samels*, 2 Johns. & H. 467, the language of the court shows the distinction between that case and the one at bar. It is there said: "It is not necessary to show that the defendants knew the facts to be untrue, if they stated a fact which was untrue, for a fraudulent purpose, they at the same time not believing that fact to be true. In that case it would be both illegal and immoral fraud. * * * What weighs upon my mind is the circumstance that the quality of the lime was not a mere subject of speculation, but a fact which the plaintiff, without any special familiarity with the business, could have made himself acquainted with."

In *Carpmael v. Powis*, 10 Beav. 44, the court uses this language. "Mr. Powis offered to procure the information. He did obtain and communicate it to the plaintiff, who relied upon it, and entered into the agreement on the credit of it. It turned out to be erroneous; but before the agreement, and till long after the agreement, Mr. Powis appears to have had no reason whatever to suspect that there was any error. He adopted it implicitly, on the authority of Mr. Cuthbert, and very innocently produced it to the plaintiff as a true statement of that upon which the amount of the annuity was to be calculated. If the plaintiff was guilty of any error or laches, it was in giving too much credit to the statement which had been adopted and communicated to him by the defendant's agent as true."

In *Millar v. Craig*, 6 Beav. 487, it appears that the plaintiffs, who lived in Scotland, never had an opportunity of examining the accounts. The court said that there was no proof whatever that the plaintiffs relied on Miller as their agent in the treaty with the other executors. On the contrary, they employed their own solicitor or law agent in Scotland. The release was signed in confidence, in the belief that the accounts had been truly stated.

In *Reynell v. Sprye*, 1 De Gex, M. & G. 709, the court says: "It was said that during the whole of the negotiations Captain Sprye not only left Sir Thomas Reynell at perfect liberty to consult his friends and professional advisers, but even on several occasions recommended him to do so. To a great extent this certainly was the case, and if the relief sought in this suit had rested on mere mistake; if Captain Sprye had not, by misrepresentations of fact, which I cannot treat as unintentional, led Sir Thomas Reynell to

believe that his rights were different from what in truth they were,—it may be that the argument to which I am now adverting would have prevailed. In such a case, perhaps, this court might have considered that it was the folly of Sir Thomas Reynell to have acted without advice, and might have refused to assist any person who was so singularly little alive to his own rights. * * * But no such question can arise in a case like the present, where one contracting party has intentionally misled the other by describing his rights as being different from what he knew them really to be."

In *Doggett v. Emerson*, 8 Story, 732, it appeared to the court that the purchase of the plaintiff was made upon an entire credit given to the representation of Williams as to the quantity and quality of the timber. The plaintiff resided in Boston, and confessedly had no knowledge of timber lands, and had never seen the township in which they were situated. He must, therefore, have placed implicit reliance upon the statements of Williams. It appeared, also, that Emerson not only knew the contents of the certificates upon which the plaintiff relied, but corroborated the statements therein contained.

In *Lewin on Trusts*, cited by appellants, the author says: "Before any dealing with the *cestui que trust*, the relation between the trustee and *cestui que trust*, must be actually or virtually dissolved. * * * The parties must be put at such arms-length that they agree to stand in the adverse situations of vendor and purchaser; the *cestui que trust* distinctly and fully understanding that he is selling to the trustee, and consenting to waive all objections upon that ground, and the trustee fairly and honestly disclosing all the necessary particulars of the estate, and not attempting a furtive advantage to himself by means of any private information. * * * Where the *cestui que trust* took the whole management of the sale himself, chose, or at least approved, the auctioneer, made surveys, settled the plan of sale, fixed the price, and so had a perfect knowledge of the value of the property, * * * Lord ELDON said that if, in any instance, the rule was to be relaxed by consent of the parties, this was the case. * * * Again, a *cestui que trust* had urged the purchase upon the trustee, who at first expressed an unwillingness, but afterwards agreed to the terms, and the sale was supported. So, where the trustee had endeavored in vain to dispose of the estate, and then purchased, himself, of the *cestui que trust* at a fair and adequate price, and there was no imputation of fraud or concealment, Lord NORTHINGTON said. 'He did not like the circumstance of a trustee dealing with his *cestui que trust*, but upon the whole he did not see any principle upon which he could set the transaction aside.' * * * If it be absolutely necessary that the property should be sold, and the trustee is ready to give more than any one else, he may file a bill in chancery, and apply by motion to be

allowed to purchase, and the court will then examine into the circumstances, ask who had the conduct of the transaction, whether there is reason to suppose the premises could be sold better, and upon the result of that inquiry will let another person prepare the particular sale, and allow the trustee to bid." Star paging 463.

In *Boyd v. Hawkins*, 2 Dev. Eq. 208, we find this language: "The prohibition of the trustee to purchase from the *cestui que trust* himself is not found to be so absolute. * * * Bargains between them are viewed with anxious jealousy. It must appear that the relation has ceased, at least that all necessity for activity in the trust has terminated, so that the trustee and *cestui que trust* are two persons, each at liberty, without the concurrence of the other, to consult his own interest, and capable of vindicating it; or that there was a contract definitively made, the terms and effect of which were clearly understood, and that there was no fraud or misapprehension, and no advantage taken by the trustee of the distresses or ignorance of the other party. The purchase must also be fair and reasonable.

Mr. Pomeroy, in his work on Equity Jurisprudence, at section 855, uses this language: "When parties have entered into a contract or arrangement, based upon uncertain or contingent events, purposely as a compromise of doubtful claims arising from them, and where parties have knowingly entered into a speculative contract or transaction,—one in which they intentionally speculated as to the result,—and there is in either case an absence of bad faith, violation of confidence, misrepresentation, concealment, and other inequitable conduct mentioned in a former paragraph, if the facts upon which such agreement or transaction was founded, or the event of the agreement itself, turn out very different from what was expected or anticipated, this error, miscalculation, or disappointment, although relating to matters of fact, and not of law, is not such a mistake, within the meaning of the equitable doctrine, as entitles the disappointed party to any relief, either by way of canceling the contract and rescinding the transaction, or of defense to a suit brought for its enforcement. In such classes of agreements and transactions the parties are supposed to calculate the chances, and they certainly assume the risks, where there is no element of bad faith, breach of confidence, misrepresentation, culpable concealment, or other like conduct amounting to actual or constructive fraud."

In *Brooks v. Martin*, 2 Wall. 73, it appears that Brooks took advantage of his position as partner, agent, and brother-in-law of Martin intentionally to conceal from the latter the prosperous condition of the concern, and purchased his interest for a price totally disproportioned to its real value. So, also, in *Addington v. Allen*, 11 Wend. 383, there appeared an actual intent to mislead and defraud the plaintiff.

In *Safford v. Grout*, 120 Mass. 25, the character of the representations was not disclosed by the record. No objection was made that they were mere expressions of opinion, judgment, or estimate, or that they were intended to be understood as expressions of belief only. The court said: "We must presume that they were legally sufficient to support the action; that is to say, that they were statements of facts susceptible of knowledge, as distinguished from matters of mere opinion or belief; and that they were calculated to have, and did have, material influence in deceiving the plaintiffs as to the maker's means and ability to pay, and in inducing them to part with their property."

All that is decided in *Redgrave v. Hurd*, 20 Ch. Div. 24, is "that, where a false representation has been made, it lies on the party who makes it, if he wishes to escape its effect in avoiding the contract, to show that, although he made the false representation, the defendant, the other party, did not rely upon it. The *onus probandi* is on him to show that the other party waived it, and relied on his own knowledge. Nothing of that kind appears here."

In *Wells v. Millet*, 23 Wis. 67, the court assume that, if the defendant had been careless or indifferent to ordinary and accessible means of information as to the truth or falsehood of the representation which had been made, he would have had no right to rely upon that.

In *Rohrschneider v. Insurance Co.*, 76 N. Y. 218, the court said that "the fraud was really undisputed. The managers of the defendant had made the false representations, and they knew them to be false, as the dividends of the company never had paid the notes thus given for the one-half of the annual premiums. But, on the contrary, such dividends had always fallen far short of making such payments; and they must have known that they generally, if not always, would fall short. There was, in fact, no foundation or excuse whatever for making the untrue representations. * * * It is said on behalf of the defendant that the plaintiff did not rely upon these representations, and was not induced by them to take the policy. But there was sufficient evidence from which the jury could have found that she did thus rely, and was thus induced."

In *Baker v. Spencer*, 47 N. Y. 564, the court said that the appellant's claim that the settlement of the action by the giving of a 300-dollar note operated as a compromise of the alleged fraud, and was a bar to the action, might have been well taken, if it had appeared from the pleadings or the findings that at the time of the settlement the defendant had knowledge of the facts constituting the fraud alleged, but that such claim was not well founded, being based entirely upon the statement that after giving the note the plaintiff began to suspect that the defendant had not the right to sell and transfer the agency.

The court said: "It does not appear from the complaint or findings that the plaintiff had any grounds for his suspicion, or any information on the subject, nor what defense was interposed on the trial before the justice in the action on the \$500 note." The court then proceeds to distinguish the case before it from the case of *Adams v. Sage*, 28 N. Y. 103. In the latter case the court held that "where a party to whom representations are made has the means at hand of determining their truth or falsehood, and resorts to such means, and, after investigation, avows his belief that the statements are false, and acts upon such belief by bringing an action to recover money obtained from him by means of the fraudulent representations, he is not entitled to credit when he alleges that, upon reiteration of the truth of the same statements by the same party, he was induced to enter into an agreement to settle the suit, and was thereby defrauded. Such investigation and ascertainment of facts, and belief in the falsity of the representations made, exclude the idea that any reliance could have been placed upon the repetition of the falsehood; and the verdict of a jury, or finding of a referee, to the contrary, should be set aside, as unsustained by the evidence. Indeed, upon such evidence, it would be error to submit to a jury the question whether reliance was or was not placed upon the reiterated false representations. Under the circumstances assumed, the law presumes that the party relied in making the agreement upon his own investigation, and not upon the representations of the party with whom he is dealing. This conduct, in acting in opposition to the knowledge acquired by inquiry from one who knows the facts, is attributable, and is set down by the law, to his own indiscretion and recklessness, and not to any fraud or surprise of which, under the circumstances, he has any right to complain. * * * In 2 Pars. Cont. 270, the rule is laid down, in relation to defenses to actions on the ground of false representations, that it must appear that the injured party not only did in fact rely upon the fraudulent statement, but had a right to rely upon it, in the full belief of its truth; for otherwise it was his own fault or folly, and he cannot ask of the law to relieve him. Many of the cases cited by the author to sustain this rule hold that, if the truth or falsehood of the representations might have been tested by ordinary vigilance and attention, it is the party's own folly if he neglect to do so, and he is remediless."

In *Perkins v. Gay*, 3 Serg. & R. 331, the court said: "It is a principle of equity that the parties to an agreement must be acquainted with the extent of their rights, and the nature of the information they can call for respecting them, else they will not be bound. The reason is that they proceed under an idea that the fact which is the inducement to the agreement is in a particular way, and give their assent, not absolutely, but on conditions that are falsified by the event. [Citing cases.] But where the parties treat

upon the basis that the fact which is the subject of the agreement is doubtful, and the consequent risk each is to encounter is taken into consideration in the stipulations assented to, the contract will be valid, notwithstanding any mistake of one of the parties, provided there be no concealment or unfair dealing by the opposite party that would affect any other contract. * * * Every compromise of a doubtful right depends on this principle. * * * There is an express mutual abandonment of their former rights upon an agreement that, whether they be good or whether they be bad, neither is to recur to them on any pretense whatever, or claim anything that he does not derive from the terms of the agreement. Each takes his chance of obtaining an equivalent for everything he relinquishes; and, if the event turn out contrary to his expectations, so much the worse for him. If there be no intention of fraud, no unfair dealing, and neither party has more knowledge of the fact misconceived than the other had, the contract will bind."

In *Peck v. Derry*, 37 Ch. Div. 577, while the court did not attribute to the defendants any intention to commit a fraud, it found that they had made a statement which was incorrect to induce the plaintiff to act upon it, without any sufficient reason for making that statement, or any sufficient reason for believing it to be true.

Kerr on Fraud and Mistake thus states the proposition: "If a man to whom a representation has been made knows at the time, or discovers before entering into a transaction, that the representation is false, or resorts to other means of knowledge open to him, and chooses to judge for himself in the matter, he cannot avail himself of the fact that there has been misrepresentation, or say that he has acted on the faith of the representation. * * * If the party to whom the representations were made, himself resorted to the proper means of verification before entering into the contract, it may appear that he relied on the results of his own investigation and inquiry, and not upon the representations made to him by the other party. * * * If the subject is in its nature uncertain, if all that is known is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge, it is not easy to presume that the representations made by the one would have much or any influence upon the other." Pages 75-78. Speaking of fiduciary relation, the author says: "A transaction between them [trustee and *cestui que trust*] will be supported, if it can be shown to the satisfaction of the court that the parties were, notwithstanding the relation, substantially at arms-length, and on equal footing, and that nothing has happened which might not have happened had no such relation existed. The burden of proof lies in all cases upon the party who fills the position of active confidence to show that the

transaction has been fair. If it can be shown to the satisfaction of the court that the other party had competent and disinterested or independent advice, or that he performed the act, or entered into the transaction, voluntarily, deliberately, and advisedly, knowing its nature and effect, and that his consent was not obtained by reason of the power of influence to which the relation gave rise, the transaction will be supported." Page 151.

In *Shaw v. Stine*, 8 Bosw. 159, it is held that the true test in cases of false representations may be found in the inquiry whether the plaintiff would have entered into the contract if the false representations had not been made. If he would, then the false representations did not contribute to the sale.

In *Matthews v. Bliss*, 22 Pick. 53, it is held that, where one of the parties has an advantageous knowledge, if he exercise a studied effort to prevent the other from coming to the knowledge of the truth, or if there be any, though slight, false and fraudulent suggestion or representation, then the transaction is tainted with turpitude, and alike contrary to the rules of morality and of law.

In *Gilbert v. Endean*, 9 Ch. Div. 268, there was a material fact intentionally concealed, namely, that the son was without means because the father was still alive, and was still refusing to assist him.

Some of these cases, it will be observed, involved transactions between trustee and *cestui que trust*, and are applicable to the first proposition discussed herein.

After the execution of the compromise agreement, the Western Development Company paid an indebtedness of over \$3,000,000, with interest, to the Central Pacific with Southern Pacific bonds, at 90 cents on the dollar. These bonds were represented to plaintiff to be worth 60 cents on the dollar. It is now claimed that the transfer to the Central Pacific, a few days after the compromise, at 90 cents on the dollar, is conclusive evidence that they were worth 90 cents on the dollar at the time they were represented to be worth 60 cents, and that this was a fraud on the plaintiff; at least, that there is an equitable estoppel preventing defendants from claiming that they were not worth 90 cents at the time of the compromise. The transaction seems to have been one in which the defendants practically dealt with themselves. They paid off the debt of the Western Development Company to the Central Pacific Company with bonds of the Southern Pacific Company; and themselves fixed the value of the bonds at what they supposed they would be worth when they should be called on to pay the Central Pacific bonds. Equitable estoppels must be mutual. If the defendants, in attempting to pay off some debt similar to that of the Western Development Com; any, about the time the compromise was effected, had rated the Southern Pacific bonds at 25 cents on the dollar, would their act fix irrevocably the market value of the bonds, so that Mrs. Colton would have been bound by their act, and forever there-

after estopped from proving that in fact they were worth more? The transaction was but a temporary mode of setting up a corporate obligation. The court weighed it as evidence; and, as the intrinsic value of the property did not enter into the questions involved in the compromise, we do not perceive any ground upon which plaintiff can complain. *Fitz v. Bynum*, 55 Cal. 461; 2 Suth. Dam. 374; *Kountz v. Kirkpatrick*, 72 Pa. St. 389. Furthermore, the values set opposite to the names of the stocks mentioned, the court finds, were not relied upon; and in fact the controversy was chiefly over this very matter, Mr. Wilson insisting all the time that they were too low, and the defendants contending that they could not afford to allow more for them. The charge that Mrs. Colton was induced by threats to enter into the contract is unequivocally denied by Mr. Wilson, in the following testimony: "*Question*. Now, in the course of these negotiations, did the defendants, or any of them, make any threat in reference to aspersing the memory of Gen. Colton unless a settlement was made, or anything of that kind? *Answer*. No, sir; nothing of the kind."

Counsel for appellant rely with much confidence for a reversal of the judgment upon the twentieth finding of the court, which is as follows: "That the individual defendants, prior to the execution of the contract, Exhibit F, and during the negotiations which preceded and led to that contract, stated and represented to the plaintiff that D. D. Colton had in his hands, and standing in his name on the books of said company, 408 shares of the capital stock of the Rocky Mountain Coal & Iron Company, which were in truth and in fact the property of, and belonged to, Stanford, Huntington, Crocker, and the estate of Mark Hopkins, in equal proportions, and which were held by said Colton in trust for them and said estate of Mark Hopkins; and that upon paying the plaintiff, as successor of said D. D. Colton, the cost price of said 408 shares of stock, which they represented to be \$6,625.92, they were entitled to have said 408 shares assigned, transferred, and delivered to them. That the plaintiff relied upon said statement and representation, and accordingly did assign and transfer said shares of stock by and in said agreement and contract sought to be rescinded by this action. That said representation was not true, and was made by said defendants without due circumspection, and was unwarranted by the facts within their knowledge. That in truth and in fact said Colton did have in his possession, and there were standing in his name on the books of the company, only 240 shares of stock, which he held as trustee of said defendants and the estate of Mark Hopkins, and to the extent of 168 shares said representation was a false representation. That said representation, however, was not made with any actual fraudulent intent, but through inadvertence, and lack of due circumspection; and that said contract would

have been executed by the plaintiff, had she known the truth in regard to said stock, if the defendants, upon being made aware of the facts, had still insisted upon it. That during the negotiations which resulted in the making of the compromise expressed in Exhibit F, Mr. S. M. Wilson knew precisely what the claim of defendants was as to the aforesaid 408 shares of said Rocky Mountain Coal & Iron Company stock; had the books of last-mentioned corporation before him, including the dividend book; knew that Colton had collected dividends for several years on said 408 shares of stock; knew that the claim of defendants to said 408 shares of Rocky Mountain Coal & Iron Company's stock was supported by no written evidence. Defendants also claimed from the estate of Colton the dividends on the stock of the Rocky Mountain Coal & Iron Company, which they asserted he held in trust for them."

It is contended that this finding conclusively establishes the fact that plaintiff was induced to enter into the contract by a false representation as to a material fact; that it is immaterial whether the representation was the result of an innocent mistake, it having been made without due circumspection, which is the equivalent of a positive assertion of a fact without knowing it to be true, or being warranted by the information of the person making it; that it is not necessary that the false representation should have been the sole or controlling inducement to the making of the contract, it being sufficient to defeat the contract if it appear that it was one of the inducements, and a motive, of her action; that the court could not say, as a matter of fact or matter of law, if she had known the truth in regard to the stock, she would have executed the contract, provided the defendants, upon being made aware of the facts, had still insisted upon it. There are cases in which it could not be said, in view of the evidence, that the party would have entered into the contract if the false representation had not been made; and there are many cases reported in which the courts have said that it was error to apply the rule referred to. But, where it clearly appears from the evidence that the contract would have been made if the truth had been known, we see no reason why the court may not find the fact, and act upon it. If, as a matter of fact, the contract would have been made without regard to the character or force of the representation relied upon for a rescission, the plaintiff cannot complain. As said by Judge TEMPLE: "The power to cancel a contract is a most extraordinary power. It is one which should be exercised with great caution, nay, I may say, with great reluctance, unless in a clear case. A too free use of this power would render all business uncertain, and, as has been said, make the length of a chancellor's foot the measure of individual rights. The greatest liberty of making contracts is essential to the business interests of the country. In general, the parties must look out for

themselves." Our Code provides that a contract may be rescinded, "if the consent of the party rescinding * * * was given by mistake, or obtained through duress, menace, fraud, or undue influence." Section 1689, Civil Code. Section 1565, Id., says: "The consent of the parties to a contract must be (1) free; (2) mutual; and (3) communicated by each to the other." Sections 1566, 1567, and 1568, Id., read as follows: "1566. A consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties in the manner prescribed by the chapter on 'Rescission.' 1567. An apparent consent is not real or free when obtained through (1) duress; (2) menace; (3) fraud; (4) undue influence; or (5) mistake. 1568. Consent is deemed to have been obtained through one of the causes mentioned in the last section only when it would not have been given had such cause not existed."

The most that can be said in support of appellant's contention is that there is a conflict in the decisions on the subject; but the sections of the Civil Code above quoted are clear and unambiguous in language, and they seem to establish the rule, beyond all controversy, that the contract cannot be rescinded when it appears that consent would have been given; and the contract entered into, notwithstanding the duress, menace, fraud, undue influence, or mistake relied upon. A misrepresentation as the basis of rescission must be material; but it can be material only when it is of such a character that if it had not been made the contract would not have been entered into. The misrepresentation, it is true, need not be the sole cause of the contract, but it must be of such nature, weight, and force that the court can say, "without it the contract would not have been made." That the Code commissioners recognized the fact of a conflict of authority upon this subject, and desired to settle it in accordance with what seems to us to be the plain meaning of the language used in section 1568, Civil Code, is apparent, we think, from the authorities quoted by them in a note to that section. Thus, in *Flight v Booth*, 1 Bing. N. C. 376, the court said: "It is extremely difficult to lay down from the decided cases any certain, definite rule which shall determine what misstatement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be the ground of compensation only. All the cases concur in this: that where the misstatement is willful or designed it amounts to fraud; and such fraud, upon general principles of law, avoids the contract altogether. But, with respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases; some of them laying it down that no misstatements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only; whilst other cases lay down the rule that a misdescription in a material point, although occasioned by negligence only, not by fraud,

will vitiate the contract of sale. In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation." In *Shaw v. Stine*, 8 Bosw. 159, a case also cited by the Code commissioners, the court said: "A true test in such cases may be found in the inquiry whether the plaintiff would have sold the goods if the false representations had not been made. If he would, then the false representations did not contribute to the sale; for he would have made the sale without them." They also cite article 1819 of the Civil Code of Louisiana, which reads as follows: "The error in the cause of a contract, to have the effect of invalidating it, must be on the principal cause, when there are several. This principal cause is called the 'motive,' and means that consideration without which the contract would not have been made." See, also, the cases cited by appellant, and reviewed herein on another topic. Here the court found that plaintiff never intended, after the death of her husband, to go on with the enterprises in which he and the defendants had been interested; that she did not intend to take any further risks in the business ventures; that the transaction was a lumping settlement, all parties understanding it to be such, and that no accurate adjustment of the accounts could be had; that the representation as to this stock was made without any actual fraudulent intent, but through inadvertence, and the plaintiff would have executed the contract sought to be rescinded, had she known the truth in regard to the matter, if defendants had insisted on it; that Wilson knew exactly what defendants' claim as to the stock was, had the books of the company, including the dividend book, examined them, knew that Mr. Colton had collected dividends, and that defendants' claim was not supported by any written evidence; that Wilson made a thorough investigation into the affairs of the Rocky Mountain Coal & Iron Company, and had many sources of information other than those possessed by the defendants, and was more thoroughly acquainted with, and better qualified to form an accurate judgment as to, the condition of the affairs of that company than were the defendants, or either of them; that Mr. Dou-ty, cousin and friend of Mr. Colton, and book-keeper of said company, Mr. Green, secretary of Gen. Colton in his life-time, and Mr. Steinberger, an old friend, frequently consulted with plaintiff and Wilson with regard to the business in hand; that plaintiff placed no reliance upon the defendants, and had no confidence in them; and that before

consummating the agreement, she had discovered many inaccuracies in the statements they had presented. At that time there was one error in the account of the Western Development Company, which would, if known, have shown the liabilities of that company to be \$1,000,000 greater than they were represented. In a transaction involving such vast properties and values as we find here, the amount involved in this particular transaction is comparatively a small item, only about \$10,000. But, if the defendants had relied upon their strict rights in regard to this stock, they would have been entitled to receive back the dividends on the 240 shares wrongfully appropriated, with interest on each one from the time it was so taken, and plaintiff would have been entitled to receive the purchase price of the 240 shares, and interest upon it from the time it was paid. So that if the truth had been stated, and the controversy as to this particular stock had been settled upon a fair accounting, plaintiff would not have been more than \$1,000 or \$2,000 better off than the settlement left her. From all the circumstances of the case, Judge TEMPLE concluded that this representation as to the 168 shares had no material influence. It is true, the judge states "that the plaintiff relied upon said statement and representation, and accordingly did assign and transfer said shares of stock by and in said agreement and contract sought to be rescinded in this action." Plaintiff believed, at least assumed, the statement of defendants as to this stock to be true, and therefore assigned it. This is entirely consistent with the finding that she would have executed the compromise agreement had she known the truth in regard to the stock. From all the circumstances, especially the testimony of Mr. Wilson, it is made very clear that this representation was not an inducing cause of plaintiff's action. Speaking upon this subject, the court, in its opinion, said that "Wilson concluded it would do no good, unless he could satisfactorily explain away charges of appropriating \$181,000. In comparison with these figures, the sum involved in this unwarranted assertion is small. But, I think, on general principles, in a matter of such magnitude as this, such a mistake or misrepresentation would not justify setting aside the agreement, especially where, as here, expenditures have been made by the defendants on the faith of the agreement which have materially enhanced the value of the property involved in the litigation." In these observations of the learned judge we fully concur.

It remains only to consider whether there was any unconscionable advantage taken of plaintiff. This question must be determined, not in the light of subsequent events, but upon the circumstances existing at the time of the negotiations and the execution of the contract. The court found that defendants did not obtain great advantage, or any advantage, over plaintiff, and that the agreement was fair, just, and equal. The question

whether there has been an undue advantage, an unconscionable exercise of a superior power, depends largely upon the situation of the parties at the time of the negotiations. The immediate cause of the trouble between the parties arose from the fact that after the death of Gen. Colton, who had been president and treasurer of the Rocky Mountain Coal & Iron Company from January 1, 1871, until the time of his death, the books and papers of that corporation showed that he had used large sums of money belonging to that company, for which he had never accounted. He had also taken large amounts, which he designated as "salary," in contravention of the terms of his agreement with Mr. Crocker, and with the other associates. There were also some serious irregularities in his account with the Western Development Company, of which he had been manager from its organization, in December, 1874. The latter company was heavily in debt. It owed at that time, to Stanford, Crocker, and the estate of Hopkins, over \$10,000,000. Its assets consisted chiefly of railroad stocks and bonds which had no market value. Mrs. Colton concluded before the commencement of the negotiations that she could not go on with the enterprise in which her husband had been interested. These facts are found by the court. In one of the preliminary interviews with Mr. Crocker, when asked whether she wished to pay for the stock purchased by Mr. Colton, and continue along in the execution of the corporate schemes which her husband had helped to advance, she replied that "she was in no condition or state to build railroads." And her chief adviser, Mr. Wilson, said in his testimony: "Very early in the conversations that I had with Mrs. Colton, it was agreed and understood between us that she was to sell out her interest there, and not to remain in the railroad. That was our leading proposition from the beginning of my relation with the business, and we never swerved, or never wavered, on that. * * * We had made up our minds that she should not go ahead. * * * We had already determined that she should not go ahead, and would get out, if she should get a certain sum of money." It must be remembered that the plaintiff herself first sought a settlement,—a fact which deserves attention. As was said in *Morse v. Royal*, 12 Ves. 375, by Lord ERSKINE: "This is not a trustee, looking around him and fixing his eye upon this property, as increasing in value. It is in evidence that Morse was determined to sell it, and, if he could not get what he wanted, that he would put it up at Garraway's; that he frequently teased Vanheylin to purchase it, who was reluctant, but at last said he would go the length of giving £5,000." So, in the case at bar, Mr. Huntington, in his deposition, says that he was teased into making the settlement. In many cases we have examined, the fact that the party endeavoring to rescind the compromise agreement made the first proposal, and persuaded the other party

to enter into the agreement, has been adverted to and considered by the court as an important factor in determining the rights of the plaintiff to a rescission of the contract. *Harrison v. Guest*, 6 De Gex, M. & G. 433; *Montesquieu v. Sandys*, 18 Ves. 311. The evidence before us shows, without conflict, that the defendants did not want to make the settlement with plaintiff which was made, or any settlement, at that time. The circumstances were so unfavorable for the prosecution of the plans which had been laid out that the surviving associates believed they required more help, financial and executive, rather than more property in the hands of, and to be managed by, the survivors. Mr. Wilson, in his deposition, referring to this matter, says: "Several times during our later negotiations they had stated that they did not care about buying her out. They would do it at certain prices, and at this rate; but they would prefer she should go on, and meet her obligations, and be enabled to meet her advances for the needs of the building of the railroads, if they would be called for, from time to time; that they would prefer that she should stay in. They wanted money. They had not any money to pay out, and they wanted money. They preferred to get money in rather than to pay it out." The court also found that the defendants, at the time they requested plaintiff to continue along with them in the corporation, offered to manage her interests for her as well as they could their own, and promised that she should receive the full benefit of their knowledge and experience, and that they would get every dollar they could, and "share with her to the last cent."

The Southern Pacific Railroad was finished to the Colorado river, at Yuma, in September, 1877. Mr. Hopkins had always been opposed to building the road east of the Colorado; and for that reason the work of construction stopped at that point. After the death of Mr. Hopkins, which occurred on March 29, 1878, Mrs. Hopkins was very unwilling, in fact was probably unable, before the distribution of the estate, which was in process of administration, to furnish any money, and for that reason opposed the Western Development Company engaging in any new schemes. As stated before, that company was at the time heavily indebted to various parties, and its assets consisted of unmarketable stocks and bonds. After the death of Mr. Hopkins, the surviving associates concluded that they would build the road east. The organization of a new construction company had been agreed upon during Gen. Colton's life-time, and but a short time before his death the Southern Pacific of Arizona was incorporated, and he became a member thereof, with 30,000 shares of the capital stock in his name. The associates had lost the aid and encouragement of both Mr. Hopkins and Gen. Colton, in whose executive ability and good judgment they had unlimited confidence. On May 5, 1879, the

supreme court of the United States affirmed the validity of the Thurman act, which took from the defendants 25 per cent. of the net earnings of the Central Pacific to secure the government. At that time the Central Pacific was apparently the source of all income and credit to the defendants. The debt of the Central Pacific was over \$100,000,000. The affirmance of the validity of this act threw the associates, especially Mr. Colton, into great despondency. He declared that the construction plant should be sold, and that no more road should be built until they had money laid up in bank. He declaimed bitterly against the communistic tendency of the times. It was a year of remarkable political excitement. There was a general business depression all over the country, and in fact the whole commercial world, for a year or more preceding the time of these negotiations. In the midst of these negotiations there was in session in this state a constitutional convention, which formulated and promulgated the constitution ratified in May, 1879. Into this constitution there were incorporated many new and novel features, especially those relating to the taxation of railroad property and the fixing of freights and fares. The outlook for the parties was very dark. Of course, it is easy to say, in the light of subsequent circumstances, that their fears as to the evil effects of the provisions of the new constitution were largely groundless; but there was a real panic in railroad affairs at that time. True, confidence was soon restored, and their fears have not been realized. It certainly is not the fault of these defendants that they became despondent during that period, or that the transactions, unfortunately for this plaintiff, were consummated during such gloomy times. It was impossible for them to discontinue their operations without utter disaster to all their enterprises. Their road was built several hundred miles into a desert. To make it useful at all, it was necessary to connect it with the eastern systems of railroads. There was actual danger of active competition. To make the road a success, this competition had to be headed off. The value of the assets of the Western Development Company depended almost entirely upon the completion of the road which had been projected. It is important, we think, that these facts should be remembered in determining the fairness of the transaction between the parties. It is the misfortune of the plaintiff that she had not the means or disposition to accept and act upon the proposition made by the defendants to continue on with them in their operations. It is an important fact to remember, too, that the demand for the rescission of the compromise agreement came from the plaintiff over two years after the execution of the contract, and at a time when the gloom and depression had given way to an active "boom" in railroad business,—a time when there was a most unprecedented demand for railroad securities, owing to which the de-

fendants found themselves in a most prosperous condition. The court below evidently considered the matter of delay in bringing this action an important factor, especially as the plaintiff had successfully forced a settlement upon the defendants, at a time when many of their securities had no market value, when they were all subject to great fluctuation, and when the question of the solvency or insolvency of their concerns depended solely upon the market value of such securities, and had deliberately entered into the settlement with full means of information, and upon full advice of many competent friends. The failure of plaintiff to inform herself as to the facts upon which she relied, and to proceed to rescind the contract, until the property had, under fortuitous circumstances, become immensely enhanced in value, is an important circumstance to be considered. *Nicholson v. Janeway*, 16 N. J. Eq. 285; *Murray v. Elston*, 24 N. J. Eq. 310; *Oil Co. v. Marbury*, 91 U. S. 587; *Kitchen v. Railway Co.*, 69 Mo. 224.

Mrs. Colton was determined to get out of the enterprises without waiting and taking her chances on creating a market. Her one-ninth of the indebtedness due from the Western Development Company to Stanford, Huntington, Crocker, and the estate of Hopkins amounted to over \$800,000. If defendants had desired to take any advantage of plaintiff, their opportunities were unbounded. If they had simply refused to pay her any money, what would have become of her? They had a perfect right to refuse to buy her out, or furnish her with money with which to meet her outside obligations. The estate was indebted to defendants to the extent of three-quarters of a million of dollars, and was pressed with claims amounting to over \$175,000. These claims could not have been met if defendants had not supplied plaintiff with money to pay them. They paid a note of Colton to Michael Reese which alone amounted to over \$75,000. From October, 1878, to the time of the settlement, plaintiff had been allowed to draw about \$175,000 for her own use, and to pay off the debts of the estate. The situation of the plaintiff at that time is best expressed in her own language. In a letter to Mr. Hunt, dated May 8, 1879, she says: "Now, I have managed wonderfully well. The railroad people agreed to let me draw for my household expenses. * * * I have paid a note, bearing interest at 8 per cent., of \$25,000. I have paid a note on call (no interest) in Europe of \$9,000. I have paid \$18,000 on a call note bearing 8 per cent.; a note of \$25,000, held by the National Gold Bank, of which David was a director. I held 100 shares of this bank stock, and I sold it for 85 cents to the bank, so I still owe them \$7,000, which I am paying them interest on. They have treated me very nicely, but I wish to pay them as soon as possible. Then there were about three thousand dollars of bills coming in, owing on our country place, for labor and lumber for improvements, other

immediate obligations, of a sacred nature, of about three thousand dollars. Now we have cut down at every turn and corner. * * * They have once or twice asked if I was making investments, and the last time they drew they declined to allow me any more until we had made a settlement. This settlement I am anxious to make, and am waiting their moves. Now, you will see that I am not idle. I have had a hard struggle. I have lain awake nights, wondering how I was going to pay a note coming due. I do not believe the railroad people will settle squarely with me. I am afraid I shall have trouble." "I talk business with no one except my lawyer. I have had a sale of thoroughbred stock from the farm. I have sold the carriages and horses, except just such as we positively needed. I will send you a catalogue. While I have no business experience, I am learning that I have good judgment in many things, and when I depend upon myself I do far better than when I depend on others." As stated before, the defendants were under no obligations to purchase from the plaintiff. All parties were in great distress. Plaintiff was in need of money; so were the defendants. If defendants had desired to take an unfair advantage of Mrs. Colton, all that was necessary to accomplish their aim was the enforcement of their claims against the estate. No purchaser other than defendants for the securities in which the estate was interested could be found. Defendants were not to blame for that circumstance. If plaintiff had been put to a forced sale, and defendants had seen fit to take advantage of their position, and had purchased the interest of the estate at even nominal figures, could plaintiff have complained, except from a moral stand-point? Mr. Tevis was a man of great wealth, familiar with railroad matters, and the affairs of the companies in which the parties were interested. Defendants' statements as to values were mere matters of opinion, and they were so understood by everybody concerned. Mr. Wilson and Mr. Tevis were as competent to judge as to the value of the securities as were the defendants. The defendants did not deny that the stocks would be worth more in the future. They expressly so declared. They had confidence in their own ability, and the eventual success of their enterprises; but plaintiff had no confidence in them or their schemes. It is the misfortune of the plaintiff, not the fault of defendants, that the prospect of success was so poor. We must be careful not to judge a transaction of this kind in the light of subsequent events. There is a natural inclination to do so. It must be remembered, too, that Mrs. Colton was not destitute of coercive power. Mr. Tevis told defendants they could not afford to have litigation with plaintiff, the widow of their old associate; that it would be prejudicial to themselves as individuals, and to all their enterprises; that she would have the sympathies of the public, etc. Staggering as

they were under heavy burdens, litigation meant disaster. Their securities would be injured, and the expense of a protracted trial, such as would follow a full investigation into the affairs of the company, would seriously cripple them. Concessions had to be made on both sides, or ruin would fall upon both. Concessions were made, and they were honestly and fairly made. All parties acted upon their best information as to the amount and character of the property in controversy, and according to their best judgment as to the value thereof. Mr. Colton had undertaken to carry a burden which was beyond his strength, and for Mrs. Colton to attempt to carry it was a proposition which was entirely discarded as an impossibility before the negotiations began. The inability of plaintiff to go on was as embarrassing to defendants as it was to her. By the terms of the compromise plaintiff was released from corporate liabilities amounting to millions of dollars.

How can unfairness or inadequacy be predicated upon such conduct and such facts? The statement of the circumstances is sufficient, we think, to demonstrate the truth and justice of the finding of the court that defendants were guilty of neither threats, concealments, nor undue exercise of a superior position and power, but that the negotiations which culminated in the contract, Exhibit F, were fair, just, and equal.

Other points are made by appellant, which we do not deem necessary to consider at length. It is said: That the findings do not cover the issues. That the court adopted an erroneous theory as to the relation of the parties; tried the case on one theory, and decided it on another; drew erroneous conclusions of law from the facts found, proved, and admitted; found conclusions of law where facts should have been stated. That the evidence is insufficient to justify the findings of the court in certain particulars,—the most important of which are, the evidence shows that Mr. Wilson was not an independent adviser; that Mr. Tevis was not possessed of information in regard to the affairs of the corporations to enable him to give reliable advice. That plaintiff would not have entered into the contract, had she known the truth as to the stock. That many of the items set forth in that portion of Exhibit D, after the heading therein, "General D. D. Colton in Account with the Western Development Company," were true or correct. And that Mr. Wilson was not informed how the account had been made up, or that the defendants had no personal knowledge of the correctness thereof. Many of these points were not referred to on the argument, and most of them are apparently abandoned by at least a majority of appellant's counsel in this court. Nevertheless, we have given careful attention to each and all of the points made in all the briefs. Some of those last referred to are involved in the questions we have considered at length in this opinion. The

others, we think, are without merit. The judgment and the order denying a new trial are affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; SHARPSTEIN, J.; WORKS, J.

FOX, J., not having heard the argument, and THORNTON, J., deeming himself disqualified, did not participate in the decision.

(32 Cal. 57)

McRAVEN *et al.* v. DAMERON. (No. 12,023.)
(Supreme Court of California. Dec. 12, 1889.)

ATTORNEY AND CLIENT—CONTRACTS.

An attorney who has agreed to sue for certain land at his own expense, in consideration that he should receive one-half of whatever interest he might recover therein, cannot, in an action for money received by him as a compromise of the suit, allege as a defense that he recovered no interest in the land.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

James P. Dameron and Aylett R. Cotton, for appellant. William W. Porter, for respondents.

GIBSON, C. Suit against defendant for an accounting of money received by him as an attorney for plaintiffs, and to recover the same. Judgment passed for plaintiffs, from which, and an order denying a new trial, defendant appeals.

The plaintiffs alleged, in substance, in their complaint, that the defendant, as their attorney, prosecuted two actions, in two of the late district courts in and for the city and county of San Francisco, for the recovery of a one-fifth interest in certain real estate situated in said city and county. The first was against one John Norton and about 203 others, and the second was against one David Worcester and others. That the plaintiffs were the same in both actions, and substantially so in the present suit. That, during the pendency of said actions, the defendant, as the attorney of the plaintiffs in this suit, and without their authority, in consideration of certain sums of money paid to him as such attorney by said defendants, made dismissals of said actions as to a large number of them. That plaintiffs, who reside in Mississippi, upon information and belief, allege that defendant, as their attorney, received about the sum of \$8,000 on account of said dismissals. That, although often requested so to do, he has never paid the same to any of them, except the sum of \$50, nor rendered any account of the amounts received by him for such dismissals. That the said acts of defendant were fraudulent, and that plaintiffs were not informed of them, or of the receipt of said money by him, until within two years before the commencement of this action.

Defendant answered by denying each and every allegation in the complaint, and ad-

mitted that he was the attorney for the plaintiffs, as alleged in their complaint, and averred that the actions were tried as alleged, and in one of said actions judgment was rendered against the plaintiffs regarding the premises sought to be recovered, and that the defendants recovered of them their (defendants') costs and disbursements, amounting to \$600 in gold coin; that upon an appeal from said judgment to the supreme court of the state it was affirmed. Defendant also admitted that he dismissed one of the actions as to divers of the defendants therein, deeming it for the best interests of said plaintiffs so to do, and that he received from such defendants certain sums of money, amounting to about \$4,000, which amount, he avers, he placed to the payment of costs of said suits, and that the said suits were expensive, and that he paid out for the cost thereof over \$7,300, and that not less than \$3,300 remains due on account thereof from defendants to him, no part of which has been paid; and further avers that his professional services rendered in said actions were worth the sum of \$5,000, and that he has received no compensation whatever for them; that plaintiffs were well aware of all these facts, as he (the defendant) had rendered them a statement of the same; and that more than two years had elapsed since he received any money, and all claims and demands, if any ever did exist, were barred by the provisions of sections 338 and 339 of the Code of Civil Procedure. Subsequently, by a supplemental answer, defendant averred that since the commencement of this action four of the plaintiffs, viz., W. J., M. B., and R. D. McRaven and Emma D. Collins, died intestate, without issue, and left surviving them their brothers, D. J. and G. H. McRaven, as sole heirs of the said decedents; that after the death of all of the said decedents he obtained, for a valuable consideration, from the said D. J. and G. H. McRaven a release of all demands they then had against the defendant, as well as all demands on account of the interest in the estate of said decedents inherited by them; and that the said D. J. and G. H. McRaven, in and by the same writing, consented and agreed to the dismissal of the said action so far as it concerned their interest, including that inherited by them from said decedents; and, further, that as to said decedents said suit should be dismissed.

The cause was referred to S. W. Holladay, who found and reported that the defendant, an attorney of this court, discovered and brought to the knowledge of the plaintiffs, who were residents of Mississippi, their supposed interests in a certain tract of land in San Francisco, descended to them as heirs of one W. B. Dameron, deceased, who, at the time of his demise, was the owner of a certain undivided interest in the land referred to. That defendant believed, and represented to plaintiffs, that their recoverable interests in the land were worth at least \$1,000,000. That defendant prosecuted the suits mentioned in

the complaint "under his promise, made to his said clients, in which they acquiesced, that he would, as their attorney, commence, conduct, and manage the necessary suits and litigation to recover their rights in the property, and that he would pay all expenses without recourse to them, and that for his services and expenditures he should have one-half the land, and divide the property recovered. Those terms were fair and reasonable." That he commenced and conducted said suits to the best of his ability and judgment, and on or before October 10, 1877, he stipulated with about 70 of the defendants in said suits, claimants of parcels of the property therein in litigation, that they should have judgments against the plaintiffs therefor; upon which judgments were accordingly entered, he receiving therefor \$4,008, which he appropriated to his own use, except \$50 paid to plaintiffs. That he made the said stipulations and dismissals solely on his own responsibility and volition, not fraudulently, but in the proper exercise of his discretion as attorney and sole representative here of the plaintiffs, his clients, who were all in Mississippi, the state of their residence, but without their knowledge or special consent. That "defendant never informed plaintiffs, and they did not know, either of the stipulations or of the respective amounts so received by him, nor of the total sum received by him on account of said dismissals or stipulations for judgment against his clients in said suits, or either of them; nor has he disclosed the same at the present trial. Said stipulations are all silent as to the sum paid on them, or any of them." That the only account or statement defendant ever rendered plaintiffs was that he had paid out \$7,000 for expenses, and had received \$4,008, on account of said suits, which statement was not made until about October 10, 1877. That D. J. McRaven released all of his demands against defendant, as alleged in the latter's supplemental answer, but that G. H. McRaven made no release. That said released interest was one-eighth of the whole interest in this suit, and is without prejudice to whatever right or claim said D. J. may have, by succession as heir or otherwise, to the estate of his deceased co-plaintiffs, who died without issue since the commencement of this suit, viz., W. J., M. B., and R. D. McRaven and Emma D. Collins. That one W. W. Porter, the administrator of the estates of all of said decedents except R. D. McRaven, was regularly substituted as plaintiff herein in place of his intestates; and that there is no personal representative yet appointed of said R. D. McRaven, deceased. That, of the \$4,008 received, one-half (\$2,004) should be allowed for defendant's compensation, and \$50, paid plaintiffs, deducted, leaving \$1,954 due plaintiffs, with interest thereon from November 10, 1877, to November 16, 1885,—\$1,107.90; aggregating \$3,061.90. From this last sum the one-eighth interest of D. J. McRaven, which he released to defendant November 16, 1885, should be deducted,

leaving a remainder of \$2,679.17, to which is added the interest thereon from November 16, 1885, to August 16, 1886, \$140.65; making a total of \$2,819.82 due to the plaintiffs other than said D. J. McRaven. From this total the sum of \$352.48 should be deducted, it being the share that R. D. McRaven, one of the deceased plaintiffs, unrepresented, would have been entitled to; said deduction being made without prejudice to the rights of his heirs or legal representatives, and in accordance therewith. That at the trial it was expressly stipulated that the statute of limitations had no application in the suit. Upon this report, and in accordance with it, the court entered judgment for the plaintiffs. The defendant preserved, in a bill of exceptions, his exceptions to the ruling of the court denying him a trial by jury, and referring the cause to a referee, but must have properly concluded that his exceptions were not well founded, as they are not urged upon this appeal.

The principal point urged upon this appeal is that the findings are not sustained by the evidence, and that the findings that are within the issues are not sufficient to sustain the judgment. This suit, as we have seen, is to recover money received by the defendant while acting in a fiduciary capacity under a certain contract between himself and plaintiffs; and the findings complained of as not being within the issues relate to this contract. We think that the findings are within the issues tendered by the pleadings. The complaint may not be as specific with regard to the contract as it might be; but as there is sufficient in the complaint from which it may be gathered, in the absence of a special demurrer on the ground of any defect in the statement regarding the contract, it is sufficient according to a number of decisions of this court. The complaint shows that defendant was the attorney for plaintiffs in certain litigation, and that he received as the fruit thereof certain money, which he failed to deliver or account for to the plaintiffs. This, we think, is a sufficient statement of the contract, under the above rule. A statement of the contract under which the defendant received the money claimed by plaintiffs was plainly necessary to enable the court to ascertain the amount of money received for, and how much there might be due, the plaintiffs. It was therefore necessary for the referee to find upon it.

Regarding the sufficiency of the evidence to sustain the findings, we think the evidence, in connection with the admission of the defendant in his answer, viz., that he, while acting as the attorney for plaintiffs, as alleged in their complaint, received certain sums as the result of the litigation, amounting to \$4,008, is amply sufficient to sustain the findings; and as the evidence consists wholly of the testimony of the defendant himself, and certain documentary evidence, no good purpose would be subserved by setting it forth.

One of the arguments of the defendant as to his liability seems to be that even if he did undertake to and did prosecute the actions mentioned in the pleadings, for and on behalf of the plaintiffs herein, at his own expense, in consideration of receiving one-half of whatever interest in the land he might recover, that, as he failed to recover any interest in the land, there was nothing for him to divide with his clients, and that he was not accountable to them for any money received as the result of certain stipulations made by him in the said litigation. It is almost needless to say anything in disposing of this argument in addition to the statement of it, but we will add that such fine distinctions between what may be the fruit of a litigation, when prosecuted to a final determination, and what may be realized by the exercise of the best judgment of an attorney in the way of a compromise, have never obtained anywhere, so far as we are advised, and probably never will. There are some other points stated, but not argued, and, as we discover no prejudicial error in the record, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

Hearing in bank denied.

(32 Cal. 119)

MURRAY v. WHITE. (No. 12,411.)

(Supreme Court of California. Dec. 19, 1889.)

TRIAL—INSTRUCTIONS.

1. An assignment of error because of unnecessary instructions, or that the instructions placed too prominently before the jury the law on any point, cannot be sustained when there is considerable evidence to support the theory or fact on which they were based.

2. In an action by the assignee of an insolvent debtor to recover personal property conveyed by the insolvent to defendant by an alleged fraudulent bill of sale, an objection to a charge of the court as to the effect of a lease from defendant to the debtor, which was followed by the alleged fraudulent bill of sale of the same property from the insolvent to defendant of all the insolvent's "right and interest" in the property, on the ground that the charge was inapplicable, because defendant must be held as claiming the property under the bill of sale, cannot be sustained when the jury find what the debtor's interest in the property was, and give plaintiff a verdict for its value.

Department 2. Appeal from superior court, Mendocino county; R. McGARVEY, Judge.

Action by John S. Murray, as assignee of D. T. Woodman, against George E. White, to recover certain personal property and damages. Plaintiff appeals. The charge in regard to the lease referred to in the opinion is as follows: "Now, there was a lease by White to Woodman, made June 19, 1884. The lease was to run two years. There is no question but what that lease might have been surrendered by the consent of White, and, if Woodman surrendered the lease, White had a right to the possession of the property. In other words, I may say that he—that each

party—had a right to the possession of the property. There was no impropriety in White taking possession of it after the lease was surrendered."

Horace L. Smith and J. A. Cooper, for appellant. T. L. Carothers, for respondent.

MCFARLAND, J. The plaintiff, Murray, brought this action as assignee of Daniel T. Woodman, an insolvent debtor. The complaint avers that within one month before the filing of the petition (in involuntary insolvency) against Woodman, he did, in contemplation of insolvency, etc., assign, transfer, etc., to the defendant White, certain personal property, consisting principally of sheep, with a view of giving a preference, etc. The value of the property is alleged to have been \$15,815, for which sum, with damages, judgment is prayed. The jury found a verdict for \$2,250; and plaintiff, being dissatisfied with the amount, appeals from the judgment, and from an order denying a new trial. For several years prior to the alleged fraudulent transfer, the said Woodman and the defendant, White, had been engaged in the business of sheep-raising. There were several distinct flocks of sheep kept on several different ranges in Humboldt and Trinity counties, in some of which Woodman and White were jointly interested. Others were owned by one or the other individually. Their business affairs and accounts, as between themselves, were very much confused, and the evidence was conflicting as to what their real relations were with respect to those sheep in which they were, in some way, jointly interested; and the main point made by appellant is that the court erred in giving certain instructions to the jury on the subject of partnership. The objection urged is not that the instructions do not state the law correctly, but that there was no evidence to support the theory or fact on which they were based; that is, that there was no evidence on the subject of partnership. But an examination of the record certainly does show that there was considerable evidence tending to show a partnership relation between the parties as to some of the sheep. Indeed, the appellant himself asked the court to give an instruction on the subject of partnership; and the court, at his request, did give instruction No. 7 on that subject. And it is apparent from appellant's brief that his main objection to the instructions of the court on this point is that they "placed too prominently before the jury the law applicable to partnership relations." But that would be an unsubstantial ground for the reversal of a judgment, unless in a case much more extreme in that respect than the one at bar. We think, therefore, that the judgment should not be reversed on account of the instructions about partnership.

We do not think that there was any error in the charge about a lease by White to Woodman. The objection seems to be that it was not applicable, because White, in appellant's view, must be held as claiming all the prop-

erty under a bill of sale from Woodman to him, dated August 3, 1885. But that bill of sale purported to sell and transfer only the "right and interest" which Woodman had in any or all of the sheep; and the jury evidently found what that interest was, and its value, and gave plaintiff a verdict therefor. We see no objection to any of the other instructions. They were full; and, considering them all together, we think that they stated the law of the case very clearly and correctly, and certainly not unfairly to plaintiff.

There are two or three points alluded to in appellant's brief about alleged errors committed in admitting evidence; but the references to the transcript are too general and vague to point out where the rulings complained of may be found. From a general examination of the transcript, we discover no material errors on this score. It was, no doubt, somewhat difficult for the jury in this case to discover the real facts; but the case was fairly put to them, and we see no reason to disturb their verdict. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

(82 Cal. 132)

SAUNDERSON v. BROADWELL *et al.* (No. 12,323.)

(Supreme Court of California. Dec. 19, 1889.)

FRAUDULENT CONVEYANCES—EVIDENCE—TRUSTS.

1. A deed by an insolvent debtor to a creditor, in consideration of a pre-existing debt and a promise by the grantee to pay a debt of the grantor to another creditor, the two debts being equal to the value of the property conveyed, is not in fraud of the rights of creditors, and especially when the grantee in fact pays the other creditor.

2. The promise by the grantee to pay the debt of another creditor does not create a trust for the benefit of creditors.

3. The grantee was absent from the state at the time the deed was signed and recorded; but it was delivered to him on his return, which was in a short time. The grantor testified that the consideration of the deed was \$1,500; that he owed the grantee \$800; and that the grantee promised to pay a debt of \$688, which he owed another creditor. *Held*, that a finding that the deed was made in good faith, and for a valuable consideration, was supported by the evidence.

Commissioners' decision. Department 2. Appeal from superior court, Napa county; R. CROUCH, Judge.

Action by David Saunderson against William B. Broadwell and another to set aside a deed on the ground of fraud. Plaintiff appeals.

Aylett R. Cotton and W. H. H. Hart, for appellant. Ham & Hull and Spencer & Henning, for respondents.

HAYNE, C. This was a suit to set aside a deed made by the defendant William B. Broadwell to the defendant C. E. Broadwell, upon the ground that it was in fraud of the rights of plaintiff as a creditor. The trial court gave judgment for the defendants, and the plaintiff appeals from the judgment, and from an order denying a new trial. The court found that the deed "was in good faith,

for a valuable consideration; that it was an actual sale, without reservation, and not in trust; that said deed was not fraudulently made, and was not made or executed or recorded or received, either on the part of said W. B. Broadwell, or on the part of said C. E. Broadwell, or any one else, to hinder or delay or defraud any creditor or creditors of said W. B. Broadwell." In addition to the general finding the court found specifically that the value of the property was "about \$1,500," and that the consideration was a pre-existing indebtedness of the grantor to the grantee of \$800, and a promise by the latter to assume and pay an indebtedness of \$688 of the grantor to a third person, which indebtedness was paid by the grantee within a reasonable time.

The indebtedness of the grantor to the grantee was a valuable consideration for the conveyance. *Jamison v. King*, 50 Cal. 132; *Schluter v. Harvey*, 65 Cal. 159, 3 Pac. Rep. 659. The promise to pay the debt due from the grantor to the third person was also a valuable consideration, (*Gladwin v. Garrison*, 13 Cal. 332;) and especially so when this payment was in fact made.

It is argued, however, that, inasmuch as part of the consideration was a promise to pay another creditor of the grantor, the transfer must be held to have been for the purpose of creating a trust for the benefit of creditors, and that it was invalid, as such, because all the creditors were not provided for. But we do not think that there was an attempt to create a trust for the benefit of creditors. The promise was not to pay the debt which was assumed out of the property transferred. The creditor for whose benefit the promise was made could not have fastened a trust upon the property if his debt had not been paid. The most that he could have done, in such case, would have been to bring a personal action against the grantee upon a promise for his benefit. And any creditor of the grantee could proceed to make their debts out of the property, which would not be the case if it were trust property. In other words, the transfer was absolute, and not in trust. The case of *Dana v. Stanford*, 10 Cal. 275, goes further than is required here; and the doctrine of that case has been several times approved. *Lawrence v. Neff*, 41 Cal. 569; *Wood v. Franks*, 67 Cal. 34, 7 Pac. Rep. 50. Doubtless, if the entire consideration of a transfer consisted of promises to pay the debts of the grantor, and it could be seen that such promises were made without any ability or intention of performance, the transaction would not be allowed to stand. But that is not the case here.

It is contended, however, that the findings above quoted are not supported by the evidence. But we think that the testimony of W. B. Broadwell is sufficient to sustain the findings. He testified, in substance, that he owed the grantee the sum above mentioned, and that he owed W. H. Broadwell the other sum referred to. It would seem that at first

the grantor "had offered the land as security," and that subsequently a sale was effected. The witness testified as follows: "The consideration for that deed from me to my brother was \$1,500. That was what we named in the deed,—the consideration of that deed in settlement with my brother. The consideration was in settlement with my brother for debts due him at the time he took the deed. * * * Well, the agreement was that I should transfer the land to him in settlement of the bills I owed him, and he was to assume those that my father held against me. * * * The only agreement was that I was to make him the deed, and he was to cancel the obligation he had against me at the time, and pay those items of indebtedness that my father had against me."

The appellant lays stress upon the fact that the grantee was absent from the state at the time the deed was signed and recorded. But it was handed to him on his arrival in California, which was within a short time, and he then accepted it, and on his return to the east performed his part of the agreement.

It seems plain that the grantor intended to prefer his brother and his father to his other creditors. But the evidence must be held sufficient to sustain the finding that there was a valuable consideration for the transfer, and that it was an absolute, and not a colorable, one. Under such circumstances, a debtor has a right to give such a preference. Civil Code, § 3432. No question as to such inadequacy of consideration as to show fraud arises in this case.

It is contended that the findings are inconsistent with the answer, and with each other; but we do not see any material inconsistency.

The other matters do not require special notice. We therefore advise that the judgment and order appealed from be affirmed.

We concur: **BELCHER, C. C.; VAN CLIEF, C.**

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(82 Cal. 110)

In re SPENCER. (No. 20,550.)

(*Supreme Court of California.* Dec. 19, 1889.)

DIVORCE—ALIMONY—SEPARATE PROPERTY.

Civil Code Cal. § 141, which prescribes that in executing the provisions of section 139, providing for the maintenance of the wife in case of divorce, the court shall resort first to the community property, and then to the separate property of the husband, does not embrace the earnings of the husband after divorce.

In chambers. Petition for writ of *habeas corpus*.

Franklin P. Bull, for petitioner. **Dorn & Dorn,** for respondent.

PATERSON, J. The petitioner is before me on a writ of *habeas corpus*. The question involved is whether, after a divorce, the husband can be required to devote his earn-

ings to the support of his former wife: On August 25, 1884, a decree of divorce was entered in favor of Josephine M. Spencer, and against petitioner herein, and the court further ordered the defendant, petitioner herein, to pay to plaintiff as permanent alimony the sum of \$50 per month. The decree also awarded to the plaintiff the household furniture, silverware, and other property in the possession of defendant. The decree was afterwards modified so as to allow the plaintiff \$25 a month, instead of \$50. Petitioner paid the regular monthly allowance down to about the beginning of the year 1887. Since the latter date he has failed to pay anything, and for such failure and neglect was adjudged guilty of contempt of court, and sentenced to be confined in the county jail until he should pay the amount due his former wife under the decree, and order amending the same, as to alimony.

Inasmuch as it is the duty of the court in granting a decree of divorce to make such disposition of the property as is just and lawful, the presumption is here that the plaintiff, Josephine, was awarded all the property, no mention being made in the decree of any other property. Furthermore, it is apparent from the affidavit upon which the court based its order for the petitioner to show cause why he should not be punished for contempt, and from the order itself, that the petitioner was adjudged guilty of contempt solely upon the ground that he had refused or failed to appropriate a portion of his salary to the payment of the sums required by the order for alimony. The question, clean cut, is whether the court has the power to compel a divorced man to devote any portion of his present earnings to the support of the woman as to whom and himself the bonds of matrimony have been dissolved by the court, and both parties released from all the obligations thereof. If it have such power, there may be this anomalous condition of domestic affairs: A man having a wife and children to support, under the obligations of the bonds of matrimony and his duty as a parent, may be compelled to devote his daily wages—that which is necessary to maintain them—to the support of a woman who owes him no duty, and who may be the wife of another man. If the power is vested in the court, it is absolute, and such a state of affairs may result. If such a power as this exists, it ought to appear clearly in the letter of the law. It certainly is not the spirit of the law. When the Code commissioners framed, and the legislature adopted, the system applicable to marriage and divorce in this state, they made divorce easy by providing an unusually large number of grounds upon which it might be based, and placed no limitation upon the right of either spouse after divorce to marry again. It never was intended, I think, to allow a man to marry as many times as he or his wives might have grounds for divorce, and compel him thereafter, subsequent to the dissolution of the

marriage obligation, to support from his daily earnings those from whom he had been divorced. With the policy of the law, however, judges have nothing to do.

Looking at the law upon which the respondent herein relies, I find nothing to support the view above referred to. Section 139 of the Civil Code provides that, when a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children, and may make such suitable allowance to the wife for her support during her life, or for a shorter period, as the court may deem just; but, in executing this and other sections, it is expressly provided that the court must resort first to the community property, and then to the separate property of the husband. "Separate property" is a relative term. It implies the existence of the community. After the divorce there is no community, and there can be no such thing as separate property. We do not speak of a single man's separate property; yet a divorced man is a single man. Separate property, as defined by the Code, is that owned by him before marriage, and that acquired afterwards by gift, bequest, devise, or descent. "Afterwards," means, of course, after the marriage, and during the existence of the community. The earnings of this petitioner subsequent to the dissolution of the marriage are neither community property nor separate property. It would be a solecism to speak of property which had come to a divorced man from the community property of himself and his former wife—to speak of it after divorce—as his community property; and so it would be to speak of a single man's property as his separate property. I am of opinion, therefore, that the order upon which the petitioner is held in custody is void, and that the matter can be tested on *habeas corpus*, because of the facts which appear on the face of the record itself. My view of the law is supported by the supreme court of Tennessee in *Chenault v. Chenault*, 5 Sneed, 247, and *Boggers v. Boggers*, 6 Baxt. 299. Those cases review and construe statutes similar to our own on this subject. In view of the fact, however, that there is a decision of our own supreme court (*Eidenmuller v. Eidenmuller*, 37 Cal. 364) which seems to hold that the subsequent earnings of a divorced husband may be taken for the support of his former wife, and in view of the fact that the learned judges of our superior courts throughout the state differ widely as to the extent of the power of a court in such cases, I feel it to be my duty to remand the petitioner to the custody of the sheriff. I shall, however, be pleased if the petitioner make another application to me to order a writ returnable before our supreme court in bank, for the consideration and determination by the full bench of this most important question. It is one which affects a large number of people, and society generally, and one upon which, so far as the policy of the law is concerned, much can be said *pro* and

con. It is ordered that the writ be discharged, and petitioner remanded to the custody of the sheriff.

(32 Cal. 245)

Ex parte STERNES. (No. 20,480.)

(Supreme Court of California. Dec. 30, 1889.)

PROCEDURE IN HABEAS CORPUS—KIDNAPPING.

1. Under Pen. Code Cal. § 1487, providing that a party may be discharged where he has been committed on a criminal charge without reasonable or probable cause, it is competent for the court, on *habeas corpus*, though defendant is held under commitment by a justice of the peace, and though an information has been filed against him, to go behind the warrant of commitment, and inquire into the question of reasonable or probable cause.

2. Where it appears that defendant was a deputy-sheriff, and a deputy United States marshal, and a warrant of arrest was duly issued, directed generally to any sheriff, marshal, etc., authorizing and commanding the arrest of a certain person, and such warrant was put in defendant's hands for execution, his arrest of the person named therein in a county other than that for which he was deputy-sheriff, and that in which the warrant was issued, does not warrant his commitment on the charge of kidnapping.

THORNTON, McFARLAND, and WORKS, JJ., dissenting.

In bank. Petition for writ of *habeas corpus*.

For former opinion, see 21 Pac. Rep. 1132.

Charles W. Kitts and A. L. Hart, for petitioner. W. D. Long and C. W. Cross, for respondent.

FOX, J. On a former hearing of this cause, upon the coming in of the return, it appeared that the prisoner was held under a warrant of commitment issued by a justice of the peace of Nevada county, committing the accused to the county jail to await trial on a charge of kidnapping, and that since such commitment, and after the issue of the writ from this court, the district attorney had filed in the superior court of that county an information in due form to put the accused upon trial for the said alleged offense. Petitioner thereupon offered to prove, and to introduce competent evidence for that purpose, that he was held by the magistrate, and committed, without probable cause, and claimed that upon making such proof he would be entitled to his discharge, under section 1487 of the Penal Code. To the introduction of this proof the respondent objected, on the ground that this court was precluded from going behind the warrant of commitment, and inquiring into the question of reasonable or probable cause, by reason of the fact that an information had already been filed against the prisoner; claiming that the information took the place of an indictment by the grand jury, and had the same force and effect upon *habeas corpus*. Upon a brief consultation upon the bench, a majority of the justices then sitting were inclined to that view of the case, and the warrant of commitment being regular upon its face, and issued by a court of competent jurisdiction, it was ordered that the prisoner be remanded. Subsequently the petitioner moved the court to set aside the order so made, and allow the

parties to file briefs upon the question of the admissibility of the testimony so offered; and the court, having doubts about the correctness of its ruling, granted the motion. Subsequently the parties were heard in open court upon the subject; and the testimony, consisting of the depositions and transcript of the evidence taken by the committing magistrate, was offered and received, subject to the final conclusion of the court as to the admissibility thereof.

Upon more mature deliberation we have concluded that we have not only the right, but that it is our duty, to inquire into the question of reasonable or probable cause, notwithstanding the filing of the information, and that the evidence tending to show whether there was such reasonable or probable cause is admissible, and the same is admitted. As early as the case of *People v. Smith*, 1 Cal. 9, it was held that, upon the return of the writ of *habeas corpus*, it was proper for the court to look into the depositions taken before the committing magistrate, in order to ascertain whether there is reasonable and probable cause to suppose that a felony has been committed by the prisoner. This has been the practice from that time to this, and we are not aware that the right to do so has ever been doubted, when it appeared that the prisoner was held upon a warrant of commitment issued by a committing magistrate, before final judgment, or indictment by the grand jury. If there was a doubt about it, that doubt has been resolved by the provisions of section 1487 of the Penal Code, where it is provided that the prisoner may be discharged "in any of the following cases: * * * (7) Where a party has been committed on a criminal charge without reasonable or probable cause." It is not pretended that this provision is in conflict with any provision of the constitution; and, if it is not, it is an established law which the court cannot disregard. Such a case is materially different from one in which an indictment has been found by a grand jury. There the charge is made by a judicial body,—a tribunal of the people, charged with judicial duties, and which has judicially investigated and passed upon the question of reasonable or probable cause. A tribunal taken from the body of the people, and consisting of so large a body as to be supposed to be beyond the influence of prejudice or passion, and whose judgment upon this question of reasonable or probable cause has for centuries been held so conclusive that, in the absence of very recent constitutional provisions, all the courts in the land have been powerless to put a man upon trial for felony except upon a charge emanating from this body, or to dismiss one without trial who had been in proper form so charged. Until the recent adoption of a constitutional provision for prosecution by information, no man could be put upon trial for felony upon the commitment of a committing magistrate alone, no matter what the grade of judicial office which

he held. The commitment only served the purpose of detaining him until the grand jury could investigate the charge made against him. While the people, by the constitution, have changed this method, and provided the alternative of a more speedy proceeding for putting a man upon his trial, they have not taken away this power of investigation by the grand jury, or reserved to themselves or the courts the right to try a man for an offense into which the grand jury has inquired, and for which it has refused to prosecute; nor has it taken from the courts the power, or absolved them from the duty, pending the prosecution by this more speedy method, of inquiring into the question of reasonable or probable cause. Nor can we perceive that the act of filing an information by the district attorney in any degree affects this right or duty. The district attorney is a mere ministerial officer. He exercises no judicial functions whatever. He does not, and has no power to, judicially inquire into the question of probable cause. As was said by Mr. Justice HARLAN in the case of *Hurtado v. California*, 110 U. S. 553, 4 Sup. Ct. Rep. 292: "The district attorney of a county is deprived of any discretion in the premises; for if, in the judgment of the magistrate before whom the accused is brought,—and generally he is only a justice of the peace,—a public offense has been committed, it becomes the duty of the district attorney to proceed against him by information for the offense indicated by the committing magistrate." The information filed by him is the mere formulation of the pleadings in the case, and not the result of any judicial investigation whatever. It does not come, therefore, with the sanctity of an indictment, and prevent the going behind it to inquire into probable cause. The duty of the court in that behalf remains the same after as before the information. We do not, however, agree with the counsel for the petitioner that the fact of filing the information after the issue of the writ from this court was in any sense an attempt to interfere with the jurisdiction or powers of this court in the premises. It was a ministerial act which the law requires that he must perform within a limited time after the commitment. The issue of the writ from this court neither stayed nor extended the time within which he was required to perform that duty, and he would have been derelict in his duty had he not filed it.

Looking into the evidence it appears that the prisoner was a deputy-sheriff of the county of Yuba, in this state, and a deputy United States marshal for this district; that a warrant of arrest was duly issued out of the superior court of the county of Yuba, directed generally to any sheriff, constable, marshal, or policeman in this state, authorizing and commanding the arrest of one Ah Fong, and the production of his body before the judge of said court at Marysville, in said county of Yuba, to be dealt with according to law; that said warrant was placed in the

hands of the prisoner Sternes to be executed, and he executed the same by arresting the said Ah Fong, in the county of Nevada in this state, and producing his body before the said judge at Marysville. This was the act, and the only act, for which he was subsequently arrested and committed upon the said charge of kidnapping. It thus appears that he was regularly acting in his official capacity, in executing a warrant regularly issued by a court of competent jurisdiction. The act was lawful, and does not constitute a public offense. The prisoner was therefore committed, and is held, without reasonable or probable cause, and must be discharged. So ordered.

We concur: BEATTY, C. J.; SHARPSTEIN, J.

I concur in the judgment: PATERSON, J.

We dissent: THORNTON, J.; MCFARLAND, J.; WORKS, J.

Ex parte STERNES. (No. 20,481.)

(*Supreme Court of California.* Dec. 30, 1889.)

In bank. Petition for writ of *habeas corpus*.

FOX, J. The prisoner is held upon a warrant of commitment for trial for the alleged kidnapping of one Ah Men. The case is in all respects like No. 20,480, same title, ante, 38, decided this day, and on the authority of that case it is ordered that the prisoner be discharged.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.

We dissent: MCFARLAND, J.; THORNTON, J.; WORKS, J.

Ex parte LEE. (No. 20,482.)

(*Supreme Court of California.* Dec. 30, 1889.)

In bank. Petition for writ of *habeas corpus*.

FOX, J. The prisoner is held under a commitment for the alleged kidnapping of Ah Fong. The act constituting the alleged offense was that of assisting George H. Sternes, a deputy-sheriff, in making the arrest mentioned in case No. 20,480, this day decided; the assistance being rendered at the command of said Sternes. On the authority of said case of *Ex parte Sternes*, ubi supra, (No. 20,481,) it is ordered that the prisoner be discharged.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.

We dissent: MCFARLAND, J.; THORNTON, J.; WORKS, J.

(82 Cal. 635)

WHITBY v. ROWELL *et al.* (No. 13,998.)

(*Supreme Court of California.* Jan. 27, 1890.)

FORECLOSURE OF MORTGAGE—PLEADING.

In an action to foreclose a mortgage, a complaint containing no description of the mortgaged lands, but having annexed to it a copy of the mortgage, with a full description of the land, is sufficient.

Department 2. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

Elmer E. Rowell, in pro. per. Curtis & Otis, for respondent.

MCFARLAND, J. Action to foreclose a mortgage. Defendant Rowell demurred to the complaint. The demurrer was overruled, and, said defendant refusing to answer, judgment went for plaintiff. From the judgment Rowell appeals. The demurrer was on the general ground of a failure to state sufficient facts, and also on the ground of want of jurisdiction. It resolves itself into the point that the complaint contains no description of the land mortgaged, and does not show that it was situated in the county of San Bernardino. The complaint contains a copy of the mortgage, which has a full description of the mortgaged premises. Appellant's point is that the complaint is defective in this regard, because the copy of the mortgage is in an exhibit which is attached to and made part of the complaint. This has been held to be sufficient in a number of cases, and pointedly in *Emeric v. Tams*, 6 Cal. 156, a case precisely similar to the case at bar. The appeal was evidently for delay. Judgment affirmed, with \$200 damages, and costs.

We concur: SHARPSTEIN, J.; THORNTON, J.

(82 Cal. 620)

PEOPLE v. MCCONNELL. (No. 20,583.)

(*Supreme Court of California.* Jan. 27, 1890.)

DEMURRER TO INFORMATION—ARREST OF JUDGMENT.

1. Under Pen. Code Cal. §§ 995, 996, providing that an information can be set aside on motion where defendant before the filing has not been legally committed by the magistrate, such objection must be raised on motion, and not on demurrer, which, by section 1004, lies when it appears from the face of the information that the court has no jurisdiction.

2. Under Pen. Code Cal. § 1185, providing that "a motion in arrest of judgment * * * may be founded on any of the defects in the * * * information mentioned in section 1004," unless the defects appear on the face of the information the motion will not be allowed.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; WILLIAM A. CHENEY, Judge.

Information for burglary. Pen. Code Cal. § 1185, provides for a motion in arrest of judgment for any defects mentioned in section 1004, providing for a demurrer for defects apparent on the face of an information or indictment.

Hugh J. & William Crawford, for appellant. *George A. Johnson*, Atty. Gen., for the People.

FOOTE, C. The defendant was convicted of the crime of burglary in the first degree. From the judgment rendered in the premises and an order refusing him a new trial he appeals. The ground upon which his contention is based is that he was not legally committed by a magistrate, and for that reason the superior court, which has tried him, had no jurisdiction to do so. He did not make

any motion to set aside the information, but raised the question by demurrer.

In order to sustain a demurrer to the information on the ground that the trial court is without jurisdiction of the offense charged therein, the want of such jurisdiction must appear from the face of the information. Section 1004, Pen. Code. A demurrer to an information on the ground that the defendant has not been legally committed by a magistrate is not permissible under the section of the Penal Code supra. The point must be made on a motion to set aside the information. Sections 995, 996, Pen. Code; *Ex parte Moan*, 65 Cal. 218, 3 Pac. Rep. 644.

The motion in arrest of judgment made herein could not prevail, because it should have been founded upon defects in the information appearing on the face thereof. Pen. Code, §§ 1004, 1185; *People v. Johnson*, 71 Cal. 392, 12 Pac. Rep. 261. The defendant asserts, in the points and authorities filed on his behalf, that it appears from the transcript (page 1027) he interposed a motion to set aside the information when he was arraigned, but the transcript fails anywhere to show that a motion to set aside the information was ever made. We therefore advise that the judgment and order be affirmed.

We concur: VAN CLIEF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

Hearing in bank denied.

(82 Cal. 135)

DAVIS v. MCGREW et al. (No. 12,219.)

(Supreme Court of California. Dec. 19, 1889.)
CANCELLATION OF LEASE—FRAUDULENT REPRESENTATIONS—DENIAL OF LANDLORD'S TITLE.

1. Plaintiff owned an undivided interest in land, all of which was claimed by defendant, but plaintiff was in possession. Defendant obtained a writ of assistance, putting him in possession jointly with plaintiff, and afterwards a compromise was effected by plaintiff's taking a lease on the land for one year from defendant. In an action by plaintiff to annul the lease on the ground of fraudulent representations by defendant as to the effect of the writ of assistance, there was evidence that plaintiff was shown a letter from the judge, stating that the order was to put defendant into joint possession with plaintiff; that plaintiff remarked that the writ made them partners in the land, but that he did not want a partner, but would take the lease, and pay rent. *Held*, that a finding that there was no fraudulent representation was sustained by the evidence.

2. Where plaintiff enters under a lease, having been previously in possession under claim of title, he is not estopped by the lease from afterwards asserting any title which he might have by a clause in the lease whereby he waives and renounces all claim to title of any kind to the premises, other than the leasehold interest created in the lease, as the words "waive and renounce" are not words of conveyance.

Commissioners' decision. Department 2. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

For former report, see 8 Pac. Rep. 618.

A. H. Griffith, for appellant. Moore & Reed, for respondents.

HAYNE, C. Suit to annul a lease from the defendant McGrew to the plaintiff, Davis. Davis was the owner of an undivided interest in the San Pablo rancho, and was in possession of two parcels thereof, viz., one of 320 acres, called his "home place;" and the other, 45 acres, upon which latter he had growing crops of the value of \$1,000. McGrew claimed this latter piece, and applied to the superior court, in a case pending therein, for a writ of assistance to remove Davis from possession. The court awarded the writ for the purpose of placing McGrew in possession jointly with Davis; and the parties compromised the matter by Davis taking a lease from McGrew of the 45-acre tract for one year, at an annual rent of \$500. This lease contained the following clause: "The lessee hereby expressly and absolutely waives and renounces any and all claim to title of any kind in himself in or to the premises herein described, other than the leasehold interest by this lease created." As a part of the arrangement, it was agreed (although this latter part was not reduced to writing) that McGrew should waive all claim to the tract of 320 acres. The suit was to have the lease canceled, on the ground of fraudulent misrepresentations as to the effect of the decision in relation to the writ of assistance. And upon a former appeal it was held that the complaint stated a cause of action. *Davis v. McGrew*, 8 Pac. Rep. 618. Upon the return of the case to the court below, a new trial was had, and the court found that there was no fraudulent misrepresentation, and rendered judgment for the defendants, from which the plaintiff appeals.

It is contended that the finding referred to is not sustained by the evidence. But we think that there was evidence in its support sufficient, at least, to make a substantial conflict. Before signing the lease there was shown to Davis a letter from the judge of the court stating that the order was to place McGrew "into joint possession with Davis." And one Gift, a constable, who had misinformed Davis in the first instance, testified as follows: "After seeing this letter from Judge BROWN I explained that his 320 acres was entirely free; that McGrew was to go into joint possession of the forty-five acres." And McGrew testified as follows: "I read it [the letter] out loud, so it could be heard. Mr. Davis took it, and looked at it, and Mr. Gift or Mr. Davis made the remark, 'That would make us partners in the land.' Davis said: 'I don't want no partners. If you will give me what I paid for the barley I put in, and some potatoes that I planted, I will take you right out in my buggy, and give you full possession of the land. I don't want anybody in there but myself.' I said: 'No; you are a farmer, and have farming utensils. I have nothing. I am a blacksmith, and no farmer. You just continue on the land, and pay the rent that others have offered for it, and you can have it.'" He agreed to it, and consummated the bargain. It is argued that

the circumstances and the nature of the transaction show that the testimony above referred to was not true. But, so far as the lease proper is concerned, there was nothing unnatural about the transaction. Davis states that the growing crop was worth \$1,000. McGrew was to be put in joint possession with him; and the rent was one-half of the above-stated value of the crop. Nor can we see that the effect of the transaction upon the title of parties made it unfair or improbable. Davis not having entered under the lease, but having been previously in possession, would not be estopped by the lease from afterwards asserting any title that he might have. *Tewksbury v. Magrath*, 83 Cal. 245; *Franklin v. Merida*, 85 Cal. 558; *Insurance Co. v. Stroup*, 63 Cal. 153. And the clause above quoted, and much dwelt upon by the appellant's counsel, does not operate as a conveyance of the title. The words "waive and renounce" are not words of conveyance, and, especially when inserted in a document which does not purport to be a conveyance, are not sufficient to convey any title which Davis may have had. A similar agreement was made by McGrew in relation to Davis' "home place," though this latter agreement was not reduced to writing. Possibly these agreements may be held to relate to the allotment or apportionment of the interests of the parties when a partition comes to be made. At any rate, one was evidently in consideration of the other; and we do not see anything improbable about the transaction. Upon the whole case, we do not think that the findings can be set aside as not sustained by the evidence; and we therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Hearing in bank denied.

(82 Cal. 128)

NEYLAN v. GREEN *et al.* (No. 12,164.)
(Supreme Court of California. Dec. 19, 1889.)

MORTGAGES—PAYMENT—EVIDENCE.

In an action to foreclose a mortgage for \$900, it appeared that defendant applied to D. & W., commission merchants, with whom he had dealings, and to whom he was then largely indebted, for a loan of \$133. D. & W., being unable to furnish the amount, applied to plaintiff, to whom they owed \$700. Plaintiff agreed to advance it if D. & W. would give security for the \$700. Defendant then executed the note and mortgage for \$900. Several witnesses testified that the note was made up of the \$133 for defendant, the \$700 due from D. & W. to plaintiff, and the expenses of the transaction. Afterwards D. & W. shipped to plaintiff goods worth more than \$900, which were credited by plaintiff on D. & W.'s account. *Held*, that defendant was merely a surety for D. & W., and the burden was on plaintiff to show that the shipments by D. & W. were not applicable to the note.

Commissioners' decision. Department 2. Appeal from superior court, Santa Cruz county; JAMES F. BREEN, Acting Judge.

P. B. Ladd, for appellant. Underwood & McCann and J. M. Lesser, for respondents.

HAYNE, C. This was an action to foreclose a mortgage given the firm of Neylan & Young by the defendant Abram F. Green to secure the payment of a promissory note for the sum of \$900. The answer, among other things, puts in issue the allegation of non-payment of the note. The court found that it had been paid, and rendered judgment for the defendants. The plaintiff appeals from an order denying his motion for a new trial. The general features of the case are as follows: The defendant Abram F. Green was a settler on the public lands, and was in the habit of taking lumber, bark, "shakes," etc., from the tract, and selling it to the firm of Dingwall & Waldo, in Santa Cruz, and getting supplies, etc., in return. Dingwall & Waldo were in the habit of shipping the stuff which they received from Green and from other parties to the firm of Neylan & Young, of San Francisco, who sold it on commission, and placed the proceeds to the account of Dingwall & Waldo, who drew against it as occasion required, and frequently their account was overdrawn. While their account was so overdrawn, the defendant Abram F. Green applied to them for \$133.12, which he needed to make the last payment upon the tract upon which he had settled. They could not let him have the money, but went with him to San Francisco, where a transaction was concluded by which Neylan & Young supplied the \$133.12 to make the payment on Green's land, and he gave to them the note and mortgage in suit. The clearest account of what occurred is given by Levi K. Green, the brother of Abram F. Green. He says: "My brother, Abram F. Green, wanted \$133 to pay for the land, but he could not get it unless he gave them security for what they owed Neylan & Young. The \$900 was made up of the \$700 due from Dingwall & Waldo, the \$133 that Abram F. Green got, and the expenses in going to the city, and making out the note and mortgage." This account is confirmed by the testimony of Dingwall, by that of the plaintiff himself, and by that of Waldo, although the latter witness seems to have had very confused notions of the legal effect of the transaction, and gave testimony which is contradictory and unintelligible in many respects.

There can be no doubt that Abram F. Green received only \$133.12, and he did not receive this sum from Neylan & Young, but from Dingwall & Waldo, to whom it was advanced by the former firm. The plaintiff admits that the money was advanced to Dingwall & Waldo, and was charged to them on the books; and they so understood the transaction. We do not think that the relation between Abram F. Green and Dingwall & Waldo are material in this connection. As between Neylan & Young and Green, the latter was a surety merely. And the result is that if the debt was paid, either by Ding-

wall & Waldo or by Green, it was extinguished, and the plaintiff has no case. The court made a general finding that the note was paid. It also made a special finding that, after the date of the note and mortgage, "the said Dingwall & Waldo received from Abram F. Green merchandise to the value of \$1,000, in payment of the debts of said Abram F. Green, one of which was the promissory note in suit;" and that, "within eighteen months after the date of said note and mortgage, Dingwall & Waldo had shipped to said Neylan & Young goods, wares, and merchandise to the value of several thousand dollars, including all the merchandise received from Abram F. Green, mentioned in finding 12, and the same was received by Neylan & Young, and placed to the credit of Dingwall & Waldo in their account. The amount of goods, wares, and merchandise so shipped and received was sufficient to pay, and did pay, all of the indebtedness of Dingwall & Waldo owing to Neylan & Young on the 24th day of March, 1876, including the note and mortgage in suit." Unless this finding can be set aside as not warranted by the evidence, the order appealed from must be affirmed. We think there is evidence in its support. It seems plain that Abram F. Green's lumber and stuff was sent to Neylan & Young through Dingwall & Waldo. Levi Green testifies that a sufficient quantity to pay off the note was sent; and Waldo testifies to the same thing; and the plaintiff admits that, from the date of the note and mortgage "to March 24, 1877, Dingwall & Waldo were credited by our firm with \$7,983.89 for lumber sent us by them, sold by us for them, and placed to their credit." And Waldo testifies that, although the account of his firm was generally overdrawn, yet they had settlements every year, and that in 1877 Neylan & Young were indebted to them. It further appears in evidence that the understanding was that the note was to be taken up in a short time. Waldo told Green that "just as soon as they shipped some stuff up there the mortgage would be canceled;" and the plaintiff was informed of this arrangement. The foregoing evidence, at least, cast the burden upon the plaintiff of explaining why the payments were not, or ought not to have been, applied to the note in suit. The whole evidence is very confused and unsatisfactory upon essential matters; and we do not feel that we can say that the finding quoted should be set aside.

With reference to errors in law the appellant's counsel has the following: "Having made so clear a case for a reversal of the order denying a new trial on the facts of the case, so far as errors are concerned, we here simply point out where they are to be found in the transcript;" and a list of folios of the record is added. We do not suppose that the court will think it necessary to examine questions submitted to it in this manner. And we merely say that, while the case appears to have been very loosely tried, we have seen no

error which materially affects the finding above referred to. We therefore advise that the order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(82 Cal. 187)

ALLEN v. NAPA COUNTY. (No. 12,603.)
(Supreme Court of California. Dec. 27, 1889.)

CONSTABLES—FEES.

1. Pen. Code Cal. § 819, provides that a warrant issued by any magistrate other than a justice of the supreme court or judge of the superior court may be directed to any constable in the county in which it is issued, and may be executed in that county, or, if defendant be in another county, it may be executed therein upon the written direction of a magistrate of that county indorsed on the warrant. *Held*, that a constable may recover his fee for executing in another county a warrant issued by a justice of the peace, though the complaint does not allege that the warrant was indorsed by a magistrate of the county in which it was executed, as it will not be presumed that the constable acted unlawfully.

2. Under Act Cal. March 5, 1870, providing that constables shall receive such fees as are now or hereafter may be allowed by law, "and that constables shall receive mileage for "every mile necessarily traveled, in going only, in executing any warrant of arrest, subpoena, or venire, bringing up a prisoner on *habeas corpus*, taking prisoners before a magistrate," a constable is entitled to mileage both for the distance traveled in going to make an arrest, and for that traveled in bringing his prisoner from the place of arrest to the magistrate.

3. Act Cal. March 5, 1870, providing that constables shall receive the same fees as are allowed to sheriffs, does not make applicable to constables of counties of the thirteenth class the provision that sheriffs of counties of the thirteenth class shall receive a salary of \$5,000 per annum, and their necessary expenses for transacting criminal business outside their counties.

Commissioners' decision. Department 2. Appeal from superior court, Napa county; R. CROUCH, Judge.

Action to recover fees and mileage of a constable for executing a warrant of arrest outside of his county. Plaintiff had judgment, and defendant appealed. Pen. Code Cal. § 818, provides that, "if a warrant is issued by a justice of the supreme court or judge of the superior court, it may be directed generally to any sheriff, constable, marshal, or policeman in the state, and may be executed by any of those officers to whom it may be delivered." Section 819 provides that, "if it is issued by any other magistrate, it may be directed generally to any sheriff, constable, marshal or policeman in the county in which it is issued, and may be executed in that county; or, if the defendant is in another county, it may be executed therein, upon the written direction of a magistrate of that county indorsed upon the warrant," etc.

H. M. Barstow, Dist. Atty., and Henry Hogan, for appellant. Henry C. Geaford, for respondent.

HAYNE, C. This was an action against Napa county by the assignee of a constable

of Napa township, in said county, for official services in making an arrest under a warrant issued by a justice of the peace of Napa township: In executing the warrant the constable traveled to San Pedro, in Los Angeles county, arrested the alleged criminal there, and brought him before the justice who issued the warrant. The claim is mainly for mileage in going to San Pedro, and in bringing back the prisoner. The trial court overruled a demurrer to the complaint, and, no answer having been put in, gave final judgment for the plaintiff for the amount claimed. The only questions which have been argued are whether the constable was authorized to execute process outside of his county, and, if so, whether he was entitled to mileage in taking his prisoner before the magistrate.

1. Was the constable authorized to execute the warrant outside of his county? As will be shown below, the provisions of the present statutes in relation to this question are not materially different from those formerly in force. The construction given to the old statutes will therefore aid in the solution of the question. The definition of the duties of a constable given in the act of 1850 seems to have restricted him to acts "within his township." See Laws 1850, p. 263, § 2. And it was accordingly held under this provision that a constable could not serve a summons in a civil action outside of his township. *Lowe v. Alexander*, 15 Cal. 297. It will be observed that this case related to the service of a summons. With reference to writs of execution, however, section 601 of the civil practice act (as amended in 1854) provided that the writ, "when issued by a justice, shall be directed to the sheriff, or to a constable of the county," etc. And the construction which this seems to have received was that it meant any constable of the county; and that, consequently, it might be directed to a constable of a different township from that of the justice, or from that where the property to be levied on was situated. The inference was that a constable could act outside of his township. This was, in effect, held in *Lafontaine v. Greene*, 17 Cal. 296. The court, per COPE, J., distinguished *Lowe v. Alexander*, above cited, saying: "The question there related to the service of a summons, and the decision was based upon the language of the second section of the act of April, 1850, prescribing the duties of constables. There was no other statute affecting the point in controversy."

Soon after this decision the legislature amended the act of 1850 so as to extend the duties of a constable to the performance of acts "within his county," instead of "within his township." See Laws 1861, p. 28. If there were no other provision, it might be plausibly argued that a constable could not go outside of his county. But in relation to criminal process, at least, there were other provisions. Sections 111 and 112 of the criminal practice act (1699 and 1700, Hitt. Gen. Laws) were as follows: "Sec. 111. If a

warrant be issued by a justice of the supreme court, district judge, or county judge, it may be directed generally to any sheriff, constable, marshal, or policeman in this state, and may be executed by any of those officers to whom it may be delivered. Sec. 112. If it be issued by any other magistrate, it may be directed generally to any sheriff, constable, marshal, or policeman in the county in which it is issued, and may be executed in that county; or, if the defendant be in another county, it may be executed therein, upon the written direction of a magistrate of that county, indorsed upon the warrant," etc. Under these provisions, it was held in *Cunningham v. San Joaquin Co.*, 49 Cal. 323, that a constable could go outside of his county to execute criminal process. The opinion is short, and does not refer to any statute or authority, but the briefs show that the provisions above quoted were the ones upon which reliance was placed by counsel, and we have no doubt that the decision was based upon them.

The existing law is substantially the same as that upon which the decision last cited was based. Section 158 of the county government act is not more restrictive in its definition of the duties of constables than the act of 1861 above referred to, which latter was in force when the facts of *Cunningham v. San Joaquin Co.* occurred and were passed upon. And the provisions of the criminal practice act, above quoted, are reproduced in the Penal Code. See sections 818, 819. This being the case, we think it plain that constables may execute criminal process outside of their counties, if such process be properly issued and indorsed.

The complaint does not allege that the warrant under which the plaintiff's assignor acted was indorsed by a magistrate of the county of Los Angeles. It alleges merely that the arrest was made "under and by virtue of a warrant of arrest for the said John Williams, issued out of the justice's court of said Napa township," etc. But we think that the foregoing is sufficient in an action to recover fees. It will not be presumed in such an action that the officer acted unlawfully.

2. Was the constable entitled to mileage for bringing his prisoner before a magistrate, or only in going to make the arrest? It is agreed by counsel that Napa is a county of the thirteenth class. And by the county government act it is provided that constables of counties of that class shall receive "such fees as are now or hereafter may be allowed by law." Laws 1883, p. 342; Laws 1885, p. 174. The only provision of law regulating the charges of constables is contained in the fee bill of March 5, 1870. This act, after making provision for certain services of constables, provides that they shall receive "for all other services the same fees as are allowed to sheriffs for similar services." Laws 1869-70, p. 171. The same act has the following provision in relation to the services of sheriffs of the kind rendered by the plaintiff here: "For every mile necessarily trav-

eled, in going only, in executing any warrant of arrest, subpoena, or *venire*, bringing up a prisoner on *habeas corpus*, taking prisoners before a magistrate or to prison, or for mileage in any criminal case or proceeding: provided, that in serving a subpoena or *venire*, when two or more jurors or witnesses live in the same direction, but one mileage shall be charged,—30 cents: provided, further, that in the counties of Amador and Sacramento, for every mile necessarily traveled in any criminal case, 20 cents." Laws 1869-70, p. 159, § 9.

Two points are made by the appellant in relation to this latter provision: (a) It is contended that it does not apply. The same act, it is said, provides that constables shall receive the same fees as sheriffs, and the county government act provides that sheriffs of counties of the thirteenth class shall receive a salary of \$5,000 per annum, (Laws 1883, p. 342,) and his necessary expenses in transacting criminal business outside the county, (section 164, County Gov. Act 1883, renumbered as section 211 in 1885, Laws 1885, p. 194.) But we do not think that this position can be sustained. The act of 1870 did not provide as much compensation for constables as for sheriffs. Similar services were to be charged at similar rates by each class of officers; but the legislature must have had in view the fact that constables have comparatively little to do. It could not have been the intention to give each constable of a township the same compensation as is given to an important and busy county officer like the sheriff. And the language does not imply this. It is not said that a constable shall receive the same salary as a sheriff, but that he shall receive the same fees for similar services. Fees are not salaries; nor do they come under the head of "necessary expenses." The only logical result of the appellant's argument in this regard would be that after the sheriffs' fees were abolished the constables would receive no fees whatever. But this could not have been intended. We think, therefore, that the provision of the act of 1870, above quoted, is the one which regulates the matter. (b) It is contended that the proper construction of the provision last mentioned is that the constable was only entitled to his mileage in going to make the arrest, and not in bringing his prisoner before the magistrate. This contention is based upon the words "in going only." But this question was decided adversely to the appellant's view in the case of *Cunningham v. San Joaquin Co.*, above cited; and we are inclined to agree with the majority of the court in that case. The words "in going only" would in all probability prevent the officer from charging mileage for the return trip when he does not succeed in making the arrest. But where, as in this case, (and as in the case referred to,) he does succeed, and consequently has to take the prisoner before a magistrate, it would seem that the case is covered by the words, "taking prisoners before a magis-

trate." But, however this may be, the decision does not appear to have been questioned during 15 years, and, according to the respondent, "it has been the universal practice ever since for constables to charge mileage both in going to execute a warrant and in taking the prisoner before the magistrate who issued the warrant," and we think that, if the rule is not satisfactory, recourse must be had to the legislature. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C.C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(82 Cal. 184)

GOLDEN GATE MILL & MIN. CO. v. JOSHUA HENDY MACHINE WORKS. (No. 12,882.)

(*Supreme Court of California*. Dec. 26, 1889.)

INTEREST ON VERDICT — TRESPASS — VERDICT AGAINST ONE DEFENDANT.

1. Under Code Civil Proc. Cal. § 1035, which provides that the clerk shall include in the judgment any interest on the verdict from the time it was rendered, it is properly allowed on a judgment entered on a verdict one year after its rendition.

2. In an action against three defendants, there was a verdict against one and in favor of another, but no reference was made to the third, and no answer was filed by him. Held, that the omission to mention his name in the verdict, or to take judgment by default against him, was not a thing of which his co-defendant can complain.

3. In an action to recover damages for a trespass, the possession of plaintiff is sufficient evidence of title as against a mere trespasser.

4. Proof of the existence of a corporation *de facto*, in an action by it to recover damages for injury to its property, is sufficient as against a mere trespasser.

5. A mere trespasser, who is sued by a corporation for a trespass on its property, cannot question the capacity of the corporation to take and hold property under Civil Code Cal. § 358, providing that the incorporation of a company claiming to be duly organized shall not be inquired into in any private suit in which the company is a party.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Civil Code Cal. § 358, provides that the due incorporation of a company claiming in good faith to be incorporated shall not be inquired into in any private suit to which it is a party.

Wm. H. H. Hart, for appellant. H. W. Philbrook and Arthur Rodgers, for respondent.

HAYNE, C. This was an action of trespass, for breaking into the building of the plaintiff, and injuring and carrying away certain machinery which was affixed thereto. There was a verdict for the plaintiff for \$900, and the defendant against whom it was rendered appeals from the judgment, and from an order denying a new trial.

1. We do not think that the appellant's criticisms upon the complaint are well founded.

2. The judgment was not entered until one year after the rendition of the verdict, and, in entering it, the clerk included therein in-

terest on the amount of the verdict from the time of its rendition. It is objected that this was unauthorized. If the point were well taken it could only lead to a slight modification of the judgment at the appellant's costs. But it is not well taken. The statute expressly provides that "the clerk must include in the judgment entered up by him any interest on the verdict or decision of the court, from the time it was rendered or made." Code Civil Proc. § 1035. This provision authorized the course taken. There is nothing to the contrary in *Alpers v. Schammel*, 75 Cal. 590, 17 Pac. Rep. 708. If there were, the decision would be in direct conflict with the statute, and would have to be overruled.

3. The action was against three defendants. The verdict was against one and in favor of another, but omitted all reference to the third. And it is argued that this is error for which the defendant, against whom judgment was rendered, is entitled to a reversal. But the record does not show that the omitted defendant put in any answer. There was no issue as to him. Consequently, the verdict properly omitted all reference to him; and the omission to enter a judgment by default against him, for failure to plead after the overruling of his demurrer, is not a thing of which his co-defendant can complain. There are other answers to the objection, but the foregoing is sufficient.

4. It is contended that the plaintiff showed no title to the property, and that there were errors in the introduction of his attempted chain of title. But the plaintiff introduced evidence to the effect that it was in possession of the property. And this was sufficient as against a mere trespasser. The appellant seems to be under the impression that this evidence was overcome by certain other evidence. But if it be assumed that such would be the effect of the latter evidence, it is sufficient to say that it was stricken out, and the ruling in this regard was, in our opinion, proper. The evidence of the witness was by deposition, and the answer he gave was not responsive to the interrogatory. The evidence as to plaintiff's possession renders it unnecessary to consider the questions raised in regard to its chain of title.

5. The allegation of the corporate existence of the plaintiff was denied, and it is contended that there was no sufficient proof on the subject. But the evidence showed that the plaintiff was at least a corporation *de facto*, claiming in good faith to exist. And, this being so, a mere trespasser could not raise the question of its corporate existence in an action by it to recover damages for injury to its property. Civil Code, § 358; *Rondell v. Fay*, 32 Cal. 361. Neither could such a trespasser raise the question of its capacity to take and hold property.

6. The deed from Nevin was properly excluded. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(82 Cal. 219)

In re McEACHRAN. (No. 12,225.)

(Supreme Court of California. Dec. 28, 1899.)

DISCHARGE IN INSOLVENCY—FRAUDULENT DEBTS—EVIDENCE.

1. On the trial of an application for discharge of an insolvent debtor under Act Cal. April 16, 1880, § 50, providing that an opposing creditor may file specifications of the grounds of his opposition, which the debtor may answer, and section 49, specifying the grounds on which a discharge may be opposed, and section 52, providing that a debt fraudulently contracted shall not be discharged, a judgment for a debt so contracted is not a ground for opposing a discharge.

2. On such trial, a deed of land by the debtor to his wife for the consideration of natural affection, made more than two years before he instituted the insolvency proceedings, and her declaration of homestead thereon, are inadmissible in evidence, where there is no proof that they were made with fraudulent intention.

3. An order discharging the insolvent in the language of section 51, and excepting "such debts, if any, as are by said insolvent laws excepted from the operation of a discharge in insolvency," does not release the insolvent from debts fraudulently contracted.

4. An objection that the oath required to be taken on obtaining the discharge under section 49 was taken in one year before the discharge was granted, comes too late on appeal.

Commissioners' decision. Department 2. Appeal from superior court, Napa county; R. CROUCH, Judge.

Trial of an application by C. T. McEachran, an insolvent debtor, for a discharge from his debts under the insolvent act of 1880. The discharge was opposed by William Matheson, a creditor. Act Cal. April 16, 1880, § 50, provides that an opposing creditor may file specifications of the grounds of his opposition to the discharge, which the debtor shall answer, and the issues thus raised shall be tried by the court, with or without a jury, as in civil actions. The court granted the discharge of the debtor, from which decision the opposing creditor appealed.

Spencer & Henning, for appellant. *Wallace & Johnston*, for respondent.

BELCHER, C. C. On the 18th day of February, 1885, the respondent, C. T. McEachran filed his petition in the superior court of Napa county, praying that he be adjudged an insolvent debtor. On the same day he was adjudged insolvent; and in March following an assignee of his estate was appointed. On the 31st of October, 1885, the appellant, William Matheson, filed his claim against the estate of the insolvent, and therein set up that the insolvent was indebted to him, in the sum of \$3,351.11, upon a judgment rendered in the superior court of Napa county on the 26th day of October, 1883. On the 27th of March, 1886, the respondent filed in court his petition for a discharge from his debts. The appellant opposed the discharge, and filed specifications in writing of the

grounds of his opposition; and thereupon the respondent made and filed the oath required, by section 49 of the insolvent act, to be taken and subscribed before any discharge can be granted. Thereafter, on the 16th of June, 1886, the appellant filed amended specifications of the grounds of his opposition to the discharge. The specifications set up that from the year 1870 to the 26th of October, 1883, a partnership existed between respondent and appellant; that on the day last named this partnership was dissolved by a decree of the superior court of Napa county; that the court found and determined that respondent was indebted to appellant, in a sum named, for money advanced and delivered to respondent by appellant for their joint benefit, and which respondent fraudulently misapplied and appropriated to his own use; and that respondent was also indebted to appellant, in another sum named, for money received by respondent in the partnership business, and which sum of right belonged to appellant as his share and interest in the partnership, but which the respondent fraudulently misapplied and appropriated to his own use; that thereupon judgment was duly given and rendered in favor of appellant and against respondent for the aggregate of these sums, being \$3,049, with costs of suit; and that only \$195.50 had ever been paid on this judgment. The specifications further set up that a short time prior to the commencement of the action before mentioned the respondent transferred and conveyed to his wife, Emelie McEachran, the undivided one-half of the lands and premises then and theretofore owned in partnership by respondent and appellant; that the conveyance was without consideration, and was made for the sole purpose of defrauding appellant, and to prevent him from recovering the amount due him out of said partnership; that the said Emelie McEachran, immediately after such transfer, caused to be filed and recorded a declaration of homestead upon the premises so conveyed to her; and that this was done at the instigation of respondent, and in furtherance of a plan on his part to cheat and defraud appellant, and to prevent a recovery of such sum of money as might be found due him out of the said partnership. The respondent filed an answer to the objections of appellant to his discharge, and therein fully denied all the charges of fraud made against him.

The matter came on for trial before the court without a jury, on the 22d day of April, 1887, and the appellant offered in evidence the judgment roll in the case before referred to. The respondent objected to the offered evidence on the ground that it was irrelevant, immaterial, and incompetent; and the court sustained the objection. The appellant then offered in evidence a deed made by respondent to his wife under date of June 28, 1882, and purporting to convey to her, in consideration of love and affection, the undivided one-half, and all the right, title, and interest of respondent of, in, and to certain

real property, and also a certificate of homestead made by the wife upon the property conveyed to her, which was in proper form, and was duly acknowledged and recorded on August 29, 1882. The same objections were made to these offers as to the judgment roll, and sustained. The appellant reserved an exception to each of the rulings. At the conclusion of the trial the court granted the prayer of respondent, and gave him a certificate of discharge from his debts, in the language provided in section 51 of the insolvent act. Act Cal. April 16, 1880. The appeal is from this order, and the action of the court in excluding the three items of evidence above mentioned constitutes the principal grounds urged for a reversal.

1. The action, the judgment roll in which was offered in evidence, was commenced by the appellant against the respondent, in 1883, to dissolve a partnership existing between the parties, and for an accounting. The court found, in substance, that in the year 1870 the parties entered into a partnership for the purpose of purchasing certain lands in Napa county, and improving and cultivating the same for their joint benefit; that the plaintiff was to advance the money necessary to purchase, improve, and cultivate the lands while they should remain unproductive, and the defendant was to give his whole time, labor, and skill in clearing, improving, and cultivating the same; that, in pursuance of the partnership agreement, the defendant purchased the lands, and went into possession thereof, and that the partnership business was continued and carried on until some time in the year 1882; that the plaintiff advanced to defendant for partnership purposes, and upon his representations that it was all necessary therefor, the sum of \$1,299 more than was necessary, and more than was in fact used by defendant for or on account of the partnership, and that defendant fraudulently kept and appropriated this last-named sum to his own use; that during the seven years next prior to 1882 crops were raised on the land owned by the partnership which were received and disposed of by defendant, and that the net profits arising therefrom were \$3,500; that all of such profits were the property of the partnership, and the plaintiff was entitled to one-half thereof, but the defendant fraudulently kept and appropriated to his own use the plaintiff's half, and refused to account for the same. The court further found that prior to the commencement of the action the real property was partitioned and disposed of by the parties. Judgment was accordingly entered that the partnership be dissolved, and that the plaintiff recover the aggregate of the sums found to have been fraudulently misappropriated, with interest thereon.

Section 49 of the insolvent act specifies the grounds upon which a creditor may oppose the discharge of an insolvent debtor, and section 52 declares what debts shall not be discharged. The last-mentioned section reads as follows: "No debt created by fraud or em-

bezzlement of the debtor, or by his defalcations as a public officer, or while acting in a fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt," etc. It is argued for respondent that appellant's judgment did not constitute a debt which was "excepted from the operation of a discharge in insolvency," and that it therefore furnished no ground for opposition; and in support of this position counsel cite *Hennequin v. Clews*, 77 N. Y. 427; *Palmer v. Hussey*, 87 N. Y. 303; *Neal v. Clark*, 95 U. S. 704; *Hennequin v. Clews*, 111 U. S. 676, 4 Sup. Ct. Rep. 576. We do not consider it necessary to decide this point; for, conceding that the judgment debt was excepted from the operation of the discharge, still we do not think it furnished any good ground for opposition.

The provisions of the last United States bankrupt act were substantially the same as those of our statute in regard to the discharge from debts. Under that act it seems to have been uniformly held by the bankrupt courts that the fact that a debt was created by fraud was not ground for opposing the discharge of a bankrupt. In *Bump, of Bankr.* (5th Ed.) 436, it is said: "Fraud in the creation of a debt is no ground for withholding a discharge;" citing numerous cases. And in *Re Rosenfield*, (1 N. B. R., 575,) one of the cases cited, the district court of New Jersey, by FIELD, J., said: "Is the creation of a debt by fraud a good ground upon which to oppose the discharge of a bankrupt? The thirty-third section of the act provides: 'That no debt created by the fraud of the bankrupt shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt.' Why, then, should a creditor be allowed to object to the discharge of a bankrupt on the ground that the debt due to him was created by fraud? So far as he is concerned, the bankrupt is not discharged at all. Such creditor is in fact a favored creditor. Like other creditors, he is entitled to receive a dividend, but this dividend, instead of being a payment in full, is only a payment on account, and the bankrupt is forever liable for the balance of the debt; and this balance is much more likely to be paid if the bankrupt is discharged from the payment of all his other debts than if he is not discharged at all. Such a creditor, therefore, has not only no right to oppose the discharge, but it is not his interest to do so. This, no doubt, is the reason why the fact that the debt was created by fraud is not by the twenty-ninth section made a ground for refusing a discharge." This reasoning seems to us correct, and to be entirely applicable to the proceedings under our insolvent act. There was therefore no error in excluding the judgment roll.

2. The deed and declaration of homestead which were offered in evidence were made more than two years before the insolvency proceedings were commenced; and the land

affected by them was partitioned and disposed of by the partners before the action was commenced to dissolve the partnership. No proof was offered, tending to show that the husband had any fraudulent purpose in making the deed, or that the wife had any in filing the homestead claim. There is certainly nothing fraudulent *per se* in the fact that a husband conveys land, which he owns, to his wife, in consideration of love and affection, and she subsequently declares a homestead thereon. Under these circumstances, we are unable to see that the offered papers had any relevancy whatever to the matter before the court; and, in our opinion, they were properly excluded.

3. It is urged that the decision is against law, and should be reversed, because it purports to discharge the petitioner from all debts, and does not except from its operation debts contracted in fraud. But the order referred to does not purport to discharge the insolvent from any debts. It is simply an order that the application be granted. The final order granting the discharge is in the language of section 51, and it expressly excepts "such debts, if any, as are by said insolvent laws excepted from the operation of a discharge in insolvency."

4. The appellant makes the point that the oath required by the last clause of section 49 to be taken and subscribed by an insolvent before any discharge is granted was made in May, 1886, while the discharge was not granted until April, 1887. It is said that the statute intended that the oath should be taken at the time of granting the discharge. A sufficient answer to this point is that when respondent's oath was offered in evidence no objection was made to it by appellant, and the objection comes now too late. If objection had been made at the proper time, respondent could, and probably would, have taken and subscribed a new oath, and thereby have removed any question of irregularity. We advise that the order appealed from be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(82 Cal. 523)

HITCHCOCK v. CARUTHERS. (No. 18,233.)

(Supreme Court of California. Jan. 10, 1890.)

STIPULATION—JURY—SLANDER—PLEADING AND EVIDENCE.

1. A stipulation by defendant to allow his demurrer to the complaint to be overruled, on leave to answer, does not estop him from thereafter, at any stage of the proceeding, objecting that the complaint does not state facts sufficient to constitute a cause of action, within Code Civil Proc. Cal. § 434.

2. The fact that a case is tried before 11 instead of 12 jurors, there being no objection thereto, is not ground for a new trial.

3. Under Civil Code Cal. § 46, providing that language imputing a want of chastity is actionable *per se*, a complaint which alleges that defendant

said of plaintiff, a girl of 17, that a certain man named S. "was cohabiting with plaintiff as his mistress;" that "he was keeping the girl for immoral purposes;" and that "he was using Ida as his mistress,"—sufficiently states a cause of action.

4. In an action for slander for charging plaintiff with want of chastity, defendant's witness testified to having had intercourse with plaintiff. Held, that it was competent for plaintiff, in rebuttal, to testify that he had never, at any time, offered or suggested improper liberties to her.

Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

R. H. Ward and Meuw & Edward, (P. D. Wiggington, of counsel,) for appellant. Church & Cory and Grady & Welsh, for respondent.

McFARLAND, J. Action for slander. Judgment for plaintiff; from which, and from an order denying a new trial, defendant appeals.

1. Appellant contends that the complaint does not state facts sufficient to constitute a cause of action. Respondent contends that this point cannot be heard here, because, after appellant had demurred to the complaint on that ground, in the court below, he stipulated that the demurrer might be overruled, and defendant allowed to answer within a certain time. It is not necessary to determine what consequence would have followed if appellant had expressly stipulated that the complaint did state a cause of action; for it is evident that the stipulation in this case did not go to that extent, and, under any view of the law, did not estop appellant from relying, at any future stage of the case, under section 434 of the Code of Civil Procedure, on the alleged failure of the complaint to state sufficient facts. But we think that the complaint does state facts sufficient to constitute a cause of action. The main objections made by the appellant to the sufficiency of the complaint are,—*First*, that there is no distinct averment that plaintiff was an unmarried woman, and therefore she may have been the wife, either of the defendant, or of the man with whom defendant charged her with having sexual intercourse; and, *second*, that the language alleged to have been used by defendant does not impute to plaintiff a want of chastity. The plaintiff named in the complaint is "Ida Hitchcock, an infant, by her guardian *ad litem*, L. W. Scronce," and she is averred to be of the age of 17 years. The slanderous language alleged to have been used by defendant about plaintiff refers to her as "the girl." He is alleged to have said, among other things, that a certain man named Scronce "was cohabiting with plaintiff as his mistress;" that "he was keeping the girl for immoral purposes;" and that he "was using Ida as his mistress." This, with other language not repeated here, shows that plaintiff was a young unmarried woman, and shows most clearly, at least, that she was not the wife of the man whose name was connected with her in the alleged slanders. That the alleged slanderous language imputes to plaintiff a want of chastity is too plain to warrant discussion. We shall not repeat the language

here; it is sufficient to say that it charges a want of chastity, not only in plain, but in most gross and indecent, terms. And language imputing a want of chastity is actionable *per se*. Section 46, Civil Code. We think that the complaint sufficiently shows that the persons to whom the slanderous words are alleged to have been spoken knew that they were spoken of and concerning plaintiff. This is particularly true of the third count.

2. Appellant asks for a new trial, because it appears that the case was tried with only 11 jurors. But we will not presume the extraordinary spectacle of a court compelling a party to go to trial, against his consent, with less than 12 jurors, upon a record which not only fails to show any objection or exception on the point, but which does state that "a jury of eleven persons was regularly impaneled and sworn to try said action."

3. There is an exception to a ruling of the court about the admissibility of evidence. One Hardwick, called as a witness for defendant, testified that the general reputation of plaintiff for virtue was bad. On cross-examination, he was asked if one Carlisle had not gone to San Benito county, where Hardwick lived, and brought him down to Fresno county, as a witness; if he had not told Carlisle that he, Hardwick, had seduced plaintiff; and if he had not told Carlisle that he would swear that he had seduced plaintiff. No objection was made by defendant to either of these questions, and the witness answered them all in the affirmative. On further cross-examination he stated, without objection from defendant, that he had seduced plaintiff about 3 years previous to the trial, at which time she must have been not over 14 years old. The defendant then took the witness again, and, upon re-direct examination, led him to give a detailed account of the circumstances under which he claimed to have had illicit intercourse with plaintiff, and to swear that he had not "seduced" her, in the ordinary sense of the word, because, as he testified, she had been unchaste with others before her alleged relation with him. Plaintiff was afterwards recalled on her own behalf, and, after having testified that she had never had any acquaintance with the witness Hardwick, was asked by her attorney this question: "Did he, at any time, offer or suggest any improper liberties with you?" To this question the defendant objected as "irrelevant, immaterial, and incompetent, and not in rebuttal of anything in the case that was brought out by the defense." The objection was overruled, and defendant objected. The witness answered the question, and one or two other questions of similar import, in the negative. The testimony was not "incompetent;" that is, if the fact sought to be proved was a proper fact to be proved, the testimony offered to prove it was not secondary, or hearsay, or not the best evidence, or not the evidence prescribed by the statute

in a particular case, or within any of the categories of incompetent evidence. And a denial of the grave charges made by Hardwick was certainly neither "irrelevant" nor "immaterial." Neither was it "not in rebuttal of anything in the case that was brought out by the defense." If the defendant had let the witness Hardwick alone when plaintiff had concluded the cross-examination, this particular phase of the objection would have presented a somewhat different aspect; but he took the witness again, and drew out new matters on redirect examination of which the testimony of plaintiff was clearly in rebuttal. Moreover, considering the things which usually and properly influence human belief, we think that plaintiff had a right to show that the witness came from a place beyond the reach of a subpoena to voluntarily testify to his own undue intimacy with a young girl; and that, in addition to the extent to which that fact alone might weaken his testimony before the jury, the plaintiff had a right to show by express testimony, if she could, that his statement was absolutely false. We think, therefore, that there was no error in admitting the evidence. Respondent contends that no alleged errors in ruling on the admission of evidence on the subject of plaintiff's character for chastity can be considered, because her character is not assailed by any averment in the answer; that the common-law rule, which allowed the character of a plaintiff in a slander suit to be attacked under the general issue, has been abrogated by section 461 of the Code of Civil Procedure; and that, under said section, there can be no proof of mitigating circumstances which are not alleged in the answer. This might be an interesting question if properly presented; but, as evidence to character went before the jury without objection, respondent cannot be heard to make the objection here for the first time. We see no error in the rulings of the court on the subject of instructions which were excepted to by appellant, and the case seems to have been correctly presented to the jury. Judgment and order affirmed.

We concur: THORNTON, J.; SHARFSTEIN, J.

(82 Cal. 502)

WARD v. CLAY. (No. 12,302.)

(Supreme Court of California. Jan. 11, 1890.)

PLEADING—EXHIBITS—FINDING—STIPULATIONS.

1. In an action on a promissory note, the complaint alleged the date of the parties to, the consideration, and the execution of, the note; also the "principal sum" and rate of interest; that the principal sum and interest remained due and unpaid; that defendant refused to pay the same, or any part thereof; and that plaintiff still held the note; and prayed judgment for the principal sum and interest. Held sufficient on general demurrer, as defects of form of averment or uncertainty cannot be considered on general demurrer.

2. Under Code Civil Proc. Cal. § 447, providing that when an action is brought on a written instrument, and a copy is annexed to the complaint, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified, a copy of a note at-

tached to a complaint in a suit thereon, and which is alleged in the complaint to be a copy in "words and figures" of the note executed by defendant may be treated as part of the complaint on demurrer to its sufficiency.

3. In an action on a promissory note, a finding that there is now due and owing from defendant to plaintiff on the note a certain balance is equivalent to finding that the balance remained unpaid.

4. Under Code Civil Proc. Cal. § 473, providing that the court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by correcting a mistake in the name of a party, or a mistake in any other respect, etc., it is within the court's discretion to set aside, on proper terms, a stipulation in a pending case, entered into between attorneys, that certain facts alleged in the answer should be admitted without proof, where it is shown that the stipulation was made without plaintiff's knowledge, and that plaintiff's attorney was mistaken as to its legal effect, and that it admitted material averments which were not true, which would prevent the case being tried on its merits.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. McGARVEY, Judge.

R. Percy Wright, for appellant. J. W. Ward, Jr., and J. A. Cooper, for respondent.

VAN CLIEF, C. Action upon a promissory note for \$2,546.48, on which plaintiff recovered a balance unpaid of \$790.75 and costs. The appeals are from an order denying defendant's motion for new trial, and from the final judgment. The complaint states: "(1) That on or about the 7th day of December, 1883, the defendant, Mrs. Sadie I. Clay, and her husband, Frederic Clay, (since deceased,) were indebted to the said plaintiff, John T. Ward, in the sum of twenty-five hundred and forty-six and 48-100 (\$2,546.48) dollars, and on said 7th day of December, 1883, in consideration of said indebtedness, Mrs. Sadie I. Clay, defendant herein, and Frederic Clay aforesaid, executed and delivered to said John T. Ward their promissory note, in words and figures, which in a copy of said note annexed to this complaint, and marked 'Exhibit A,' are fully set forth." The second paragraph alleges certain collateral security "for the aforesaid note of \$2,546.48." "(3) That the principal sum of \$2,546.48 on said note of Mrs. Sadie I. Clay and Frederic Clay, and the interest thereon at 10 per cent. per annum, payable quarterly, in accordance with the terms of said note, from the 7th day of March, 1885, remains due and unpaid, and defendant, though often requested, has neglected and refused, and still neglects and refuses, to pay the same, or any part thereof. (4) That plaintiff is still the holder of said promissory note for \$2,546.48, and of the said note and mortgage for \$2,000, assigned to this plaintiff as collateral security in part as aforesaid." Attached to the complaint is a copy of the note marked "Exhibit A," as follows: "\$2,546.48. San Francisco, Cal., Dec. 7, 1883. Twelve months after date, without grace, we promise to pay to the order of John T. Ward, at his office in this city, the sum of \$2,546.48, payable in United States gold coin, with interest thereon in

like gold coin, from date until paid, at the rate of 10 per cent. per annum, payable quarterly, and, if not so paid, to compound and become a part of the principal, and bear interest thereafter at the same rate, for value received. SADIE I. CLAY. FREDERIC CLAY."

1. It is contended by appellant's counsel that, without reference to the copy of the note exhibited, the complaint does not state a cause of action; that the copy of the note forms no part of the complaint, and cannot be referred to for the purpose of supplying any deficiency in the substance of the complaint; and that the court erred in overruling a general demurrer to the complaint based solely upon the ground that it does not state facts sufficient to constitute a cause of action. I think the material substance and legal effect of the note may be read from the body of the complaint without reference to the copy exhibited, although inartificially and indirectly stated. The first paragraph avers the date of, the parties to, and the execution of, the note, for a consideration of \$2,546.48. The second paragraph refers to it as "the aforesaid note of \$2,546.48." The third paragraph states the "principal sum" and rate of interest; and that the principal sum of \$2,546.48, and the interest from March 7, 1885, remain due and unpaid, and that the defendant refuses to pay the same, or any part thereof. Fourth, that plaintiff is still the holder of the note. Prayer for judgment for \$2,546.48, and interest from March 7, 1885. Tested only by a general demurrer, this seems sufficient. Defects of form of averment or uncertainty cannot be considered upon general demurrer. *Phelps v. Owens*, 11 Cal. 25; *Slattery v. Hall*, 43 Cal. 195; *Berry v. Cammet*, 44 Cal. 352; *Reynolds v. Hosmer*, 45 Cal. 630; *Chase v. Evoy*, 58 Cal. 352. I think, also, that the copy of the note referred to in the body of the complaint, and annexed to it, might properly have been referred to by the court for the purpose of ascertaining the "words and figures" and the form of the note. *Emeric v. Tams*, 6 Cal. 156; *People v. De la Guerra*, 24 Cal. 78; *Clary v. Thomas*, 103 Mass. 44; *Hall v. Foster*, 114 Mass. 18. It was properly annexed to the complaint for the purpose of informing the defendant of its form and contents, and, unless denied by a verified answer, its "genuineness and due execution," in the form exhibited, are admitted for all purposes of the trial. Code Civil Proc. § 447.

In *Los Angeles v. Signoret*, 50 Cal. 298, cited by counsel for appellant, the plaintiff was required to state facts creating a lien upon land; but the complaint merely stated "that, in pursuance of facts set forth in a notice and claim of lien recorded in the recorder's office," which notice was annexed to the complaint as an exhibit, "the plaintiff laid out and constructed a sewer over and along the lot, and that by virtue of the premises the plaintiff acquired a lien on the lot

for the assessments levied thereon." There was no averment that plaintiff had performed any act stated in the notice and claim of lien; nor that the facts therein stated were true; nor even that plaintiff had filed the notice and claim for record. By reference to the acts of the legislature under which the lien was claimed, it will be readily seen that this court very properly said: "Several matters of substance are lacking in the averments found in the complaint, which are sought to be supplied only by reference to the recitals found in an exhibit annexed to the complaint." In the case at bar the complaint directly alleges that the defendant executed and delivered to plaintiff the promissory note a copy of which is annexed to the complaint, and referred to for the purpose of showing its form, and the exact words and figures of which it is composed, and thereby enabling the defendant to determine whether she made it or not. *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. Rep. 327. The copy of the note thus exhibited is a part of the single count of which the complaint is composed, and is stated and referred to in the manner and form authorized by section 447 of the Code of Civil Procedure; and therefore *Loup v. Railroad Co.*, 63 Cal. 97, and other cases requiring each count to state a complete cause of action without reference to other counts, cited by appellant's counsel, have no application to this case.

2. The objection that "there is no finding of the amount remaining unpaid on the promissory note sued upon" is answered by the "ninth" finding, as follows: "That there is now due and owing from defendant, Sadie I. Clay, to the plaintiff, on the promissory note sued on in this case, a balance of \$790.75." This implied that the balance found to be due and owing remained "unpaid."

3. On October 3, 1886, two days before the commencement of the trial, the attorneys for the respective parties signed a written stipulation as follows: "It is hereby stipulated that the plaintiff admits the truth of all the facts alleged in the answer herein, and that defendant need not offer any evidence on the trial of the above-entitled action, except as to the following facts alleged in the answer, viz.: The facts alleged in said answer on page 1 thereof, and on page 2, up to and including line 14 on said page. The words 'and before,' on page 3 of said answer, line 3, are struck out, and on line 5 of said page the word 'and' is inserted between 'plaintiff' and 'said.' J. W. WARD, JR., Attorney for Plaintiff. B. PERCY WRIGHT, Attorney for Defendant." This stipulation was filed with the clerk on October 5th, the day of the commencement of the trial, and after plaintiff had rested his case was introduced in evidence by defendant's counsel. The evidence for both parties was closed, and the argument of counsel commenced on the 5th, when the court adjourned until the next day (October 6th) to hear further argument. At the opening of court, on October 6th,

counsel for plaintiff moved for an adjournment of the trial to afford him an opportunity to move the court, upon affidavits, to set aside said stipulation, and to relieve the plaintiff from the effect thereof, on the ground that it was inadvertently entered into under a mistake of fact and a misapprehension of its legal effect. The court thereupon ordered that, upon the payment by plaintiff to defendant's attorney of \$100, the case would be continued until the following November. Plaintiff paid to defendant's attorney \$100, and the case was continued until the November term. On October 20th plaintiff filed and served notice on the motion, and the grounds thereof, with the affidavits of plaintiff and his attorney, appointing November 8th for the hearing. After hearing, the court "ordered that said motion be granted, and said stipulation is hereby set aside on the ground that the plaintiff's attorney was mistaken as to the legal effect of said stipulation when he signed the same."

It is contended by appellant's counsel that this action of the court was error, for which the judgment and order should be reversed. The affidavits of plaintiff and his attorney tend to prove, and, if true, do prove, that the allegations of the answer admitted by the stipulation were not true; that the stipulation was hastily and inadvertently entered into without the knowledge or consent of the plaintiff, and by mistake as to the truth of those facts induced by representations of defendant's counsel, and also under a mistaken view of the legal effect of those facts and of the stipulation. On the part of the defendant, the affidavit of her attorney tended to disprove all the material facts stated by affidavits on the part of the plaintiff, except the facts that the stipulation was entered into without the knowledge or consent of the plaintiff, and that plaintiff's attorney was mistaken as to the legal effect of the stipulation.

No doubt that his attorney had authority to bind the plaintiff by the stipulation, and the only question to be decided is, did the court, in relieving the plaintiff from the effect of the stipulation, exceed or abuse its discretionary authority? I think the learned counsel for appellant is mistaken in contending that the stipulation should be treated as an ordinary contract not relating to proceedings in a court, from the obligation of which a party will not be relieved, as a general rule, except on the ground of fraud or mistake as to matter of fact. The stipulation in this case related to proceedings in a pending action. Its sole object was to settle and limit the issues of fact to be tried; and its obligation was not different from nor any stronger than that incurred by an express admission of fact by a pleading. Indeed, it stands in the place and performs the function of an express replication to the answer in this case, and is therefore subject to be amended or set aside by the court to the same extent, and under like circumstances, as would be a plead-

ing having a like effect. The Code of Civil Procedure (section 473) provides that "the court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding * * * by correcting a mistake in the name of a party, or a mistake in any other respect: * * * The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; * * * and may also, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." It was said by BALDWIN, J., in *Roland v. Kreyenhagen*, 18 Cal. 457: "The power of the court should be freely and liberally exercised, under this and other sections of the act, to mould and direct its proceedings, so as to dispose of cases upon their substantial merits, and without unreasonable delay, regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial right. * * * It [the court] can also usually prevent unjust or unfair advantages, or serious injury arising from casualties or inadvertence." In *Kirstein v. Madden*, 38 Cal. 163, the original answer failed to deny material allegations of the complaint, the defendant moved to amend it by denying those allegations, and the court denied the motion. Upon appeal the appellate court, by SAWYER, C. J., said: "We think he [defendant] ought to have been permitted to amend his answer. From oversights of counsel, committed under pressure of business, pleadings are often defective. In such cases, when an offer to amend is made, at such a stage in the proceedings that the other party will not lose an opportunity to fairly present his whole case, amendments should be allowed with great liberality." In *Richardson v. Musser*, 54 Cal. 198, this court, by MCKINSTRY, J., said: "There can be no doubt of the power of the trial court to relieve a party from the effects of a stipulation which admits as a fact that which is not true, if the application is made in proper time." It is true that the mistake in the case last cited was a mistake as to a matter of fact; but the general principle announced by the court is in accord with section 473 of the Code of Civil Procedure, which extends the power of the court to grant relief in this class of cases, "by correcting a mistake in the name of a party, or a mistake in any other respect."

The principal purpose of vesting the court with this discretionary power is to enable it "to mould and direct its proceedings so as to dispose of cases upon their substantial merits," when it can be done without injustice to either party, whether the obstruction to such a disposition of cases be a mistake of fact or a mistake as to the law; although it may be that the court should require a stronger showing to justify relief from the effect of

a mistake in law than in case of a mistake as to matter of fact. The exercise of the power conferred by section 473 of the Code, however, should appear to have been "in furtherance of justice," and the relief, if any, should be granted upon just terms. In this case it appears that the trial court was justified, by the showing made, in believing that the stipulation was entered into by plaintiff's attorney inadvertently and by mistake, without the knowledge or consent of plaintiff; that it admitted material averments of the answer which were not true; and that the effect of the stipulation would be to prevent a trial of the case upon its true merits, and that the trial would thereby result in injustice to the plaintiff. The terms upon which the relief was granted do not appear to have been unjust. There is no complaint that the defendant was not allowed sufficient time and opportunity to prove the allegations of her answer, and it does not appear that \$100, paid her by the plaintiff, was not sufficient compensation for all detriment suffered by the postponement of the trial. Therefore it does not appear that the setting aside of the stipulation was an abuse of the discretionary power of the trial court.

4. The finding that the deed from Marion Thompson to J. W. Ward was not made for or on behalf of plaintiff, and that J. W. Ward never held the title to the property described in said deed for plaintiff as security or otherwise, is justified by the positive testimony of J. W. Ward. I think the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(32 Cal. 636)

ADAMS v. SEAMAN *et al.* (No. 13,443.)

(*Supreme Court of California.* Jan. 25, 1890.)

PROMISSORY NOTE—NEGOTIABILITY.

Under Civil Code Cal. § 3088, which provides that "a negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment," a promissory note containing a provision for 5 per cent. attorney's fees on the accrued principal and interest, in case suit should be brought for its enforcement, is not negotiable.

Department 2. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Hunsaker & Britz; (*Haggin, Van Ness & Dibble*, of counsel,) for appellants. *F. W. Burnett*, for respondents.

McFARLAND, J. This action was brought by plaintiff upon what he alleges to be a negotiable promissory note made by defendant Seaman to the order of one O. S. Hubbell, and indorsed and assigned by Hubbell to plaintiff before maturity. Seaman, in his answer, pleads as set-off certain debts due him from Hubbell before the assignment.

Plaintiff demurred to this part of the answer, and his demurrer was overruled. After trial the court allowed certain of these set-offs, and gave judgment for plaintiff only for the balance due on the note, after deducting the set-offs. Plaintiff appeals from the judgment. The only question presented is, was the instrument sued on a negotiable note? The instrument would be negotiable, and, in the hands of an indorsee before maturity, not subject to any equities of the maker against the original payee, if it did not contain the following clause: "Should suit be commenced, or an attorney employed, to enforce the payment of this note, I agree to pay the additional sum of 5 per cent. on principal and interest accrued as attorney's fees in such suit." The court below held that this clause rendered the note non-negotiable, and we think that the court was right in so holding.

When one man promises to pay money to another in the future, if he puts that promise in the form of a negotiable paper, he gives to the promise characteristics which do not belong at all to ordinary indebtedness. If A. merely promises, either orally or by common writing, to pay B. \$1,000 at the expiration of 10 months, and during that time B. becomes indebted to A. on other transactions in the sum of \$500, the latter sum can be set off against the former; and it can be so set off against an assignee of B. if it accrued before notice of assignment. But, if the promise be made in the shape of a negotiable promissory note, then, if B. indorse the note before the expiration of the 10 months to a third party, the latter can compel A. to pay him the whole amount of the note, no matter how many set-offs he may have against B. In order, however, for this to be so, the note must clearly comply with the requisites of negotiable paper. And one of the main requisites, in addition to negotiable words, such as payable "to order" or "bearer," is absolute certainty as to the amount of money to be paid; a certainty which must appear on the face of the instrument. No part of the amount must depend on any contingency which may or may not happen, or upon the proof of any fact other than the genuineness of the instrument itself.

There have been many conflicting decisions in other states on the question whether, at common law, a promise in a note for attorney's fees, in case suit be brought, destroys the certainty which negotiable paper must have. The point has never been conclusively determined by this court; but in *Chase v. Whitmore*, 68 Cal. 548, 9 Pac. Rep. 942, the opinion of the court contains the following language: "Besides, the note provided for the payment of a reasonable attorney's fee, and that, under our Code, destroyed its negotiability. * * * In other states the rule is not uniform upon this subject; some of them holding that such a provision does, and others that it does not, destroy the negotiable character of the instrument." It is

contended by appellant that *Chase v. Whitmore* is not conclusive authority on the point, because in that case the assignment was made after the maturity of the note, and the language quoted was not necessary to the decision, and therefore *dictum*. This is true; but, as the point appears to have been quite elaborately considered, and as the opinion was concurred in by the whole court in bank, what was said is entitled to great weight, if it be not taken as authority in the strict sense. The language there employed was directly based on the provisions of our Civil Code upon the subject; and we think that it correctly applied the meaning of the Code to the question under discussion. Section 3087, art. 1, c. 1, tit. 15, Civil Code, is as follows: "A negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer, in conformity to the provisions of this article." Section 3088 (same article) provides that "a negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment." Section 3093 is as follows: "A negotiable instrument must not contain any other contract than such as is specified in this article." There are other sections in the article, not material here. These Code provisions were evidently intended to remove, and they do remove, all doubt which conflicting judicial decisions had thrown over such questions as the one arising in the case at bar. Under them an instrument is not negotiable if it have "any condition not certain of fulfillment." In the case at bar the instrument, in addition to the main sum, which is to be paid absolutely, provides for another sum, to be paid not only upon the contingency of a suit being brought, but also upon the other condition of the employment of an attorney. It makes no difference that 5 per cent. is adopted as the measure of the attorney's fee, should the contingency of the employment of an attorney happen, even admitting that a court would be absolutely bound to allow, in the event of a suit, the whole amount of attorney's fee mentioned in the instrument, which is itself a doubtful proposition. *Bank v. Treadwell*, 55 Cal. 379. An attorney's fee, no matter how estimated, was not to be paid unless "suit be commenced, or an attorney employed," each being a "condition not certain of fulfillment." We think, therefore, that the instrument sued on was not, in the sense of current commercial paper, a negotiable promissory note. Judgment affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.
Hearing in bank denied.

(82 Cal. 588)

WYSINGER v. CROOKSHANK. (No. 13,287.)
(Supreme Court of California. Jan. 27, 1890.)
PUBLIC SCHOOLS—EXCLUSION OF COLORED CHILDREN.

Under Pol. Code Cal. § 1662, providing that "every school, unless otherwise provided by law,

must be open for the admission of all children between six and twenty-one years of age, residing in the district," etc., colored children have equal rights with white children to admission to any public school, and cannot be refused admission to the same school with white children, though separate schools have been established for each race.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

W. A. Gray and Oregon Sanders, for appellant. N. O. Bradley and W. B. Wallace, for respondent.

FOOTE, C. This is an application for a writ of mandate to compel the defendant, Crookshank, a teacher of a public school located in the city of Visalia school-district, of the county of Tulare, to admit the plaintiff as a scholar. The application was denied; and from the judgment rendered therein, and an order refusing a new trial, this appeal is prosecuted.

The only ground for the refusal of the teacher to admit the applicant to the public school as a pupil is, as stated by the former, that the father of the petitioner, "on October 1, 1888, came to me, at the public school in Visalia, with a boy about twelve years of age, named Arthur; Wysinger said he had brought his boy to put in school. He said: 'Here is my boy to put in your school.' I told him to take his boy to Mr. McAdams, who taught the colored school. I just assigned him to the colored school. I refused to admit his boy to the public school on Locust street because he was colored, and because this public colored school was established by the board of education, who had instructed me to send the colored children to that colored school. These were my only reasons for refusing to admit him to the public school on Locust street." The boy thus excluded from a public school established for white children is a person of African descent; and both he and his father are colored citizens of the state of California, and of the United States.

The sole question to be determined is whether or not, under the laws of this state touching the education of children in the public schools, it is within the power of the board of education of the city of Visalia, in the county of Tulare, to establish a public school exclusively for such children as the applicant, and to exclude them from the schools established for white children. At the date of the decision rendered by the appellate court of this state in *Ward v. Flood*, 48 Cal. 37, the statute governing the admission of children to public schools ran thus: "Sec. 53. Every school, unless otherwise provided by special law, shall be open for the admission of all white children between five and twenty-one years of age residing in that school-district; and the board of trustees or board of education shall have power to admit adults, and children not residing in the district, whenever good reasons exist for such exceptions. * * * Sec. 56. The education of children of African descent and Indian children shall be provided for in separate schools. Upon

the written application of the parents or guardians of at least ten such children to any board of trustees or board of education, a separate school shall be established for the education of such children; and the education of a less number may be provided for by the trustees, in separate schools, in any other manner. Sec. 57. The same laws, rules, and regulations which apply to schools for white children shall apply to schools for colored children." Laws 1869-70, p. 838. In pursuance of these statutes, the board of education of the city and county of San Francisco adopted a rule which provided that "children of African or Indian descent shall not be admitted into schools for white children; but separate schools shall be provided for them, in accordance with the California school law." It was held in the case *supra* that separate schools for colored children of African descent might be established, and that such establishment was not in conflict with the constitution of the state, nor with the thirteenth and fourteenth amendments to the constitution of the United States, but that the legislature could not exclude children from the benefits of a system of education provided for the youth of the state merely because such children, so excluded, were of African descent. It was there said, at page 56: "In order to prevent possible misapprehension, however, we think proper to add that in our opinion, and as the result of the views here announced, the exclusion of colored children from schools where white children attend as pupils cannot be supported, except under the conditions appearing in the present case; that is, except where separate schools are actually maintained for the education of colored children; and that, unless such separate schools be in fact maintained, all children of the school district, whether white or colored, have an equal right to become pupils at any common school organized under the laws of the state, and have a right to registration and admission as pupils in the order of their registration, pursuant to the provisions of subdivision 14 of section 1617 of the Political Code."

If the statutes as they stood when the decision *supra* was made had remained the law of the state at the time when the petitioner made his application, there can be no question but that it might have been lawfully refused, as a separate school, in all respects like the white school in the same district, had been established for children of African descent. But, following this decision, by an act of the legislature passed April 7, 1880, (Amend. 1880, p. 47,) sections 1669-1671 of the Political Code were repealed. They were as follows: "Sec. 1669. The education of children of African descent, and Indian children, must be provided for in separate schools: provided that, if the directors or trustees fail to provide such separate schools, then such children must be admitted into the schools for white children. Sec. 1670. Upon the written application of the parents or guardian of such children to any board of

trustees or board of education, a separate school must be established for the education of such children. Sec. 1671. The same laws, rules, and regulations which apply to schools for white children apply to schools for colored children." Deer. Pol. Code, note at foot of page 290. Section 1662 of the Political Code was by the same act amended so as to omit the word "white" before the word "children," as it had stood before that time, and as amended it read: "Every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age residing in the district; and the board of trustees or city board of education have power to admit adults and children not residing in the district whenever good reasons exist therefor. Trustees shall have the power to exclude children of filthy and vicious habits, or children suffering from contagious or infectious diseases."

Following the repeal and amendment of the sections, *supra*, a Mongolian or Chinese child applied for admission to a public school for white children established in the city and county of San Francisco. Its admission was refused by the teacher of the school, and an application for a writ of mandate was made to compel admission. The appellate court, in *Tape v. Hurley*, 66 Cal. 473, 6 Pac. Rep. 129, speaking by Mr. Justice SHARPSTEIN, held that such Chinese or Mongolian child could not be excluded from a white school. And it was there said, in reference to section 1662, *supra*, as amended by striking out the word "white" before the word "children," (erroneously printed as section 1667 in the opinion:) "That is the latest legislative expression on the subject, and was passed as late as 1880. Prior to that time the first clause of the section read: 'Every school, unless otherwise provided by special statute, must be open for the admission of all white children, between five and twenty-one years of age, residing in the district.' As amended, the clause is broad enough to include all children who are not precluded from entering a public school by some provision of law; and we are not aware of any law which forbids the entrance of children of any race or nationality. The legislature not only declares who shall be admitted, but also who may be excluded; and it does not authorize the exclusion of any one on the ground upon which alone the exclusion of the respondent here is sought to be justified. The vicious, the filthy, and those having contagious or infectious diseases, may be excluded, without regard to their race, color, or nationality. * * *

In this case, if effect be given to the intention of the legislature as indicated by the clear and unambiguous language used by them, respondent here has the same right to enter a public school that any other child has. * * * The board of education has power to make, establish, and enforce all necessary and proper rules and regulations not contrary to law,' and none other. St. 1871-

72, p. 846. Teachers cannot justify a violation of law on the ground that a resolution of the board of education required them to do so." After the rendition of the judgment in this case, the legislature, in 1885, amended section 1662 of the Political Code so as to add, after the word "diseases," "and also to establish separate schools for children of Mongolian or Chinese descent. When such separate schools are established, Chinese or Mongolian children must not be admitted into any other school." *Deer. Pol. Code*, § 1662. And so the law existed upon the subject at the date of the institution of this action, and so it stands now. It must appear clear, therefore, that the power to establish separate public schools for children of African descent, and to exclude them from the public schools established for white children, has been taken away from boards of school trustees and boards of education, and that the power claimed by the teacher and the board of education of the city of Visalia does not exist. If it had been intended by the law-making department of the government to invest such boards with the power claimed, it would have given it as expressly as it was taken away by the repeal and amendment of the statutes which once authorized it; and especially is this plainly to be discerned when section 1662, *supra*, as it now stands, gives the power to establish separate schools for Chinese or Mongolian children, but none other.

The whole policy of the legislative department of the government upon this matter is easily gathered from the course of legislation shown herein; and there can be no doubt but that it was never intended that, as a matter of classification of pupils, the right to establish separate schools for children of African descent, and thereby to exclude them from white schools of the proper district, should be given to such boards, under section 1617 of the Political Code, which reads: "The powers and duties of trustees of school-districts and of boards of education in cities are as follows: (1) To prescribe and enforce rules not inconsistent with law, or those prescribed by the state board of education, for their own government, and the government of schools." If the people of the state desire separate schools for citizens of African descent and Indians, their wish may be accomplished by laws enacted by the law-making department of the government in accordance with existing constitutional provisions. But this course has not been pursued, as the law now stands; and the powers given to boards of education and school trustees, under section 1617 of the Political Code, do not include the right claimed by the board of education of Visalia. For these reasons we advise that the judgment and order be reversed, and the court below directed to issue a mandate compelling the admission of the appellant as prayed for.

We concur: *BELCHER, C. C.; HAYNE, C.*

PER CURIAM. For the reasons given in

the foregoing opinion the judgment and order are reversed, and the court below is directed to issue a mandate compelling the admission of the appellant as prayed for.

(82 Cal. 631)

HANSON v. GRAHAM. (No. 18,130.)

(*Supreme Court of California.* Jan. 27, 1890.)

ATTACHMENT—NON-RESIDENT—DOMICILE.

1. A railroad contractor, who has left the state, and has gone to a foreign country for the purpose of prosecuting his business there, and who, if successful in obtaining contracts, will remain at least as long as will be necessary for their completion, and who has actually been gone four months, though he has repeatedly stated before leaving that he intended to return shortly, is "not residing" in the state within the meaning of Code Civil Proc. Cal. § 537, which provides that a writ of attachment may issue where the defendant is "not residing" in the state.

2. *Pol. Code* Cal. § 53, which provides that "residence" is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose; that there can only be one residence; and that it can be changed only by the union of act and intent,—was not intended to apply to the attachment law, even if it can be considered as establishing the rule that one who has a settled abode for the time being in another state, for the purposes of business or pleasure, shall be treated as a resident.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; *E. PARKER, Judge.*

F. W. Burnett, for appellant. *Henderson & McDonald*, for respondent.

HAYNE, C. This is an appeal from an order refusing to dissolve an attachment. The attachment was issued upon an affidavit that the defendant was a non-resident, and the motion to dissolve was upon the ground that the affidavit was not true, and that the defendant was a resident. The affidavits read upon the hearing consist in great part of mere conclusions and statements on information and belief. The following facts, however, appear to be undisputed: The defendant, *Graham*, was a contractor for the building of railroads and other similar works. In 1884 he left his former residence, and established himself in Victoria, B. C. In 1886 he left that place, and finally settled in San Diego, with the intention of engaging in business there. While in San Diego he lived in hotels and lodging-houses. After about 10 months, business became dull, and he stored his contractor's tools and implements, and in June, 1888, went to Chili for the purpose of engaging in business there. In October, 1888, the attachment was levied, at which time he had not returned from Chili. It further appears that the purpose of going to Chili was to get contracts in his line of business, of which he had heard. So much is undisputed. It does not distinctly appear how long such contracts would take to fill if he succeeded in getting them. In this regard the plaintiff states in his affidavit, upon information and belief, that the defendant had gone to Chili with the intention "of engaging in railway contracting, in-

volving millions of dollars and years of time for completion, the said work necessitating an extended residence of many years duration," and that, should it be necessary for him to return to the United States, such return would be only for the temporary purpose of arranging his business affairs in said county of San Diego preparatory to the removal of said outfit to the republic of Chili. The defendant produced many affidavits to the effect that Graham had stated before leaving that he intended to return shortly; and the affiants offer their conclusions to the effect that he always intended to return, and that he was still a resident of California. As above stated, the affidavits on each side are vague and unsatisfactory. We think that it sufficiently appears, however, that defendant went to Chili for the purpose of prosecuting his business of contractor there, and that, if successful in obtaining contracts, he would remain at least as long as would be necessary for their completion; and that he had been gone about four months without returning.

Upon these facts the question arises whether the judge of the court below was right in holding that the defendant was a non-resident. The statute in relation to attachments provides that the writ may issue when the defendant is "not residing" in this state. Code Civil Proc. § 537. In the next section it is provided that the plaintiff must present an affidavit that the defendant "is a non-resident." These two phrases seem to have been used as equivalent in meaning. Whether they are so in strictness or not need not be considered. But we think that the residence referred to is an actual, as contradistinguished from a constructive or legal, residence; and that there may be such an actual residence, notwithstanding a general intention to return to the place of legal residence or domicile. This was held in a well-considered case in Virginia, in which the facts were nearly the same as those involved here. There a person domiciled in Washington city removed to Virginia with the intention of remaining there for nine months, or for such additional time as might be required to complete certain contracts for building parts of a railroad. He rented his residence in Washington, but without any intention of abandoning his domicile there, and during his stay in Virginia he always claimed Washington as his place of residence, and declared his intention of returning there as soon as his contracts should be completed. Upon these facts it was held that, for the purposes of the attachment law, he was a resident of Virginia; and the court said: "It is apparent that the word 'residence,' like that of 'domicile,' is often used to express different meanings, according to the subject-matter. In statutes relating to taxation, settlements, right of suffrage, and qualification for office, it may have a very different construction from that which belongs to it in the

statutes relating to attachments. In the latter actual residence is contemplated, as distinguished from legal residence. * * *

While, on the one hand, the casual or temporary sojourn of a person in this state, whether on business or pleasure, does not make him a resident of this state, within the meaning of the attachment laws, especially if his personal domicile be elsewhere, so, on the other hand, it is not essential he should come into this state with the intention to remain here permanently, to constitute him a resident." Long v. Ryan, 30 Grat. 720. Decisions similar in principle have been made in other states. Frost v. Brisbin, 19 Wend. 11; Krone v. Cooper, 43 Ark. 547; Morgan v. Nunes, 54 Miss. 311; Burrill v. Jewett, 2 Rob. (N. Y.) 701; Haggart v. Morgan, 5 N. Y. 423; Nailor v. French, 4 Yeates, 241; Bank v. Merrit, 13 N. J. Law, 134; Stout v. Leonard, 37 N. J. Law, 495; Swaney v. Hutchins, 13 Neb. 266, 13 N. W. Rep. 282.

And the rule seems to rest upon sound principle. The reason of allowing an attachment against a non-resident was that it was one mode of acquiring jurisdiction in a suit against him. And this purpose would not be satisfied if the debtor could preserve a constructive residence in the state by virtue of a general intention to return, when he was in fact residing in another state. The rule, indeed, has not gone so far as to cover the case of a mere transient journey. But where a man has a settled abode for the time being in another state for purposes of business or pleasure, we think that both reason and authority require him to be treated as a non-resident of this state, within the meaning of the attachment law. We have not overlooked section 52 of the Political Code.¹

But, if a different rule is there provided, we think that the provision was not intended to apply to the attachment law. In the light of these principles, we think that it does not appear that Graham was a resident of California after his departure for Chili. It having been shown that he left the state for the purpose of engaging in business in a foreign country, a *prima facie* case of non-residence was made out, and we do not feel that we can say that the contrary was shown. We therefore advise that the order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in foregoing opinion the order appealed from is affirmed.

¹ Pol. Code Cal. § 52, provides: "In determining the place of residence, the following rules are to be observed: (1) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose. (2) There can only be one residence. (3) A residence cannot be lost until another is gained. * * * (7) The residence can be changed only by the union of act and intent."

(83 Cal. 7)

HOLTON v. NOBLE et al. (No. 13,256.)*(Supreme Court of California. Jan. 28, 1890.)***ACTION FOR RENT—COUNTER-CLAIM—FRAUDULENT REPRESENTATIONS—APPEALABLE ORDER.**

1. In an action to recover rents due under a lease, a plea as a defense of false representations made by plaintiff as to the number of acres planted in certain crops is no defense, where defendant failed to plead such deficit as a counter-claim, or to aver damage by the false representations.

2. Representations as to the harvest land sown in certain crops would produce are matters of opinion, and cannot be regarded as fraudulent.

3. An agreement to accept a smaller sum in discharge of a larger, and to take a note extending the time for payment, does not extinguish the larger sum, unless the agreement is executed by giving the note or making the payment.

4. An order allowing judgment on the pleadings is not appealable, but it may be reviewed on appeal from the judgment.

Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Grady & Austin, for appellants. *Meux & Edwards*, for respondent.

THORNTON, J. Appeal by defendants. This action was brought to recover rent due on a written lease executed by plaintiff to defendants for one year, commencing January 5, 1888, and ending the 5th of January, 1889. The lease was for two years, commencing on the day above mentioned, in 1888, and ending on the 5th day of January, 1890. The stipulated rent was \$3,200 a year for the first year, payable on the 20th day of December, 1888, and for the second year on the same day of December, 1889. The defendants went into possession under the lease, and occupied the premises until the 20th day of January, 1889. The defendants filed an answer, in which they set forth that, before the lease was entered into, plaintiff made certain false representations to the defendants as to the number of acres of the land on which there was a good stand of alfalfa; that he represented that there were 180 acres in good stand of alfalfa, while in truth and in fact there were not more than 80 acres. It is further averred that plaintiff represented that the land so sown in alfalfa would produce at least 8 tons of hay to the acre, while in fact said 80 acres would or did produce, with the best tillage and care, less than 4 tons per acre, and the balance of said 180 none; that plaintiff also represented that the 40 acres of grape vines on the land would produce at least from a ton to two tons of raisins per acre, while in fact the 40 acres produced only 6 tons of raisins; that defendants relied on the said representations of plaintiff, and for this reason, and not otherwise, leased the land; that the only reason why they did lease this land was that they believed the statements so made by plaintiff to be true.

The alleged representations of the plaintiff as to the amount that the alfalfa and grape vines would produce were clearly matter of opinion, and cannot be regarded as fraudulent. It may be conceded that the representation as to the number of acres in the land

was a fraudulent representation, and defendants, if they had properly pleaded it as a counter-claim, might have been allowed to reduce the stipulated rent by the amount of damage sustained. But they neither aver that they were damaged by such representations, nor do they set forth to what amount they were damaged. The alleged fraud is pleaded as a defense to the action, without any showing that defendants were damaged at all. Fraud, without damage, furnishes no ground for action, nor is fraud without damage a defense.

It is averred in the answer that plaintiff agreed to take \$2,400 in full payment of the \$3,200 rent sued for, and to extend the time of payment of the rent mentioned for the period of six months on a note. The answer shows that this agreement was never executed. The money was never paid, nor was a note executed, as alleged to have been agreed. Unless the agreement to accept the smaller sum in discharge of the larger was carried out, the obligation to pay the larger sum was never extinguished or discharged. There was no execution of the agreement or accord, and hence the original obligation remained unaffected. The accord may be binding on the parties, but it does not discharge the obligation it is made to satisfy until it is executed. Execution alone is satisfaction. The averments in the answers set forth no defense to the action in whole or in part. Hence the motion of plaintiff for judgment on the pleadings was properly granted, and the judgment must be affirmed.

The defendants also appeal from the order of the court below allowing judgment on the pleadings. This is not an appealable order, and therefore the appeal from it is dismissed. This order may, however, be reviewed on an appeal from the judgment, and this has been done, as appears above. The record shows no error, and the judgment is affirmed.

We concur: **McFARLAND, J.**; **SHARPESTEIN, J.**

(3 Cal. Unrep. 199)

JUDSON v. LYFORD et al. (No. 12,032.)¹*(Supreme Court of California. Dec. 20, 1889.)***JUDICIAL SALE—RIGHTS OF PURCHASER.**

1. D., against whom plaintiff held a judgment, succeeded, on his wife's death, to one-third of her lands, and conveyed his interest to defendant in trust to be leased, and one-half of the profits applied to his support during his life, and at his death the whole to go to his children. After the execution of the trust-deed, plaintiff levied an execution on D.'s interest in the land, and at the sale bid it in, taking a sheriff's deed. Afterwards, plaintiff received the balance due on the judgment, and entered a satisfaction in full. Held, that at the time of the sale under execution the legal title was in defendant, and plaintiff, under the sheriff's deed, took nothing but D.'s equitable interest therein, which ceased on D.'s death.

2. Whatever may have been plaintiff's right, as a creditor, to set aside the deed of trust because given to hinder and defraud creditors, it was lost by his purchasing the "right, title, and interest of D." in the property, and accepting the balance due on the judgment, and acknowledging satisfaction thereof, and he thereafter had no other stand-

¹ Reversed in banc. See 24 Pac. 288, 84 Cal. 506.

ing than that of a purchaser at an execution sale, subject to the rule of *caveat emptor*.

Department 1. Appeal from superior court, Marin county; E. B. MAHON, Judge.

E. F. Swortfiguer, (*Walter Van Dyke*, of counsel,) for appellant. *Sawyer & Burnett*, for respondents.

PATERSON, J. On the 7th day of November, 1881, a judgment was entered in the superior court in favor of Michael Lynch, and against T. B. Deffebach, for the sum of \$9,446.74, and on the day following it was assigned by Lynch to the plaintiff herein. On September 15, 1883, Mrs. Deffebach died, and T. B. succeeded to an undivided one-third of her estate, the same being the lands described in the complaint. On October 10th following, Deffebach conveyed the property to defendant Lyford, as trustee, in trust for him (said D.) and his four minor children. By the terms of the trust Lyford, as trustee, was to sell sufficient of the interest of D. to pay off all debts of the estate of Mrs. D., deceased; lease the remainder of his (said D.'s) interest upon such terms as said trustee should think proper; and out of the rentals pay taxes, and expenses of caring for the property, render one-half of the surplus profits to said D. for his support during his natural life, and upon his death to apply the whole of the surplus to the support and education of the children; further, to convey, upon T. B. Deffebach, Jr.'s., becoming of age, or, in the event he should not live so long, then when the youngest child living should become of age, to the said children or the survivors of them, said property, share and share alike. An execution on the judgment was issued out of the superior court on the 13th day of November, 1883, and levied on all the right, title, and interest which Thomas B. Deffebach had in said property on said 13th day of November, and on December 15th, following, was executed by a sale of the property to this plaintiff for the sum of \$9,500. At the time of this levy the lien of the judgment upon this land, if any there had ever been, had ceased. No redemption having been made, a certificate and sheriff's deed were issued to plaintiff in due time and in due form. Deffebach died on June 24, 1884. The defendant Lyford is the administrator of the estate of T. B. D., deceased, and is also guardian of the minor children. After the answers of the defendants were filed herein, to-wit, on November 13, 1884, the plaintiff having received from the defendant the balance due upon the judgment in the case of Lynch v. Deffebach, entered a satisfaction in full of the judgment therein. This action was commenced on August 21, 1884, to set aside the deed of trust from Deffebach to Lyford as fraudulent and void, and to quiet the title of plaintiff to the premises. The court found that D. was not insolvent at the time of the death of his wife; that the deed to Lyford was without any moneyed consideration; that Lyford knew

nothing of the indebtedness of D. at the time he accepted the trust; that the trust-deed was not made in fraud of plaintiff, or of his rights, or with the intent to hinder, delay, or defraud creditors; that the equity held by D., and purchased by plaintiff, ceased upon the death of D., and that plaintiff is not the owner of the property described in the complaint, or any part of it, or interest therein. Judgment followed for defendant, and plaintiff appealed. Upon the facts admitted, proved, and found, the judgment is right and should be affirmed. The equitable interest retained by D. was subject to execution. Section 688, Code Civil Proc. Lyford, the trustee, was to receive the rents, and apply them to the maintenance of the *cestui que trust*, and after the death of D. was to convey to the children; he therefore held the legal title. *Robinson v. Grey*, 9 East, 1; *Silvester v. Wilson*, 2 Term R. 444. Plaintiff purchased, and the sheriff's deed conveyed to him, only the right, title, and interest of D. For this interest he paid \$9,500, leaving a balance of about \$1,600 due on the judgment. As an execution purchaser he can claim no more than the equitable interest left by D. on November 13, 1883. *Caveat emptor* is the rule. *Plant v. Smythe*, 45 Cal. 162; *Freem. Ex'ns*, §§ 301, 309; *Boggs v. Fowler*, 16 Cal. 564; *Abadie v. Lobero*, 36 Cal. 398. The plaintiff cannot now be heard to say that the interest he purchased was not worth what he paid for it. He must stand by his bargain. The court will not consider the fact that the interest he purchased was terminated by the death of D., soon after the sale, and that by reason thereof plaintiff has not been able to realize the actual amount due on his judgment.

But it is claimed by appellant that the purchaser here was, at the time the trust-deed was executed, a creditor of the grantor, and therefore the general rule that the purchaser takes upon himself all risks as to title does not apply. A complete answer to this is found, we think, in the facts that there was no actual fraud, that the deed was not void *per se*, and that the relation of creditor and debtor no longer exists. When the plaintiff accepted the balance due on the judgment and entered a satisfaction in full, the relation of debtor and creditor ceased, and he has no other standing in court than that of a purchaser at execution sale. Whatever may have been his right as a creditor to set aside the deed because given to hinder, delay, or defraud creditors, it was lost by reason of his own acts in purchasing, in terms, "the right, title, and interest of T. B. Deffebach," accepting the balance due on the judgment, and acknowledging that he had received satisfaction in full. The court found that, in consideration of the payment by Lyford, as administrator of the deficiency, — \$1,598.60, — plaintiff executed and acknowledged full satisfaction of the judgment. This finding is not assailed. D. did not convey all of his property to Lyford.

He retained an equitable interest. The sheriff did not sell the land. He sold and conveyed simply the right, title, and interest of D. Plaintiff paid \$9,500 for that interest, as his deed shows, and the judgment became satisfied to that extent. When the administrator paid the balance, and satisfaction was entered, D. was no longer a creditor, and the rule of *caveat emptor* became no less applicable to his case than to that of every other purchaser under execution sale. *Freem. Ex'ns*, § 340; *Abadie v. Lobero*, supra.

Judgment and order affirmed.

We concur: WORKS, J.; FOX, J.

(83 Cal. 33)

GRAY v. DIXON. (No. 13,411.)

(Supreme Court of California. Jan. 30, 1890.)

PUBLIC LANDS—CANCELLATION OF ENTRY UNDER DESERT LAND ACT—PREFERENCES.

The act of congress (21 U. S. St. at Large, 140, 141) providing that a person who has procured the cancellation of any pre-emption, homestead, or timber culture entry shall be notified of such cancellation, and shall have 30 days within which to enter said lands, does not embrace the case of one who has procured the cancellation of an entry under the desert land act; and the fact that defendant procured the cancellation of such an entry made by another, and at the same time filed his own application under another act, gives him no preference over the right of plaintiff, who also filed an application for entry; and plaintiff, having made the first settlement, is entitled to recover the land.

Department 2. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Charles R. Gray, pro se. Curtis & Otis, for respondent.

SHARPSTEIN, J. Ejectment. Judgment for defendant. Plaintiff's motion for a new trial overruled. Appeal from the judgment and order overruling motion for a new trial. Prior to the 4th day of May, 1877, the demanded premises were a part of the public lands of the United States. At that date one Ward applied for and made entry under the act to provide for the sale of desert lands of the section which embraces said premises. On the 19th day of December, 1881, defendant initiated a contest against said entry for abandonment and failure to comply with the law, and at the same time filed his application for said land under the soldiers' and sailors' homestead act. The contest resulted in the cancellation of Ward's entry; and he relinquished his claim to enter under the desert land act, but applied to enter said land under the timber act. His application was rejected by the local land-office. He applied to the general land-office, and the commissioner thereof decided that his application should have been allowed, subject to the preference right of the defendant herein to enter said land under the soldiers' and sailors' homestead act. From that decision Ward appealed to the secretary of the interior, whose action thereon is not stated. December 4, 1885, plaintiff settled upon and

took possession of the demanded premises for the purpose of making it his home by residence, occupation, and cultivation, and continued thereafter to reside on said land, and built a house thereon, and procured the same to be surveyed, and filed an affidavit in compliance with the provisions of an act entitled "An act to provide the mode of maintaining and defending possessory actions on public lands in this state, approved April 20, 1852." He made improvements of the value of \$200 on the land.

When plaintiff settled upon and took possession of said land, it was wholly unoccupied and unimproved public land of the United States, except that there was a small, uninhabitable house, without doors or windows, thereon, which had been erected by defendant, and about one-half of an acre of said land had been plowed. Defendant never occupied or resided on said land prior to September 9, 1886. Plaintiff, though not a party to the controversy between defendant and Ward in the land department, made a motion therein on the 24th day of December, 1886, for a review of the decision therein, and offered to prove his (plaintiff's) settlement, residence, and improvement on said land, which motion was denied by the commissioners of the general land-office; and from that ruling plaintiff appealed to the secretary of the interior, who granted plaintiff's application to be heard, and on such hearing said secretary decided: *First*, that the defendant herein had the preference right to the entry of said lands under his application made on the 19th day of December, 1881; *second*, that the application of plaintiff herein to enter said land under the homestead laws should be allowed, subject to defendant's preference right to enter the same; *third*, that, if plaintiff's claim of settlement should be found unfounded in fact, then the application of said Ward to enter said land under the timber culture law should be allowed, subject to said defendant's preference right to enter the said land under his said application of December 19, 1881.

Plaintiff, when he settled upon said land, possessed all the qualifications necessary to entitle him to make his application for 160 acres of land under the homestead laws of the United States. On the 9th day of September, 1886, defendant entered on and took possession of the demanded premises, and began the erection of a dwelling-house thereon, which was soon finished; and in October, 1886, he moved his family into it, and continued to dwell therein, claiming all said demanded premises as his own, and has prevented plaintiff from making any more improvements thereon. Defendant plowed and sowed portions of the land previously plowed and sowed by plaintiff. On the 15th of August, 1888, defendant made his final proof at the Los Angeles land-office, under the homestead laws of the United States, and paid \$400, for which he received the following: "No. 3,226. Receiver's Office at Los Ange-

les, Cal., Aug. 15, 1888. Duplicate. Received from John C. Dixon of San Bernardino county, Cal., the sum of four hundred dollars and — cents, being in full for the $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, N. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, of section No. 8, in township No. 2 south, of range No. 4 west, S. B. M., containing one hundred and sixty acres and — hundreds, at \$2.50 per acre. Commuted Home, No. 2,892. \$400. See letter 'P' of commissioner, May 12, 1886. J. H. POLK, Receiver. [Indorsed:] No. 13. Recorded at request of John C. Dixon, August 18, 1888, at 40 minutes past 9 A. M., in Book E. Mis. Records, page 337, Records San Bernardino County. LEGATE ALLEN, County Recorder. By T. I. BOLTON, Deputy-Recorder. Paid \$1."

After the decision of the secretary of the interior, May 7, 1888, plaintiff obtained from the officers of the Los Angeles land-office the following:

"Township No. 2 S., range No. 4 W., district of —. Part of section —. Section —. N. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, N. $\frac{1}{4}$ of S. E. $\frac{1}{4}$. 8 Appli. Home, Chas. R. Gray. June 9, 1888. Subject to right of John C. Dixon, authorized by Sec'y letter of P. of May 12, 1888.

"United States Land-Office, Los Angeles, Cal., June 9, 1888. I, the undersigned, register of the United States land-office at Los Angeles, California, do hereby certify that the above and foregoing is a true and correct copy of abstract of entry of Chas. B. Gray, made and entered on the books of said land-office, and as the same now appears thereon, on a comparison with said books. H. W. PATTON, Register U. S. Land-Office, Los Angeles."

The foregoing facts were found by the court below, and the principal contention of appellant here is that they are insufficient to support the judgment. If, at the time appellant built his house and went to reside on the land in controversy, it was subject to private entry, we think the findings show a sufficient compliance with the law on his part to entitle him to recover in this action. He seems to have done all that the law requires a pre-emption claimant to do to perfect his pre-emption claim to the land. But, when he offered to file his homestead application to enter said land under the homestead laws of the United States at the Los Angeles land-office, although said application was in due form, and accompanied by the affidavit required by law in such cases, and he tendered all fees and commissions required by law on his said application, the officers of said land-office rejected his said application, and he thereafter, and within the time allowed by law and the rules and regulations of the department of the interior, duly perfected an appeal from the action of said officers of the Los Angeles office to the commissioner of the general land-office, who affirmed the action of said officers of said Los Angeles

land-office; from which decision of said commissioner appellant appealed to the secretary of the interior. The court does not find that the secretary ever distinctively heard or denied that appeal, but finds that nearly a year afterwards he took up the case of the three claimants, Ward, appellant, and respondent, and decided that the application of appellant herein to enter said land under the homestead laws should be allowed, subject to respondent's preference right to enter the same.

Whether that decision of the secretary of the interior is a valid determination of the respective rights of appellant and respondent herein, in the premises, is the main question presented by the record before us. The "preferred" right of respondent, as it is denominated, is based upon the fact of his initiating on the 19th of December, 1881, a contest against the right of Ward to enter said land under the desert land act, and at the same time filing an application to enter the land himself under the soldiers' and sailors' homestead act. The act of congress entitled "An act for the relief of settlers on public lands" contains this provision: "In all cases where any person has contested, paid the land-office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land-office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands: provided, that said register shall be entitled to a fee of \$1 for the giving of such notice, to be paid by the contestant, and not to be reported." 21 U. S. St. at Large, 140, 141. That act, in terms, does not mention entries under the desert land law, such as the respondent is found to have initiated his contest against, and obtained the cancellation of by the land department. Although we cannot perceive any reason for the omission of desert land entries in the above enumeration, the fact of its omission makes the rule, *expressio unius, exclusio alterius est*, applicable; and we must hold that respondent acquired no "preference right" to enter the land by successfully contesting the right of Ward to enter it under the desert land act. With the "preference right" eliminated, it is a case in which two persons have settled upon the same tract of land; and the right of pre-emption is in him who made the first settlement, and he, indubitably, is the appellant. This being so, the judgment should be in his favor. Judgment reversed, and cause remanded, with directions to the court below to enter judgment in favor of plaintiff for the recovery of the demanded premises, upon the findings of fact filed herein.

We concur: THORNTON, J.; McFARLAND, J.

(32 Cal. 650)

HYMAN v. COLEMAN *et al.* (No. 11,448.)

(Supreme Court of California. Jan. 30, 1890.)

JURISDICTION—STOCKHOLDER'S LIABILITY—LIMITATION OF ACTIONS.

1. Where seven defendants are sued, and the complaint demands a several judgment against five of them for less than \$300, the superior court in California has no jurisdiction as to these five.

2. In an action against the stockholders of a corporation on its renewal notes, which are claimed to have extinguished the old notes, the complaint should allege that defendants were stockholders of the corporation when the renewals were made.

3. Where renewal notes are given by a corporation, the statute of limitations begins to run in favor of the stockholders from the maturity of the first notes, and an action against the stockholders is barred in three years from the time the first notes matured, under Code Civil Proc. Cal. §§ 338, (subd. 1.) 359, which prescribe that actions against the stockholders of a corporation must be brought within three years after the discovery of the facts on which the liability was created.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco.

Severance & Travers, for appellant. *T. M. Osment* and *C. P. Robinson*, for respondents.

BELCHER, C. C. This is an action to recover from the defendants, as stockholders of a corporation, their several proportions of an indebtedness due plaintiff from the corporation. The complaint contains two counts. In the first it is alleged that plaintiff advanced and loaned to the corporation, on the 7th day of October, 1879, the sum of \$2,000, for which the corporation then and there executed to plaintiff its promissory note, payable in one year after date, with interest, and that "said promissory note was renewed by said corporation each year, by the surrender of all former notes given by said corporation to plaintiff, and the execution and delivery of new notes to plaintiff for the amounts found due upon the said indebtedness." It further alleges that the capital stock of the corporation was divided into 1,000 shares, and states the number of shares owned by each defendant on the 7th of October, 1879. The second count alleges another loan by plaintiff to the corporation of \$1,000 on the 16th day of December, 1879, and the execution of its promissory note for that sum, payable one year after its date, with interest, and a like surrender and yearly renewal of same by the corporation. It further states the number of shares of the capital stock of the corporation owned by each defendant on the last-named date. The complaint then alleges that on the 8th day of September, 1883, an accounting as to the amount of the aforesaid unpaid indebtedness was had between the corporation and plaintiff, and that plaintiff then surrendered the notes which he held, and the corporation executed to him for such indebtedness four new notes, dated December 16, 1883, and payable one year after date with interest. This action was commenced in April, 1885, and is based upon three of the last-named notes, one of the four having been paid. The defendants demurred to the complaint upon the

grounds that it did not state facts sufficient to constitute a cause of action, and that the cause of action was barred by the statute of limitations. The court sustained the demurrer, and rendered judgment for defendants, and the plaintiff appealed.

1. The plaintiff demanded a several judgment against five of the seven defendants, who appeared, for less than \$300. The superior court had therefore no jurisdiction of the action against these five, and as to them the judgment must be affirmed for that reason. *Derby v. Stevens*, 64 Cal. 287.

2. It is not claimed that the renewals of its notes by the corporation created any new debt or liability against the defendants; and it is clear that, if the renewals had had the effect to extinguish the old debt and create a new one, then the complaint stated no cause of action, for the reason that it did not allege that the defendants were stockholders of the corporation when any of the renewals were made.

The only question, then, is, did the renewals operate to extend the time of payment of the original indebtedness, and thereby prevent the statute of limitation from beginning to run, in favor of those who were stockholders when that indebtedness accrued, until the last notes matured, on the 16th of December, 1884? It is settled law in this state, that, under our constitution and statutes, each stockholder of a corporation is liable for his proportion of the corporate debts, contracted while he was a stockholder, as a principal debtor, and not as a surety. *Canal Co. v. Woodbury*, 14 Cal. 265; *Neilson v. Crawford*, 52 Cal. 248; *Bank v. Hull*, 59 Cal. 107; *Morrow v. Superior Court*, 64 Cal. 383, 1 Pac. Rep. 354. The liability commences and a right of action accrues against the corporation and stockholders at the same time. *Davidson v. Rankin*, 34 Cal. 503; *Mitchell v. Beckman*, 64 Cal. 117. Suspension of the remedy against the corporation does not suspend the remedy against or affect the liability of the stockholders. *Young v. Rosenbaum*, 39 Cal. 646. A judgment against the corporation does not create a new liability, nor extend the time prescribed by the statute of limitations for bringing suit against the stockholders. *Larrabee v. Baldwin*, 35 Cal. 168; *Stilphen v. Ware*, 45 Cal. 110. The liability of stockholders is created by statute, and an action to enforce that liability must be brought within three years after the cause of action accrues. Code Civil Proc. §§ 338, (subd. 1.) 359; *Green v. Beckman*, 59 Cal. 545; *Moore v. Boyd*, 74 Cal. 167, 15 Pac. Rep. 670. In New York it has been held that the renewal of a note by a corporation does not extend the time prescribed by statute for suing a stockholder. In *Parrott v. Colby*, 6 Hun. 57, the court said: "We think the liability of stockholders in such cases cannot be revived or extended by any renewal or extension of the indebtedness which the creditors may make with the corporation." This decision was affirmed on appeal in 71 N. Y. 597; and

in *Iron Co. v. Walker*, 76 N. Y. 521, Parrott v. Colby is cited, and substantially the same doctrine announced. In view of the foregoing authorities, our conclusion is that the plaintiff's right of action against the defendants commenced when his first notes matured, and was barred in three years thereafter. We therefore advise that the judgment be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed. Rehearing denied.

(33 Cal. 12)

MORA, Bishop of Monterey, v. MURPHY.
No. 13,159.)

(Supreme Court of California. Jan. 30, 1890.)
POWER OF ATTORNEY—INCORPORATION OF RELIGIOUS SOCIETIES.

1. A power of attorney to convey and sell, or to agree to convey and sell, land, is *prima facie* a power to sell for money; and, in the absence of evidence to the contrary, a tenant in common, who is so authorized by his co-tenant, but who, in his own name only, agrees to convey, and afterwards does convey, a portion of the land, in consideration of the purchaser's boring an artesian well thereon, binds only himself, and not his co-tenant.

2. In ejectment by the vendor's co-tenant against the vendee, a finding that the plaintiff knew that the deed purported to convey the whole title to the tract is matter of law, and not of fact.

3. As the vendor could convey and contract with reference to his own share, plaintiff was not estopped to deny the vendee's title to the whole tract, by his knowledge of the agreement, the well-boring, the deed, and the occupation and improvements of the purchaser, without objecting thereto.

4. Under St. Cal. 1850, p. 874, § 177, and St. 1854, p. 53, § 2, amending St. 1850, § 184, a religious corporation was required to file its articles of incorporation with the county clerk of the county where situated. St. 1853, p. 87, § 2, provided that the certificate of incorporation of manufacturing, trading, and mining corporations should be filed with the county clerk, and a copy with the secretary of state. Civil Code, § 299, provides that no corporations hereafter formed shall hold or purchase property without filing a certified copy of their articles of incorporation, filed with the secretary of state, with the county clerk of the county where the property is situated, and that every corporation "now in existence" must file "such certified copy" with the county clerk of the county where the property was situated. *Held*, that the section of the Code does not apply to the Roman Catholic Bishop of Monterey, a sole corporation formed before the adoption of the Code, and it was not necessary for it to file its articles of incorporation with the secretary of state and the county clerk before suing in ejectment.

Department 2. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Ejectment by Francis Mora, Roman Catholic Bishop of Monterey, a corporation sole, against Murphy. From the judgment for defendant plaintiff appeals. Civil Code Cal. § 299, provides that no corporation hereafter formed shall purchase or hold property without filing a copy of its articles of incorporation, filed with the secretary of state, with the county clerk of the county where the property is situated, and that all corporations "now in existence" shall also file such a copy

with the county clerk of any county where they hold property.

R. B. Canfield, for appellant. W. C. Stratton, for respondent.

THORNTON, J. Ejectment. Judgment for defendant. Appeal by plaintiff from the judgment. On the 8th of May, 1874, J. S. Alemany, and Thaddus Amat, Roman Catholic Bishop of Monterey, the latter a corporation sole, became tenants in common of the College Rancho, in Santa Barbara county, the interest of Alemany being three-fifths, and that of Amat two-fifths, of the rancho. On the 21st of March, 1887, Amat, as a corporation sole, appointed Alemany his attorney in fact by a letter of attorney bearing date the day just above named. By this letter Amat authorized his constituent, as his attorney, and for him, and in his name, to convey and sell his title to the land above mentioned, or to agree to convey and sell the same, giving and granting to his attorney full power in the premises, etc. On the 10th day of June, 1879, Alemany executed a written agreement, whereby he agreed to convey to defendant 640 acres of the rancho above named, in consideration of defendant's boring an artesian well upon the rancho. Defendant complied with the conditions of the agreement on his part, and on the 4th day of November, 1879, Alemany conveyed to defendant a specific tract in the rancho, which is the parcel of land involved herein. The letter of attorney was in force when the agreement and conveyance above mentioned were executed. Neither the agreement nor the conveyance was signed by Amat or the plaintiff, and Alemany did not sign the name of either Amat or plaintiff to the document aforementioned. Prior to the making of the agreement with defendant, Amat died, and was succeeded by plaintiff as bishop of Monterey.

The above facts are found by the court below. The agreement with defendant was made by Alemany alone, and did not bind Amat or the plaintiff. The same is true of the conveyance. Neither purports to be made on behalf of Amat or the plaintiff. So far as the findings show, Alemany acted wholly for himself in executing the agreement, as well as the conveyance to plaintiff. He did not sign the name of either Amat or Mora to either paper, and it is too clear to admit of argument that he acted, not as attorney under the letter of attorney, but entirely on his own account. Alemany was competent to contract. He was the owner of an undivided three-fifths of the rancho, and the ownership of this large interest was sufficient inducement to prompt him to act for his own interest and to bind himself alone. Further, the letter of attorney did not authorize Alemany to contract for the boring a well, and pay for it in land. He was authorized to convey and sell, or to agree to convey and sell. A power to sell and convey is *prima facie* a power to sell for money, usually for cash paid.

To give it any other meaning, there must appear to be some usage or custom in the country where the power is to be exercised modifying the *prima facie* significance of the power conferred. The same is true of a power to agree to convey and sell, or sell and convey. We see no difference in the meaning to be attributed to the two forms of expression, whether it is convey and sell or sell and convey. The defendant was not justified in attributing any other effect in law to the agreement and conveyance than that above stated. It was clear that he was dealing with Alemany alone, and that to Alemany alone could he look for his compensation. The only parties to the contract in fact and in law were Alemany and defendant.

It is argued that an estoppel arose and bound plaintiff because the agreement was made for the benefit of the rancho; the plaintiff was present while the well was being bored, and knew that Alemany had agreed to convey the land to defendant in consideration of his boring it; that at the time a partition was made between plaintiff and Alemany, by which the specific tract conveyed to the defendant fell into the portion conveyed to plaintiff; plaintiff knew that this land had been conveyed by Alemany to defendant for boring the well, and that it purported to convey the whole title to this trust; and that plaintiff further knew that defendant was occupying this land, and had made valuable improvements on it, and made no objections to the agreement or the deed, or to the well, or the boring of it, and gave defendant no notice of any objection to the agreement or well or deed.

The above facts are found, on which this contention as to the estoppel is based. Before considering the effect of these facts as an estoppel, it is well to notice one matter injected into the findings as a fact which is clearly matter of law. It is stated in the finding, as is quoted above, that plaintiff knew that the deed of Alemany to defendant purported to convey the whole title to the tract. This cannot be said from any fact appearing in the findings, unless it be held to be law that one tenant in common can, by conveying a specific tract, convey the title of his co-tenant. The legal character of Alemany's deed to defendant has been considered above, and it is clear, both in reason and authority, that he conveyed no more than an undivided three-fifths of the tract in suit, and intended to convey no more. It follows from what has been above said that there can be no estoppel upon the facts found. Granted that plaintiff knew of the agreement, the well-boring, and the deed, that he was further cognizant of the facts of occupation by defendant, and making improvements, without making any objection, where is the estoppel? Plaintiff knew that Alemany had a right to contract and pay for a well on his own land with his own land, and to make a deed of it. He also knew that defendant had a right to the deed made by him, and to occupy and im-

prove the land. What right had plaintiff to make any objection to such acts of Alemany and defendant, and of what avail would such objection have been? The parties were only exercising each his own rights, which rights, so acted on and exercised, plaintiff also knew did not in the least affect or impair his rights. The failure of plaintiff to object did not affect defendant's rights. Defendant was not deceived in any way. He was permitted to exercise his rights without molestation by plaintiff. How anything like estoppel can be predicated of plaintiff's conduct does not appear.

We think it clearly follows that the plaintiff and defendant became tenants in common of the land in suit, (*Stark v. Barrett*, 15 Cal. 363,) the plaintiff's interest being two-fifths, and the defendant's three-fifths, thereof; and that plaintiff is entitled to recover his property, (*Carpenter v. Webster*, 27 Cal. 524,) unless a further contention of defendant can be maintained. This contention we proceed to consider. Bishop Amat became a corporation sole in 1870. He filed his articles of incorporation in the office of the county clerk of Monterey county in the year just named, and filed a certified copy of those articles so filed in Monterey county, in the office of the county clerk of the county of Santa Barbara, before this action was commenced. The original articles of incorporation were never filed in the county of Santa Barbara, nor has a copy of the copy of the articles of incorporation filed in the office of the secretary of state, certified by said secretary, ever been filed in the office of the county clerk of Santa Barbara county. The contention of defendant is that, as a certified copy of the copy of the articles of incorporation filed in the office of the secretary of state has never been filed in the county clerk's office of Santa Barbara county, plaintiff cannot maintain this action. As the legislation of this state stood in 1870, when the corporation plaintiff was formed, the filing of the articles of incorporation was only required to be made with the county clerk of the county where the church or other religious society or association was situated. See St. 1850, p. 374, § 177; St. 1854, p. 53, § 2, amending section 184 of act of 1850. In 1853 an act was passed providing for the formation of manufacturing, mining, and trading corporations, and by this act it was provided that the certificate of incorporation (articles of incorporation) should be filed in the office of the county clerk, etc., and a duplicate of the same filed in the office of the secretary of state. St. 1853, p. 37, § 2. Religious corporations were not referred to in this act, and it had no application to them. Such corporations were not affected by this act. The law as to them remained unchanged. Has the law as to such corporations ever been changed? It is said that it has by the provisions of the Civil Code, and we are referred to section 299 of that Code. It is clear, on a perusal of the section referred to, (299, Civil Code,) that it refers only to corporations whose articles had

been required by the statute to be filed with the secretary of state. This is so evident from reading the section that it is needless to further elaborate the question. The law at no time required such corporation as is involved in this case, formed previous to the Code, to file its articles of incorporation, or a copy or duplicate thereof, in the secretary of state's office. As to such a corporation, formed since the Code went into effect, we say nothing. We are fully convinced that the contention of defendant under discussion cannot be maintained, and that the court below erred in rendering judgment for defendant on its finding of facts.

We remark, further, in relation to the partition of the rancho by Amat and Alemany, that, conceding the defendant had an equity to have the tract conveyed to him by Alemany set apart to him on a partition of the rancho, such equity may still exist and be enforced in an action for a partition. This equity, if it exists, entitles the defendant to have his interest set apart out of the share of Alemany. The partition made, certainly does not affect defendant, as he was no party to it. As the facts appear in this case, defendant can have no right to have his interest taken from the share of Mora.

The judgment is reversed, and cause remanded, with directions to the court below to enter judgment for plaintiff for his undivided two-fifths interest in the tract in controversy. So ordered.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

(33 Cal. 126)

FULWEILER v. HOG'S BACK C. M. CO. (No. 13,190.)

(Supreme Court of California. Feb. 7, 1890.)

JUDGMENT BY DEFAULT—EXCUSE.

Defendant's attorney, who did not reside in the county where the action was begun, started for the place of trial, to serve and file certain papers, and to arrange for motions and proceedings in the cause, on the last day for filing and serving papers. He had previously informed himself, both by inquiry and time-tables, of the departure of a train which would have carried him to his destination in ample time; but, on learning for the first time at the station that the train had been discontinued, he took the next freight train, and telegraphed plaintiff's attorney to detain the clerk of court. He arrived at 6:30 P. M., and unsuccessfully sought for the clerk at his residence, office, and at the places where he was most likely to be found. Plaintiff's attorney was confined to his house by illness, and the judge lived a mile out of town. It was 9:30 P. M. when the attorney finished his search, the night was dark and rainy and he was exhausted and sick. *Held*, that a default should be set aside.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; B. F. MYRES, Judge.

Blanchard & Swisler and Wallace & Prewett, for appellant. *J. M. Fulweiler and E. L. Craig*, for respondent.

HAYNE, C. This is an appeal by defendant from orders refusing to set aside a default. v.23p.no.1—5

The defendant's first motion to set aside the default was denied. Leave was subsequently granted to renew the motion, and the motion was renewed upon additional affidavits, but was again denied. There was made also a motion to change the place of trial, but the counsel for the appellant states in his brief that this motion was abandoned; and the appeal is taken only from the orders refusing to set aside the default.

We think that the default should have been set aside. The action was commenced at Auburn, in the county of Placer, where the plaintiff's attorney resided. On January 7, 1889, service was made in Placer county upon the president of the defendant, which had its principal place of business in El Dorado county, where its officers resided. Within three days after service the defendant retained the firm of Blanchard & Swisler, who had their office in Placerville, El Dorado county, as its attorneys for the defense of the action. They prepared a demurrer to the complaint, and moving papers upon an application to change the venue; and on January 17th, which was the last day for the filing and service of said papers, Mr. Blanchard went to Auburn for the purpose of serving and filing them, "and arranging for the motions and proceedings in said cause." The first misfortune which befell the attorney was that he mistook the connection of the trains. He was informed at Placerville, "both upon inquiry and by the time-tables, etc., of the railroad company," that a train left Sacramento at 1.05 P. M., and arrived at Auburn at 3:30 P. M. of the same day, which would have given him ample time to have attended to the filing and service of the papers; and, knowing that he could get to Sacramento in time to connect with such a train, he proceeded to do so. Upon arriving there, however, he learned for the first time that the train mentioned had been discontinued three days previously. He took the next train from Sacramento to Auburn, which was a freight train, and was due at the latter place at 6:15 P. M. From one of the way stations he telegraphed to the plaintiff's attorney that he was on the freight train, and requested him to detain the clerk of the court. In compliance with this telegram the plaintiff's attorney sent word to the clerk, who promised "to be around either at his office or at his residence, so as to meet and accommodate Mr. Blanchard, up to 7 o'clock P. M. of that day." The freight train arrived at 6:30 P. M. According to the affidavit of Mr. Blanchard, "it was dark and raining at the time, but, that there might be no delay, he procured a lantern, umbrella, and the services of one Graham, and at once, through the mud and rain," went first to the residence of the clerk and then to his office, and then to the places about town where he was informed that the clerk was likely to be; but he did not succeed in finding him. He then inquired for the residence of the judge in order to get an order extending the time to plead, but

was informed that the judge resided "about one mile away from said lower town, and had not been in town since about 5 P. M." He was also informed that the plaintiff's attorney "had been violently kicked by a horse, and was unable to be out of his house." The affidavit of Blanchard further states that "by the time he had completed his searches for said clerk, judge, etc., it was 9:30 o'clock P. M. of said 17th of January, and very dark, and raining all the time;" that he was a stranger to the place; and that "after the search aforesaid he was exhausted and sick;" and that "when he gave up said search at about 9:30 P. M. on said 17th he really did not consider it decorous or proper for him to make any further exertion to save a default, but honestly, and in good faith, thought he was excusable for the default." At 8:30 or 9 o'clock of the next day the papers were served and filed, but the default was entered before 8 o'clock, at the request of the plaintiff's attorney.

The foregoing facts appear without substantial conflict. The respondent's affidavits show, among other things, that the defendant's attorney was mistaken as to some of the hours which he gives; that the clerk remained at his residence until 7 P. M., and that it was after that hour that the attorney called there. But we do not consider this material. There is nothing in the respondent's position that there was no necessity for the appellant's attorney to go in person to Auburn, and that the papers could have been sent by mail. Going in person showed extra caution; and, in addition to this, the attorney wished to arrange for the hearing of the motions, etc. It was quite proper for him to go in person. Nor can he be charged with imprudence in not taking the stage between Placerville and Auburn. It does not appear wherein the stage route was preferable to the railroad. But, assuming that it was preferable, the railroad was good enough for the purpose, if the usual train had been running, and the attorney had reasonable ground to believe that it was running. He was informed on inquiry that there was such a train, and the railroad time-tables assured him of the fact; and the discontinuance of the train within three days was a thing which may well have taken a prudent man by surprise, notwithstanding the fact that the change was published in certain newspapers. It was an accident against which ordinary prudence did not guard. After this accident the attorney seems to have used reasonable endeavor to avert the consequences. It may be conceded that after he arrived at Auburn it would have been better to have gone at once to find the judge of the court or the plaintiff's attorney instead of looking for the clerk. But the evidence seems to us to show an honest and faithful effort to comply with the law, and, although such effort was not as well directed as it might have been, we think that when the attorney, tired, cold, and sick, gave up his search in a strange

town, at 9:30 o'clock on a dark and rainy night, he had done enough to entitle him to relief under the wise and liberal rule which recognizes that there may be cases of neglect which are excusable. The sworn answer was a sufficient showing of merit. We therefore advise that the orders refusing to set aside the default be reversed, with directions to the trial court to permit the answer to be filed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the order refusing to set aside the default is reversed, with directions to the trial court to permit the answer to be filed.

(18 Or. 351)

KILLINGSWORTH v. PORTLAND TRUST CO.

(Supreme Court of Oregon. Jan. 13, 1890.)

CORPORATIONS—EXECUTION OF DEED AS ATTORNEY IN FACT.

When a corporation is made the agent of another to sell and convey real property, it acts through the same instrumentalities as when acting for itself, and the relation between it and its instrumentalities are as one legal entity or artificial person in the performance of its engagements, and involves no delegation of powers. *Held, therefore*, that a corporation has capacity to execute a deed as attorney in fact for another.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

Sears & Beach, for appellant. *Woodward & Woodward*, for respondent.

LORD, J. This is an action to recover damages for failure of the defendant to execute and deliver to the plaintiff a conveyance of certain premises pursuant to an agreement to that effect. The defendant denies this, and alleges, as the attorney in fact of one Deborah H. Ingersoll, in compliance with said agreement, that it did execute and tender to the plaintiff a conveyance of said premises, etc., and now brings it into court, and deposits it for the plaintiff, and that plaintiff refuses to accept the same. To this the plaintiff demurred on the ground that the same does not state facts sufficient to constitute a cause of defense to the cause of action alleged.

The point raised by the demurrer is, can the defendant, a corporation, execute a deed of conveyance of real property as the attorney in fact of another? In this state the right to become incorporated is secured by a general law, and any persons may avail themselves of it by complying with its provisions. Corporations which owe their existence to the common law must be governed by it in the mode of their organization, in the manner of exercising their powers, and in the use of the capacities conferred. But the legislature may authorize the creation of corporations for many purposes not contemplated by the common law, and endue them with powers and capacities to be exercised in disregard of

its rules, or which may greatly extend, modify, or limit their common-law powers and privileges. The measure of the legislative power in this regard is limited only by circumstantial provisions. Ordinarily, in the creation of corporations, the common-law incidents and powers are implied, unless otherwise provided or restrained by the law of its corporate existence. But, in determining the nature and extent of the powers and capacities conferred on a corporation, and the mode of their exercise, the law of its creation, whether a charter or a statute, must be consulted; for it has no power, except as thus given, either expressly or as incidental to the exercise of the powers granted. It is provided by our statute that a corporation may engage in any lawful enterprise, business pursuit, or occupation, (Code, § 3217;) so that, unless corporations are affected with some disability, when the articles of incorporation are sufficient for the purpose, there is no lawful occupation or business in which it may not engage in this state exactly as individuals. By its articles of incorporation, the defendant corporation is expressly authorized and empowered "to act as the general or special agent, or attorney in fact, for any public or private corporation or person in the management and control of real estate or other property, its purchase, sale, or conveyance," etc. No question is made but what the defendant, by its articles of incorporation, has conferred upon it the power to do the act as to which there is claimed to be an alleged failure; but the contention is that a corporation, from the nature of the organization, as an artificial body, necessitated to act through agents, is incapable of executing a deed as an attorney in fact. This argument is based on the assumption that there are some things, from the inherent nature of the case, that a corporation is incapable of doing, and seeks its illustrations in the common law, as that a corporation cannot be an administrator or executor, because its duties are of a personal nature, and cannot be delegated; or cannot take an oath, when so required by law, before proceeding to execute some duty or trust. But this argument overlooks the fact that a corporation may be empowered to do by statute what it was incapable of doing under its common-law powers; and, when thus created, its powers, capacities, and modes of exercising them depend upon the statute. Nor is the disability, in such cases, of a character which cannot be obviated by statute; for, as Mr. Morawetz says, "there are numerous instances in which corporations have been expressly empowered by statutes to administer estates." 1 Mor. Priv. Corp. § 357.

The reason why a corporation was unable to perform the office of executor or administrator, as stated by Blackstone, was that it could not take an oath for the due execution of the office. 1 Bl. Comm. 477. But, to enable a corporation to act as executor or administrator, the statute may dispense with the oath, or provide that some one of its

officers may take it, or the law of the state may not require any oath for the due execution of the office; and in such case, when no other impediment intervenes, a corporation may act as administrator when the law of the state does not require the administrator to take an oath. It was not so held in *Deringer's Adm'r v. Deringer's Adm'r*, 5 Houst. 416. So, too, in *Bank v. Ewing*, 12 Lea, 602, where it was urged that a corporation was incapable of taking to itself a mortgage or trust conveyance, it was held that a corporation may take and hold as a trustee or mortgagee, and execute a trust in which it has an interest, within the scope of its business; and a failure or inability to comply with the provisions of the Code by taking the required oath would not affect the validity of the deed, or the title vested.

As it is not questioned that the business in which the defendant is engaged is a lawful occupation, and that the articles of incorporation are sufficient to confer the power on the defendant to act as an attorney in fact in furtherance of its legitimate objects, there is nothing to prevent it from doing the acts essential to carry on its business, and comply with the terms of its agreement, unless it is incapable of performing such acts from some cause inherent in itself. A corporation, like a natural person, has a right to conduct its legitimate business by all the means necessary to effect such object. Within its prescribed range, it can do whatever a natural person *mutatis mutandis* could do. Whart. Ag. § 57.

In *Barry v. Exchange Co.*, 1 Sandf. Ch. 280, it is said: "Every corporation, as such, has the capacity to take and grant property, and to contract obligations in the same manner as an individual. * * * And every such corporation has power to make all contracts which are necessary and usual in the course of the business it transacts, as means to enable it to effect such object, unless expressly prohibited by law." Having the power conferred upon it to act as an attorney in fact, is it not endowed with all the faculties or capacities essential to execute it, and carry out the business projects of its creation? Why may not a corporation act as an agent for an individual, or another corporation? As the owner of real property, it can by its authorized agents execute a conveyance, or it may authorize another, by power of attorney in writing, to convey such property for it; why then may it not act as the agent or attorney in fact of another for a like purpose, when it is so authorized, and to thus act is one of the chief powers conferred to effect the object of its creation, and to carry on the business in which it is engaged?" "Within the scope of its corporate powers," says Mr. Mechem, "unless there are express provisions in its charter or constituting instruments to the contrary, a corporation may act as agent, either for an individual, a partnership, or another corporation. Many of the great corporations of the country are organized for

this express purpose, under statutes or charters conferring and defining their powers, and the methods of executing them; but even in other cases, authority so to act might be implied as auxiliary to their main purpose." *Mechem, Ag. § 64.*

It is clear, then, that a corporation may act as the agent of another; and, if so, it must be endowed with the faculties or instrumentalities to perform the office it is authorized to undertake, and carry out the purposes of its creation. When a corporation engages in a legitimate business, and is authorized by its incorporation to do the things necessary to carry on such business, it is an express grant of power to enable it to effect that object. If it is to be excluded from doing such things because, from the nature of its organization, it cannot act personally, but only through agents, there would be little left in the domain of business it could do. As was said by the court in *Hopkins v. Turnpike Co.*, 4 *Humph.* 412: "The common-law rule with regard to natural persons, that an agent, to bind his principal by deed, must be empowered by deed himself, cannot, in the nature of things, be applied to corporations aggregate. These beings, of mere legal existence, and their board, as such, are, literally speaking, incapable of a personal act. They direct or assent by vote; but their most immediate mode of action must be by agents." Being a creation of the law,—an artificial person,—it can only act by agents, who are its limbs, or instrumentalities to effect the purpose for which it was organized, and to act for it; their act being the act of the corporation, exactly as the act of an individual is his act. As such, upon the principle of the objection raised, it could not make an acknowledgment in person, but it may by its officers; and in such cases its officer affixing the seal is the party executing the deed, within the meaning of the statute requiring deeds to be acknowledged by the grantor. *Kelly v. Calhoun*, 95 U. S. 711; *Association v. Brace*, 51 Md. 508; *Amer. & Eng. Cyclop. Law*, "Acknowledgment," "Corporations." In fact, within the same principle of reasoning, it may be said that a corporation cannot make a deed of its own property; but we know it can, and that the act of its officers in so doing is the act of the corporation.

When a corporation is made the agent of another to sell and convey property, it acts through the same instrumentalities as when acting for itself; and the relation between it and its instrumentalities are as one being or artificial person in the performance of its engagement, and involves no delegation of powers. So that, when a corporation is invested with a power of attorney to sell and convey real property, the person conferring the power knows that the corporation cannot act personally in the matter, but that in performing the engagement it will act through its agents, who for that purpose are its faculties, and whose acts in the discharge of that duty are the acts of the corporation, and as

such must be considered to be included in the artificial person, as instrumentalities authorized by him to do the act conferred upon it by his power of attorney. In this view, the argument that the corporation cannot do such act, under the power of attorney, without a delegation of authority to its agents, and that the grantor of the power has given no such power of substitution, cannot be sustained. There was no error, and the judgment must be affirmed.

(3 Wyo. 311)

HOWARD v. BOWMAN.

(Supreme Court of Wyoming. Jan. 22, 1890.)

BILL OF EXCEPTIONS.

1. Where time is given to present a bill of exceptions, it must appear on the record that it was presented within the time allowed.

2. A bill of exceptions is fatally defective, unless it is certified that it is correct, and that it contains all the evidence, or so much as is necessary to explain the exceptions.

Error to district court, Crook county.

Anthony C. Campbell, for plaintiff in error. *W. S. Metz*, for defendant in error.

SAUFLEY, J. In this case the plaintiff in error was plaintiff in the district court in an action of replevin. The law and facts were submitted to the court without the intervention of a jury, the trial resulting in findings and a judgment for the defendant. The bill of exceptions filed with the transcript is fatally defective in two respects:

1. On the overruling of plaintiff's motion for a new trial, he asked and obtained time until the 1st day of December, 1887, to present his bill. The record does not anywhere disclose whether the bill was tendered to the court for allowance within the time given. It should affirmatively appear, by a recital of the record, that this was done; otherwise it cannot be considered by this court.

2. It does not appear from the bill that all, or even any, of the testimony heard on the trial of the cause is set forth in the bill. It is not certified to this court as a true or correct bill, nor does the certificate show that it contains so much of the evidence as is necessary to explain all of the exceptions reserved or any of them. The certificate simply is, in substance, that all exceptions taken in the cause were taken at the time the adverse ruling was made, and that all of the proceedings were had and taken in the court below during the judicial days of a regular term of said court. The record being thus defective, the only question cognizable by this court is whether the pleadings are sufficient to support the judgment. We are of the opinion that they are, and the judgment of the district court is therefore affirmed.

(3 Wyo. 327)

MENARDI v. OMALLEY.

(Supreme Court of Wyoming. Jan. 31, 1890.)

APPEAL—RECORD.

Where a demurrer to the petition is sustained, but no judgment for defendant entered nor

final order made, within the meaning of Code Civil Proc. Wyo. § 3128, which provides that a judgment or final order made by the district court may be reversed, vacated, or modified by the supreme court, and afterwards the case is stricken from the docket on motion of plaintiff, the record presents nothing on which the supreme court can act.

Error to district court, Johnson county.

The plaintiff sued the defendant in the court below, and the defendant demurred to the petition, alleging that it did not state facts sufficient to constitute a cause of action. The plaintiff, by leave of court, filed an amended petition, and by consent of parties the demurrer already filed was treated as a demurrer to the amended petition. The court sustained the demurrer, and the plaintiff excepted. No further order or entry appears in the record, except the recital that subsequently, on December 10, 1888, the case, on motion of plaintiff, was stricken from the docket of the court. Rev. St. Wyo. § 3128, provides that a judgment rendered or final order made by the district court may be reversed, vacated, or modified by the supreme court for errors appearing on the record.

Charles H. Burritt and Henry S. Elliott, for plaintiff in error. *J. J. Orr*, for defendant in error.

CORN, J., (after stating the facts substantially as above.) The record presents nothing upon which this court can act. Judgment was not rendered for the defendant upon the sustaining of the demurrer, and no final order, within the meaning of section 3128 of the Code of Civil Procedure, appears to have been made. The order sustaining the demurrer did not, in effect, determine the action, and prevent a judgment. The order striking the case from the docket upon the plaintiff's motion either disposes of it finally upon plaintiff's own motion, of which he cannot complain, or leaves it pending in that court, subject to be reinstated upon the docket. If it is still pending, so far as anything appears to the contrary, he may yet amend his petition, and recover judgment. In either case, the plaintiff in error has no standing in this court. The petition in error will be dismissed.

VAN DEVANTER, C. J., and SAUFLEY, J., concurred.

(3 Wyo. 322)

STAMPER v. GAY et al.

(Supreme Court of Wyoming. Jan. 27, 1890.)

NEGOTIABLE INSTRUMENTS — INDORSEES — APPEAL FROM JUSTICES.

1. An indorsee of a note is the legal holder thereof, and may sue on it in his own name, and a denial that he possessed the beneficial interest in it at the time the suit was brought, presents an immaterial issue.

2. A certified copy of the record of a case tried before a justice of the peace is not admissible in evidence when the certificate does not show that the person signing it was justice of the peace at the time of signing, and there is no proof that he was in any way the legal custodian of the record.

Error to district court, Albany county.

Action by Jesse Stamper against Stephen H. Gay and another to recover on a promissory note. Plaintiff appeals.

Brown, Blake & Arnold, for plaintiff in error. *H. V. S. Groesbeck*, for defendants in error.

CORN, J. This was a suit brought before a justice of the peace to recover upon a promissory note executed by defendants in error, bearing date September 1, 1887, and payable to one William Stamper, a brother of plaintiff in error. The note bore the indorsement: "Pay to Jesse Stamper the inside amount. WILL STAMPER." The defendants, who are also defendants in error here, filed a written answer denying that plaintiff was the owner of the note, and also setting up, by way of defense, that, before any transfer of the note by the payee to plaintiff, Stephen H. Gay, defendant, was served with notice of garnishment, issued out of the justice's court of one JOHN Q. BROOKS, in the county of Carbon, and thereafter, under the order of the court, paid into said justice's court the entire amount due on said promissory note, in certain suits brought against William Stamper, and that by said payment said note was discharged. The plaintiff interposed a general denial to the new matter in the answer, and a trial resulted in a judgment for plaintiff. Defendants appealed to the district court, where a jury trial was had, resulting in a verdict and judgment for the defendants. The plaintiff comes by petition in error to this court.

We are of the opinion that the answer of defendants, in so far as it denies that plaintiff was the owner of the note, in the sense of denying that he was the possessor of the beneficial interest in it at the time of the trial, or when suit was brought, presents an immaterial issue. If it was assigned by a special indorsement to him, or by indorsement in blank made by the payee in whose possession it was at the time of such indorsement, and was delivered to him by the payee, he became the legal holder of the note, and as such could sue and recover on it in his own name. Daniel, Neg. Inst. § 1181a; Bliss, Code Pl. § 232. Whether William Stamper was the owner of the note at the time of the alleged proceedings in garnishment is quite a different question.

In our view of this case, it will be necessary for us to consider but one of the errors assigned. Evidence was offered by the defendant to show that William Stamper, the payee in the note, became indebted in Carbon county, where he resided, and subsequently left the territory, leaving his debts unpaid; that attachment suits were instituted by his creditors before JOHN Q. BROOKS, a justice of the peace of that county, and that defendants were summoned, as garnishees, to answer concerning their indebtedness to William Stamper upon the note in question; that they answered, and, upon the order of the justice, paid into his court the full amount

due upon the note, and were thereby discharged from all liability thereon. To establish this state of facts they offered in evidence a certified transcript of the justice's docket. The certificate to the transcript was as follows: "The territory of Wyoming, county of Carbon—ss.: I do hereby certify that the above is a full and true copy from my docket of the proceedings had by and before me at my office in Carbon, Carbon county, Wyoming territory, in the above-mentioned action. Dated this 2d day of February, A. D. 1889. [Signed] JOHN Q. BROOKS, Justice of the Peace for Said County and Territory." The introduction of the copy in evidence was objected to upon the ground, among others, that it was not properly authenticated. The proof of records may be made by a copy, and the copy may be of three kinds, and only three: (1) Exemplification; (2) copies made by an authorized officer; (3) sworn copies. 1 Greenl. Ev. § 501. It is plain that this is not an exemplification, nor a sworn copy. Is it one of the second class named, a copy made by an authorized officer, or what is called an "office copy?" That it was not made by an officer specially authorized is clear. But it is well settled in the United States that an officer having the legal custody of public records is *ex officio* competent to certify copies of their contents, (1 Greenl. Ev. § 507,) and, if admissible at all, it is under this rule of law. Giving this rule its widest possible scope, there must be proof of some character that JOHN Q. BROOKS, at the time of making the certificate, was the custodian of the records desired to be proved. Of this there is no evidence whatever. He does not state it in his certificate. It is not testified to by any witness. John W. Johnson, while testifying on his own behalf, was asked the question, "You may state, if you know, who was justice of the peace at Carbon at that time, in 1887 and 1888," and answered: "I think J. Q. Brooks." This does not tend to show that he was occupying that position February 2, 1889, the date of the certificate. By the statute, an election for justices of the peace was required to be held in November, 1888, and the officers then elected to enter upon their official duties on the first Monday of the January following; the terms of their predecessors expiring at that time. There is certainly no presumption of his re-election at the November election, 1888. It is true he signed himself, "Justice of the Peace for Said County and Territory;" and from this we might infer that he intended it to be understood that he was justice of the peace at the time of signing the certificate; but it falls far short of proof of such fact. There was no other evidence tending to show that he was justice of the peace, or custodian of these records, on February 2, 1889. The objection to this evidence should have been sustained. This, we think, is decisive of the case. There is nothing to authorize the presumption that the jury returned a verdict for the defendants upon any other theory than that the debt was

discharged by reason of the defendants having paid it under the order of the justice's court in these proceedings in garnishment. The judgment of the court below is reversed, with instructions to grant a new trial.

VAN DEVANTER, C. J., and SAUFLEY, J., concurred in above opinion.

(3 Wyo. 325)

BOBURG v. PRAHL *et al.*

(Supreme Court of Wyoming. Jan. 28, 1890.)

SPECIFIC PERFORMANCE—ADMINISTRATORS—APPEAL.

1. Under Rev. St. Wyo. § 3008, providing that the "heirs at law or devisees of a person who purchased an interest in land by written contract, and died before conveyance thereof to him, may compel such conveyance as the deceased might have done," the administrator of a deceased vendee cannot sue for specific performance.

2. An exception for irregularity which does not point out the error complained of is too general and indefinite.

3. Where there is testimony sufficient to sustain the finding, the supreme court will not inquire into the weight of the evidence.

Error to district court, Albany county.

Action by Anna M. S. Boburg, as administratrix *de bonis non* of the estate of John Boburg, deceased, against Fred Prahl and another, for specific performance of a contract for the sale of real estate. From a judgment for defendants, plaintiff appeals. Rev. St. Wyo. § 3008, provides that "the heirs at law or devisees of a person who purchased an interest in land by written contract, and died before conveyance thereof to him, may compel such conveyance as the deceased might have done."

W. H. Fishback, for plaintiff in error.
M. C. Jahren for defendants in error.

VAN DEVANTER, C. J. This was a suit in the district court of the county of Albany to compel the specific performance of a contract for the sale of real estate. John Boburg, in his life-time, entered into a written contract with Fred Prahl whereby the latter agreed to convey to Boburg certain lots in the city of Laramie upon receipt of a stated consideration, to be thereafter paid in monthly installments. Under the agreement, Boburg took possession of the lots, and made improvements thereon; but before completing the payment of the purchase price he died. The petition, after stating these facts, alleges that Anna M. S. Boburg is the widow of the decedent, and is the duly-constituted administratrix *de bonis non* of his estate. It also states that she has completed the payments under the contract, has demanded a conveyance from the defendant Prahl, and that he refuses to execute a deed for the premises in question. The defendants answered, and upon the trial the court found that the purchase money had not been fully paid, and gave judgment for the defendants. The plaintiff made a motion for a new trial on the following grounds: "(1) Irregularity in the proceedings of the defendant Fred

Prahl, by which the plaintiff was prevented from having a fair trial. (2) That the decision and judgment of the court is not sustained by sufficient evidence, and is contrary to law. (3) Because the finding and judgment of the court is against the law and the evidence. (4) Error of law occurring at the trial, and excepted to by the plaintiff. (5) Because the finding, decision, and judgment of the court should have been for the plaintiff in said cause, and against the defendants. (6) Because the findings, decision, and judgment of the court were given for the defendants, when they should have been given for the plaintiff." The motion being overruled, the plaintiff excepted, and now brings the case here for review.

The first and fourth grounds of the motion are too general and indefinite. The irregularity and error complained of should have been clearly designated. The second, third, fifth, and sixth grounds are not well taken, as will further appear. While the sufficiency of the petition was not questioned in the court below, it is fatally defective. A suit to compel the specific performance of a contract for the sale of real estate cannot be maintained by the plaintiff in the capacity of administratrix. Such suits can only be brought by the heirs at law or devisees of the decedent, and not by the personal representatives. Rev. St. Wyo. § 3008. Even if the plaintiff had sued in her capacity as an heir of the decedent, the petition does not show that she is the only heir; and, if there are others, they should have been made parties.

On the trial, the evidence concerning the payment of the purchase price was conflicting; and, as there was testimony amply sufficient to sustain the finding, this court will not inquire into the weight of the evidence. *Ketchum v. Davis*, (Wyo.) 13 Pac. Rep. 15. The judgment of the court below is affirmed.

CORN and SAUFLEY, JJ., concurred.

(3 Wyo. 328)

PERKINS v. McDOWELL.

(*Supreme Court of Wyoming*. Jan. 31, 1890.)

RECORD ON APPEAL—DEMURRER.

1. A motion for a change of venue, with the affidavit supporting it, and a motion for a new trial, are not pleadings, and can only become part of the record by being incorporated into a bill of exceptions, and this is not sufficiently done when the bill simply recites the filing of the motion and affidavit, and then states that reference is made to them, and the same made part thereof.

2. An erroneous ruling on a demurrer to a pleading is not an error for which a new trial will be granted, under Rev. St. Wyo. § 2652, as the error is not one which occurred on the trial, nor could it be avoided or corrected by a new trial, and a motion for a new trial is not necessary to preserve an exception to such ruling.

3. Where the Christian name of plaintiff is given as "J. M." and there is nothing in the petition to show that "J. M." is not his Christian name, a demurrer on the ground that the petition does not state the name of plaintiff cannot be sustained.

Error to district court, Albany county.

Action by J. M. McDowell against Charles F. Perkins to recover money due for labor. Judgment for plaintiff, and defendant brings error. For former report, see 19 Pac. Rep. 440.

G. C. Smith, for plaintiff in error. Brown, Blake & Arnold, for defendant in error.

VAN DEVANTER, C. J. This cause was heard by this court, and an opinion rendered therein, at a former term. 19 Pac. Rep. 440. No brief having been filed by the defendant in error, the imperfections in the bill of exceptions, which is contained in the record, were overlooked, and the attention of the court having been called to this, a rehearing was granted. McDowell brought the action against Perkins in the district court for the county of Albany, to recover for services rendered. The defendant filed a general demurrer to the plaintiff's petition, which was overruled; and later he filed a motion and affidavit for a change of venue to another county, which was also denied. Upon the trial the court found for the plaintiff, and rendered judgment in his favor. The defendant made a motion for a new trial, which was overruled, and, exception being taken to each of these rulings, Perkins brings the case to this court on petition in error.

A motion for a change of venue, with the affidavit supporting the same, and a motion for a new trial, are not pleadings, and can only become a part of the record by being incorporated into a bill of exceptions; but neither of these motions is set out therein. The bill recites the filing of the motion and affidavit for a change of venue, the ruling of the court, and the exception thereto, and then states: "Reference being had to said motion and affidavit of defendant, * * * the same is hereby made a part hereof." The recitals relating to the motion for a new trial are in the same form. It thus appears that the motion for a change of venue and for a new trial were never embraced in the bill of exceptions, and they are not now copied into the bill, as set forth in the record. It is not sufficient for the bill to recite that the motions are made a part thereof, for, as in this case, the recitals may not be true. Such a recital is not an equivalent for the doing of the act which is recited to have been performed. When properly embraced in the bill of exceptions, such motions become a part thereof by reason of being actually copied and set out in the bill at the time of the allowance and signing thereof, and not by virtue of any mere recital like the one in this instance. These motions not being made a part of the record, the rulings thereon cannot be considered by this court.

We now come to the question presented by the overruling of the demurrer to the petition. Our statute (section 2652) seems to contemplate that any substantial irregularity or error which could be avoided or corrected by another trial shall be cause for a new trial. An error committed in ruling upon a demur-

rer to a pleading is not one which occurred upon the trial, or in the proceedings relating thereto, and would in no sense be avoided or corrected by another trial. The plaintiff in error, (the defendant in the court below,) in now objecting to the overruling of his demurrer to the petition, does not complain of any matter connected with the trial, but says that there should have been no trial at all upon this petition. Had a new trial been granted by the district court, the error, if any, in the decision upon the demurrer, would not have been reached, and would still remain uncorrected in the record. It therefore follows that the ruling upon a demurrer to a pleading is not a cause for granting a new trial, and that a motion for a new trial is not necessary to preserve an exception taken to such ruling.

In his petition the plaintiff sued as J. M. McDowell, and it is contended that the letters "J. M." do not constitute a name, and that the petition, therefore, fails to state the name of the plaintiff. A demurrer is permissible only when the defect complained of is apparent upon the face of the pleading. While it does not occur frequently, there are many instances where single letters constitute the only Christian name. We cannot, then, judicially know that the letters "J. M." are not a name, and, as the petition does not disclose that the letters "J. M." are not the Christian name of the plaintiff, it follows that there is no defect apparent on the face of the petition in this respect. The petition is otherwise in the usual form of one for work and labor performed, and we perceive no defect in its allegations. The judgment of the court below is affirmed.

CORN and SAUFLEY, JJ., concurred.

(3 Wyo. 335) .

WOLCOTT v. BACHMAN.

(Supreme Court of Wyoming. Feb. 5, 1890.)

VAGRANCY—JUSTICE OF THE PEACE—FALSE IMPRISONMENT—ASSIGNMENT OF ERRORS.

1. As Rev. St. Wyo. § 3647, expressly confers jurisdiction of the offense of vagrancy on justices of the peace, and authorizes the commitment of the offender, such a commitment does not constitute false imprisonment.

2. As errors occurring upon the trial, which are properly grounds for a new trial, can only be brought into the record by a motion for a new trial, and must be included in the motion to bring them to the attention of the supreme court, it is not necessary to separately assign them as error. They are sufficiently included in the assignment that there was error in overruling the motion for new trial.

SAUFLEY, J., dissents.

Error to district court, Converse county.

This was an action for false imprisonment brought by the defendant in error against the plaintiff in error. The latter, being a justice of the peace in the county of Albany, sentenced the defendant in error to imprisonment in the county jail for vagrancy without any criminal complaint being made, the defendant in error being at that time before the justice on another charge. W.

F. Mechum, another justice of the peace, in whose precinct the plaintiff in error was acting at the time, carried the sentence into effect by issuing a *mittimus*, under which the defendant in error was imprisoned. Upon a trial by jury in the district court of the county of Converse, a verdict was returned for the plaintiff, Bachman, assessing his damages at \$3,500. The defendant, Wolcott, moved the court for a new trial, alleging in his motion that different errors had been committed by the court during the trial of the cause. The motion being overruled, judgment was entered for the plaintiff upon the verdict.

Corlett, Lacey & Riner, for plaintiff in error. H. V. S. Groesbeck, for defendant in error.

VAN DEVANTER, C. J. The petition in error contains 15 assignments of error, the first 14 of which relate to alleged errors occurring upon the trial, and the fifteenth is based upon the overruling of the motion for a new trial. Errors occurring upon the trial can only be preserved and fully brought into the record by a motion for a new trial, and, if such errors are not made the basis of a motion for a new trial in the court below, they are waived, and this court cannot consider them. Then, since it is necessary to complain of such errors in a motion for a new trial in order to ultimately bring them to the attention of the appellate court, they should not be separately assigned as error here, but will be sufficiently included in the assignment that there was error in the overruling of the motion for a new trial. This, however, is only true as to such matters as are properly grounds for a new trial, and all other errors in the rulings and decisions of the trial court should be separately assigned as such. U. S. v. Trabling, (Wyo.) 6 Pac. Rep. 721.

Without considering the first 14 assignments in this case, we will inquire whether there was error in the overruling of the motion for a new trial. In its charge to the jury, the court gave the following instruction, over the objection of the defendant: "If you find as a fact that this plaintiff was imprisoned in the Albany county jail upon a commitment or *mittimus* issued by Justice of the Peace Mechum, and you find that the commitment was in pursuance of a supposed or alleged sentence of a justice of the peace sentencing this man to be imprisoned for the alleged crime of vagrancy, if you find those to be the facts, then I charge you that would constitute false imprisonment, as to Mechum, upon its face. You are not trying Mechum. You must further find that Mechum was directed or controlled by this defendant." This instruction assumes that a justice of the peace does not have jurisdiction to commit to the county jail for vagrancy, and in so doing it palpably misstates the law. Our statute (section 3647) specially confers jurisdiction of the offense of vagrancy on justices of the peace, and authorizes the commitment of the offend-

er; but this instruction states that such a commitment is in itself false imprisonment. To illustrate the falsity of the statement contained in the instruction, the plaintiff might have been imprisoned in the Albany county jail upon a commitment or *mittimus* issued by Justice of the Peace Mechum, and that commitment might have been in pursuance of a sentence of a justice of the peace sentencing the plaintiff to be imprisoned for the crime of vagrancy, and still the proceedings before the justice and the imprisonment might in all respects have been in strict conformity to law. The language of the instruction does not necessarily refer to an unlawful sentence, for it is broad enough in its terms to include a sentence which is entirely lawful. The only intimation found in the instruction as to the character of the sentence therein referred to is in the use of the phrase, "a supposed or alleged sentence;" but this expression can in no manner be construed to mean, or be equivalent to, a void or unlawful sentence. As before shown, a justice of the peace has jurisdiction of the offense, which is the subject-matter, so that if he obtain jurisdiction over the person of the offender he may then lawfully impose the imprisonment. In this case, one point of contention was as to whether the plaintiff had submitted himself to the jurisdiction of the justice, and this, being a question of fact, should properly have been submitted to the jury, but by the court's charge the jury was precluded from in any manner considering the matter of jurisdiction; for they were, in effect, told by this instruction that if they should find that the defendant directed the imprisonment of the plaintiff, then the liability of the defendant was established. Thus the court determined for the jury that the justice was without jurisdiction of the person, and that the imprisonment was unlawful. The instruction complained of was clearly erroneous as a proposition of law, and could not have done otherwise than mislead the jury. The giving of the instruction having been complained of in the motion for a new trial, that motion should have been sustained. The judgment of the court below is reversed, and a new trial ordered.

CORN, J., concurs. SAUFLEY, J., dissents.

(3 Wyo. 333)

PALMERSTON v. TERRITORY.

(Supreme Court of Wyoming. Feb. 5, 1890.)

CRIMINAL LAW—REASONABLE DOUBT.

An instruction that "the proof is deemed sufficient when the evidence is sufficient to impress the judgment of ordinarily prudent men with a conviction on which they would act in an important affair of their own" does not correctly state the law of reasonable doubt.

Error to district court, Albany county.

John Charles Thompson, for plaintiff in error. Atty. Gen. Donzelmann, for the Territory.

CORN, J. Plaintiff in error was tried at the March term, 1889, of the Albany county district court, upon an indictment for burglary, found guilty, and sentenced to the penitentiary. He brings the case to this court by petition in error.

Among other errors assigned in the motion for a new trial, it is alleged that the court erred in giving to the jury the following instruction, over the objection of the defendant: "The 'reasonable doubt' which entitles an accused to acquittal is a doubt of guilt reasonably arising from all the evidence in the case. It does not mean a doubt arising from mere caprice or groundless conjecture. The proof is to be deemed sufficient when the evidence is sufficient to impress the judgment of ordinarily prudent men with a conviction on which they would act in an important affair of their own." The court, in another part of the charge, instructed the jury that "the defendant is presumed to be innocent of the offense charged; and, unless you believe that he has been proven, beyond a reasonable doubt, to be guilty, you should acquit him." The instruction complained of is an explanation of the instruction last referred to, and a definition of the character or degree of certainty which must exist in the minds of the jury to justify a conviction, and is the only instruction upon the subject.

What is a proper definition of a "reasonable doubt" is a question which has been much discussed by law-writers, and in the decisions of the courts; and a correct statement of the principle is not by any means confined to one form of words. But what an instruction must contain to correctly state the principle seems to be quite well settled. We do not think the instruction in question correctly states the law. The jury are instructed that "the proof is deemed sufficient when the evidence is sufficient to impress the judgment of ordinarily prudent men with a conviction on which they would act in an important affair of their own." Now, it is plain that not only ordinarily prudent men, but men of the highest prudence and sagacity, often do and must choose between two lines of conduct, and act in matters of the greatest importance, upon a very slight preponderance of evidence. There are many exigencies, arising in the most important affairs of life, when the only thing reasonably certain is that not to act at all will be disastrous. The more prudent and sagacious a man is under such circumstances, the more promptly he will act, using his best judgment at the moment, though he be by no means convinced beyond reasonable doubt of the correctness of his action. But no such exigency can lawfully arise in the discharge of the duties of a juror in a criminal case. Where the evidence only preponderates, but falls short of moral certainty, he is not at liberty, under the law, to render a verdict which seems to him, from all the evidence, most likely to be the true one, although, in an important affair of his own, such weight of evidence might be ample to

decide his action. But, upon the contrary, it is his duty, in such a case, to render a verdict which may seem to him to be against the weight of the evidence. It does not mend the matter to urge that the use of the word "conviction" in the instruction precludes the idea of such uncertainty, and such want of evidence to act upon. If the instruction were simply that "the proof is deemed sufficient when the evidence is sufficient to impress the judgment of ordinarily prudent men with conviction," it might be without objection as a legal proposition, though it might not be deemed to greatly illuminate the subject. But it immediately proceeds to state what character or degree of conviction is sufficient; and the degree of conviction which is said to be sufficient falls far short of "moral certainty," or "conviction beyond reasonable doubt." That is, it is such a conviction as an ordinarily prudent man would act upon in an important affair of his own; and yet such a man would act, in such a case, although his conviction was not beyond reasonable doubt. We think the true doctrine is well expressed in an Indiana case, where it is said that "the jury must be so convinced by the evidence * * * of the defendant's guilt that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests, under circumstances where there was no compulsion resting upon him to act at all." *Bradley v. State*, 31 Ind. 492.

In this case the conviction was had upon the testimony of an accomplice, almost entirely uncorroborated; and the slight evidence in corroboration, while apparently entitled to full credit, was not inconsistent with the defendant's entire innocence of the charge. In such a case the statement of the law should be accurate. The judgment is reversed, and the case remanded for a new trial.

(9 Mont. 191)

KIRCHER v. CONRAD et al.

(*Supreme Court of Montana*. Jan. 6, 1890.)

SALE—CAVEAT EMPTOR—EXPRESS WARRANTY.

Plaintiff saw some wheat in defendants' store, and said that if he knew that it was spring wheat he would buy it for seed. He was told by the clerk that they were selling it for chicken feed, but they could find out if it was spring wheat. One of the proprietors then said he would write and inquire. Plaintiff asked once or twice if they had heard about the wheat, and was told they had not. Again he inquired, and the clerk said: "We have. It is spring wheat." Held, that the representations of the clerk did not amount to an express warranty that it was spring wheat, and that the rule of *caveat emptor* applied.

Appeal from district court, Custer county; M. J. LIDDELL, Judge.

J. W. Strecell and Jas. H. Garlock, for appellant. Geo. F. Shelton, for respondents.

BLAKE, C. J. This is an appeal from the order of the court below, in granting the motion of the respondents, who were the defendants in the action, for a new trial. The

questions to be investigated may be readily understood by stating the substance of the pleadings.

The complaint alleges that the defendants were merchants in 1887, and that plaintiff purchased, through their "duly-authorized agents and clerks," 81 bushels of wheat, to be used by him in the spring of 1887 for seed; that he informed the agents of the defendants that he desired the wheat to be spring wheat for seed, to be sown that year; that defendants, by their agents, sold and delivered said wheat to plaintiff, and represented and warranted the same to be spring wheat, and fit to be used for sowing in the spring of 1887; that defendants charged plaintiff therefor \$85, which plaintiff agreed to pay; that plaintiff believed the representation of the defendants, that said grain was spring wheat, to be true, and sowed the same in the spring of 1887; that said wheat was not spring, but winter, wheat, and therefore failed to produce any crop; and that plaintiff lost his entire crop of wheat for the season of 1887, and his labor in putting said seed into the ground, and was damaged in the sum of \$1,585. The answer denies that plaintiff purchased any seed wheat, and alleges that he bought a quantity of wheat which was kept and sold as "chicken feed," and that plaintiff was informed of the character and quality thereof at the times alleged in the complaint; denies that the agents or clerks of the defendants represented or warranted to plaintiff that said wheat was spring wheat, and says that the clerks and agents of defendants told plaintiff that they did not know whether the grain was spring or winter wheat; denies that the agents or clerks of defendants made any representations to plaintiff by which plaintiff was misled or deceived as to the kind or character of said wheat; alleges that said clerks and agents told plaintiff, at the time and before he bought the wheat, that they did not know whether it was winter or spring wheat, and that defendants had bought and sold said wheat for feed, and no other purpose, and defendants could not warrant the wheat in any manner as suitable for seed; and denies that plaintiff was misled, or deceived, or damaged by any representations of the clerks or agents of defendants. The replication denies the averments of the answer. The testimony at the trial tended generally to prove the allegations of the respective parties in their pleadings, and was conflicting. The jury found for the appellant, who is the plaintiff in the action. The transcript does not disclose the grounds upon which the motion for a new trial was granted, and which may have been errors in law, or the insufficiency of the evidence to justify the verdict. If they were founded upon the last, then, as the testimony is conflicting, we must follow the case of *Chauvin v. Valiton*, 7 Mont. 581, 19 Pac. Rep. 215, and affirm the order appealed from.

In conformity with the best practice, which has prevailed in this court, and in order to

settle the law of the case upon another trial, we deem it necessary and proper to review the questions which have been submitted, and decide every subject of controversy. It is admitted that the respondents were dealers in general merchandise at the times which are mentioned in the pleadings; that one Tompkins was employed by them as clerk and salesman, and was in charge of their business, when the wheat was delivered to the appellant; that the grain was subject to the inspection of the appellant, who bought the same in the belief that it was suitable for seed in the spring of 1887; that no person can ascertain by inspection the difference between spring and winter wheat; that this grain was winter wheat; and that the appellant suffered damages through the total failure of his crop. We shall assume, for the purposes of the discussion, that the testimony of the appellant is a narration of the facts, and can thereby distinguish some of the cases which have been cited by counsel as authority from that at bar. Kircher testified that, in the fall of 1886, he looked at some wheat in the store of the respondents, and asked what kind it was. Tompkins said he didn't know, and that he sold it for chicken feed. Kircher then said that, if he knew it was spring wheat, he would buy 60 or 70 bushels; and that Tompkins replied, "If you want to buy that much, we can find out." Kircher said, "If you can do that, find out;" and Tompkins told him "he would write and find out." That Tompkins then took Kircher back to Flager, in his office. That Flager, one of the respondents, told Kircher "he would write and find out." That afterwards Flager told Kircher "he did not have an answer, but expected one in a short time." That afterwards Flager said "he did not have an answer yet, but expected one every day." That in March, 1887, Kircher went into the store, and said to Tompkins, who was then in charge of the business of the respondents: "How about that wheat? Have you got an answer yet?" He said: "We have. It is spring wheat. We have just got a load of it." Kircher said: "Are you sure it is spring wheat?" and Tompkins replied: "What do you take me for?" The appellant then bought the wheat, but did not receive any statement or memorandum in writing concerning the transaction.

Did Tompkins, under these circumstances, and by virtue of his employment, have the authority to make this warranty that the grain, which was purchased by the appellant, was spring wheat? This court has adopted the rule, which is not disputed, and has held, that the principal is responsible for the acts of his agent when they have been done within the scope of his authority, and that his liability will not be enlarged. *Herbert v. King*, 1 Mont. 475; *Bank v. Mining Co.*, 3 Mont. 146; *Bank v. Hall*, 8 Mont. 341, 20 Pac. Rep. 638. The power of Tompkins is also defined in the following authorities: In *Upton v. Suffolk Co. Mills*, 11 Cush. 586, Mr. Justice MET-

CALF says: "A general agent is not, by virtue of his commission, permitted to depart from the usual manner of effecting what he is employed to effect. 3 Chit. Law of Com. & Man. 199. When one authorizes another to sell goods, he is presumed to authorize him to sell in the usual manner, and only in the usual manner in which goods or things of that sort are sold. Story, Ag. § 60. See, also, *Shaw v. Stone*, 1 Cush. 228. The usage of the business in which a general agent is employed furnishes the rule by which his authority is measured." Mr. Benjamin, in his treatise on Sales, says: "The general rule is, as to all contracts including sales, that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual." 2 Benj. Sales, (3d Eng. Ed.) § 945. See, also, *Pickert v. Marston*, 68 Wis. 465, 32 N. W. Rep. 550; *Smith v. Tracy*, 36 N. Y. 79; *Palmer v. Hatch*, 46 Mo. 585; *Stewart v. Woodward*, 50 Vt. 78; *McCormick v. Kelly*, 28 Minn. 135, 9 N. W. Rep. 675; 2 Add. Cont. 988. Many of the cases which are relied on by counsel to establish the right of Tompkins to warrant the quality of the wheat are inapplicable to the facts before us. The foregoing testimony of Kircher proves that the respondent Flager and Tompkins refused, upon several occasions, to express any opinion as to the character of the grain, except that it was chicken feed. In reply to the request of the appellant, Flager promised to write a letter and find out what he could upon this point. The conversation between Tompkins and Kircher, in which the words constituting the alleged warranty were used, was in logical effect a statement that an answer had been received by Flager, from some person who is not affected by these proceedings, conveying the information that the grain was spring wheat. Tompkins was not a party to this correspondence. The complaint does not allege that Tompkins or the respondents have been guilty of fraudulent conduct, and the gist of the action is the warranty by the agents of the respondents that the grain referred to was spring wheat. No form of words is essential to constitute an express warranty in the sale of chattels. There is no controversy relating to these principles.

Do the conditions which have been presented subject the appellant to the rule of *caveat emptor*? The case of *Lord v. Grow*, 39 Pa. St. 88, is on all fours with the case set forth in the pleadings of the appellant. A portion of the statement of facts is as follows: "On the 9th of April, 1859, the plaintiff went to the defendants, who are dealers in grain, for the purpose of purchasing some seed spring wheat for sowing. He asked F. P. Grow, one of the defendants, whether he had any good seed spring wheat. Mr. Grow answered in the affirmative. * * * The plaintiff took the wheat, which he and the miller thought was spring wheat, (there being both kinds in the mill,) and sowed it; but it proved to be winter wheat." Mr. Justice

STRONG, in the opinion, says: "We have here the bald question whether, in sales of personal property on inspection, without express warranty, the law presumes an engagement on the part of the vendor that the article sold is of the species contemplated by the parties.

* * * The tendency of the modern cases has also been to the doctrine that, in sales of articles in regard to which the seller is presumed to have superior knowledge, there is a warranty that the thing sold shall be in kind what it is represented to be. Illustrations of this are found in sales of wine by wine merchants, of jewels by a jeweler, and of medicines by a druggist. In this class of cases the buyer and the seller do not deal on equal terms. * * * The case before us is not one of this character. The wheat was not sold by sample, and neither the contract of sale, nor the identity of the article, was defined by a bill of parcels, nor was the subject of the contract a manufactured article, ordered and supplied for a particular purpose. True, the difference between spring wheat and other wheat is not ascertainable by inspection, and it may be assumed that they are not the same in species. Still, the case is one of a purchase on inspection of an article, of which the vendor's means of knowledge were no greater than those of the vendee.

* * * To the purchaser of goods on inspection the language of the law is *caveat emptor*. There may be a few exceptions, such as we have referred to, but a sale of such an article as wheat is not one of them. When the purchaser has seen it, and gets what he saw, no warranty is implied that it is properly described by the name which the vendor gives to it." The authorities hold that it is the duty of the buyer to make an inspection of goods, and the consequence of any omission so to do must be suffered by him. In *Barnard v. Kellogg*, 10 Wall. 383, Mr. Justice DAVIS says: "No principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of *caveat emptor* applies. Such a rule, requiring the purchaser to take care of his own interest, has been found best adapted to the wants of trade in the business transactions of life. And there is no hardship in it, because, if the purchaser distrusts his judgment, he can require of the seller a warranty that the quality or condition of the goods he desires to buy corresponds with the sample exhibited." See, also, *Reynolds v. Palmer*, 21 Fed. Rep. 433, note by Lawson, 439; *Lindley v. Hunt*, 22 Fed. Rep. 52; 1 Pars. Cont. (5th Ed.) 577; *Story, Sales*, (4th Ed.) §§ 349, 378; *Bid. War. § 5*; 2 *Benj. Sales*, (6th Amer. Ed.) 843, note 23. The case of *Lord v. Grow*, supra, is doubted by Mr. Biddle, and the American edition of the work on Sales by

Mr. Benjamin. *Bid. War. § 125*; 2 *Benj. Sales*, (6th Amer. Ed.) 843, note 23. But other text-writers have cited it with approval, and the same court has reiterated its doctrine in the recent case of *Shisler v. Baxter*, 109 Pa. St. 443. It appeared that Shisler purchased of Baxter what both parties called "Wakefield Cabbage" seeds, which cannot be distinguished by their appearance. After referring to *Lord v. Grow*, supra, Chief Justice MERCUR says: "The vendee had just as much knowledge in regard to the kind and quality of the seed as they (the vendors) had. In such case, in the absence of express warranty, the exemption of liability of the vendor is too well settled to need any further citation of authorities." The application of these principles to the evidence of the appellant is sufficient to justify the court below in sustaining the motion for a new trial, and virtually disposes of the action, unless additional facts are shown.

While the form of the warranty is unimportant, the circumstances attending it must be critically examined. Prof. Parsons expounds the law on this subject, and writes: "All warranties, however expressed, are open to such construction from surrounding circumstances, and the general character of the transaction, and the established usage in similar cases, as will make the engagement of warranty conform to the intention and understanding of the parties: provided, however, that the words of warranty are neither extended nor contracted in their significance beyond their fair and rational meaning. For these words of warranty are usually subjected to a careful, if not a precise and stringent, interpretation, as it is the fault of the buyer who asks for or receives a warranty if it does not cover as much ground and give him as effectual protection as he intended." 1 Pars. Cont. (5th Ed.) 576. When the evidence of the appellant is subjected to this test, it is difficult to say that Tompkins made a warranty in any form which would be recognized by the courts. It was the duty of the appellant to protect his interests by securing a bill of parcels which described in certain terms the wheat he purchased. The authorities hold that Tompkins had the power under his employment to execute this instrument, and thereby make an express warranty of the quality of the grain. The secret instructions of the respondents to their salesmen, which were not known by the appellant, cannot affect the transaction, and were properly excluded by the court below. It is therefore adjudged that the order appealed from be affirmed, with costs.

HARWOOD and DEWITT, JJ., concur.

(9 Mont. 167)

STATE v. AH JIM.

(Supreme Court of Montana. Jan. 14, 1890.)

INDICTMENT AND INFORMATION — CONSTITUTIONAL LAW—EX POST FACTO LAWS.

1. Const. Mont. art. 3, § 8, providing that all criminal actions in the district court, except those

on appeal, may be prosecuted by information, etc., cannot become operative until the enactment by the legislature of laws defining the details which affect the exercise, jurisdiction, and limitations of the procedure, and the rights and pleadings of the state and the accused, so that the courts may be enabled to carry the provision into effect.

2. As Const. Mont. art. 3, § 8, declaring that prosecutions in criminal actions in the district court may be by indictment, provides that a grand jury shall consist of seven persons, of whom five must concur to find an indictment, such provision executing itself, without legislative enactment, and as the criminal practice act of Montana territory relative to indictments is not changed in any other respect by the adoption of the state constitution, all offenses in the nature of felonies, or having their origin in the district court, must, in the absence of further legislation, be prosecuted under said act by indictment found by a concurrence of five members of a grand jury consisting of seven persons.

3. The constitutional provision reducing the number of grand jurors required to investigate criminal charges is not *ex post facto* in respect to an offense committed before the constitution was adopted.

Appeal from district court, Lewis and Clarke county.

Henri J. Haskell, Atty. Gen., and *C. B. Nolan*, Co. Atty., for the State. *C. C. Newman* and *A. J. Craven*, for respondent.

BLAKE, C. J. This is an appeal from the order of the court below sustaining the motion of the respondent to quash the information which was filed December 3, 1889, by the county attorney of the county of Lewis and Clarke. The respondent is charged with the commission of the offense of murder in the first degree upon the 25th day of August, 1889. After the arraignment of the accused a motion was made by his counsel, and sustained by the court, to quash the information, "because the county attorney in and for Lewis and Clarke county, Montana, had no authority to make or file the said information in the said action."

It is admitted that the state of Montana was legally organized on the 8th day of November, 1889, and that the crime which is described in the information was committed within the territory of Montana. The questions which have been discussed on this hearing relate to this interpretation of the following clause of the eighth section of the third article of the constitution: "All criminal actions in the district court, except those on appeal, shall be prosecuted by information after examination and commitment by a magistrate, or after leave granted by the court, or shall be prosecuted by indictment without such examination or commitment, or without such leave of the court. A grand jury shall consist of seven persons, of whom five must concur to find an indictment. A grand jury shall only be drawn and summoned when the district judge shall, in his discretion, consider it necessary, and shall so order."

In the states which are governed by constitutions containing similar provisions regarding the procedure by information, statutes have been enacted to enable the courts

to secure their enforcement. The legislative assembly of Montana have not passed any law of this nature, although it is contended that the same result has been attained by the adoption of the common law of England, when the same "is applicable and of a general nature, and not in conflict with special enactments." Comp. St. div. 5, § 201. This position is unsound, for two reasons. The criminal practice act provides ample remedies for the execution of criminal laws, and necessarily conflicts with the proceedings by information at common law. In the next place, the use of this remedy has been limited to certain cases, and has not embraced felonies. Blackstone treats of this subject, and says: "There can be no doubt but that this mode of prosecution by information or suggestion, filed on record by the king's attorney general, or by his coroner or master of the crown office in the court of king's bench, is as ancient as the common law itself. * * * But these informations, of every kind, are confined by the constitutional law to mere misdemeanors only; for, wherever any capital offense is charged, the same law requires that the accusation be warranted by the oath of twelve men before the party shall be put to answer it." 4 Bl. Comm. 309, 310. In *Ex parte Wilson*, 114 U. S. 423, 5 Sup. Ct. Rep. 938, Mr. Justice GRAY delivers the opinion, and says: "By the law of England, informations by the attorney general, without the intervention of a grand jury, were not allowed for capital crimes, nor for any felony, by which was understood any offense which at common law occasioned a total forfeiture of the offender's lands or goods, or both."

There are some provisions of the constitution which have a direct bearing upon the case at bar, and should be considered. "No person shall be deprived of life, liberty, or property without due process of law." Article 3, § 27. "All criminal laws enacted by the legislative assembly of the territory of Montana, and in force at the time the state shall be admitted into the Union, and not inconsistent with this constitution, or the constitution or laws of the United States of America, shall be and remain in full force as the laws of the state until altered or repealed, or until they expire by their own limitation." Article 20, schedule, § 1. "No crime or criminal offense committed against the laws of the territory of Montana shall abate, or in any wise be affected, by reason of the change from a territorial to a state form of government; but the same shall be deemed and taken to be an offense against the laws of the state, and the appropriate courts of the state shall have jurisdiction over, and to hear and determine, the same." Id. § 3. "Prosecutions for criminal offenses against the laws of the territory of Montana, pending at the time the state shall be admitted into the Union, shall not abate; but the same shall continue and be prosecuted in the name of the state of Montana, and the title

of every such action shall be changed to conform to this provision." Id. § 7. "Parties who at the time of the admission of the state into the Union may be confined under lawful commitments, or otherwise lawfully held to answer for alleged violations of any of the criminal laws of the territory of Montana, shall continue to be so confined or held until discharged therefrom by the proper courts of the state." Id. § 8. The constitution prescribes the following rule for its construction: "The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." Id. § 29. We are aided in giving effect to the foregoing sections of the schedule by the introductory clause: "That no inconvenience may arise by reason of changing from a territorial to a state form of government, it is declared as follows."

It is evident that the clause of the constitution respecting the information does not execute itself. All the details affecting the exercise, jurisdiction, and limitations of the procedure, and the rights and pleadings of the state and accused, must be defined by the legislative department. It has been observed that the states which have abolished the grand jury system have enacted laws to carry into effect this provision of the constitution, and the following authorities will show their importance: *Rowan v. State*, 30 Wis. 129; *State v. Sloan*, 65 Wis. 647, 27 N. W. Rep. 616; *Kalloch v. Superior Court*, 56 Cal. 229; *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. Rep. 111, 292; *State v. Boswell*, 104 Ind. 541, 4 N. E. Rep. 675. In *Kalloch v. Superior Court*, supra, the court says: "But the constitution of this state has made provision for this form of prosecution, and the legislature has furnished the machinery to enforce it. In our opinion the proceeding is a legal and constitutional one." In *State v. Boswell*, supra, the court says: "It seems clear to us that one who is tried and convicted upon an information provided for by a constitutional state statute is not deprived of his liberty without due process of law; for we perceive no reason for doubting the soundness of the proposition that proceedings founded upon an information provided for by a legally enacted statute do constitute due process of law."

The solution of the legal problem relating to the information in this case includes also the question as to the mode of prosecuting or investigating the charge against the respondent under the state government. The court below did not discharge the defendant, but ordered him to be remanded to the custody of the sheriff to await its further action. When all the provisions of the constitution which have been cited are construed together, it will be apparent that the criminal practice act relative to indictments remains in full force, with two exceptions. The number of the grand jury has been reduced from 16 to 7, and the concurrence of 5 members is required to find an indictment. In these inci-

dents the constitution executes itself; and, in the absence of further legislation, all offenses of the grade of felonies, or having their origin in the district court, must be inquired into in this manner.

It has been maintained that the substantial rights of the respondent will be thereby impaired, and that this ruling, in its consequences, is *ex post facto*. The leading authority upon this matter is the case of *Kring v. Missouri*, 107 U. S. 221, 2 Sup. Ct. Rep. 443. Mr. Justice MILLER, in delivering the opinion of the court, declares in the following sentence the law upon the decisive point: "Tested by these *criteria*, the provision of the constitution of Missouri which denies to plaintiff in error the benefit which the previous law gave him, of acquittal of the charge of murder in the first degree on conviction of murder in the second degree, is, as to his case, an *ex post facto* law, within the meaning of the constitution of the United States." The same principle is recognized in *Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. Rep. 202, and it is also held that statutes which remove "existing restrictions upon the competency of certain classes of persons as witnesses relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury can be made applicable to prosecutions, or trials thereafter had, without reference to the date of the commission of the offense charged." In *People v. Campbell*, 59 Cal. 243, the court says: "It is not an uncommon practice to change the number of grand jurors required to investigate criminal charges, but we have never heard of the right of the legislature to make such changes questioned; neither has it ever been claimed that the charge must be investigated by the precise number of grand jurors of which that body was composed at the time the act was committed." See, also, *Cooley, Const. Lim.* 272, 331, 332; *People v. Mortimer*, 46 Cal. 114; *Bish. St. Crimes*, §§ 178, 180. Those authorities support the proposition that the substantial rights of the respondent will not be prejudiced by the submission of his case to the grand jury which has been created by the constitution. It is therefore adjudged that the order appealed from be affirmed, with costs. All concur.

(2 Idaho [Hasb.] 632)

DUNNIWAY *et al.* v. LAWSON *et al.*

(Supreme Court of Idaho. Jan. 29, 1890.)

APPEAL—TRANSCRIPT—DISMISSAL.

1. In an action where relief is granted both parties, on motion to dismiss the appeal under rule 3, supreme court, the certificate of the clerk below, under rule 4, not showing the nature and substance of the judgment appealed from, held, that such certificate will not justify a dismissal of the appeal.

2. Also that rule 3 is directory, and gives no right to a party to demand its enforcement.

3. Also that the court will not dismiss an ap-

peal under rule 3, unless it be made to appear that justice requires such dismissal.

(*Syllabus by the Court.*)

Appeal from district court, Custer county.
On motion to dismiss.

Angel & Sullivan, for respondents. *J. T. Morgan*, for appellants

BERRY, J. This is a motion by respondents to dismiss an appeal in the above-entitled action, which motion is made under rules 2, 3, and 4 of this court, and upon the certificate of the clerk of the district court of Custer county. The rules are as follows: *Rule 2.* "When an appeal or writ of error has been perfected thirty days before the commencement of the next regular or adjourned term of this court, the transcript of the record shall be filed at least three days before the first day of such regular or adjourned term." *Rule 3.* "If the transcript of the record is not filed within the time prescribed [by rule second.] the appeal or writ of error may be dismissed, on motion, without notice, on Monday of the week during which the cause is subject to call, under rule eight. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party. Unless so restored, the dismissal is final, and a bar to any other appeal or writ of error from the same order or judgment." *Rule 4.* "On such motion there shall be presented the certificate of the clerk below, certifying the amount or character of the judgment; the date of its rendition; the fact and date of the filing of the motion of appeal, or issuing of the writ of error; the fact and date of the filing; the undertaking on appeal or writ of error; the fact and time of the settlement of the statement, if there be one; and also that the appellant has received a duly-certified transcript, or that he had not requested the clerk to certify to a correct transcript of the record; or, if he has made such request, that he has not paid the fees therefor, if the same have been demanded."

It is clear that rule 3 is more in the nature of a statement, or notice by the court, of what it will be likely to do under a given statement of facts, than of a declaration of rights of a party litigant. The right in the court to dismiss, when in its opinion the interests of justice demand such action, and only when it is so demanded, puts upon the party requesting such action the burden of convincing the court, by a proper showing of facts, that the interests of justice require such action. Rule 4 seems specially intended to effect that purpose. The certificate of the clerk is to inform the conscience of the court. The clerk of the court below makes his certificate in substance as follows: "That on the 2d day of October, 1889, judgment was rendered in said district court, in favor of the plaintiffs * * * and against said defendants, for costs of plaintiffs in said action amounting to the sum of \$358.95, and that each of said defendants be adjudged to

pay one-third thereof, to-wit, the sum of \$286.32, and that Paul P. Lawson and Chris. Rogers have, and each of them has, the right to the use of 10 inches of the water of Alder creek, a tributary of Big Lost river, and to use no more than 10 inches each, measured under a four-inch pressure, unless there shall be more than 220 inches of water running in said creek; and I further certify that on the 29th day of November, 1889, I received an order made by C. H. Berry, judge of said district court, ordering and directing that all papers and files, including evidence, in above cause, be sent to the clerk of the district court at Blackfoot, which was accordingly done; and I further certify that no notice of appeal from the judgment entered in said cause on the 2d day of October, 1889, has been filed in this office, nor has any been presented at this office for filing, nor has any statement on appeal from said judgment been settled and filed in this office, nor has any person requested that a transcript of the record of said action be made out and certified to the clerk of said district court, and sent such request to this office, but on the 5th day of December, 1889, an undertaking for stay of execution was made out by Paul P. Lawson, one of the defendants in said action, in the sum of \$600, being more than double the amount named in said judgment, and was duly filed in this office according to law."

It will be observed that this certificate, while it states many facts, states few required by rule 4. Incidentally upon the argument, however, it appeared that a notice of appeal by the defendants from the judgment had been served more than 30 days prior to the first day of this term of the supreme court, and that an appeal-bond, regular in form, had been filed in the office of the clerk in the court below; also that the action in which the judgment was entered was an action in equity, in which a decree was made in favor of the respondents in those things constituting the subject-matter of the said action. Aside from those general facts, this court is not further informed in the case. It is not alleged that any hardship to the respondents exists by reason of the failure to file in time the transcript on appeal; and if the respondents are not being injured, *prima facie* at least, they have no cause to complain. But the appellants' counsel gives reasons for the delay. He alleges that, in addition to the appeal from the judgment, it is his purpose to move for a new trial of the case, and thereby reach a more comprehensive remedy than would alone be an appeal from the judgment, or the bringing into this court of the judgment-roll; that, in case his motion for a new trial is denied, he desires to appeal the order of denial; and that, if he gets a new trial, the necessity for any appeal may be avoided. He also avers that the statement of his case, on which he proposes to move, on account of causes beyond control, is not settled, or even yet made; and that, in view of such facts, the court below has

extended the time for settlement of a statement to a time not yet expired.

There is nothing to cast doubt upon the entire good faith of these allegations, and in themselves they are certainly consistent with fairness and the interests of justice. We do not think, from this stand-point, that we are called upon to exercise this reserved power, and summarily dismiss the appeal. But beyond this, as we have seen, the respondents' counsel has not brought himself within the conditions prescribed by rule 4. The certificate does not even show the nature of the judgment appealed from, except in the single matter of costs and certain minor provisions in favor of the appellants. In the absence of a more full and complete showing, the court is precluded, by its own rules, from dismissing the appeal as prayed, and the motion to dismiss must be denied.

(2 Idaho [Hasb.] 627)

COFFIN et al. v. EDGINGTON et al.

(Supreme Court of Idaho. Jan. 28, 1890.)

APPEAL—DEATH OF PARTY—NOTICE.

1. After judgment was rendered, but before notice of appeal was filed or served, one of the defendants died. No substitution having been made, held, that all proceedings on the appeal were null and void as to the representatives of the deceased defendant.

2. If a party to an action die after the rendition of judgment, and before filing and serving notice of appeal, the authority of the deceased's attorney to act terminates, and any subsequent action of the attorney, before substitution, will not bind the representatives of the deceased, or any other party in interest.

3. Any party to an action, whether plaintiff or defendant, may appeal; but the notice of appeal must be served on all parties who would be affected by any order of the appellate court, whether said parties be plaintiffs or defendants or intervenors.¹

(Syllabus by the Court.)

Appeals from district court, Alturas county.

Kingsbury & McGowan, for appellants.
V. S. Anderson, for respondents.

SWEET, J. These are appeals from the second district. It is unnecessary to make a statement of the facts involved in the case. It is here presented on a motion by the respondents to dismiss the appeals, and a review of the proceedings in connection therewith will enable us to dispose of the issue at bar.

On the 9th day of October, 1889, E. C. Coffin, R. W. Berry, J. M. Burkett, and W. H. Redway, doing business under the firm name of Coffin & Co., obtained a joint and several judgment against A. P. Turner, T. J. Edgington, W. H. Nye, V. S. Anderson, and J. S. Lewis for the sum of \$933.35, with interest. On the 11th day of October, 1889, defendants filed and served their notice of appeal. Defendants appeal from the judgment, as well as from the order overruling

the motion for a new trial. The appeals were perfected, and the cause was regularly called for hearing in this court. The respondents submit two motions; one of them being a motion to dismiss both appeals. The other asks for an order of this court affirming the judgment of the court below as against appellants T. J. Edgington and J. S. Lewis. The motions were not presented in this order; but, for reasons that will appear, we consider the second motion first. The second motion is based upon an affidavit made by R. W. Berry, one of the plaintiffs, in which he sets forth the fact that after the entry of the judgment in the court below, "and before the notice of appeal herein was filed or served, and before any of the proceedings on the said appeals were had or taken," defendant Lewis died. The facts set forth in the affidavit are admitted. The affidavit of Berry was filed in this court before the cause was called for argument. This was the proper time to direct the attention of the court to the fact, and the manner adopted was approved in *Judson v. Love*, 35 Cal. 467. It further appears from the transcript, as well as from the admissions of counsel, that no substitution of the personal representatives of the deceased defendant was had in the lower court prior to the proceedings had on appeal, and that the attorney for Lewis acted in behalf of the latter's representatives, in said proceedings, without authority.

The question presented is as follows: Has this court jurisdiction to hear and determine this appeal, in view of the fact that all of the proceedings taken and had on the appeal were subsequent to the death of said defendant Lewis? We think not. In the case of *Sheldon v. Dalton*, 57 Cal. 20, the court say: "There were two plaintiffs in this case, one of whom died before this appeal was taken. There was no suggestion of the death, and no substitution of the personal representative of the deceased plaintiff. It is conceded that the appeal was prematurely taken, and the motion to dismiss is granted." In the case of *Judson v. Love*, 35 Cal. 466, the same question was involved. Judge SAWYER, speaking for the court, uses the following language: "A motion is made to dismiss the appeal as to the defendant Love, based—*Firstly*, upon exceptions to the transcript; and, *secondly*, upon affidavits filed showing that defendant Love died on the 15th of March, 1866, after the rendition of the verdict in the court below, and before any notice of intention to move for a new trial was given, on the ground that all subsequent proceedings, and motion for new trial, and the attempt to appeal, are void and ineffectual for any purpose as to said defendant Love and his successors in interest, for want of any proper party to the suit, or of any person upon whom a valid service of papers could be made." Again, the court say: "It is clear that all these proceedings, except the entry of judgment on the verdict before rendered, had since the death of defendant Harlow S.

¹ See, as to adverse parties, *Fox v. West*, 1 Idaho, 782; *Jones v. Quantrell*, 9 Pac. Rep. 418.

Love, on the 15th day of March, 1866, are irregular and void as to him, and his successors in interest. There was from that time forth no party before the court as to the interest of Love in the matter in controversy, and no one authorized to represent it. The power of attorney necessarily ceased with the death of the principal. No further proceedings could be had without bringing in the representatives of Love. The practice act authorizes a judgment to be entered upon a verdict when a party dies after verdict and before judgment, * * * but this is as far as it goes. *Warren v. Eddy*, 13 Abb. Pr., 30, is in point. Notice of argument had been served on the attorney of defendant after the death of the latter. The court say: 'At the time of the service of the notice, J. W. Culver could not act for a dead man, and he had no authority to act for or represent the estate. The order of the general term for affirmance by default, founded on such notice, was therefore irregular, inasmuch as it was made without notice to any one representing the estate of Daniel F. Eddy.' Again, the court say: "His former attorney could not give a notice of motion for new trial or of appeal that would be effectual, for he had ceased to have any authority in the matter. If he has no authority to give such notice, he has none to receive one, or act upon it, in the further stages of the proceedings, when it is received. He has become a stranger to the proceedings." It is unnecessary to quote authorities further upon this point. The principle is well known and thoroughly established. It is evident, therefore, that no proceedings can be had in this court affecting the interests of the representatives of the deceased defendant.

The next question is, could an appeal be taken by the defendants in this case before a substitution was made? It would seem to be impossible. The judgment rendered against defendants was joint and several in its character. No decision of this court can be rendered affecting one of the defendants without affecting all. This fact makes them adverse parties, within the statute. It may be worth while to define the meaning of "adverse party," as contemplated by law. In *Senter v. De Bernal*, 38 Cal. 640, the court say: "The question is as to the meaning of the words 'adverse party,' as here used; and as to that we think there can be no rational doubt. Every party whose interest in the subject-matter of the appeal is adverse to, or will be affected by, the reversal or modification of the judgment or order from which the appeal has been taken, is, we think, an 'adverse party,' within the meaning of these provisions of the Code, irrespective of the question whether he appears upon the face of the record in the attitude of plaintiff or defendant or intervenor. Such was declared to be the meaning of this language as used in the statutes and rules of the court of chancery of New York prior to v.23p.no.1—6

the adoption of the Code in that state." Our statute allows an appeal to any and every person who may feel aggrieved; but it requires of the appellant that he shall serve a notice of his appeal upon all parties who may be affected by any decision the appellate court may render affecting the interests of the parties. This cause clearly comes within the rule, as any decision affecting the interests of the representatives of Lewis must certainly affect the other defendants to the action. In the case of *Thompson v. Ellsworth*, 1 Barb. Ch. 627, after stating that any person may appeal, whether the judgment against him be joint or several, the court say that he is required to notify all other parties who are interested in opposing the relief which he seeks by his appeal, if they have formerly appeared in the action in the court below, or his appeal, as to those not served, will prove ineffectual; and also as to those served, if the relief sought is of such a character that it cannot be granted as to the latter without being granted as to the former, also.

It is further urged by counsel for respondents that this appeal should be dismissed for the reason that the undertaking was served prior to the notice of appeal. It is unnecessary to go into the merits of this question, inasmuch as the appeal must be dismissed for the reasons already stated.

But appellant asks that, in the event of an order of dismissal, the appeal be dismissed without prejudice. We do see any reason why the representatives of defendant Lewis, in whose interest the appeal is taken, cannot appeal to-day, if they so desire. Each and every step taken in the proceedings had on appeal is utterly void. The representatives of the deceased defendant are not bound by them. In short, no appeal has been taken. Therefore the rights of the representatives of Lewis cannot be prejudiced. However, section 4823 of the Revised Statutes provides that "the dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal." The court may, unquestionably, order the dismissal of an appeal without prejudice; and perhaps it is always safer to do so, when the facts justify it.

The motion submitted by respondents asking that the judgment be affirmed as against Lewis and Edgington is practically disposed of by the authorities cited. If this court is without jurisdiction of the defendants, it certainly cannot make an order that would be binding upon them; and that no such jurisdiction has been acquired is evident. The motion, therefore, to affirm the judgment as against Lewis and Edgington is overruled, and the motion to dismiss the appeal as to all the defendants is granted, without prejudice to another appeal.

BEATTY, C. J., and BERRY, J., concur.

(2 Idaho [Hasb.] 640)

TERRITORY v. BOWEN.

(Supreme Court of Idaho. Feb. 12, 1890.)

DISORDERLY HOUSE—EVIDENCE—GENERAL REPUTATION.

To establish the fact that a house is kept for the purpose of prostitution, evidence of its general reputation as such is competent.

(Syllabus by the Court.)

Appeal from district court, Ada county; H. W. WEIR, Judge.

D. P. B. Pride and *T. D. Cahalan*, for appellant. *R. Z. Johnson*, Atty. Gen., for the Territory.

BEATTY, C. J. The indictment in this cause charges that the appellant "did unlawfully keep a house for the purpose of prostitution," upon the trial of which she was found guilty of the charge; and thereupon the court rendered judgment against her of imprisonment in the county jail of Ada county for the period of four months, and that she be fined in the sum of \$150. From such judgment she has prosecuted her appeal to this court, and now, without further contest here, she represents that she suffered imprisonment under such judgment for the period of three weeks before being released on bonds; that she has discontinued the offense of which she was charged, and prays the court for a modification of the judgment against her. The attorney general, representing the territory, not disputing the statement made by appellant, consents to a modification of the judgment, but claims that the law as given by the trial court should be affirmed.

The section (6842) of our statutes upon which the indictment is based provides that "every person who keeps any disorderly house, or any house for the purpose of assignation or prostitution, or any house of public resort, by which the peace, comfort, or decency of the immediate neighborhood is disturbed, or who keeps any inn in a disorderly manner, is guilty of a misdemeanor." Rev. St.

Under this indictment and the statute two questions are involved: Was the house referred to in the proceedings kept for the purpose of prostitution? and did the appellant keep it?

The first question is disposed of by establishing the character of the house. To do this it is not incumbent on the prosecution to prove particular, or any, acts of prostitution committed in the house. This, in the nature of things, would be impracticable, and generally impossible. Such acts are veiled from the public eye, and are known only to the participators therein, whose interest it is to carefully conceal them. Whatever difference of opinion may have existed on this subject, it is now settled by the weight of authority that in actions of this nature evidence of the general reputation of the house is competent and admissible to establish its character; and so we hold. *People v. Buchanan*, 1 Idaho, 688; *Sara v. State*, (Tex.) 3 S. W. Rep. 339; *State v. Smith*,

(Minn.) 12 N. W. Rep. 524; *Drake v. State*, (Neb.) 17 N. W. Rep. 117; *State v. Mack*, (La.) 6 South. Rep. 808; *Graeter v. State*, (Ind.) 4 N. E. Rep. 461; *State v. Brunell*, 29 Wis. 435.

There was evidence to the satisfaction of the jury that the house was kept for the purpose of prostitution, and that the appellant was its keeper, which justifies the judgment, but, in consideration of the facts above stated, we direct that the trial court so modify its judgment that the sentence of imprisonment be remitted; but in all other respects the judgment is affirmed.

(2 Idaho [Hasb.] 636)

MURPHY v. BARTSCH.

(Supreme Court of Idaho. Feb. 12, 1890.)

PLEDGE—NEGLIGENCE OF PLEDGEE—BURDEN OF PROOF.

1. When a party takes any property as a pledge for the security of a debt, which through his gross neglect is lost, he must bear the loss, and he must exercise ordinary care and diligence in all cases.

2. When there is no contract as to the disposition to be made of the pledge, and the pledgor claims it is lost by neglect, he must show the neglect, and that damage resulted to him therefrom.

(Syllabus by the Court.)

Appeal from district court, second district.

F. A. Montardon, for appellant. *Kingsbury & McGowan*, for respondent.

BEATTY, C. J. On October 18, 1886, appellant delivered his promissory note to respondent for the sum of \$500, due the next day, and, as collateral security for its payment, transferred a demand he held against one Shaw, payable on the 1st day of November, 1886. At this latter date, Shaw was solvent, but by April following became insolvent; just when does not appear. In August, 1887, this action was commenced for the recovery of the \$500 note, to which appellant interposed the defense that respondent had neglected to collect the claim against Shaw, which by the latter's subsequent insolvency became wholly lost to appellant. Judgment followed for respondent, from which defendant appeals here, and he now claims the demand against Shaw was a bill of exchange, of the dishonor of which he is entitled to notice, according to the law merchant; also that defendant's failure to collect the same must be held such negligence as will charge him with its loss. The record does not inform us clearly of the nature of this claim against Shaw. Appellant, in his answer, says it was a "bill of items" for goods sold to Shaw; that Shaw admitted the same was correct, indorsed his acceptance thereon, and appellant then assigned it to respondent. The findings refer to it as an order drawn by appellant on Shaw, payable to respondent; also as a "demand" against Shaw. Appellant has not shown it was a bill of exchange, or even a check in action, negotiable in form. It was, however, an evidence of a debt admitted by Shaw to be due from him

to appellant, and by the latter transferred as collateral security to respondent. The record shows respondent made no special demand of appellant for payment of his note; neither did the latter request respondent to collect the Shaw claim, nor did the latter attempt to collect it. No agreement existed between the parties for its collection other than that implied by law. The record simply shows the collateral was accepted, was not collected, that Shaw became insolvent, and the claim against him was lost. Does its loss, under such circumstances, become the loss of the respondent?

From the briefs of counsel, we conclude they were unable in their researches to find relevant authorities by which the court might be aided to the correct conclusion, and in our effort to supplement their labor we have found the courts on this question in considerable, at least apparent, conflict, in part the result of difference in the facts of the cases. It is impossible to prescribe any definite, unyielding rule applicable to every case of property pledged as collateral security. Each case must be determined more by the attendant facts and circumstances than by any fixed standard. In all cases, however, the pledgee will be responsible for any loss resulting from his gross negligence; and generally, to avoid such responsibility, he must exercise at least ordinary care and diligence. It must be borne in mind he does not sustain to such property the relation of owner. As such, he would, of course, bear all loss, whether occurring through theft, fire, or other accident. When he holds it as pledgee, it operates as an accommodation to the owner also, by extending the time of payment of his liability; and the pledgee so holding it would not be liable for its loss by accident, unless the result of his gross carelessness. In this case, what is the negligence of respondent of which appellant can complain? The latter says he was entitled to prompt notice of the dishonor by Shaw of the claim. We do not think so. One of the objects of giving notice of the dishonor of commercial paper is that the indorser may be held responsible. It does not appear that the claim here against Shaw was a bill of exchange; and even if it were, and respondent had given appellant prompt notice of its dishonor, he would not have had any recourse against appellant, or in any way added to his responsibility. Hence, all the reasons of the rule requiring notice of the dishonor of commercial paper not existing, the rule itself is subject to modification.

The appellant invokes in his behalf the provisions of section 3601 of our statutes. That and the next preceding section clearly refer alone to written evidences of debt sold and transferred for value, and not to those deposited as collateral security. These sections provide that when the assignee, after due diligence, fails to recover thereon, he can then hold the assignor responsible. But in our case, had the respondent made every effort to collect the debt, and failed, he could

not have any recourse against appellant therefor, or even for his expenses incurred in his effort to collect. In this case it does not appear that the respondent was grossly negligent, nor does it appear there were any particular acts of negligence. It does not appear certainly that he could, if he had tried, have collected the Shaw claim. There may have been good reason why he could not. As he did not the presumption is that he could not, rather than that he would not. There is no actual evidence of his neglect, unless the mere fact that he did not collect it must be so construed. If, however, the appellant insists such is the legal conclusion, it still devolves upon him to show that such negligence resulted in his damage; for damage cannot be presumed,—it must affirmatively appear. It would be preposterous for appellant to claim a benefit from the harmless negligence of respondent. The question, then, is not whether respondent was negligent, but whether he must be presumed, without proof, to have committed such neglect as resulted in appellant's damage. There is not in this record any such proof. *Lawrence v. McCalmont*, 2 How. 454, is a case where notes deposited as collateral security were not duly protested, and the court says: "No evidence was shown at the trial to establish any loss or damage * * * for want of due protest and notice; * * * and, in the absence of such proof, we are not at liberty to presume that the agents did not do their duty." The same is held in *Aldrich v. Goodell*, 75 Ill. 457. In *Wilkinson v. Culver*, 83 Fed. Rep. 708, it appears bonds and choses in action were assigned as collateral security, with the agreement that the proceeds from their sale should be applied to the reduction of the secured debt. The pledgee failed to sell the same, and loss resulted to the pledgeor. The court says the obligation of the pledgee did not differ from that "usually and naturally resting upon holders of collateral security of same character, viz., that a sale, in the absence of a request to sell, or the commencement of suits, was not compulsory, but was to be at the discretion of the pledgee." In *Bast v. Bank*, 101 U. S. 93, a valid judgment was assigned as collateral. The bank neglected to collect it, and in the mean time it became worthless. The court held it was not the bank's loss. *Rice v. Benedict*, 19 Mich. 132-135, is a cause much like this, in which it was held the pledgee was not responsible for the loss of the securities; and in the same line are *Rozet v. McClellan*, 48 Ill. 345; *Robinson v. Hurley*, 11 Iowa, 412; *Goodall v. Richardson*, 14 N. H. 567; *Fletcher v. Harmon*, 7 Atl. Rep. 271; while more or less to the contrary are *Kennedy v. Rosier*, 83 N. W. Rep. 226; *Easton v. Bank*, 24 Fed. Rep. 523; and *Hanna v. Holton*, 21 Amer. Rep. 23. To these, many others might be added, entertaining almost every shade of view on the question. But, after considerable examination, we conclude the judgment of the court below should be affirmed, except that it

should be so modified as to bear interest from its date at the rate of 10 per cent. per annum; and it is so ordered.

BERRY and SWEET, JJ., concur.

(14 Colo. 44)

SCHWARZ *et al.* v. COUNTY COURT, GARFIELD COUNTY, *et al.*

(Supreme Court of Colorado. Jan. 11, 1890.)

ELECTION CONTESTS—PLEADING—AMENDMENT—CERTIORARI.

1. In an election contest based on illegal votes, a petition which fails to give a list of the persons alleged to have illegally voted is insufficient, within Laws Colo. 1885, p. 197, § 15, providing that, "when the reception of illegal or the rejection of legal votes is alleged as a cause of the contest, a list of the number of persons who so voted, or whose votes were rejected, and the precinct or ward where they voted, or offered to vote, shall be set forth in the statement of contestor, and shall likewise be set forth in the answer of contestee, if any such cause is alleged in his answer by way of counter-statement."

2. The omission to insert the list of illegal voters in a petition for contest, on that ground, cannot be justified by subsequently alleging that the information necessary to prepare the list was in the hands of contestees, by whose fraud and violence contestors were prevented from obtaining it, such allegation not having been made in the petition itself.

3. Where it does not appear that any attempt has been made to comply with the statutory requirement by furnishing the list, and no excuse is offered for failing to do so, amendment of the petition for that purpose, at a late day in the proceedings, is unwarrantable, in the absence of a statute directly authorizing amendment.

4. In Colorado, *certiorari* will not lie to review the action of an inferior tribunal in proceedings which are merely preliminary.

Certiorari to county court, Garfield county.

M. J. Bartley and Joseph W. Taylor, for petitioners. C. W. Darrow, J. W. Dollison, and E. H. Watson, for respondents.

HAYT, J. This controversy arose out of an election for municipal officers of the town of Glenwood Springs, held in April, 1889. The cases were recently before this court upon an appeal from a judgment rendered by the district court of Garfield county, to which court the cases had been removed from the county court by writ of *certiorari*. The district court, being of the opinion that county courts in the state had no jurisdiction of contests growing out of municipal elections, perpetually prohibited the county court of Garfield county from further proceeding with these contests. Upon appeal, this court held that such jurisdiction was conferred upon the county courts of this state by statute, and accordingly reversed the judgment of the district court. 22 Pac. Rep. 783. It was then urged that the county courts in this state had no power to entertain jurisdiction of any contest for municipal offices. Such general power is now conceded, but it is claimed that the county court of Garfield county is without jurisdiction in these particular cases on account of the insufficiency of the statements upon which the proceedings are based. It will thus be seen that

the question now presented for our determination is entirely different from the one decided upon appeal. These cases, which have been consolidated by stipulation of counsel, affect all the municipal officers of said town declared by the canvassing board to have been elected, viz., one mayor and six trustees. The contests are founded upon the claim that at said election a large number of illegal votes were cast for the parties to whom certificates of election were issued, and that such illegal votes were sufficient to change the result of the election. The particular defect relied upon to defeat the jurisdiction of the county court consists in the omission from the statements of the names of the persons whom it is claimed cast the illegal votes. That court having decided against contestee's pleas to its jurisdiction, and being about to proceed with the trial of the contests upon their merits, we are asked to interfere by *certiorari*.

The three principal questions presented for our determination may be stated as follows: (1) The reception of illegal votes being relied upon as a cause of contest, should the names of the persons who so voted be given in the petition? (2) If such names are omitted, is such omission fatal to the maintenance of the contests? (3) The court being about to proceed upon a petition thus defective, can such contemplated action be prohibited upon *certiorari*?

A reference to the statute under which these contests were instituted is the only answer necessary to the first of these propositions. In section 15 of the act it is provided: "When the reception of illegal or the rejection of legal votes is alleged as a cause of the contest, a list of the number of persons who so voted, or whose votes were rejected, and the precinct or ward where they voted, or offered to vote, shall be set forth in the statement of contestor, and shall likewise be set forth in the answer of contestee, if any such cause is alleged in his answer by way of counter-statement." Sess. Laws 1885, p. 197. Although a slight ambiguity exists, the evident purpose of this statute is to require each party is to give the other notice of the names of such persons as he claims illegally voted for his competitor, and of those whose votes for himself were illegally rejected. *Norwood v. Kenfield*, 30 Cal. 393; *Griffin v. Wall*, 32 Ala. 149.

The command of the act cannot be ignored; and if, as now contended by council, the omission to comply therewith arose from the fact that they were prevented from securing the information necessary to the making of such lists, by the fraud and violence of contestees and those under their control, or if, by any other unlawful act of contestees, contestors were prevented from obtaining the information necessary to prepare such lists, such facts should at least have been alleged in excuse in the first instance, in order that contestors may take advantage thereof. How far the court might be permitted to excuse

the failure, had this been done, we need not determine, as in none of the statements before us was there any attempt either to comply with the statute or to offer any excuse for non-compliance. The proceedings upon an election contest before the county judge, under the statute, are special and summary in their nature; and it is a general rule that a strict observance of the statute, so far as regards the steps necessary to give jurisdiction, must be required in such cases. The act under which these contests were instituted not having been complied with in the particular mentioned, the statements filed as the basis of the proceedings are radically defective. Sedg. St. & Const. Law, 299; Dorsey v. Barry, 24 Cal. 449; Casgrave v. Howland, Id. 457; Norwood v. Kenfield, supra; Loeonis v. Jackson, 6 W. Va. 613; Buckley v. Lowry, 2 Mich. 418.

The act is not only special in character, but it furnishes a complete system of procedure within itself. It requires that such contests shall be tried and determined by the county judge of the county in which the contests arise. It provides for a written statement as the basis of the proceedings, and designates what it shall contain, and the officer with whom it shall be filed. It designates the officer by whom the summons shall be issued, and provides the time and manner of making up the issues. Provision is also made for fixing the time of trial, and for the form of judgment to be entered, etc. As we have seen, the jurisdiction of the court, under such a statute, depends entirely upon the terms of the act, and consequently, before contestors can invoke such jurisdiction, facts must be stated by them which bring the cases within the purview of the act. In these statements, while the board of registration is charged with fraudulently permitting the names of those not entitled to vote to be registered, the *gravamen* of complaint in each case is that sufficient illegal votes were received and counted for the contestee to change the result of the election; and, unless this can be maintained as a cause of contest, contestors must fail; and yet no attempt has been made to comply with that portion of the act requiring a list of the number of persons who so voted, with the precinct or ward where such votes were cast, to be set forth in the statement. It is reasonable to conclude that the legislature in enacting this requirement had in view the fact that by previous legislation the utmost care had been exercised to provide for the casting of the ballots and the integrity of the count; and it is certainly not unreasonable to require those who desire to contest the right of a person to an office to which he has been declared duly elected by the tribunal provided by law to determine that question, to state with reasonable certainty and precision the cause upon which they rely to overthrow such result. We cannot say that the provision of the statute of 1885, under consideration, is unreasonable, and, if it were, relief must be looked

for from the legislature, and not from the courts. The court below should have sustained the pleas to its jurisdiction based upon the failure to include in the statements the lists required by the statute. Faribault v. Hulett, 10 Minn. 38, (Gil. 15); High, Extr. Rem. § 781; Keller v. Chapin, 34 Cal. 635; Garretson v. County of Santa Barbara, 61 Cal. 54; Quimbo Appo v. People, 20 N. Y. 531.

It is claimed that the defects in the statements may yet be supplied by amendment, although there is no provision of the act directly authorizing amendments. Even if the power exists in the court to permit amendments after the time for filing the statement has expired,—a point we do not decide,—still these statements contain nothing that can be taken as an attempt to comply with the statutory requirement in reference to giving a "list;" and, since no excuse is offered for the failure in this particular, we think it would be unwarrantable at this late day, when the terms of office for which some of the contestees were declared elected have nearly expired, to permit amendments so radical in character as those that would be necessary to supply the defects in these statements. During all the time these cases have been pending, contestors have insisted upon standing by the sufficiency of the pleadings filed as the basis of these proceedings, making no application to amend that can be considered by the court. Under these circumstances, we are of opinion that leave to amend should not be granted.

As this is the second time these cases have been before this court, and the foregoing questions have been argued at length by counsel, we have felt constrained to fully decide them. The writ of *certiorari* must, however, be quashed, for the reason that application therefor was prematurely made; the order sought to be reviewed being merely preliminary, and in no sense a final order or determination. While it is not necessary to wait until a judgment or order entered without jurisdiction is carried into effect, still it is only the final determination of an inferior tribunal that can be reviewed upon *certiorari*; the writ being never used to review merely preliminary proceedings, like those presented upon this application. Hayne, New Trial & App. 917; People v. County Judge, 40 Cal. 479; Lynde v. Noble, 20 Johns. 79; Haines v. Backus, 4 Wend. 213; Railroad Co. v. Whipple, 22 Ill. 105; People v. District Court, 6 Colo. 534. The writ of *certiorari* heretofore issued herein is accordingly quashed.

ELLIOTT, J. I concur in the construction given to the election contest statute by the foregoing opinion. In my judgment, however, so much of the rule or order of this court granting the writ as commanded the county court to desist from further proceedings in said election contest cases until the further order of this court in the premises should be made absolute.

(14 Colo. 51)

SIMONTON *et al.* v. ROHM *et al.*

(Supreme Court of Colorado. Jan. 17, 1890.)

PARTNERSHIP—PLEADING—PROVINCE OF JURY—INSTRUCTIONS.

1. An objection that the individual names of the defendants as co-partners are not set out in the complaint, appearing for the first time at the close of plaintiff's evidence, is not seasonably made.

2. The weight of the evidence, and the credibility of the witnesses, are matters of which the jury are the proper judges.

3. Though some of the instructions, separately considered, be not as perfect and accurate in form as they might be, nevertheless, if the charge as a whole fairly submits the questions at issue for the determination of the jury upon the evidence, the verdict should not be disturbed.

(Syllabus by the Court.)

Appeal from Eagle county court.

P. F. Quinn and R. D. Thompson, for appellants. Bruen & Glenn and Belford & Wikoff, for appellees.

ELLIOTT, J. This was an action of unlawful detainer, commenced by R. L. and G. L. Rohm, plaintiffs, against T. H. Simonton & Co., defendants, before a justice of the peace. It was appealed to the county court, where it was tried to a jury, resulting in a verdict and judgment for plaintiffs. The defendant appeals to this court.

The objection that the individual names of the defendants as co-partners are not set out in the complaint appears for the first time at the close of the plaintiffs' evidence in the county court. This was in the nature of an objection on the ground of a defect of parties defendant, and, as such, was not seasonably made. The principal controversy at the trial related to the issues of fact made by the pleadings, as follows: The complaint avers in substance that Simonton entered the premises of plaintiffs as a monthly tenant. This averment is traversed by the answer, in which it is also averred that the defendants entered under a written lease for the period of two years. The replication denies the entry under a lease for two years. The testimony was conflicting. R. L. Rohm testified in behalf of plaintiffs, as shown by the abstract, as follows: "Mr. Simonton came to me some time in October, or the 1st of November, 1884, and wanted to rent the store from month to month. I told him he could have it at thirty-five dollars per month. He said he would give me thirty dollars in advance. I let him have it at thirty dollars per month. There was no stated time." This evidence tended to sustain the complaint. The weight of the evidence, and the credibility of the witnesses, were matter of which the jury were the proper judges. The court properly charged the jury to the effect that, if they believed from the evidence that a lease was made by plaintiffs to defendants from month to month at the rate of \$30 per month, they should find for plaintiffs; also, that defendants, having affirmatively pleaded a written lease for two years, must prove the same by a fair preponderance of the evidence, in or-

der to warrant a verdict in his favor on that ground. While some of the instructions, separately considered, are not as perfect and accurate in form as they might be, nevertheless, the charge, as a whole, fairly submitted the questions at issue for the determination of the jury upon the evidence, and the verdict should not be disturbed. The judgment of the county court is accordingly affirmed.

(14 Colo. 53)

LOVELOCK v. GREGG.

(Supreme Court of Colorado. Jan. 17, 1890.)

PAYMENT—BURDEN OF PROOF—BOOK ENTRIES.

1. Where plaintiff's claim for wages as sued for was admitted, defendant was properly required to assume the burden of proving payment.

2. Where the entries in a book of account were made a week or more after the transactions occurred to which they related, and where the book of account was mutilated by the book-keeper cutting out the leaves on which the account was kept, the book was properly excluded as evidence.

(Syllabus by the Court.)

Appeal from Boulder county court.

J. M. North, for appellant. C. M. Campbell, for appellee.

ELLIOTT, J. Appellee, Gregg, was plaintiff below. The action was originally brought in a justice's court, where plaintiff recovered judgment for wages due her as a dress-maker. Upon appeal and trial by the county court without a jury, plaintiff again recovered judgment for the sum of \$51.40, interest and costs. Upon appeal to this court it is assigned for error that the judgment should have been in favor of defendant instead of plaintiff, and also that the court erred by admitting in evidence the book of account of plaintiff, and by excluding the book of account of defendant.

Counsel for appellant cites no authorities, and makes but slight argument, in support of the assignments of error. The plaintiff's claim for wages as sued for was admitted, and defendant was properly required to assume the burden of proving payment. The evidence shows that plaintiff's book of account was kept in a manner entitling it to be admitted in evidence as a book of original entry. But defendant's book of account was not so kept. The entries therein were made several days, and sometimes a week or more, after the transactions occurred to which they related. Besides, the book was mutilated by the cutting out of the leaves on which the account was kept. This was done by the husband of defendant, acting as her book-keeper. The court did not err in its rulings upon either of these questions. Upon careful examination, the finding and judgment of the trial court appear to be well sustained by the evidence. We are of the opinion that the litigation should not have been extended beyond the trial in the county court. The judgment of the county court is accordingly affirmed, with costs.

(14 Colo. 54)

SAUER v. TOWN OF NEVADAVILLE.

(Supreme Court of Colorado. Jan. 17, 1890.)

GARNISHMENT—MUNICIPAL CORPORATIONS.

1. Under no circumstances shall a garnishee, by the operation of the proceedings against him, be placed in any worse condition than he would be in if the defendant's claim against him were enforced by the defendant himself.

2. When an incorporated town is summoned as garnishee on account of salary due one of its officers, the town may show in discharge of its liability that the officer is a collector of its taxes, and, as such, has received money of the town, which he insists upon retaining, equal to the amount of salary due him. It is not to be inferred, however, that the officer has a right to insist upon retaining money under such circumstances; for the right of election to treat money in the hands of a receiver of the public revenue as a simple contract debt or as a trust fund is with the municipality, and not with the collecting officer.

(Syllabus by the Court.)

Appeal from Gilpin county court.

W. F. Fullerton, for appellant. Chase Withrow, for appellee.

ELLIOTT, J. The appellant, Otto Sauer, was plaintiff below. Having obtained judgment against James C. Bartle for the sum of \$109.11 and costs, he served notice, and sought to charge the incorporated town of Nevadaville as garnishee of the defendant, Bartle. The town answered to the effect that Bartle held the office of marshal of said town, and that \$80 on account of salary was due him about the time of the garnishment, but that, by virtue of his office, Bartle had at the time in his hands certain money belonging to the town which he had collected as taxes, amounting to \$91; that there was no contract or arrangement between the town and Bartle by which he could pay himself out of the money so collected, but that the town knew he had been accustomed to use such money by way of salary before, and had never objected to it; that immediately after the garnishment Bartle had notified the town that he would hold the money in his hands to the extent of his monthly salary; and so it is alleged that the town was not and is not indebted to the defendant, Bartle, in any sum of money whatever.

Upon the hearing between the plaintiff and the garnishee it was admitted that Nevadaville was a duly incorporated town of Gilpin county, Colo., and also that the ordinances of the town provide: "That the town treasurer of said town shall disburse the town funds, only upon the warrants of the town recorder, countersigned by the mayor of the board of trustees." "The town marshal shall, before entering upon the duties of his office, execute his bond to the town of Nevadaville, with two sureties, to be approved by the board of trustees, in the sum of three hundred dollars, conditioned that he will faithfully and impartially discharge the duties of his office as required by ordinance or by the laws of Colorado; and he will, as often as once in thirty days, and on Saturday preceding the regular monthly meeting of the board of trustees, pay to the town treasurer all

moneys by him collected from fines, penalties, or other sources, and belonging to said town; and that he will, at the expiration of his term of office, turn over to his successor in office all books, papers, and other property belonging to said town, as soon as he shall be elected and qualified." The matter being submitted upon the answer and admissions aforesaid, the court rendered judgment discharging the garnishee. The plaintiff appeals under the act of 1885.

Under the statute in force at the time this case was tried in the court below, every municipal corporation was subject to the process of garnishment. It is unnecessary to consider whether or not the salary due an officer of an incorporated town could have been taken by such process, for the reason that the liability of Bartle was one for which the town could have maintained an action against him for money had and received to its use. So, also, in an action by Bartle against the town for the \$80 due him on account of salary, the \$91 which he had received by the collection of taxes would be a proper set-off; hence it is a good defense in favor of the town as garnishee. It must not be inferred from this that the converse of this proposition can be maintained; for in an action by the town to compel Bartle to pay over the money he had collected as taxes, and held in trust for the town, he might not be entitled to set off the amount due him on account of salary. The right of election to treat money in the hands of a receiver of the public revenue as a simple contract debt or as a trust fund is with the municipality, and not with the collecting officer. Code 1883, § 104; Gen. St. § 1561; Drake, Attachm. § 683 et seq.; Wade, Attachm. § 447; Donelson v. Inhabitants of Colerain, 4 Metc. 430; City of New Orleans v. Finnerty, 27 La. Ann. 681; Lewis v. Dubose, 29 Ala. 219. "It is an invariable rule," says Drake, Attachm. § 462, "that under no circumstances shall a garnishee, by the operation of the proceedings against him, be placed in any worse condition than he would be if the defendant's claim against him were enforced by the defendant himself." The reasonableness of this rule and its application to the present case are apparent. It would certainly be a great hardship if the town could, by reason of a controversy between plaintiff and defendant in which it has no interest, be subjected to a liability to the former, to whom it is under no obligation whatever greater than it is under to the latter, with whom it is in direct privity. It is urged by counsel for appellant that the town should be compelled to pay over the \$80 to plaintiff, and then resort to an action against the marshal and his sureties to recover the \$91. This would impose the burden, expense, and uncertainty of litigation upon the garnishee, besides causing the sureties of the marshal to suffer unnecessarily. The obligation of their bond is to secure the town from loss on account of the official misconduct of their principal; they did not

undertake that he should pay his debts to other people. It follows from the foregoing that any defense which the town of Nevada-ville could successfully interpose as a bar to an action by Bartle for his salary is equally available against the plaintiff as an answer to the process of garnishment. Since the amount in the hands of Bartle exceeded his claim for salary, the answer setting forth these facts was sufficient to defeat the garnishment. The judgment of the county court discharging the garnishee was therefore correct, and it is accordingly affirmed.

(14 Colo. 53)

JACKSON v. HAMM.

(Supreme Court of Colorado. Jan. 20, 1890.)

ASSIGNMENT—NOTICE TO DEBTOR—ACTION BY ASSIGNEE.

1. Notice to the debtor by the assignee of a chose in action is not necessary to complete the assignment, where there is no controversy between different assignees or attaching creditors of the fund assigned.

2. The assignee of a claim against the receiver of a railway company, having obtained permission from the proper court, may, under the Code, bring suit in his own name, and, though the assignment be indorsed to another, he may still maintain the action in his own name so long as he retains possession of the instrument of assignment, and may cause the record to be amended by adding the name of the indorsee as the use party, who will thereafter be entitled to control the proceedings, and will be bound by the judgment.

(Syllabus by the Court.)

Appeal from Chaffee county court.

E. O. Wolcott and Watson & Libby, for appellant. *J. W. Hamm*, for appellee.

ELLIOTT, J. This action was commenced by John W. Hamm, as plaintiff, against William S. Jackson, as receiver of the Denver & Rio Grande Railway Company, before a justice of the peace, to recover a certain sum of money due to one E. D. Lynch, an employe of said railway company, for services. Lynch had assigned his claim to plaintiff, as follows: "Salida, Colo., February 27, 1886. J. W. Gilluly, Esq., Cashier D. & R. G. Ry. Co., Denver, Colo.: Please pay, or cause to be paid, to John W. Hamm, the sum of seventy-five dollars and fifty cents, the amount due to me by said railroad company for services; and this shall be your receipt for same in full. E. D. LYNCH." Judgment for the amount of the claim was rendered in the justice's court in favor of plaintiff. The defendant appealed to the county court, where the same judgment was again rendered. Defendant now appeals to this court.

That Jackson was the receiver of the railway company, that Gilluly was its cashier and disbursing agent, that the wages were due to Lynch as sued for, and that Lynch assigned his claim to plaintiff, are in no way controverted by the brief and argument of appellant under its assignment of errors. Gilluly refused payment to Lynch on the ground that he had not paid his board-bill to one A. L. Dodge; but it does not appear that the supposed indebtedness of Lynch for board

was in any way connected with his contract or claim for services, or that there had been any garnishment proceedings therefor. This defense was not attempted at the trial. No evidence was offered in behalf of defendant in either court, and nothing is claimed on this ground upon this appeal. It is urged, however, by appellant's counsel, that, as there is nothing in the record to show that the receiver had notice of the assignment of Lynch's claim to plaintiff before the bringing of this suit, therefore the assignment was not complete, and that this action cannot be maintained. If this were a controversy between different assignees or attaching creditors of the same chose in action, this point might require greater consideration. So, also, this appeal might be more difficult of determination but for the fact that the assignment of errors is restricted to the grounds stated in the motions to dismiss and for nonsuit, respectively, and that even some of these grounds are abandoned in the brief and argument of counsel. Neither of the aforesaid motions question the sufficiency of the evidence generally, nor the merits of the claim sued on, as above stated. *Smith v. Christian*, 47 Cal. 18; 2 *White & T. Lead. Cas.* 794 et seq.; *Clodfelter v. Cox*, 1 *Sneed*, 330; *Moore v. Gravelot*, 3 *Ill. App.* 442. In this action there are no third parties making claim to this fund, nor did defendant interpose any defense of that kind. Besides, plaintiff had given notice of the assignment to Gilluly, the financial agent of the railway company, before the commencement of the action, who made no objection thereto, except that Lynch had not paid his board to Dodge; and, moreover, plaintiff had obtained an order from the United States circuit court, which appointed the receiver, to bring this very action before instituting the same. The order specified the plaintiff as the assignee of the claim of \$75.50 due Lynch, an employe of said railway company. It appears that plaintiff gave his own due-bill to Lynch for the amount of his claim, in consideration of the assignment, and that Lynch assigned this due-bill of plaintiff to one J. M. King, and in this way got his money. It appears, also, that plaintiff, by indorsement, made the assignment which he had received from Lynch payable to King or his representatives, and caused the record to be amended so as to read, "John W. Hamm, for the use and benefit of J. M. King." It does not appear that these matters in any way prejudiced the defendant. The cause of action remained unchanged. The defense of the unpaid board-bill or any other subsisting equity in favor of defendant against Lynch was as available against Hamm, or even King, as the assignee of Lynch, as it would have been if Lynch had been plaintiff; besides, there was no plea or offer to prove any defense as against Lynch. 1 *Pars. Cont.* 229; *Code Civil Proc. Colo.* § 4; 2 *White & T. Lead. Cas.* 780-811; *Reeve v. Smith*, 113 *Ill.* 47. Hamm, being the real party in interest, was entitled

to sue in his own name by the express provision of the Code, as well as by the order of the circuit court which he had obtained. The indorsement to King of the Lynch assignment did not necessitate a dismissal of the action by Hamm, so long as he retained possession of the instrument, and while his own absolute and unconditional obligation which he had given in exchange therefor was still outstanding. But even if King did become the real party in interest by such indorsement, in the absence of anything in the record to the contrary, we must presume that the adding of his name as the use party was duly authorized; and hence, upon familiar principles, he was thereafter entitled to control the proceedings, and was bound by the judgment. Thus the defendant and the railway company are abundantly protected. 1 Greenl. Ev. § 535; *Chapman v. Shattuck*, 3 Gilman, 49; *Morris v. Cheney*, 51 Ill. 451; *Chadsey v. Lewis*, 1 Gilman, 153; *Van Camp v. Commissioners*, 2 Pac. Rep. 721; 1 Pars. Cont. 223-230; *Jessel v. Insurance Co.*, 3 Hill, 88; *Palmer v. Merrill*, 6 Cush. 282; *Bartlett v. Pearson*, 29 Me. 9; *Elliot v. Threlkeld*, 16 B. Mon. 341. This disposes of the assignment of errors, so far as they have been presented by counsel in their briefs, in favor of appellees. The judgment of the county court is accordingly affirmed.

(14 Colo. 61)

NICHOLS et al. v. JONES et al.

(Supreme Court of Colorado. Jan. 24, 1890.)

VERIFICATION OF PLEADINGS—WAIVER—STRIKING OUT ANSWER.

1. Where the complaint is verified by one of plaintiffs' attorneys, but no reason why it is not verified by the parties is stated, as required by the Code of Colorado, such defect is waived when defendants make no objection to the verification in the court below, and file an answer, duly verified, as to some of the defenses, and not verified as to others.

2. Where the answer contains several defenses, some of which are verified and others not, it is not error to strike out the unverified portion of the answer, with leave to defendants to further answer as to such portion, if they should so desire.

3. Where a defense set up in the answer is ordered stricken out, which by some error is not done, and the court afterwards correctly treats the defense as insufficient to raise an issue, defendants cannot complain.

Appeal from district court, Gunnison county.

The transcript of record does not contain the original complaint filed in the district court. By the amended complaint, A. E. Jones and W. J. King, partners doing business under the firm name and style of Jones & King, were made parties plaintiff, and Ira Nichols and H. N. Nichols and S. L. Townsend, partners under the firm name and style of Nichols, Townsend & Co., defendants. This pleading contains 26 counts. In the first count the copartnership of the defendants is duly alleged. In this count the sale and delivery of goods, wares, and merchandise to the value of \$217.85, by plaintiffs to defendants, at the latter's special instance

and request, is charged. The remaining counts are all based upon claims against the defendants in favor of third parties, duly assigned to plaintiffs. Some of these assigned claims are for goods, wares, and merchandise sold the defendants; others for work and labor performed at the special instance and request of the defendants; and still others are based upon certain due bills alleged to have been given by defendants to various persons for labor performed, etc. The verification to the complaint was made by Dexter T. Sapp, one of the attorneys for plaintiffs in the cause, the affidavit showing that the facts alleged in the pleading were within his knowledge. The defendant Townsend made default. In the answer filed by the other defendants the allegation of partnership above set out is not controverted, but all other allegations of the complaint are denied. That portion of said answer which was in response to the fourth, seventh, eighth, and ninth causes of action in the complaint was duly verified. As to the remaining counts in the said amended complaint, the answer was not verified. After this answer was filed, plaintiffs moved to strike out the portions of said answer which were not verified. After argument of counsel, the court sustained said motion, and struck out all that portion of said answer that has reference to the first, second, fifth, eighth, and tenth to twenty-seventh causes of action in plaintiffs' complaint. The above order gave the defendants time in which to further answer said causes of action, if they so desired. The defendants having failed to answer in accordance with said order, default was afterwards taken against them upon all counts unanswered, and also upon the third cause of action, to which an unverified answer remained upon file. A jury being expressly waived by the parties, the cause was tried by the court. Upon such trial the court found the issues upon the fourth, seventh, eighth, and ninth causes of action in favor of plaintiffs, and gave judgment accordingly. Upon the remaining counts in the complaint, the court rendered judgment in accordance with the prayer of the complaint, to which findings and judgment the defendants, Ira Nichols and H. N. Nichols, having duly excepted, bring the case here upon appeal.

Gullett & Barnes and *H. L. Karr*, for appellants.

HAYT, J. The first six assignments of error relate to the striking out of certain portions of the defendants' answer for the reason that the same was unverified, and the entry of judgment upon a certain cause of action by default. The action of the court was based upon the assumption that the complaint was properly verified, hence requiring a sworn answer thereto. It is now contended that the verification to the complaint was defective, in that the reasons why it was made by the attorney, and not by one of the parties to the action, were not stated therein as required

by the Civil Code. If such verification was defective in the particular mentioned, we think such defect was waived by the subsequent conduct of the defendants, as, instead of objecting to the form of the affidavit by motion or otherwise in the court below, they filed an answer, duly verified as to certain defenses, and not verified as to others. The verification was equally applicable to all portions of the complaint, and the defendants ought not to be permitted to treat it as sufficient for some counts in the complaint and insufficient as to others.

Under the circumstances, we think there was no error in requiring the defendants to verify each defense relied upon, and the order striking out the unverified portion of the answer was fully warranted. In such order ample time was given the defendants in which to plead to the causes of action remaining unanswered as the result of sustaining the motion to strike out, and we cannot doubt that properly verified answers would have been filed within the time, if the defendants desired a trial upon the merits.

The record does not affirmatively show that the defense to plaintiffs' third cause of action was stricken out, although such defense was unverified, and was embraced in plaintiffs' motion to strike out. The same being directed to all that portion of the pleading that was "subsequent to the jurat," and this defense appearing in the pleading after the jurat, it should have been stricken out in response to such motion. And the court appears to have treated it thereafter as though this had been done, by entering judgment by default upon the cause of action to which such defense was interposed. The failure to have the order of the court show the ruling in reference to such defense perhaps resulted from a clerical error. Be this as it may, however, the action of the court thereafter, in treating such defense as insufficient to raise any issue, and entering judgment by default upon said cause of action, only accomplished the same result in a different way, and this, under the circumstances, in no way prejudiced the defendants; hence they are not in a position to complain thereat. *Drum v. Whiting*, 9 Cal. 422. The remaining assignments of error relate to the admission of certain testimony, the findings of the court, and the judgment against the defendants. We think the rulings of the court in reference to the admissibility of the evidence objected to were correct. The evidence introduced on behalf of the plaintiffs is clearly sufficient to support the findings of the court in their favor. No evidence having been offered by the defendants, these findings cannot be disturbed. The judgment is accordingly affirmed.

(14 Colo. 65)

PATRICK v. McMANUS.

(Supreme Court of Colorado. Jan. 31, 1890.)

SHAM PLEAS—MOTION TO STRIKE OUT.

1. It is the policy of the Code to suppress falsehood and secure truth in pleadings, and as one

means of securing such result authority for striking out sham answers and defenses is given.

2. A counter-claim, if sham, may be stricken out upon motion.

3. The essential element of a sham plea is its falsity.

4. The power to strike out must, however, be exercised with caution. Under it the court cannot determine the truth or falsity of a plea upon conflicting evidence.

(Syllabus by the Court.)

Appeal from district court, Arapahoe county.

Action upon a promissory note bearing date April 20, 1885. The note, which is for \$1,000 and interest, is set forth in *hæc verba* in the complaint. This pleading also contains the following allegation: "That afterwards, on the 3d day of August, 1886, at Denver, Colo., plaintiff requested defendant to pay said sum of \$1,000 and interest; that defendant did not nor has not since paid said sum of money, or any part thereof. Prayer for judgment for \$1,000, together with interest from 20th of April, 1885, at 8 per cent. per annum, and costs." In his answer the appellant, after denying all allegations of the complaint, pleads payment, and for a further answer alleges: "That between the 20th day of April, A. D. 1885, and the date of filing said complaint, the defendant laid out and expended for the use and profit of the said plaintiff, at her request, the sum of fifteen hundred dollars in cash." The pleading closes with the following prayer for relief: "Wherefore defendant prays judgment against the plaintiff for the sum of five hundred dollars, together with interest thereon, from and after the date of the commencement of this suit; and the defendant prays that said promissory note be delivered up to the court for cancellation, and that he have his costs in this suit most unjustly expended."

After this answer was filed, plaintiff moved to strike the same from the files, and for judgment upon the pleadings, for the reason that "the said answer is a sham answer, as fully appears by the answer itself and by the affidavits hereto annexed and made a part of this motion. The defendant appeared, and resisted this motion, and filed a counter-affidavit. The affidavits submitted upon the hearing of plaintiff's motion were, in substance, as follows: Affidavit of John F. Shaffroth: That he is one of plaintiff's attorneys; that on July 31, 1886, he sent notice to defendant that his firm had for collection the note sued on, and requesting defendant to call and pay the same; that on or about August 3, 1886, defendant called; that defendant was shown said note, and requested to pay the same; that he admitted the note to be his, and that he owed the same, but could not pay the same then, but would do so if granted an extension of five or six months. Affidavit of Camilla S. McManus: That she is plaintiff; that on April 20, 1885, at Pass Christian, Miss., defendant made the note sued on, and delivered same to plaintiff for consideration of \$1,000; that defendant, nor any one for

him, has ever paid said note, or any part thereof, or the interest thereon; that defendant, neither between the 20th day of April, 1885, and date of bringing this suit, nor at any other time, laid out or expended for use or benefit of affiant, or at her request, the sum of \$1,500, or any other sum whatever; that said promissory note was, at the time of commencement of said action, due and unpaid, and still remains so. Affidavit of defendant: That he is defendant; that he did promise to pay said note to Mr. Shaffroth, but affiant further says that he at that time claimed to have set-offs against said note more than sufficient to pay the same in full, and that if said note was sued on affiant would set up all such claims in defense; that whether or not such counter-claims constituted a good cause of action against plaintiff is a question of law and fact for the court and jury to pass upon; and that defendant makes such counter-claim, and insists upon the trial of the same, for the purpose of obtaining a judgment against said plaintiff; that at said interview affiant stated to Mr. Shaffroth that said note had been paid by affiant's wife. At the hearing the court sustained said motion, and entered judgment for the plaintiff in accordance with the prayer of the complaint. The defendant, having duly excepted, brings the case here by appeal.

J. N. Hughes, for appellant. *J. F. Shaffroth*, for appellee.

HAYT, J., (after stating the facts as above.) The answer filed in the cause was stricken out as a sham answer, and judgment thereupon entered for the plaintiff for the amount claimed in the complaint. Should such action of the court be sustained? Whether the pleading was objectionable for other reasons than the one urged is not material. Appellee's motion was based solely upon the claim that the answer was a sham one. That part of the Code relating to sham answers reads as follows: "Sham and irrelevant answers and defenses, and so much of any pleading as may be irrelevant, redundant, immaterial, or insufficient, may be stricken out upon motion, and upon such terms as the court, in its discretion, may impose." Section 61. "Sham pleading," as defined by Chitty, is the pleading of a matter known by the party to be false, for the purpose of delay or other unworthy object. 1 Chit. Pl. 541. Bliss, in his work upon Code Pleadings, says that a "sham pleading" is one good in form and false in fact. Section 422. In Bouvier's Law Dictionary a "sham plea" is said to be one entered for the mere purpose of delay, concerning a matter which the pleader knows to be false. It will be seen, from these definitions, that the essential element of a sham plea is its falsity; and yet it is evident that not every false plea can be stricken out upon motion supported by affidavit, as this would be to substitute a trial to the court upon affidavits for a jury trial. An examination of decided cases shows that

the courts have not adopted any uniform rule in reference to the nature of answers that may be stricken out upon motion as sham. In *Brown v. Lewis*, 10 Ind. 232, it was decided that "if an answer is valid on its face, and no facts exist peculiarly within the knowledge of the court showing it to be a sham defense, it should not be stricken out upon affidavit of its falsity." But in a subsequent case, it appearing that the defendant in response to interrogatories conceded his answer to the complaint to be false, it was held that it should be stricken out as sham. *Beeson v. McConnaha*, 12 Ind. 420. And this rule subsequently received the sanction of express statutory enactment. *Lowe v. Thompson*, 86 Ind. 503. In California a plea of payment to a suit upon a promissory note was stricken out by the trial court upon affidavits showing the falsity of such plea, and the *mala fides* of the defendants in pleading it, and such action was sustained upon appeal. *Gostorfs v. Taaffe*, 18 Cal. 386. In *People v. McCumber*, 18 N. Y. 315, a defense consisting of denials of knowledge or information sufficient to form a belief as to several matters, and a qualified denial in direct terms of another allegation of the complaint, was stricken out as sham, the court holding that a defense otherwise good may, if false, be stricken out as sham, although duly verified, and this may now be considered as the general practice in New York. See *Corbett v. Eno*, 13 Abb. Pr. 65. So, also, in Minnesota it has been repeatedly held that a sham answer, although verified, may be stricken out upon proof of its falsity. *Hayward v. Grant*, 13 Minn. 165, (Gil. 154;); *Barker v. Foster*, 29 Minn. 166, 12 N. W. Rep. 460; *Lumber Co. v. Richardson*, 31 Minn. 267, 17 N. W. Rep. 388. In *Torrence v. Strong*, 4 Or. 39, it was decided that an answer good in form, and containing facts sufficient to constitute a defense, cannot be gotten rid of by demurrer, but that it may be stricken out as false. *Tharin v. Seabrook*, 6 S. C. 113, is authority for saying that objection to sham defenses ordinarily presents a question of fact to be determined on affidavits. If an answer is manifestly false, it may be stricken out as sham, although this power should be sparingly used, and only in cases free from doubt. It is the policy of the Code "to suppress falsehood and secure truth in the pleadings," and, as one means of securing such result, authority for striking out sham answers and defenses is given. In counties where the dockets are overburdened with causes, the temptation to interpose sham answers, for the purpose of delay only, is great; and when it clearly appears that such answers are false in fact, according to the great weight of authority and reason, the court may, upon motion, strike them out. This power must, however, be exercised with extreme caution; otherwise a trial to the court upon affidavits might be substituted for a jury trial. It cannot rightfully be exercised for the purpose of determining the truth or falsity of a defense

upon conflicting evidence. The inquiry ought not to be extended in such cases further than may be necessary for the court to determine that such a conflict in fact exists; but where, as in this case, the material averments of the complaint are directly supported by affidavits positive in form, we think the defendant has no right to complain of an order requiring him to support his unverified answer by an affidavit of merits, and, upon failure to comply therewith, to have his pleading stricken from the files. And it would make no difference if a portion of this answer be treated as a counter-claim, as the Code provision is directed not only against sham and irrelevant defenses, but to answers as well, and the counter-claim must be considered as a part of the answer. Any other construction would permit defendants to evade the consequences of the act, and delay judgment, by interposing sham counter-claims instead of sham defenses. It requires no argument to show that the affidavit of defendant in support of his answer in this case does not amount to an affidavit of merits. It does not deny the execution of the note. On the contrary, the due execution thereof is admitted under the pleadings, a copy of the note appearing in the complaint, and the answer thereto not having been verified. The affidavit does not state that the note has been paid. It merely alleges that on a prior occasion Patrick claimed that his wife had paid it. Neither does it contain an averment that plaintiff has a set-off of any kind or nature whatsoever, affiant contenting himself with the statement that he at one time claimed to have set-offs more than sufficient to pay the note in full, and that if sued he would set the same up in defense. This so-called affidavit of merits is clearly insufficient; it fails to state any fact showing, or tending to show, the truth of the answer. It does not even state that the answer is interposed in good faith, or that his attorney, after being informed of the facts, has advised him that he has a meritorious defense to the action. The affidavit is so entirely lacking in the essential requisites of such a paper that the court below, in deference to well-established rules, was bound to disregard it in the determination of plaintiff's motion. *Wedderspoon v. Rogers*, 32 Cal. 509; *Kaufman v. Mining Co.*, 105 Pa. St. 541; *McCracken v. Congregation* 111 Pa. St. 106, 2 Atl. Rep. 94; *King v. Stewart*, 48 Iowa, 334. The judgment of the court below is accordingly affirmed.

(42 Kan. 762)

HOLMDEN *et al.* v. JANES.

(Supreme Court of Kansas. Feb. 8, 1890.)

CONTRACTS—CONSIDERATION—PROMISE OF HEIR.

Where G. entered into a written contract with J. and H. to sell and convey to them a tract of land, and the grantees paid to him the full purchase price, a part of which was the transfer and possession of 24 acres of land, and afterwards G.'s title was extinguished to the tract he had agreed to convey, and subsequently his son, who, as an heir of his father, had received a share of the 24

acres transferred by J. and H., became the purchaser of the tract of land from the owner thereof, and thereafter agreed with J. and H. to carry out the contract made by his father with them, and J. and H. relied and acted upon the promise of the son. *Held*, that the agreement of the son was based upon sufficient consideration.

(Syllabus by the Court.)

Motion for rehearing. For former opinion, see 21 Pac. Rep. 591.

W. P. Douthitt and A. H. Case, for plaintiffs in error *Waters & Chase and A. Bergan*, for defendant in error

HORTON, C. J. James R. Greer purchased the land in controversy from Johnson & Son, who held an equitable interest therein. On the 18th day of October, 1873, he entered into a written agreement with Heman Janes and Ed P. Holmden to sell or exchange this land to them for \$190 in money, and the conveyance from them of 24 acres of land on Mill creek, in Wabaunsee county. James R. Greer was paid the \$190, and given possession of the 24 acres of land. In 1876, there being default in the payment to the railroad company from Johnson & Son for the land in dispute, the railroad company foreclosed the contract, and purchased the premises at a judicial sale. On October 23d of the same year the railroad company sold and conveyed the premises to Joseph D. Greer, the son of James R. Greer, who had entered into the written agreement with Janes and Holmden. After Joseph D. Greer had obtained title to the land, he promised to carry out the written agreement of his father with Janes and Holmden. Upon the argument for a rehearing it was earnestly insisted by the counsel for M. W. Janes, the plaintiff below, that the promise or agreement of Joseph D. Greer to carry out the contract of James R. Greer, deceased, with Janes and Holmden, of October 18, 1873, was without consideration, and therefore void, and not binding upon any one. Counsel say that "Joseph D. Greer was under neither legal nor moral obligation to carry out that agreement made by his father. His title was not derived through his father. His father's rights and equities had long before been swept away and ended, and he came in, as any stranger might have come in, and purchased directly from the railroad company, as any stranger might have done, and was no more bound by his dead father's contract than any stranger would have been." If the premises of counsel were true, we are inclined to think that the promise or statement to James D. Greer would not amount to anything. It appears, however, from the record, that his father James R. Greer, received of Janes and Holmden \$190, and also the possession of 24 acres of land under the written contract for a conveyance of this land to them. James R. Greer paid taxes on the 24 acres of land, and it descended to his heirs, and was by them divided. When an exchange of lands was made by E. V. Holmden and Heman Janes, Janes made a conveyance of the land in con-

trovery to Holmden, and Holmden took the same at its full value, making no deduction on account of any defect that might exist in the title. Joseph D. Greer is the son of James R. Greer, deceased, and as such son and heir inherited a portion of the estate, and also a part of the land which his father received from Janes and Holmden as part payment upon the land in this action. If Janes and Holmden, having paid for the land in controversy to James R. Greer, never got anything, then they had a right of action against the estate of James R. Greer for breach of contract; but the promise of Joseph D. Greer to them to carry out the agreement of his father, which was accepted and acted upon by them, prevented them from bringing any action against the estate, and also preserved to Joseph D. Greer and the other heirs of James R. Greer the real estate which was divided by them. With this view, there was ample consideration for the agreement of Joseph D. Greer, and the second part of the syllabus in the opinion heretofore filed (21 Pac. Rep. 591) was based upon the theory that the agreement of Joseph D. Greer was a valid one, with a sufficient consideration. We have ordered a new trial only. If it shall appear upon the retrial that James R. Greer left no estate, and that Joseph D. Greer received no share of the 24 acres referred to, then, we think, his promise and statement were without consideration, and not binding on him. The motion for a rehearing will be overruled. All the justices concurring.

(43 Kan. 167)

FRIEND v. GREEN.

(Supreme Court of Kansas. Feb. 8, 1890.)

SERVICE OF PROCESS—CERTIFICATE OF OFFICER—REPLEVIN—JUDGMENT—COSTS.

1. Where a summons is issued by a justice of the peace, and served by a constable, by leaving a true copy, with all the indorsements thereon, at the usual place of residence of the defendant, but no certificate is made by the officer that such copy is a true copy of the original summons, *held*, such omission renders such service violable only, and not void.

2. Where an action in replevin is brought by a judgment debtor to recover possession of specific personal property taken upon execution by an officer, and the property is delivered to the plaintiff, and judgment is afterwards rendered for the return of the property to the officer, or, in case return cannot be had, for its value, *held*, that such judgment for the value of the property cannot exceed the amount for which the execution was issued, and costs.

3. Where an action in replevin is brought by a judgment debtor, to recover specific personal property, against an officer in possession of the same by virtue of a levy of an execution thereon, and such judgment debtor recovers possession of only a part of the property, and judgment is rendered in favor of the officer for the remainder, *held* not error for the court to divide the costs.

(Syllabus by Clogston, C.)

Commissioners' decision. Error from district court, Norton county; LOUIS K. PRATT, Judge.

This was an action in replevin, brought by Joseph Friend against Ira W. Green, to re-

cover certain specific personal property. Judgment for plaintiff for the possession of part of the property, and judgment for defendant for the remainder. Plaintiff now brings the case here.

Wilson & Decker, for plaintiff in error.
Jones & Thompson, for defendant in error.

CLOGSTON, C. Plaintiff in error complains of numerous errors, many of which we shall not notice, but shall mention only such as we think are entitled to consideration. The record shows that an action was brought in justice's court against plaintiff in error, and default was made and judgment rendered in said court against him, and upon such judgment an execution was issued, and the property in controversy in this action was levied upon to satisfy such judgment. The plaintiff in error brought this action against defendant in error as constable, he having levied that execution. The first complaint we shall notice is as to the jurisdiction of the justice of the peace who rendered the judgment upon which the execution in question was issued. Plaintiff insists that the court had no jurisdiction, for the reason that the pretended service in that case was made by leaving a pretended copy at his place of residence in his absence, and that he never received the copy until after the judgment was rendered; and, *second*, that the copy of the summons so left was not certified by the constable to be a true copy of the original summons. The first of these complaints is without foundation. The statute provides for constructive service by leaving a copy of the summons at the usual place of residence of the defendant, and that was done in this case. The second claim of error is one that has given us considerable trouble, as no case has been found parallel with it. The requirement of the statute is that the copy of summons to be left or served upon the defendant must be certified to as a true copy, and, if this requirement is essential to the jurisdiction of the court, then the court had no jurisdiction of the defendant; but if the service is only voidable, and not void, then upon this indirect attack the jurisdiction of the justice court must be sustained. We are inclined to the latter view. The summons left at the defendant's residence was a command, in the name of the state, to appear before a certain court. Upon its face it was regular, and gave the defendant all the information that he could have gained if it had been properly certified to. If it had been attacked below, or in a direct manner, the service would have been set aside. It was so irregular that any court, when informed of the irregularity, would have set aside the judgment. When comparing this service with the service that is required to be made in actions commenced in the district court, it is found, and has been held, not necessary that the summons issued by the district court should be certified to by the sheriff or officer serving the same. While there is no direct

statute in that case requiring such certificate yet it tends to show that the certification of a summons is not essential to its validity. So it is with all other process issued out of the district court, such as subpoenas and other orders. A copy, without certificate, is all that is required. We therefore conclude that the service was not void, but only voidable.

The next complaint is that the district court erred in its judgment—*First*, in the amount of the judgment; and, *second*, in dividing the costs. The judgment upon which the execution was issued was for \$146.19, and the district court in rendering judgment for a return of a part of the property found its value to be \$220, and, in case the property was not returned, a judgment was rendered for the defendant in error for the sum of \$220. This was error. The defendant in error, as constable, was only interested in the return of the property to the extent of the amount set out in the execution under which he held the property, and the only jurisdiction he had over the property was to secure the payment of the judgment upon which the execution was issued, and in no event could it exceed the amount of the original judgment and costs. The judgment must therefore to that extent be modified. The second complaint is that in rendering judgment the court divided the costs, and plaintiff in error contends that, as he recovered a judgment for a part of the specific property, no costs could be taxed against him, but such costs must follow the judgment. This claim would be correct, provided the plaintiff had recovered a judgment for all the property. In that case the statute provides that, in a judgment for the return of specific personal property, the costs must follow the judgment; but in this case the judgment was for both plaintiff and defendant, and judgment for the plaintiff for the possession of the remainder, and we think the court correctly divided the costs. This is the rule laid down by this court in *Dresher v. Corson*, 23 Kan. 313. It is therefore recommended that the cause be remanded to the court below, with directions that the judgment be corrected as indicated herein, and when so corrected that it be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 197)

DRILLING *et al.* v. FIRST NAT. BANK.

(*Supreme Court of Kansas. Feb. 8, 1890.*)

PLEADING—SUPPLEMENTAL PETITION—ANSWER—NEGOTIABLE INSTRUMENTS—INNOCENT PURCHASER.

1. The filing of a supplemental petition setting forth facts occurring after the original petition was filed, material to the determination of the case, is authorized by section 144 of the Civil Code.

2. Where a general denial was filed to the original answer of the defendants, and afterwards a supplemental petition was filed simply alleging that the plaintiff, a bank, had consolidated with another, and the new bank thus organized was the owner of the note sued on, but did not repeat any

of the other allegations of the original petition upon which the plaintiff relied to recover, and the defendants answered again fully to the merits of the action, but without setting forth any new matter, only more elaborately stating the defenses of their first answer, *held*, another reply was unnecessary.

3. The mere discounting of negotiable paper by a bank, and placing the amount thereof to the credit of depositors having already a balance to their credit, will not alone constitute the bank a purchaser for value so as to cut off equities. The bank becomes, however, a debtor to the depositors, and if, before notice of any infirmities of the paper, it pays out on the checks of the depositors the full amount due thereon, including the discount, it thereby becomes an innocent purchaser for value. *Fox v. Bank*, 30 Kan. 441, 1 Pac. Rep. 789.

(*Syllabus by Holt, C.*)

Commissioners' decision. Error from district court, Ellis county; *S. J. OSBORN, Judge.*

A. D. Gilkeson, for plaintiffs in error.
Reeder & Reeder and W. P. Montgomery, for defendant in error.

HOLT, C. This was an action in the Ellis district court on a negotiable promissory note. Trial by jury. The court directed them peremptorily to find for the plaintiff for the unpaid balance of the note. The defendants, as plaintiffs in error, complain of this direction of the court, and of certain rulings concerning the pleadings. The action was commenced by the First National Bank of Battle Creek as plaintiff. Afterwards the court permitted a supplemental petition to be filed, wherein none of the allegations of the original petition were repeated upon which the plaintiff relied to recover, but simply stated that after the commencement of this action the First National Bank of Battle Creek and the Second National Bank of Battle Creek had been consolidated under the name of "The National Bank of Battle Creek." This supplemental pleading was authorized by section 144, Civil Code. *Clark v. Spencer*, 14 Kan. 398; *Simpson v. Vose*, 31 Kan. 227, 1 Pac. Rep. 601.

The defendants answered the original petition by a sworn denial, and also by setting up other matters of defense. The plaintiff replied by a general denial. After the supplemental petition was filed, the defendants again answered fully as to the merits of the action, but set up no new matter, only more elaborately and fully stating their defenses as set forth in their first answer. After this second answer there was no reply filed. None was necessary. The allegations of the answer had been once denied substantially by the reply to the defendants' original answer. This was sufficient. *Brookover v. Esterly*, 12 Kan. 149; *Cooper v. Machine Co.*, 37 Kan. 231, 15 Pac. Rep. 235.

At the trial the plaintiff showed that it bought the note before due without knowledge of any defenses there might be to it. The note was given in payment of a threshing-machine. In the sale of this machine a warranty was given; and the defense urged was that there had been a breach of the war-

ranty, and therefore a failure of consideration. The court required of the defendants, before proof of this warranty and its breach could be offered, that they should show that the note was either transferred after due, or else was not transferred for a valuable consideration; or that, if plaintiff took it before due, he took it with notice of the defenses which defendants had against it. The defendants proffered evidence to show the warranty and its breach, but neither offered or attempted to establish either one of the three propositions suggested by the court.

The defendants complain of this ruling, first, because the court arbitrarily directed their order of proof. It had the right to do so, and did not abuse its discretion in its requirements. In fact, it was the proper order for the court to make. Ordinarily, a party has latitude in introducing his testimony; but in this case it would have been an idle thing to have introduced testimony concerning the warranty and its breach when it had been fairly established, by evidence *prima facie*, that plaintiff was a *bona fide* purchaser of the note before maturity. All defenses which might have been urged against the original payee thereof were cut off in an action by the holder, who purchased before maturity, without notice, and for a valuable consideration.

The defendants urge, secondly, that the evidence offered by the plaintiff does not show it to have been a *bona fide* purchaser of the note. The testimony established that the First National Bank of Battle Creek took this note at its face value before due, and gave Nichols, Shepherd & Co., the original payees of the note, credit on their account. When the note was taken, Nichols, Shepherd & Co. had a balance at the bank to their credit of over \$10,000; and it was proven that up to the time of this action their balance had never been less than \$10,000. The testimony of Victor P. Collins, president of the bank, shows that the amount of the credit of Nichols, Shepherd & Co. at the bank when this note was placed to their credit has since been drawn out many times, and replaced by new deposits, so that the amount to the credit of Nichols, Shepherd & Co., though often changed in character, had not been materially diminished in amount, but had been kept good by other notes, drafts, and moneys deposited subsequently. It is probably true that simply discounting a note, and crediting the amount thereof on the indorser's account, without parting with any value for it, is not enough to constitute such bank a *bona fide* purchaser of the note. In this instance, however, this transaction was simply placing the note to the credit of Nichols, Shepherd & Co. alone; for they subsequently checked against it, and exhausted the amount of their credit at the time this note was placed to their account, including the amount of this note. We think the fact of thus paying out the full amount makes

them purchasers. It is conceded that the bank did not buy the note outright, and pay for it, at that time; but they certainly were debtors to Nichols, Shepherd & Co. for its amount; and the general rule as to the application of payments, when there are no special facts to interfere, is that the first payments go to the oldest debts. Under this rule, the bank paid for it by allowing Nichols, Shepherd & Co. to check against and exhaust the amount of their credit at that time. This note was a part of that credit. It paid for it by cashing checks drawn upon it, and thus became a purchaser of the same for value. *Fox v. Bank*, 30 Kan. 441, 1 Pac. Rep. 789; *Mann v. Bank*, 30 Kan. 412, 1 Pac. Rep. 579; *Rand. Com. Paper*, § 994.

The other errors complained of do not require mention, and we recommend that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 182)

COLLINS v. MARTIN.

(Supreme Court of Kansas. Feb. 8, 1890.)

SET-OFF—WHEN ALLOWABLE—GRATUITOUS SERVICES.

Where a defendant did not intend to charge the plaintiff anything for various items when they were furnished, and so testified, he cannot, after an action has been commenced, make charges for them, and recover thereon.

(Syllabus by Holt, C.)

Commissioners' decision. Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

Wm. R. Hazen, for plaintiff in error.
Frank Herald, for defendant in error.

HOLT, C. This action was commenced by the plaintiff in error, as plaintiff, before a justice of the peace, where a trial was had, and a judgment rendered in his favor. Upon appeal it was tried in the district court by a jury, and a verdict rendered for defendant, and judgment in his favor for costs. The testimony shows mutual, neighborly, and friendly dealings for a considerable length of time. Afterwards their friendly relations were broken, and this action was commenced. Of the complaints made by the plaintiff we shall notice only one,—the refusal to give the following instruction asked by plaintiff: "The court instructs you that if you believe from the evidence that Martin did not intend to charge Collins for all or any of the items set forth in his answer till after Collins commenced this suit, then he cannot make such charges after the commencement of this suit." Abstractly, this instruction correctly enunciates the law. *Stadel v. Stadel*, 40 Kan. 646, 20 Pac. Rep. 475. It is claimed, however, there was no material evidence demanding it. By an examination of the record we find that the defendant himself testified, speaking of pasturing the colts and calves of plaintiff, as follows: "Question.

Did you intend at that time to charge him anything? *Answer.* No, sir; but I did not intend he should charge me for a great many things which I did not get. *Q.* At the time you came back from Massachusetts, and found this hay uncut, did you intend to charge him with any of these things that you have here? *A.* I did not. *Q.* You so testified in the other court? *A.* That I did not intend to. *Q.* The charges were made since he commenced this suit and commenced this litigation? *A.* I wanted to get rid of him without any trouble. *Q.* Right square out, is not that so? *A.* State the question again. *Q.* You never intended to charge him anything you have figured here, until he sued you? *A.* No, sir; I did not intend to charge him anything. I intended to get rid of him the easiest way I could." It will be observed that he not only spoke of the item of pasturage, but also embraced in his testimony all items named in his bill of particulars, *i. e.*, "any of these things you have here." Under this evidence, the plaintiff was entitled to the instruction asked, or one similar to it. None was given by the court touching this phase of the evidence. *Manufacturing Co. v. Nicholson*, 36 Kan. 383, 13 Pac. Rep. 597. For this error in refusing to give this instruction we recommend that the judgment be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 219)

MCGILLVRAY v. MOSER.

(*Supreme Court of Kansas. Feb. 8, 1890.*)

PARTNERSHIP—ACCOUNTING—JUDGMENT—COSTS.

1. Where the report of a referee in an action of accounting between partners shows that there is property in the hands of the defendant belonging to the firm undisposed of, it is error for the court to render a personal judgment for money only against the plaintiff before the partnership affairs are fully settled, and the partnership property either divided or converted into cash.

2. In actions for accounting between partners, the taxation of costs lies within the sound discretion of the court.

(*Syllabus by Holt, C.*)

Commissioners' decision. Error from district court, Brown county; R. C. BASSETT, Judge.

This action was brought in the Brown district court by Peter C. McGillvray, plaintiff in error, as plaintiff, against Elias Moser. In his petition he alleges that a partnership was entered into between them in 1881 at Hiawatha, for the sale of farm machinery, agricultural implements, buggies, etc., and that by mutual agreement the firm was dissolved January 1, 1883. The plaintiff asked an accounting, and that the defendant be adjudged to pay to plaintiff such sums as might appear to be justly due him, and that some proper person might be appointed by the court as receiver to take charge of the books and collect moneys owing to said firm. After the issues were joined the court, by the

consent of the parties, referred the case to R. F. B., Esq., to hear and determine the case, and report his findings of fact and conclusions of law. At the May term, 1887, of the district court, he made the following report:

"(1) That the plaintiff and defendant entered into a copartnership under the firm name of Moser & McGillvray on the 11th day of April, 1881, in the city of Hiawatha, Brown county, Kansas, for the sale of farm machinery and agricultural implements, by the following written agreement: 'Hiawatha, Kansas, April 11th, 1881. Moser & McGillvray: We, Elias Moser and P. C. McGillvray, have this day entered upon a partnership under the firm name of Moser & McGillvray, at No. 104 Oregon street, Hiawatha, Kansas, to engage in the sale of farm machinery and agricultural implements, under the following agreement: Elias Moser shall be the manager of the business, and shall approve of all sales made, and receipt for and pay out all cash. The partners are to share equally in all losses and gains, and Mr. Moser shall be entitled to 10 per cent. interest on all sums of money advanced by him on the account of P. C. McGillvray, from the date of its advancement until the sale is repaid. The said McGillvray also waives all rights or claims to any stocks, notes, or accounts of the firm until said Moser is fully reimbursed on his investment in the business on the account of said McGillvray. Elias Moser on his part invests in the business cash in bank, \$500.00; P. C. McGillvray on his part invests in the business the following: Open accounts and machinery and agricultural stock to the amount of \$325.90.'

"(2) That the plaintiff and defendant carried on and did business under said agreement until the 1st day of January, 1883, when they dissolved partnership by the following written contract of dissolution: 'This contract of dissolution of the copartnership heretofore existing between Elias Moser and P. C. McGillvray, under the name and style of Moser & McGillvray, doing business at Hiawatha, Kansas, witnesseth: That the said Moser shall take all stock on hand, the same having been inventoried in a book now in the possession of John A. Myers, with the cost price set opposite to each article, to which shall be added the freight and drayage on the same, and the whole amount shall be discounted five (\$500) hundred dollars on the said property hereby inventoried, and shall be, and the same is now, the property of said Moser. All accounts and notes belonging to said firm shall be retained by said Moser, as herein set forth; the said Moser to use reasonable diligence in collecting the same, using the firm name for that purpose. That with the proceeds of sale from the firm to himself, and the said notes and accounts as the same shall be collected, the said Moser shall discharge and pay all indebtedness of the firm, including all advances made by the said Moser over and above the amounts con-

tributed by the said McGillvray, with interest thereon at the rate of 10 per cent. per annum. And whereas, the said firm is largely liable on contracts of indorsements and guarantyship, as also is the said Moser on partnership business, therefore the said Moser shall retain from the money realized after payment of all firm indebtedness sufficient to indemnify and pay all liabilities. But if the said indemnity fund shall bring money into the hands of said Moser in any amount, then the said Moser shall pay and account for interest on the same at the rate of 12 per cent. per annum, and can use the same in his own private business. The money coming to Moser's hands after payment of the firm's indebtedness, and above the said indemnity fund, shall be divided equally between the said Moser and the said McGillvray. And the liability of the firm, or either member thereof, arising in the partnership business, as it shall be discharged and paid, the said indemnity fund shall be lessened and divided proportionately as above. The money belonging to McGillvray on division shall be paid by said Moser to S. A. Fulton as the agent of said McGillvray. The copartnership heretofore existing between the said Moser and the said McGillvray be, and the same is hereby, dissolved, and the said Moser alone closes the partnership business. Books of account and notes shall be placed in the hands of J. N. Davis to post and correct, and also to ascertain the accounts of the individuals with the firm. Said posting, correction, and ascertaining shall be final and conclusive between the partners hereto. All notes and accounts shall be placed in the First National Bank of Hiawatha, Kansas, for collection, and, if the same shall not be paid or fully secured within thirty days after receipt by same bank, then the same bank shall turn all accounts and notes uncollected or not secured into the hands of James Falloon for collection. Also secured notes not paid at maturity, and after notice, shall be placed in the hands of said Falloon for collection. Said bank and said Falloon shall account to said Moser for all collections made. Partnership property overlooked, and not inventoried, shall be sold to said Moser the same as the property inventoried. Witness our hands this 1st day of January, A. D. 1883. ELIAS MOSER. P. C. MCGILLVRAY. Witness: H. B. VEY. D. A. VANDERPOOL.'

"(3) That the stock on hand (machinery, implements, office furniture, etc., including freight added) of the firm of Moser & McGillvray mentioned at time of dissolution, realized the sum of \$5,780.02; deducting the \$500 provided for in the contract of dissolution, the amount realized by the firm from the stock on hand was the sum of \$5,280.02.

"(4) That since the dissolution of the partnership the defendant has collected and received on notes and accounts belonging to the firm the sum of \$7,888.83.

"(5) That since the dissolution of the part-

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nership the defendant had paid firm indebtedness, including expenses since dissolution, to the amount of \$3,792.33.

"(6) That the plaintiff has drawn from the firm before and since the dissolution, over and above what he has paid into the firm, the sum of \$471.93.

"(7) That the defendant at the time of the dissolution of the partnership had advanced, in the years 1881 and 1882, the sum of \$8,331.43 over and above what he had drawn out.

"(8) That the interest at 10 per cent. on the amount advanced by the defendant, over and above what he had drawn out of the firm, amounts to \$650.

"(9) That the defendant's account with the firm, before and since the dissolution of the partnership, is as follows:

	Dr.	Cr.
To stock on hand, office furniture, as per inventory....	\$5,280 02	
By cash advanced in the years 1881 and 1882		\$8,331 43
By interest on cash advanced.....		650 00
To total amount collected and received since dissolution	7,888 83	
By amount paid on firm's indebtedness, and for expenses since dissolution.....		3,792 33
Balance		395 09
	\$13,168 85	\$13,168 85
To balance	895 09	

"That there remains on hand in the possession of the defendant the following property, including notes and accounts not collected, which belongs to the firm: One gelding; lots 21 and 25 on Pottawattomie street, in the city of Hiawatha, Brown county, Kansas; book accounts amounting to about \$900, and notes amounting to \$1,205.81, exclusive of interest; also judgments for \$268.73.

"CONCLUSIONS OF LAW.

"(1) That the plaintiff is indebted to the defendant in the sum of \$38.42.

"(2) That the plaintiff and defendant are each entitled to one-half interest in the partnership property now on hand."

C. W. Johnson and Albert Perry, for plaintiff in error. James Falloon, for defendant in error.

HOLT, C., (after stating the facts as above.) None of the testimony submitted to the referee is brought here, but there is a controversy concerning the opportunity, or want of opportunity, of the plaintiff to present a bill of exceptions to the referee before his report was filed in court. Upon this issue there is quite a voluminous amount of conflicting and contradictory testimony, which it would be profitless to discuss. It is enough to say that we shall not disturb the ruling of the district court against the plaintiff on this phase of the case, as it is upheld

by some substantial evidence. The plaintiff objected to the judgment of the court, for the reason it was not supported by the report and findings of the referee, and to the taxation of all the costs against him. It appears from the findings that the plaintiff had drawn out more than his share of the cash proceeds of the firm, but there was still left in the defendant's hands a considerable amount of property,—a horse, two lots in the city of Hiawatha, accounts, judgments, and a large number of notes. The referee found, as a conclusion of law concerning this property, that each party was entitled to a one-half interest therein. No order was asked for by either party, after the referee's report was filed, to have a receiver appointed, or that the sheriff be directed to sell the property, or any other method suggested by which this property could be turned into money, and the affairs of the firm closed. Simply a judgment was rendered against the plaintiff for \$38.42 and the costs of suit. This judgment was erroneous, and not authorized by the findings. The report itself shows, as we have suggested, that there was still in the hands of the defendant a considerable amount of property belonging to the partnership. If it had been converted into money, it is altogether probable that, instead of having overdrawn, the plaintiff might have had something to his credit in the hands of the defendant. Until this was disposed of, there should certainly have been no personal judgment for money only against the plaintiff.

The plaintiff in his petition complains that the defendant refused to settle with him, and had failed to use diligence in collecting the debts of the firm. For all that these findings show, the defendant might have collected many more of the notes and accounts, and disposed of the other property for cash. If, instead of collecting nearly \$8,000, he had only collected \$6,000, and there had remained in his hands \$2,000 worth of good notes, then a judgment against plaintiff upon the theory upon which this judgment was rendered would have been for a large amount; while, on the other hand, if by using a little more activity he had collected \$100 more than he did, then the judgment, instead of being against plaintiff for the amount named, would have been in his favor. In other words, the more careless and negligent he might have been in the winding up of the business under their agreement, the more favorable the judgment would have been for him, and the more faithful and diligent he might have been, the greater probability of a judgment against him. This would have been placing a premium upon negligence, and a penalty upon diligence. The law does not tolerate such practice. For this error in disregarding in the judgment the property of the firm in the hands of the defendant, and the taxation of all the costs against the plaintiff, we recommend that the case be remanded for further proceedings, and suggest that either a receiver be appointed to take charge of the re-

maining property of the firm, and convert it into money, or that the sheriff be directed to sell it, or some method be adopted, as may be agreed upon by the parties or directed by the court, in order that all the assets of the firm may be converted into cash, and then judgment rendered as the law and evidence may warrant. From the record brought here the taxation of the costs is now important to the parties, and we therefore suggest that, in actions of this nature, the question of costs lies entirely within the sound discretion of the court. Section 591, Civil Code; *Hottenstein v. Conrad*, 9 Kan. 436. There is nothing in the findings of the referee which would indicate that all the costs should be taxed against the plaintiff. There is nothing to show that he wished to unnecessarily prolong this litigation, or in any way obstruct the due course of procedure, nor is there anything that shows that he dealt fraudulently with defendant. The trial court, being acquainted with all the surroundings of this action and its trial before the referee, is in a position to use its discretion wisely, either in taxing all the costs against either one of the parties, or dividing them in such proportion as may seem right and equitable. We recommend that the case be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 123)

CURTIS *et al.* v. BOARD OF EDUCATION.

(Supreme Court of Kansas. Feb. 8, 1890.)

SCHOOL-DISTRICTS—DIVISION—OFFICERS—DEEDS—CONDITIONS.

1. A deed of conveyance was executed by the owner of a certain lot situated within a certain school-district, conveying the lot in fee and forever to the members of the school board, and to "their successors in office, for the erection of a school-house thereon, and for no other purposes," and afterwards that portion of the school-district within which the lot was situated was severed from the remainder of the school-district, and placed within the corporate limits of an incorporated city. *Held*, that the school officers of such city became and are the "successors in office" of the officers of the school-district.

2. In such a case the conveyance did not create an estate merely upon condition either precedent or subsequent; but the words, "for the erection of a school-house thereon, and for no other purposes," constituted only a limitation upon the manner in which the property should be used.

3. Conditions subsequent, which render estates already vested liable to be forfeited, are never favored in law; and no deed will be construed as creating such a condition unless the language to that effect is so clear that no room is left for any other construction.

(Syllabus by the Court.)

Error from superior court, Shawnee county; W. C. WEBB, Judge.

Charles Curtis and *A. H. Case*, for plaintiffs in error. *Douthitt, Jones & Mason*, for defendant in error.

VALENTINE, J. This was an action brought by *Permelia Curtis*, *William H. Curtis*, and *Orrin A. Curtis* against the board of education of the city of Topeka to have a for-

feiture declared of the defendant's title, whatever it might be, to lot No. 91 on Kansas avenue, originally in the town of Eugene, but now in the city of Topeka, on the north side of the Kansas river, and to have the title to such real estate declared to be in the plaintiffs. The case was tried before the court without a jury, and the court made special findings and conclusions of fact and law, and rendered judgment in favor of the defendant and against the plaintiffs for costs of suit; and the plaintiffs, as plaintiffs in error, bring the case to this court for review.

The facts of the case appear to be substantially as follows: On August 31, 1866, and prior thereto, William Curtis owned the property now in controversy, and with his wife, Permella Curtis, conveyed the same, by a certain warranty deed, to school-district No. 45, of Shawnee county, Kan., which school-district included all the territory of the town of Eugene, and much other territory, which deed, omitting some of the formal parts and the signatures and acknowledgment, reads as follows: "This indenture, made this 31st day of August, 1866, between William Curtis and Permella Curtis, his wife, of the county of Shawnee and the state of Kansas, of the first part, and A. Rambo and B. F. Vanhorn, as school board of district No. 45 of the county of Shawnee and state of Kansas, witnesses: That the said parties of the first part, in consideration of one dollar to them duly paid, have bargained and sold, and by these presents do grant and convey, to the said parties of the second part, *their successors in office, for the erection of a school-house thereon, and for no other purposes*, lot number 91, Kansas avenue, in the town of Eugene, Shawnee county, state of Kansas, with the appurtenances, and all the estate, title, and interest of the said parties of the first part therein; and the said parties of the first part do hereby covenant and agree with the said parties of the second part that at the time of the delivery hereof the said parties of the first part were the lawful owners of the premises above granted, and seised thereof in fee-simple absolute, and that they will warrant and defend the above-granted premises in the peaceable possession of the said parties of the second part and their successors forever." In the execution of this deed a printed blank was used, but the foregoing words in italics were and are in writing. This deed was duly recorded on September 4, 1866. The officers of the school-district immediately took the possession of the property conveyed, erected a school-house thereon, and maintained a school therein up to April 11, 1867, when that portion of the school-district which was known as the "Town of Eugene" was severed from the remaining portion of the school-district and was annexed to and incorporated within the city of Topeka, which city was then school-district No. 23; and immediately afterwards the school officers of the city of Topeka took the possession of the property and continuously held the possession thereof until May 5, 1883, and

used it continuously for school purposes up to 1881 or 1882, with the possible exception of the period from 1869 up to 1878. In 1867 the school board of the city of Topeka constructed a new school-house on the property, which remained thereon until June 16, 1882, when it was sold and removed. In March, 1873, the aforesaid William Curtis died, leaving the plaintiffs in this action as his sole heirs; the aforesaid Permella Curtis being his widow. On April 2, 1873, the school-district No. 45 sold and conveyed by a quitclaim deed the property in controversy to the present defendant for the sum of \$400. On June 16, 1882, the school-house on said property was sold and removed therefrom as aforesaid. During that year and the next year the defendant offered the property for sale for the purpose of procuring money to build a new school-house elsewhere, and early in 1883 entered into a contract with O. L. Haywood to sell the property to him, but no sale was ever consummated. and the aforesaid contract was finally abandoned by both parties. On May 5, 1883, the plaintiffs took the possession of the property, and have remained in the possession thereof ever since. On March 3, 1884, the defendant took steps to build a new school-house on the property in controversy, and procured plans, specifications, etc., therefor, when, on April 4, 1884, this action was commenced, which stopped all further proceedings. Since that time the property has been taxed, and the taxes paid by one of the plaintiffs.

We think, upon the foregoing facts, the members of the board of education of the city of Topeka are, properly speaking and in law, the "successors in office" of the members of the school board of school-district No. 45, with respect to the property in controversy, and, as such successors in office, are entitled to all the rights and privileges with respect to such property as the school officers of school-district No. 45 would have under the same circumstances, if the property still remained within the territorial boundaries of school officers of school-district No. 45; and therefore the deed executed by the school officers of school-district No. 45 to the board of education of the city of Topeka can have no practical effect or force in this case. It is useless, for what it attempted to effect had already been effected. It was probably equitable for the school board of the city of Topeka to pay to school-district No. 45 the sum of \$400 for the property acquired by the city school-district from school-district No. 45. Yet neither the payment of such sum of money, nor the aforesaid deed of conveyance from school-district No. 45 to the city school-district, can affect any question involved in this case. That the city of Topeka, as represented by its board of education, is a school-district, see the case of Knowles v. Board, 33 Kan. 692, 7 Pac. Rep. 561. But, if the school officers of the city of Topeka are not the successors in office of the school officers of school-district No. 45, for the purposes of this property, and if the school-district of

the city of Topeka, for that reason, is, and has been all the time since April 11, 1867, holding the property in controversy illegally, and as trespassers, and adversely to the rights of the plaintiffs, then the 15-years statute of limitations has barred the plaintiff's present action, for the school-district of the city of Topeka has held and controlled the property in controversy from April 11, 1867, up to May 5, 1883, over 16 years, continuously, and before the commencement of this action.

With the exception of a certain condition or limitation hereafter to be mentioned, everything pertaining to the property in controversy, fee and all, was conveyed by Curtis and wife to the school officers of school-district No. 45, and to their successors in office, "forever." That condition was and is as follows: The property was conveyed "for the erection of a school-house thereon, and for no other purposes." We have quoted the condition or limitation literally, and it is all contained in the above-quoted words. It is claimed by the plaintiffs that by these words a school-house was not only to be erected upon the property in controversy, but also that such school-house, or some other school-house, should be maintained thereon forever, and that a school should be maintained in such school-house forever. To this extent we are inclined to agree with the plaintiffs. But they further claim that by these words only an estate upon condition subsequent was created, and that for any breach of such condition, as by failing to erect a school-house on the property, or to afterwards maintain the same, or to maintain a school upon the property, a forfeiture of the title would ensue, and that the title would revert back, and become vested in the grantors or their heirs; or, at least, that the grantors or their heirs might, for any breach of the supposed condition, re-enter the premises, and reinvest themselves with the title. Whether this claim is correct or not is the principal question in this case. On the other hand, the defendant claims that the foregoing words constitute at most only a limitation upon the manner in which the property should be used, and also claims that, even if such words should be held to constitute a condition either precedent or subsequent, still that the condition was fulfilled and performed when the first school-house was erected on the property, in 1866, by school-district No. 45, citing as authority for this claim the cases of *Mead v. Ballard*, 7 Wall. 290, and *Taylor v. Binford*, 37 Ohio St. 262. We are inclined to agree with the defendant that the foregoing words constitute only a limitation upon the manner in which the property in controversy should be used, and do not constitute either a condition precedent or subsequent, upon which only the estate is held. They in effect create a covenant that the property shall be used in a particular way; and the property has never, in fact, been used in any other way since the deed was executed, except by the plaintiffs themselves. There are no words

in the deed stating that the estate was or should be conveyed "upon condition," or that it might be "forfeited" under any circumstances whatever, or that the estate might under any circumstances "revert" to the grantors or their heirs, or that they might under any circumstances ever have the right to "re-enter" the premises. Nor was the estate conveyed or to be continued in existence upon any such terms as "provided," or "if" something in the future should be done or not done, or happen or not happen. Indeed, there is nothing sufficiently strong in any part of the deed, or in the whole of the deed, to indicate that the estate was conveyed, or intended to be conveyed, upon any condition, either precedent or subsequent; but, taking the whole of the deed together, it shows that an absolute estate in fee-simple, and the whole of the estate, was intended to be conveyed and was conveyed, and was to continue in the grantees, the school officers of school-district No. 45, and their successors in office, "forever," the property to be used, however, only for school purposes. The authorities are uniform that estates upon condition subsequent, which, after having been fully vested, may be defeated by a breach of the condition, are never favored in law, and that no deed will be construed to create such an estate unless the language to that effect is so clear that no room is left for any other construction. 2 Devlin, Deeds, § 970 et seq., and cases there cited. And, as illustrations generally of the disfavor with which conditions subsequent are considered by the courts, and as having some application to this case, see the following cases: *Packard v. Ames*, 16 Gray, 327; *Rawson v. School-District*, 7 Allen, 125; *Chapin v. Harris*, 8 Allen, 594; *Sohler v. Trinity Church*, 109 Mass. 1; *Laberee v. Carleton*, 53 Me. 211; *Emerson v. Simpson*, 43 N. H. 475; *Wier v. Simmons*, 55 Wis. 637, 13 N. W. Rep. 873; *Mills v. Seminary*, 58 Wis. 135, 15 N. W. Rep. 133; *Stanley v. Colt*, 5 Wall. 119.

We think the property in controversy belongs to the school-district of the city of Topeka, to be used for school purposes only. If it should ever be used for any other purpose, then any person injured thereby would have his action for damages, or his action to enjoin the parties from so using it; and possibly circumstances might occur, or be brought into existence, under which the courts would hold that the title to the property had been forfeited, but no such case is presented in the present action. The judgment of the court below will be affirmed; all the justices concurring.

(43 Kan. 216.)

MCCLELLAN v. KRALL.

(Supreme Court of Kansas. Feb. 8, 1890.)

LANDLORD AND TENANT—PURCHASER OF CROP AT EXECUTION SALE.

H. rented a farm from M. for a term of three years from March 1, 1884, the rent to be payable in money at stated times. Failing to pay the rent for the first year when due, M. obtained a judgment

against him on December 27, 1884, and caused an execution to be levied on a crop of winter wheat growing upon the rented land, and at the execution sale, held on January 9, 1885, the crop was purchased by K., to whom the judgment of M. had been assigned the day prior to the sale. M., by notice to and agreement with H., terminated the tenancy on March 1, 1885, and then sought to charge K., the purchaser at judicial sale, for the value of the use and occupation of the land on which the crop was growing from March 1, 1885, until the crop was ripened and removed. *Held*, that K. did not become a tenant of M., or liable for any rent, but was entitled to ingress and egress over the land for the purpose of harvesting and removing the crop within a reasonable time after the same became ripe, without incurring any liability to the plaintiff for the value of the use and occupation of the land while the crop was ripening.

(Syllabus by the Court.)

Error from district court, Atchison county;
DAVID MARTIN, Judge.

Jackson & Royse, for plaintiff in error.
A. F. Martin, for defendant in error.

JOHNSTON, J. This is an action to recover \$200 for the use and occupation of 40 acres of land from the 1st day of March, 1885, to the 2d day of June, 1885, when the action was instituted. Plaintiff, who was the owner of a farm, leased it to one Henke for a period of three years from March 1, 1884, at an annual rental of \$475, payable at stated times. The rent for 1884 not being paid according to agreement, plaintiff began two suits against Henke to recover the rent, and judgments therein were obtained on December 27, 1884. Two days later the plaintiff caused an execution to be levied upon 40 acres of wheat which had been sown by Henke, and was growing upon the rented farm, which, after being advertised, was sold, on January 9, 1885, to the defendant, Frank Krall. On January 8, 1885, the plaintiff sold and transferred his interest in the judgments to Krall, and took his notes in payment for the same. In December, 1884, the plaintiff notified Henke that he must surrender the possession of the farm on March 1, 1885, which was done, and the farm was leased to another from that date, with the exception of the 40 acres on which the wheat was standing. Plaintiff insists that he is entitled to recover from the purchaser of the crop the use of the land from the 1st of March, 1885, until the crop was harvested, but the district court held otherwise. The ruling was correct. The relation of landlord and tenant did not exist between McClellan and Krall, and there was no contract that Krall should pay any part of the rent, or for the use of the land for any time. He was a purchaser at a judicial sale, and acquired the interest of both McClellan and his tenant in the crop purchased. McClellan had a lien on the crop growing on his premises for the rent of 1884. To enforce that lien, he caused the levy and sale of the growing crop sown that year by Henke. Under these circumstances, Krall was clothed with the interest or title of the landlord as well as with that of the tenant. By purchasing at such a sale Krall did not become a tenant or

liable for rent, but he was entitled to ingress and egress over the land for the purpose of harvesting the crop when it became ripe. He was entitled to a reasonable time after the crop ripened to harvest and remove the same, and this without any liability to the plaintiff for the use and the occupation of the land while the crop was ripening. *Brittain v. McKay*, 35 Amer. Dec. 738; *Coombs v. Jordan*, 3 Bland, 284; *Craddock v. Riddlesbarger*, 2 Dana, 205; *Raventas v. Green*, 57 Cal. 254; *Hartwell v. Bissell*, 17 Johns. 128; *Smith v. Tritt*, 28 Amer. Dec. 565; *Whipple v. Foot*, 2 Johns. 418; 4 Amer. & Eng. Cyclop. Law, 893, and cases cited. There was no use or occupation of the premises by Krall beyond what was proper and necessary. In fact, he was never upon the land but once, and then only for a few minutes. If the purchaser at the judicial sale had failed to harvest and remove the crop within a reasonable time after it ripened, some liability might have arisen against him; but, as this action was brought before the harvest season, there certainly was no unreasonable delay by Krall, and can be no liability against him. It appears from the plaintiff's evidence that the crop was so badly injured and frozen as to be practically valueless, and was therefore abandoned by Krall; and this probably accounts for the premature action of the plaintiff in bringing this suit. The purchase of the judgments against Henke the day prior to the sale will not change the rule or affect Krall's liability. The plaintiff caused the levy to be made on the crop, the sale to be advertised, and Krall, having become a purchaser at such sale, is entitled to a reasonable opportunity to take possession of the crop when it was in a condition to take, without incurring any liability to the party who caused the levy and sale of the crop for the use of the ground on which it grew. The judgment of the district court will be affirmed; all the justices concurring.

(43 Kan. 195)

STATE *ex rel.* BRADFORD, Attorney General, v. BOARD OF COUNTY COMMISSIONERS *et al.*

(Supreme Court of Kansas. Feb. 8, 1890.)

APPEAL—SUFFICIENCY OF EVIDENCE—RECORD.

Where the ruling of a district judge upon an application for a temporary injunction is brought to the supreme court on a case made, the question of whether the testimony was sufficient to sustain the application cannot be reviewed, unless there is in the case made itself a statement or showing that it contains all the testimony offered on the application.

(Syllabus by the Court.)

Error from district court, Harper county;
J. T. HERRICK, Judge.

S. B. Bradford, Atty. Gen., *Sam S. Sisson, Finch & Finch*, and *Webb & Webb*, for relator. *Shepard, Grove & Shepard*, for defendants in error.

JOHNSTON, J. This was an action brought by the state, on the relation of the attorney

general, against the county commissioners, the county clerk, and county treasurer of Harper county, alleging that the county commissioners were proceeding, in violation of law, to construct and build a permanent county building without submitting the question to a vote of the electors, and receiving their sanction, and had awarded contracts involving an expenditure largely exceeding \$1,000 without advertising for bids, or having any plans or specifications prepared of the proposed improvement, and without any public letting, as the law requires. It was further alleged that a portion of the work had been completed, and county warrants issued therefor, which the county treasurer would pay unless restrained by the court. The prayer of the petition was that the board of county commissioners be enjoined from proceeding further with the construction until authority was given by a vote of the electors, as the law prescribes; that the county clerk be restrained from issuing any county warrants in that behalf; and the county treasurer restrained from paying any such warrants which might have been, or should thereafter be, issued. Upon presentation of the verified petition, on October 17, 1887, the district judge granted a restraining order, and fixed the hearing for a temporary injunction on the 19th, at which time the parties appeared, and the hearing was begun and continued until the 21st, when the case was taken under advisement. The district judge announced his decision on the 24th of October, 1887, denying the application for a temporary injunction. The case was at once removed to this court, and it is now contended that, under the evidence, the district judge should have granted the temporary injunction. There was considerable testimony offered at the hearing, the greater part of which was oral, and the defendants now insist that the testimony cannot be reviewed, as the record does not contain, or purport to contain, all that was introduced. This objection precludes an examination of the real point in controversy between the parties. The question of whether the improvement or addition to the court-house which was being constructed was of such a character as to be regarded as a permanent county building, which could not be constructed without an approving vote of the electors of the county, as was decided in *State v. Commissioners*, 21 Kan. 419, or whether it was to be regarded as a mere repair or improvement of an already existing court-house, constructed in good faith, as decided in *State v. Harrison*, 24 Kan. 268, depends upon the testimony; and neither these nor any of the questions submitted to the district court can be determined here, unless the whole testimony is before us. There is no statement or showing in the case made brought to this court that it contains all the evidence submitted to the judge. There is a statement to that effect in the certificate attached to the case made; but, as has been repeatedly held, this is insufficient, and hence the question of

whether the decision is sustained by the evidence is not before us. *Brown v. Johnson*, 14 Kan. 377; *Moody v. Arthur*, 16 Kan. 419; *Greenwood v. Bean*, 20 Kan. 240; *Winstead v. Standeford*, 21 Kan. 270; *Muscott v. Hanna*, 26 Kan. 770; *Eddy v. Weaver*, 37 Kan. 540. 15 Pac. Rep. 492; *Railroad Co. v. Grimes*, 38 Kan. 241, 16 Pac. Rep. 472; *Insurance Co. v. Hogue*, 41 Kan. 524, 21 Pac. Rep. 641; *Hill v. Bank*, 42 Kan. —, 22 Pac. Rep. 324. In the absence of a statement in the case made, or of an equivalent showing therein that the testimony is all preserved, we cannot at this stage of the litigation, and in this proceeding, say that the action of the officers was illegal, or that the evidence was insufficient to sustain the ruling of the district judge. Judgment affirmed; all the justices concurring.

(43 Kan. 185)

ST. LOUIS, FT. S. & W. R. CO. v. McAULIFF.

(Supreme Court of Kansas. Feb. 8, 1890.)

EMINENT DOMAIN — DAMAGES — EVIDENCE — VERDICT — SPECIAL FINDINGS.

1. Upon an appeal from the award of commissioners in a condemnation proceeding, the special findings of fact of the jury, stating the damages allowed to the land-owner against the railroad company, control the general verdict.

2. Where a part of a farm is taken for railroad purposes, inconvenience to the farm, and danger from fire to buildings, fences, timber, or crops upon the remainder, may properly be considered in estimating the depreciation in the value of the property.

3. Where the jury specially find the amount of the depreciation in value of the whole tract of land by reason of the construction of the railroad through a part of it, such sum must necessarily include the elements of damages causing such depreciation, like inconvenience, and danger from fire.

(Syllabus by the Court.)

Error from district court, Harvey county; L. HOUK, Judge.

On the 22d day of March, 1886, the district judge of Harvey county appointed three commissioners to condemn a right of way through that county for the St. Louis, Ft. Scott & Wichita Railroad Company. In the discharge of their duties the commissioners condemned a strip of land through the E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 6, township 23, range 1 E., belonging to Timothy McAuliff, and awarded McAuliff for the land taken, and for damages to the land not taken, the sum of \$110. He appealed from the award of the commissioners, and on March 1, 1887, filed a petition claiming as his damages the sum of \$1,500, with interest thereon from the 24th day of March, 1886. Subsequently the railroad company filed its answer, denying that McAuliff was the owner of the premises through which the right of way had been laid out, and also denying that he was entitled to any damages whatever. To this answer McAuliff filed his reply; and on the 10th of June, 1887, trial was had before the court with a jury. The jury returned a verdict for McAuliff, and assessed the amount of his recovery at \$295.05. The jury also

made the following special findings of fact: "(1) What do you find was the market value of the land actually taken on May 24, 1886? *Answer.* \$80. (2) What do you find was the actual market value of the parcel of land south of the railroad track May 24, 1886? *A.* \$120. (3) What do you find was the amount of damage to that tract of land lying south of railroad track? *A.* \$80. (4) What was the damage, if any, to the tract of land north of the railroad track? *A.* \$50. (5) What was the damages, if any, to the eighty acres of land known as the 'east half of the north-east quarter of section six, township twenty-three, range one east,' by reason of the construction of defendant's railroad, and in what did such damage consist? *A.* Directly, there is no damage; indirectly, there is a probable damage. (6) What was the market value per acre of that forty-acre tract of land belonging to plaintiff described as the 'south-west quarter of the north-east quarter' of said section six, May 24, 1886, and before the location of the right of way through it? *A.* \$40 per acre. (7) What elements have you taken into consideration in fixing the amount of your award? State fully. *A.* Damage for depreciation of land, land taken for right of way, inconvenience of farming, and danger of fire. (8) What amount have you allowed for the inconvenience in farming plaintiff's land in the shape it is now? *A.* \$20. (9) What amount have you allowed for the depreciation of the whole tract of land in the market by reason of the construction of defendant's railroad through the same? *A.* \$150. (10) What amount have you allowed for the depreciation of 'east eighty' in the market on account of the construction of defendant's road across the corner of the 'west forty'? *A.* Nothing. (11) What amount do you allow on account of liability of fire? *A.* \$45." The railroad company filed a motion asking the court, upon the special findings of the jury, to render judgment against it for \$162.50 only. This motion was overruled, and judgment was entered upon the general verdict for \$295.05, with interest at 7 per cent. from the 1st day of July, 1887. The railroad company excepted, and brings the case here.

Ady & Henry and *J. H. Richards*, for plaintiff in error. *Brown & Kline*, for defendant in error.

HORTON, C. J., (after stating the facts as above.) This was an appeal in the court below from the award of the commissioners, who condemned a right of way for the St. Louis, Fort Scott & Wichita Railroad Company through the land of Timothy McAuliff. The evidence is not preserved in the record, and no motion for a new trial was filed. The only question for our determination is whether the special findings of fact of the jury are inconsistent with the general verdict; if so, the amount of the judgment to be rendered. The amount of land actually taken for the right of way was two acres. The jury found

the land to be worth \$40 per acre, making \$80. They also found that the depreciation of the whole tract of land in the market by reason of the construction of the railroad through the same was \$150. The general verdict was for \$295.05. Although there were findings of an amount for inconvenience in farming the land, and for liability of fire, it must be assumed that these elements of damages were included in the allowance for the depreciation of the land. Inconvenience, danger of fire, etc., are the items to be taken into account in assessing the depreciation to a tract of land on account of the construction and operation of a railroad through it. If the amount stated in the special findings for inconvenience and liability of fire are added to the amount the jury found for the depreciation to the whole tract of land, then double damages will be allowed for the same elements or items. Adding the market value of the land actually taken, which was \$80, to the amount allowed for the depreciation of the whole tract of land, which was \$150, makes \$230. This, with interest, will make \$252.75. When the special findings of fact are inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly. Section 287, Civil Code. In this case the value of the land actually taken, and the depreciation of the whole tract as returned by the special findings, are less than the amount of the verdict, and the special findings must control. The cause will be remanded, with direction to the court below to enter judgment upon the special findings of fact in favor of McAuliff, and against the railroad company, for \$252.75. The costs in this court will be divided. All the justices concurring.

(43 Kan. 178)

MEAD v. UNITED BRETHREN IN CHRIST OF EL DORADO *et al.*

(Supreme Court of Kansas. Feb. 8, 1890.)

EJECTMENT—EVIDENCE—DEMURRER.

In an action of ejectment to recover a lot in an addition to the city of E., the plaintiff showed a patent from the United States to L., dated December 1, 1870, for a tract of land; that a portion of the same was surveyed, subdivided, and platted by L. as an addition to the city of E., but the plat was not filed until July, 1870; also a warranty deed, dated December 29, 1869, from L. and wife, conveying a certain lot in the addition, as surveyed and platted, to plaintiff; and, further, that while the deed was prior in point of time to the date of the patent and the recording of the plat, it was not made until after the right of L. for a patent from the United States was complete, nor until after the addition was surveyed and subdivided; and testimony was also offered tending to identify the lot in controversy as the one conveyed to plaintiff, and as a part of the tract embraced in the patent to L. *Held*, that the evidence tended to sustain plaintiff's cause of action, and that the demurrer to the same should have been overruled.

(Syllabus by the Court.)

Error from district court, Butler county; A. L. REDDEN, Judge.

Action in ejectment by J. R. Mead against the United Brethren in Christ of El Dorado, and M. Haishman, John Elwood, Henry

Paiscal, James Helton, and William Sexton, as trustees of the United Brethren in Christ of El Dorado, to recover certain land.

Gillett, Fowler & Sadler, for plaintiff in error. *Shinn & Yeager* and *W. E. Kilgore*, for defendants in error.

JOHNSTON, J. J. R. Mead brought an action in the nature of ejectment against the United Brethren in Christ of El Dorado for the recovery of lot No. 22 on Taylor street, in Lower's addition to the city of El Dorado, alleging that the defendants had unlawfully kept him out of the possession of the lot for three years past, to his damage in the sum of \$100, for which also he demanded judgment. A trial was had, which resulted in a judgment in favor of the defendants; and upon the demand of plaintiff the judgment was vacated and set aside, and a second trial granted, which occurred on December 28, 1887. This trial was before the court without a jury; and after the plaintiff had submitted his testimony the defendants demurred thereto upon the ground that it did not show that plaintiff was entitled to recover in the action. The demurrer was sustained, and of this ruling the plaintiff complains.

There was offered in evidence a patent from the United States to Edward L. Lower, dated December 1, 1870, for a quarter section of land in Butler county, a portion of which appears to have been platted by Lower as an addition to the city of El Dorado. Then there was introduced a warranty deed from Lower and wife to plaintiff, J. R. Mead, dated December 29, 1889, conveying, among other property, that which is in controversy, viz., lot 22 on Taylor street in Lower's addition to El Dorado. It was shown that the plat made by Lower was not filed until July, 1870, but he was a witness, and testified on the trial that the addition was surveyed and platted before the deed was made to the plaintiff, and before any lots in the addition were sold; and he further stated that the lot conveyed and described as a part of the addition was a part of the tract patented to him, and that he had executed the deed under which the plaintiff claims. This, in our opinion, tended to show title in the plaintiff, and to sustain his cause of action, and was at least sufficient to withstand a demurrer. No argument or appearance is made by or in behalf of the defendants in this court; nor have we any intimation, from any source, as to the grounds upon which the demurrer was sustained. It is true that the patent to Lower is of a later date than his deed to plaintiff, but the testimony tends to show that the deed was not made until the right to a patent was complete. When the full equitable title had vested in him, he was authorized to convey, although the patent had not yet been issued. The patent is only the evidence of title; and the delay in issuing one, where all the prerequisites to its issuance have been performed, will not affect or hinder the conveyance of the title vested in the owner. It

is also true that the plat of the addition of which the lot formed a part appears to have been filed with the register of deeds subsequent to the date of the deed from Lower to plaintiff; but Lower testifies that the addition was surveyed, the lots staked off and numbered, and the streets named, before the lot in question was sold. A conveyance of the lot is not rendered invalid by the failure to make and file the plat before the execution of the deed. In section 5, c. 78, Gen. St., it is provided that "if any person sell, or offer for sale, any lot within any city, town, or addition before the map or plat thereof be made out, acknowledged, filed, and recorded, as aforesaid, such person shall forfeit a sum not exceeding three hundred dollars for every lot which he shall sell or offer to sell." Under a similar statute it has been held that a sale made before a plat had been filed was not void; that the imposition of a penalty upon the grantor does not vitiate the conveyance, but that the title to the lots would pass to the grantee. *Bemis v. Becker*, 1 Kan. 226; *Mason v. Pitt*, 21 Mo. 391; *Strong v. Darling*, 9 Ohio, 201. The testimony of Lower tends to identify the lot in controversy as the one conveyed to plaintiff, and as a part of the tract described in the patent granted by the United States to Lower. Considering all the testimony in the light which we must when attacked by a demurrer, the ruling of the court must be held erroneous. *Brown v. Railroad Co.*, 31 Kan. 1, 1 Pac. Rep. 605; *Wolf v. Washer*, 32 Kan. 533, 4 Pac. Rep. 1036; *Railroad Co. v. Foster*, 39 Kan. 329, 18 Pac. Rep. 285. The judgment of the district court will be reversed, and the cause remanded for a new trial; all the justices concurring.

(43 Kan. 181)

WALSH MERCANTILE CO. v. FULLAM *et ux.*

(Supreme Court of Kansas. Feb. 8, 1890.)

APPEAL—WEIGHT OF EVIDENCE—OBJECTIONS NOT RAISED BELOW.

1. A judgment on a verdict approved by the trial court, based upon conflicting and contradictory evidence, will not be disturbed when there is substantial evidence to uphold it.

2. Where no exceptions are taken to the giving or refusing of instructions at the trial, this court cannot examine them. *Gafford v. Hall*, 39 Kan. 166, 17 Pac. Rep. 851.

(Syllabus by Holt, C.)

Commissioners' decision. Error from district court, Leavenworth county; ROBERT CROZIER, Judge.

Porter & Hunter, for plaintiff in error. *William Dill*, for defendants in error.

HOLT, C. The plaintiff in error, as plaintiff, recovered a judgment in the Leavenworth district court at the September term, 1887, for \$63.25, against John Fullam, and Ellen Fullam recovered against plaintiff a judgment for costs. The plaintiff complains of the judgment in favor of Ellen Fullam, claiming there should have been a judgment against both John Fullam and Ellen Fullam, as they were partners in the business of sell-

ing liquors in Leavenworth. The agent of the plaintiff claims that the liquors for which this action was brought were sold to both parties. This is denied by both defendants and their daughter, and the written order for wines and liquors offered in evidence by plaintiff was signed by John Fullam alone. Upon this conflicting and contradictory testimony the jury found in favor of the defendant Ellen Fullam. From a careful examination of the record we are inclined to think that the verdict was supported by a preponderance of evidence. In any event, under the well-established rule of this court, we shall not disturb the judgment based upon this verdict, there being substantial evidence to sustain it.

Another complaint of the plaintiff is that the court erred in its instructions to the jury concerning a certain order for \$16.25 for wines and liquors, given by John Fullam at Leavenworth, Kan., to the agent, and by him forwarded to plaintiff at St. Joseph, Mo. We are precluded from examining this alleged error, for the reason that neither the refusal to give the instruction asked, nor the giving of the instruction submitted, were excepted to by the plaintiff. *Gafford v. Hall*, 39 Kan. 166, 17 Pac. Rep. 851. These are the only errors complained of, and we recommend that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 175)

PURSLOW v. BRUNE.

(Supreme Court of Kansas. Feb. 8, 1890.)

GUARDIAN AND WARD—ACCOUNTING—OMISSIONS—FRAUD.

Where a guardian omits by mistake or inadvertence from his accounts filed in the probate court a small amount which he has collected for his ward, but it appears that such omission was not done with the intention of defrauding or injuring his ward, and the guardian gains no pecuniary advantage thereby, as the sum omitted is shown to have been used for the benefit of the ward, held, that such omission establishes no actual or constructive fraud.

(Syllabus by the Court.)

Error from district court, Atchison county; DAVID MARTIN, Judge.

J. T. Allensworth, for plaintiff in error.
S. H. Glenn and Tomlinson & Eaton, for defendant in error.

HORTON, C. J. On May 1, 1863, Henry Brune was married to the widow of Richard Key, deceased. She was the mother of five children. The plaintiff, Jane C. Purslow, *née* Key, was her daughter. At the second marriage of her mother she was about four years of age. Her father had died in the military service of the United States, and his children were entitled to a pension. On August 29, 1866, Henry Brune was appointed her guardian. The amount of pension money which he received for the plaintiff was \$834.95. She became of age on April 29, 1877. On May 28, 1877, Henry Brune made and

filed his final settlement with the probate court, showing a balance in his hands belonging to his ward of \$926. This settlement was confirmed by the court. The defendant took a receipt from the plaintiff, and was discharged as guardian. On the 9th day of April, 1886, the plaintiff brought this action to recover \$265.86 of pension money, which she alleged that the defendant, with the intention of defrauding her, had fraudulently omitted to account for to the probate court or to herself. The trial was had before the court without a jury, and, among other things, the court specially found that "the defendant is a German, not well versed in the English language, and all of said settlements, except the last two, appear to be in the handwriting of the incumbents of the office of the probate court. But the settlement of March 27, 1877, is in the handwriting of S. H. Glenn, an attorney at law, and that of May 28, 1877, is in the handwriting of John M. Price, an attorney at law. The defendant kept a memorandum book, now lost, of his receipts and expenditures, and he had the book present when the settlements were made. The persons making out the settlements had the use of the book to aid them in making them out. That the testimony does not show the shortage of \$90 in the pension money in the settlement of January 6, 1875, was the result of a design on the part of the defendant to cheat or defraud his wards, nor any of them, but the evidence tends rather to show that the item of September, 1873, \$60, and March, 1874, \$30, were omitted by mistake or inadvertence; and the testimony does not show any fraudulent misrepresentations of the defendant to the plaintiff, nor to the probate court, outside of the omission of the defendant to charge himself with said sum of \$90." The court further found that \$10 of the pension money was probably paid to John M. Price for legal services, and that there were also two little discrepancies in the accounts, amounting to 26 cents and 3 cents. Judgment was rendered in favor of the defendant, and against the plaintiff, and of this complaint is made.

The petition shows upon its face that plaintiff's claim is barred by the statute of limitations, unless the defendant was guilty of fraud. The final settlement in the probate court, as before stated, was on May 28, 1877, and this action was not brought until the 9th of April, 1886, nearly nine years after the plaintiff became of age. The findings show, however, that the plaintiff did not know of any omission or error in the accounts of her guardian until about the commencement of this action. The statute of limitations bars her claim, unless the defendant was guilty of actual, constructive, or some other kind of fraud. Without doubt, if the plaintiff had brought her action in time, she could have recovered for omission, accident, or mistake, if defendant had not filed a set-off. But, giving "fraud" its widest definition, we cannot see, upon the findings of fact or the testimony

ny, that any fraud upon the part of the defendant has been established. He was not guilty of any cunning, deception, or artifice used to circumvent or cheat the plaintiff, and it does not appear to us that the omission in the account was injurious to the plaintiff, nor did the defendant gain pecuniary advantage over the plaintiff by unfair means. If there had been no mistake or omission in the accounts, it is clearly evident that the probate court would have allowed the additional sum, or the sum omitted to be applied for education, clothing, and support of the plaintiff. The defendant testified that he claimed all the pension money for the support of his ward. The amount which he accounted for was all applied that way, with the consent of the probate court, and, if the additional \$90 or other sums had been reported, it would also have been charged to the ward in the same way. The plaintiff continued to reside from the time of the marriage of her mother with the defendant at the home of the defendant until October 15, 1878, more than a year after she was of age. During her minority she attended school part of the time, and took some lessons in music. She was treated as a member of the family, and it must be apparent that the amount of the pension money reported was not sufficient to board, clothe, and educate her. Again, the defendant never charged anything whatever for his time, trouble, or service as guardian. The defendant not only testified that he claimed the pension money not reported for the support of his ward, but it is apparent that he expended a greater amount for her support, clothing, etc., than all the pension money received by him. The findings of the court show that the omission of the \$90 and the other little sums were wholly unintentional, and as nine years have elapsed since the final settlement was made with the probate court, and no fraud established or actual wrong done, the plaintiff cannot recover. If there were any mere irregularities in the allowance of the charges for board, clothing, etc., by the probate court, these matters cannot be reviewed or corrected in this action. The judgment of the district court will be affirmed; all the justices concurring.

(43 Kan. 209)

RICHARDS v. THOMPSON et al.

(*Supreme Court of Kansas. Feb. 8, 1890.*)

CHAMPERTY AND MAINTENANCE—MORTGAGES—FORECLOSURE—PARTIES—TAX-DEEDS.

1. Where certain real estate is occupied by persons whose title is defective, and R., an attorney at law, writes to T., the person holding the paramount title, and then the following correspondence, according to the testimony of R., ensues: "I had made two propositions to him: That I would carry the suit through the district court and the supreme court for \$1,000; or, if he did not want to do that, I would divide the cash proceeds of the litigation. He wrote to me, and notified me to bring the suit; and he would let me know about the terms afterwards." In pursuance of this correspondence, R. commenced the action in the name of T. as plaintiff, signing the petition as follows. "R., Attorney for the Plaintiff." Afterwards, T.

sold and conveyed the property to R.; and from that time on the action was prosecuted in the name of R. *Held*, that neither maintenance nor champerty on the part of R. is shown.

2. Where the holder of a mortgage, long after the death of the mortgagor, proceeds to foreclose his mortgage, making no person a party to the suit except the holder of the mortgage, and the mortgagor, and service of summons is made by publication, and the foreclosure proceedings are prosecuted to final determination, and a sheriff's deed is executed and recorded, *held*, that all the foreclosure proceedings, including the sheriff's deed, are void as against the heir of the mortgagor and the grantee of such heir, although no action was instituted questioning the validity of such proceedings or deed for more than five years after the sheriff's deed was executed and recorded.

3. Where a tax-deed shows upon its face that it was executed on September 7, 1873, upon a tax-sale made on September 7, 1873, *held*, that such tax-deed is void upon its face, for the reason that it shows upon its face that it was executed one day too soon; and in such a case the five-years statute of limitations contained in section 141 of the tax-law will not operate in its favor.

(*Syllabus by the Court.*)

Error from district court, Sumner county; J. T. HERRICK, Judge.

A. A. Richards, for plaintiff in error.
McDonald & Parker, for defendants in error.

VALENTINE, J. This was an action in the nature of ejectment, brought in the district court of Sumner county, on December 18, 1885, in the name of Robert Thompson against Kate Patterson and others, to recover lot 17, in block 59, in the city of Wellington. Afterwards, and with the consent of the parties, A. A. Richards was substituted as the plaintiff in the place of Robert Thompson, and, Kate Patterson having died, the action was revived against William Thompson, her executor, and against Margaret J. Thompson and others, her devisees. The case was tried twice before the court without a jury, the second trial being upon the same evidence as was introduced on the first trial, and the court found generally in favor of the defendants and against the plaintiff, and rendered judgment accordingly; and the plaintiff, as plaintiff in error, brings the case to this court for review.

The facts of the case are substantially as follows: On December 20, 1873, and prior thereto, Robert H. Thompson owned the land in controversy, and on that day mortgaged it to John G. Tucker, to secure the sum of \$200, to become due on February 20, 1874. On January 25, 1876, Robert H. Thompson died at Warner, in the state of New Hampshire, intestate, leaving as his sole heir his father, Robert Thompson. On August 8, 1877, the mortgage debt being overdue, and the mortgagee having no knowledge of the death of Robert H. Thompson, such mortgagee commenced an action in the district court of Sumner county to recover the mortgage debt, and to foreclose the mortgage, making Robert H. Thompson, and him alone, the defendant. Service of summons was obtained by publication, and the foreclosure proceedings were carried on to final consum-

mation; and on September 7, 1878, a sheriff's deed was executed under the foreclosure proceedings to Christiana Tucker for the property in controversy, and on the same day this deed was recorded. Also, on the same day, a tax-deed was executed to Christiana Tucker for the same property, on a tax-sale made on September 7, 1875, for the taxes of 1874. The defendants' title to the property in controversy is founded upon the aforesaid sheriff's deed and tax-deed; and the defendants, with their grantors, including Christiana Tucker, have held the possession of the property under such sheriff's deed and tax-deed continuously since about the time when such deeds were executed. Some time in the spring of 1885, A. A. Richards, an attorney at law at Wellington, Kan., was informed by some person that the title to the property in controversy, as held by Christiana Tucker and her grantees, was not good; and from that time on until about November, 1885, he made extraordinary effort to ascertain who held the adverse, and, as he supposed, the better title, when finally he ascertained, as he believed, that the adverse and paramount title was in the aforesaid Robert Thompson, of Warner, N. H. After some correspondence between Richards and Thompson, Richards wrote to Thompson, as he states in his testimony, as follows: "I had made two propositions to him: That I would carry the suit through the district court and the supreme court for \$1,000; or, if he did not want to do that, I would divide the cash proceeds of the litigation. He wrote to me, and notified me to bring the suit, and he would let me know about the terms afterwards." In pursuance of this correspondence, and on December 18, 1885, Richards brought this action in the name of Thompson as plaintiff, signing the petition as follows: "A. A. RICHARDS, Attorney for the Plaintiff." On January 7, 1886, Thompson executed a deed for the property to Richards; the consideration therefor being \$600. The property was then and is now worth about \$10,000. Since the execution of the last-mentioned deed, Richards' name was substituted for that of original plaintiff, Thompson, and the action has since that time been carried on and conducted in the name of Richards as the plaintiff.

The principal questions urged in this case are with reference to Richards' supposed maintenance and champerty, and to the validity or invalidity of the aforesaid sheriff's deed and tax-deed. Under the evidence in the case, we do not think any other question could seriously be presented. Under the evidence, the original title, which on December 20, 1873, and prior and subsequent thereto, was in Robert H. Thompson, unquestionably by his death passed to Robert Thompson, and by deed of conveyance passed from Robert Thompson to Richards, unless the sheriff's deed or tax-deed has placed the title somewhere else.

As to the question of maintenance or

champerty, we hardly think that there is much ground for urging the same. It does not appear from the evidence that any contract was made between Thompson and Richards, except that Richards should commence the action for Thompson. There was no contract made with reference to what Richards' compensation should be. Also, in this state, and under section 6 of the conveyance act, the purchase of the property by Richards from Thompson was not in violation of law. Said section 6 reads as follows: "Sec. 6. Any person claiming title to real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest therein in the same manner, and with like effect, as if he was in the actual possession thereof." Comp. Laws 1885, p. 206.

The objections urged by the plaintiff against the sheriff's deed are as follows: *First.* All the foreclosure proceedings upon which the sheriff's deed is founded took place long after the death of Robert H. Thompson, the mortgagor, and the only defendant in such foreclosure proceedings. *Second.* No summons was ever issued or served in the foreclosure proceedings. The service, however, was by publication. *Third.* There was no foreclosure decree in the foreclosure proceedings. It would seem from the record that this is a mistake. *Fourth.* The sheriff's deed was executed on September 7, 1878, upon a judgment stated in the sheriff's deed to have been rendered on November 15, 1878. The judgment was in fact rendered on November 15, 1877. The first objection urged against the sheriff's deed, we think, is sufficient. In this state a mortgagee has no title or estate in the mortgaged property. The whole title and estate remains in the mortgagor, and the mortgagee obtains nothing but a lien upon the mortgaged property to secure the payment of his debt; and when he forecloses the mortgage the foreclosure is in the nature of a personal action, as against the mortgagor, to recover the mortgage debt, with the additional remedy to enforce his mortgage lien. He obtains a personal judgment against the mortgagor for the amount due on the mortgage, with an order that the mortgaged property shall be sold to satisfy the judgment, and that, in case the mortgaged property does not satisfy the judgment, then that a general execution may be issued for the remainder. Of course, he may make other persons than the mortgagor—persons who are interested in the mortgaged property—parties to the action; but, if he does not do so, then the foreclosure proceedings as to such other persons will be void. In the present foreclosure action, Robert Thompson was not a party; but the only parties were the holders of the mortgage, as the plaintiffs, and Robert H. Thompson, the mortgagor, as the defendant. Now, the fact that the mortgagor, the only defendant in the action, was dead long before the foreclosure action was commenced, we think, rendered the whole of the foreclosure proceedings absolute-

ly null and void. In this connection, see *Green v. McMurtry*, 20 Kan. 189. Under the laws of some of the states, where the mortgagee has the legal title to the mortgaged property, and where he may take the possession of the mortgaged property after condition broken, and where he may have a strict foreclosure of his mortgage, this might be different. But our laws will not tolerate these things. We think the sheriff's deed is void; and, as none of the proceedings upon which the deed is founded were against Robert Thompson, the real owner of the property, we do not think that any statute of limitations has so run as to make the deed good as against him or his grantee, Richards. Indeed, all the proceedings anterior to the sheriff's deed, and upon which it is founded, are also void. They never had the slightest validity as against any person.

The tax-deed is alleged by the plaintiff to be void for the following reasons: *First*, the tax-deed was executed on September, 7, 1878, on a tax-sale made September 7, 1875, one day too soon, and is therefore void; *second*, the tax-deed shows that the property was sold at the tax-sale to Sumner county, and does not show that Sumner county, or any officer for it, ever assigned the tax-sale certificate; *third*, the tax-deed shows that the tax-sale certificate was assigned by Whitney R. Tucker, as administrator of the estate of John G. Tucker, to Christiana Tucker, who obtained the tax-deed, but does not show that Whitney R. Tucker ever had any power or rightful authority to make such an assignment. We think the first ground for claiming that the tax-deed is void is sufficient. It has uniformly been held by this court that the original owner of land sold for taxes, or his grantee, must have the full time of three years, as given to him by statute, within which to redeem his land from the taxes, before any tax-deed for the land can be legally executed, and that, in the computation of the time given him within which to redeem, the day on which the sale was made must be excluded. *English v. Williamson*, 34 Kan. 212, 8 Pac. Rep. 214; *Cable v. Coates*, 36 Kan. 191, 12 Pac. Rep. 931; *Hill v. Timmermeyer*, 36 Kan. 252, 13 Pac. Rep. 211. And it has uniformly been held that a tax-deed void upon its face will not start the statute of limitations to running in its favor. *Shoat v. Walker*, 6 Kan. 65; *Sapp v. Morrill*, 8 Kan. 677; *Waterson v. Devoe*, 18 Kan. 223. In the present case the tax-deed was executed one day too soon. The tax-sale was on September 7, 1875. That day, in computing the time within which the owner could redeem, is to be excluded; and the original owner and his grantee had three years after that day within which to redeem; and the tax purchaser and his assignees had to wait three years after that day before they could obtain their tax-deed. In other words, the tax-deed

could not rightfully have been executed prior to September 8, 1878. In the present case the tax-deed itself shows upon its face that it was executed one day too soon, and therefore no evidence *aliunde* was or is necessary to show that fact. Hence, upon such fact, and the foregoing decisions, the tax-deed must be held to be void upon its face, and that it has not been cured by the operation of any statute of limitations. If the tax-deed had been valid upon its face, and voidable only for some extrinsic matter, not including a want of jurisdiction in the taxing officers, or that the taxes had been paid, then the five-years statute of limitations, found in section 141 of the tax-law, would have made the tax-deed valid. But that is not this case. The following cases are cited by the defendants, where tax-deeds have been spoken of as being voidable; and from these cases it is claimed that the tax-deed in the present case is only voidable, and that the five-years statute of limitations, above mentioned, had completely run in its favor before this action was commenced, and had therefore barred any action that could be brought that would have the effect to defeat or avoid the tax-deed: *English v. Williamson*, 34 Kan. 213, 8 Pac. Rep. 214; *Cable v. Coates*, 36 Kan. 191, 12 Pac. Rep. 931; *Hill v. Timmermeyer*, 36 Kan. 252, 13 Pac. Rep. 211. In the first and third of these cases the tax-deeds were in fact only voidable, for they were not issued until after the three years given for redemption had elapsed, and upon their faces they appeared to be valid; and they were held to be invalid simply because the notices given of the expiration of the time for redemption gave the owner less than three years within which to redeem his property from the taxes. In the second case it made no difference whether the deed should be called void or voidable; for the action to defeat the tax-deed in that case was commenced long before any statute of limitations in favor of the tax-deed had completely run. In that action it was necessary to hold that the tax-deed was invalid; and, while the court used the word "voidable" in the opinion, the court might properly, if it had so chosen, have used the word "void."

It is unnecessary to extend this opinion further. The judgment of the court below will have to be reversed. This, perhaps, is unfortunate; for possibly it may seem to encourage speculation and speculators in doubtful titles. We would hope not, and it may not; for the case must go back to the district court for a new trial, and in such new trial, possibly, something may be shown that will enable the defendants to defeat the present action. But if they finally fail in their title they will still not be entirely without redress. The judgment of the court below will be reversed, and cause remanded for a new trial; all the justices concurring.

CITY OF MCPHERSON v. MANNING.

(Supreme Court of Kansas. Feb. 8, 1890.)

APPEAL—ASSIGNMENT OF ERRORS—MOTION FOR NEW TRIAL.

Rulings of the district court, made in the course of a trial, are not available as grounds of error in the supreme court, unless the district court has had an opportunity to re-examine and correct them upon a motion for a new trial, and unless the overruling of that motion is assigned as error in the supreme court.

(Syllabus by the Court.)

Error from district court, McPherson county; FRANK DOSTER, Judge.

D. C. Welch and *W. J. Travis*, for plaintiff in error. *Earle & Sawyer*, for defendant in error.

JOHNSTON, J. E. J. Manning was walking along the sidewalk of a street in McPherson, after dark, on January 26, 1886, when he fell and was severely injured. He brought this action against the city to recover \$10,000, alleging that the injury was caused by the negligence of the city in allowing ice and snow to accumulate on the sidewalk, rendering it unfit and dangerous to travel over, and upon a trial he recovered a judgment for \$1,000. The city asks a reversal, insisting that the findings and verdict of the jury are not sustained by sufficient evidence, and that the court erred in its charge to the jury. A motion for a new trial, based on similar grounds, was filed and overruled, but this ruling of the district court is not assigned as error in this court. The assignments of the petition in error are: (1) That the court erred in the instructions given to the jury in this action; (2) that the said court erred in refusing to give the instructions which the said city of McPherson prayed the court to give; (3) that said court erred in admitting the evidence of witnesses of said defendant to which the city of McPherson objected; (4) that said court erred in ruling out the evidence offered by the said plaintiff in the trial of said action; (5) that there was not sufficient evidence to support the verdict of the jury against the said city of McPherson; (6) that said verdict was illegally arrived at by said jury; (7) for errors of law occurring at the trial of said cause, excepted to by said plaintiff." Thus, it will be seen, that error is not predicated on the overruling of the motion for a new trial; and the silence of the city in this respect must be regarded as an acquiescence in the ruling. All matters now complained of occurred during the trial of the action, and were subject to review upon the motion for a new trial. Such rulings can only be brought to this court after the district court has had an opportunity to re-examine and correct them upon a motion for a new trial, and, unless the overruling of that motion is assigned for error, they cannot be considered here. *Carson v. Funk*, 27 Kan. 524; *Clark v. Schnur*, 40 Kan. 72, 19 Pac. Rep. 327; *Landauer v. Hoagland*, 41 Kan. 520, 21 Pac. Rep. 645. Judgment affirmed; all the justices concurring.

STAPLETON *et al.* v. ORR *et al.*

(Supreme Court of Kansas. Feb. 8, 1890.)

APPEAL—RECORD—ASSIGNMENT OF ERRORS—ATTACHMENT—DISSOLUTION—EFFECT.

1. Where all the evidence offered on the hearing of a motion to dissolve an attachment is attached to an amended and supplemental answer, and referred to as a part thereof, and is certified to properly, it becomes properly a part of the transcript in this court, in proceedings to review alleged errors apparent on the face of the record.

2. Where an alleged error is apparent by an examination of the pleadings and judgment, such error can be reviewed in this court without a motion for a new trial.

3. The judgment of a court vacating an attachment is not an adjudication of the merits of the action.

(Syllabus by Holt, C.)

Commissioners' decision. Error from district court, Lane county; S. J. OSBORN, Judge.

The plaintiffs in error, as plaintiffs, filed their petition in the Lane district court, asking for a judgment against defendant Orr for \$4,544.10, and that certain lots held by the other defendant, Julia E. Lewis, be adjudged to be the property of said plaintiffs, and that her deed therefor from Orr be set aside, and a commissioner be appointed to execute a deed to the same to said plaintiffs. The plaintiffs and defendant Orr were partners in the lumber business at Dighton and Pierceville, under the firm name of the Orr & Stapleton Lumber Company. The firm became embarrassed in business, and the members agreed upon a dissolution, and did dissolve in May, 1886. In the agreement for dissolution and the settlement of the partnership affairs between themselves and the defendant Orr, he fraudulently and falsely, by means of changed, altered, and false entries in the books, misrepresented the accounts due said firm, and the assets belonging to it, with the intent to defraud the plaintiffs, and they were misled by such false statements and changes in the books. They further allege that certain real estate which belonged to the firm, describing it, was, in fraud of plaintiffs' rights, transferred and conveyed by Orr to his sister, said Julia E. Lewis. At the commencement of the action an order of attachment was issued out of the district court, and the property of Orr attached. There were several grounds alleged in the plaintiffs' affidavit; among the rest, that he had fraudulently contracted the debt and incurred the liability and obligation for which this action was brought. Orr made a motion to dissolve the attachment, which was heard at the December term of the Lane district court. The testimony upon this motion was quite voluminous, and is preserved in full. The court vacated the attachment. At the April term, 1887, by agreement of the parties in open court, a referee was appointed to hear and determine said case, and make a report on or before September 24, 1887. Evidence was submitted before the referee, and he made findings of fact and conclusions of law in favor of the plaintiffs, awarding them

\$3,000. On motion of the defendants that report was set aside at the October term, 1887. The defendants, then, upon leave of the court, amended their answer, alleging that the issues had been finally adjudicated by the court at the December term, 1886, on a motion to dissolve the attachment, and annexed as exhibits to their answer the affidavit for attachment, journal entry of the order of the court dissolving the attachment, and the testimony taken upon the hearing of said cause. Upon the pleadings so amended, this case came on for trial, and at the October term, 1887, it was found by the court that all the issues had been once fully tried upon the motion to dissolve the attachment herein, and a judgment rendered in favor of defendants for costs. The plaintiffs excepted to the judgment, and bring the case here for review.

William A. Calhoun, Milton Brown, and Rossington, Smith & Dallas, for plaintiffs in error. *Silas W. Porter and S. T. Fenn*, for defendants in error.

HOLT, C., (*after stating the facts as above.*) The defendants say that we cannot investigate the merits of the action for the reason that no motion for a new trial has been filed. Where an error is apparent upon the face of the record, a motion for a new trial is unnecessary. In this case the judgment was based upon the pleadings, and the error appears, and an exception was taken to the judgment at the time of its rendition. It is claimed that we cannot examine the testimony submitted before the district court upon the motion to dissolve an attachment. We could not, we think, do so in order to determine whether or not the order of dissolution was correct, but, as the defendant has made it a part of his answer, we certainly can treat it as a part of the pleadings in this case. The defendants say, however, that the evidence was not properly a part of the transcript, but in their amended answer they aver that "the entire evidence taken upon the motion to dissolve the attachment is hereto attached, marked 'Exhibit A,' and made part and parcel of this answer." From the pleadings and the judgment it is clearly shown that the judgment is based upon the fact that the issues in the case had been once determined upon the motion to dissolve the attachment, and the court held that the previous order vacating the attachment must control and be decisive of the merits of the case. The defendants' theory is that because the testimony upon the motion to dissolve was directed exclusively to that portion of the affidavit which states that the defendant Orr had fraudulently contracted the debt and incurred the liability and obligation for which the above-named suit had been brought, and the charge in the petition that Orr had fraudulently misled the plaintiffs by making false entries in the firms' books and concealing and misrepresenting the accounts, property, and assets of the firm, both allegations of

fraud being substantially the same, that the issues joined by the pleadings had been practically and in fact determined by the order vacating the attachment in favor of defendant Orr, for the reason, they say, that unless the plaintiffs should establish that Orr practiced fraud and deceit in the settlement between the partners they would fail in their action. It is further urged by the plaintiffs that, because all the parties after the dissolution of this attachment entered into an agreement in open court to submit the issues to a referee, they are estopped by such agreement to raise the question of a prior determination of the case. It will be unnecessary to pass upon this phase of the case, though it is pressed with earnestness, and many authorities are cited by the plaintiffs to sustain their theory; but, without examining or attempting to determine it, we prefer to place our decision squarely upon the ground that an order on a motion to vacate an attachment does not determine the merits of the action itself. In actions of this nature it is conceded that the evidence would be substantially the same, so far as the allegations of fraud are concerned, on a motion to dissolve and vacate an attachment, as it would be on the trial of the action upon its merits; yet the manner of introducing the evidence might be different, and the trial upon the motion unlike the one upon the pleadings. On a motion to vacate an attachment, affidavits are admissible,—very often the only evidence admitted. In this case, however, the evidence was given orally in court. Upon the trial of an action upon the issues joined, it may be by the court alone, or by the court and a jury, as to all the issues of fact, or certain questions of fact submitted to them by the court, or, as in this case, all the issues of law and fact may be submitted to a referee. If an order dissolving an attachment should be the final determination of the case, then the plaintiffs would be deprived of a trial in the due and regular way. They could not have their evidence submitted to a jury or referee. It would be disposing of the cause in a collateral and summary manner, as the proceedings in attachment are simply auxiliary to the action itself. This is not a new question in this state. In *Bundrem v. Denn*, 25 Kan. 490, it is decided that, on a motion to vacate an attachment, the court cannot inquire into the validity or justice of the cause of action for the purpose of investigating its merits, but may examine into the alleged existence of the grounds of attachment set forth in the affidavits, even though they might trench upon that ground for the purpose only of determining whether the attachment should be vacated. See, also, *Beniz v. Hines*, 3 Kan. 390; *Watson v. Jackson*, 24 Kan. 442; *Tucker v. Green*, 27 Kan. 355; *Schulenberg v. Farwell*, 84 Ill. 400; *Alexander v. Brown*, 2 Disn. 395. What is said in *Boord v. McIntosh*, 1 Pac. Rep. 572, does not conflict with anything said in the opinion. There had been a motion in another action to retax

costs, made after the judgment, concerning a question upon which the parties were not entitled to a jury, as the decision in such cases is given by the statute expressly to the court. In that opinion it is stated that the doctrine of *res adjudicata* does not apply to interlocutory motions, so far as determining the same subject-matter again in the more regular form of an action in law or equity. We recommend that the judgment be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 131)

BRAND v. HEDWICK et al.

(Supreme Court of Kansas. Feb. 8, 1890.)

REPLEVIN—EVIDENCE—WRONGFUL DETENTION.

In an action of replevin, wherein no order of delivery was issued, for the possession of a warehouse, treated by all parties as personal property, between the party claiming to be the owner and the sheriff and his deputies, who levied upon it as the property of another than the plaintiff, and the sheriff's return on the execution showed that the building was levied upon, but was silent as to taking it in his possession, and upon the trial the plaintiff testified that she had kept the key, and used and permitted others to use the building, since the levy, and that the defendants could not get into it unless they broke the lock, held no wrongful detention by the defendants was shown; and further held, there was no error in sustaining defendants' demurrer to the evidence.

(Syllabus by Holt, C.)

Commissioners' decision. Error from district court, Johnson county; J. P. HINDMAN, Judge.

Action of replevin, by Abbie Brand against W. P. K. Hedwick, C. V. Townley, and Joel Cochran, to recover possession of a warehouse.

John T. Little, for plaintiff in error. H. L. Burgess, for defendants in error.

HOLT, C. This was an action of replevin, brought by plaintiff in error, Abbie H. Brand, against defendants, to recover possession of a warehouse standing on the right of way of the Kansas City, Fort Scott & Gulf Railroad, in the city of Olathe. The answer of defendants was a general denial. After all the evidence of plaintiff was introduced in court, the court sustained a demurrer thereto.

From the testimony it appears that this building was 40x60 feet. It was treated by all parties as personal property; all the transfers being ordinary bills of sale, coming from the original owner, through the husband of plaintiff, to her. An execution was issued out of the Johnson district court on a judgment in favor of Bovard & Dickson against Brand, the husband of plaintiff, and Henrietta Miller; and this building was levied upon July 21, 1886, to satisfy it. Upon the 15th of August, plaintiff began an action in replevin; but no order of delivery was asked or issued. The sole object raised by the de-

murrer to the evidence was that no proof had been offered to show that the defendants had wrongfully detained the property from plaintiff, claiming, on the contrary, that plaintiff had continuous possession of the warehouse.

By an examination of the plaintiff's own testimony, we find that, although she testified she believed she had not had possession, yet she said she had given persons permission to put in wheat, a little coal, kept her own fanning-mill in there, and allowed several parties to use it after the building was levied upon by the defendants, and then further said, in answer to Mr. Burgess, who conducted the cross-examination: "Question. You had the key to this building, did you? Answer. Yes, sir. Q. Have always had the key, didn't you? A. Yes, sir. You didn't succeed in getting it away when you sent your man to get it. Q. We never had it, have we? A. No, sir. Q. We have never been in that building? A. No, sir. You haven't. You didn't get the key when you sent your man after it. Q. We never have been in there, have we? A. Yes; I guess you have been in there. But you were not sharp enough to get the key. Q. Will you tell the jury when we have been in there,—any of the defendants? A. I don't know. I think you were in there yourself when the house was open. Q. Are you certain of that? A. I think I saw you outside. I don't know that you were in there, but I think I saw you at the door. * * * Q. You could not tell whether the defendants have been in there? A. No, sir. Q. They have never had possession of the building, have they, Mrs. Brand? A. No, sir. In one sense of the word, they have not, because I always carried the key. Q. And you have gone into that building, and out of that building, when you pleased, haven't you? A. Yes, sir. Q. No one else could get in without your permission, could they, unless they broke the lock? A. No, sir. Q. You now have it in your possession, have you not? A. I have the keys in my possession. Q. You went in and out as you pleased, didn't you? Just go on and tell this jury whether you did or not. A. Yes, sir. I went in if it was necessary for me to do it. Q. Now you may tell the jury if it isn't true that you had access to that building, and went in and out when you pleased. A. I had the keys to the door, of course. Q. Will you answer my question, please? Did you go in and out when you wanted to? A. I could. Q. There was none to prevent you? A. Certainly not. I had the keys to the door."

From this testimony of the plaintiff it is apparent that there was no detention of the property from her. The basis of the action in replevin was a wrongful detention. Failing to show any detention, the plaintiff failed to establish her cause of action. The return of the officer shows that he simply levied upon the building, and offered it for sale. There is nothing to show that he took it in his possession. We believe, under the evidence in this case, that the judgment of the court was

correct, and therefore recommend that it be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 134)

UNION PAC. RY. CO. v. KINDRED, Trustee,
et al.

(Supreme Court of Kansas. Feb. 8, 1890.)

ADVERSE POSSESSION — RAILROAD COMPANIES —
RIGHT OF WAY—DEFECT OF PARTIES—WAIVER.

1. The case of *Smith v. Smith*, 34 Kan. 293, 8 Pac. Rep. 385, followed.

2. Where abutting or adjoining land-owners cultivate and occupy a part of the right of way granted by congress as an easement to a railway company, such possession must be regarded as permissive only, and not hostile or adverse, so as to confer title.

3. If, in a petition filed in a civil action, there is a defect of parties, but no objection is taken thereto, either by demurrer or answer, the defendant is deemed to have waived the same.

(Syllabus by the Court.)

Error from district court, Wyandotte county; O. L. MILLER, Judge.

A. L. Williams and Charles Monroe, for plaintiff in error. Winfield Freeman, for defendants in error.

HORTON, C. J. This was an action, brought in the court below, by the Union Pacific Railway Company against J. W. Kindred, trustee of Delaware township, and Robert Barnwell, overseer of a road-district in the same township, in Wyandotte county, to enjoin and restrain them from opening or constructing a public highway upon the right of way of the company. The Union Pacific Railway Company was created by the consolidation of the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway & Telegraph Company, and by virtue of such consolidation became possessed of, and has ever since held, possessed, and controlled, all the property of each of the constituent companies. The Kansas Pacific Railway Company, one of the constituent companies, was the successor, by change of name, of the Union Pacific Railroad Company, Eastern Division, and the Leavenworth, Pawnee & Western Railroad Company, under which last name it was chartered by the territorial legislature of Kansas, and is the same company, mentioned by its various names in the act of congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July 1, 1862, and the other acts amendatory and supplemental thereto. Congress, by the second section of the act of July 1, 1862, granted the right of way for the railroad through the Delaware Diminished Indian Reservation, and agreed to extinguish as rapidly as might be the Indian title required for such right of way. This grant

was for 400 feet,—200 feet in width on each side of the railroad. *Grinter v. Railway Co.*, 23 Kan. 642. The trial court made the following findings of fact: "That the railroad of plaintiff and the proposed highway is in what is known as the 'Delaware Diminished Indian Reservation,' that the proposed highway is within 200 feet of the railroad track of the company, but not within 50 feet thereof; that the railroad was built in 1863 or 1864 through the Indian reserve, and has been operated by it through the reservation ever since."

It is conceded in the record that no notice of the meeting of the viewers to view the proposed highway was ever served upon the railway company. Therefore the commissioners had no power or authority to direct the trustee or road overseer to open and construct the highway. *State v. Farry*, 23 Kan. 731; *Commissioners v. Cartter*, 30 Kan. 581, 1 Pac. Rep. 814; *Troy v. Commissioners*, 32 Kan. 507, 4 Pac. Rep. 1009; *State v. Horn*, 34 Kan. 556; 9 Pac. Rep. 208. The trial court held that under the pleadings the title to the land taken for the proposed highway was in dispute, and for that reason refused to grant the injunction. It is true that the defendants claim the title is in controversy, but an examination of this claim shows it is not tenable. The railway company obtained this right of way or easement from congress. 12 U. S. St. at Large, pp. 489-498, § 2; *Grinter v. Railway Co.*, supra. The company does not own the fee.

The validity of the act of congress is not contested; nor is it denied that the railway company obtained a grant of 400 feet through the Indian reservation for its right of way. All that is claimed upon the question of title by the defendants is that the abutting land-owners, by cultivation and inclosures, have held adverse possession of a part of the easement or right of way of the railway company for a greater length of time than that required by the statute of limitation. In *Railway Co. v. Allen*, 22 Kan. 285, this court decided that where the railway company has only an easement the proprietor of the soil retains the fee of the land and his right for every purpose not incompatible with the rights of the railway company. This rule is recognized everywhere.

Although the abutting land-owners have cultivated and inclosed part of the right of way granted by congress, this possession cannot be considered as hostile or adverse. It must be regarded as permissive only. If the fee of the land belongs to the United States, then the abutting land-owners can acquire no title or claim by possession or limitation. *Smith v. Smith*, 34 Kan. 293, 8 Pac. Rep. 385. If the abutting land-owners own the fee of the right of way, they may use the land in any way not inconsistent with the paramount rights of the railway company; but such use will not give them adverse possession, so as to confer title. *Kirk v. Smith*, 9 Wheat. 241; *McClelland v. Miller*, 28 Ohio St. 488; Rail-

way Co. v. Harris, 28 Kan. 206; In re Railway Co., 20 Amer. & Eng. R. Cas. 196; Sapp v. Railway Co., 51 Md. 115.

Again, under the great weight of authority, neither the defendants nor the county commissioners of Wyandotte county could open or construct a public highway parallel with the track of the railway on the right of way granted by congress. Pierce, R. R. 155, states the law as follows: "Thus, if a railroad is authorized between certain points, and if necessarily, or in the usual and convenient course, it will cross highways or other railroads, it may be laid across them, even without any express preference to them in the authority. Such crossing, being necessary to the enjoyment of the second grant, and not essentially impairing the first, is presumed to be authorized. But, on the other hand, the right to take exclusively the location made under the first grant, or any part of it, or to lay tracks longitudinally for a considerable distance upon it, ought to be expressly conferred or implied only where otherwise effect could not be given to the second grant." Mills, Em. Dom. § 46, says: "Under a general authority to condemn lands for streets, a street may be laid out across a railroad, but not longitudinally on the railroad track. Under general laws, property cannot be taken, where the appropriation will destroy or impair the exercise of the franchises of another corporation, unless the power to take is given in express terms, or arises from a necessary implication. The right to lay a street across a railroad track arises from a necessary implication." Lewis, Em. Dom., also says: "A general authority to lay out highways and streets is sufficient to authorize a lay-out across the right of way of a railroad. * * * An authority to lay out a highway across the track of a railroad company is authorized to cross all the tracks at any place. But under a general authority to lay out highways a part of the right of way of a railroad cannot be taken longitudinally; nor can the way be laid through depot grounds, shops, and the like, which are devoted to special uses in connection with the road, and necessary to its operation, and in constant use in connection therewith." Section 266.

The record does not show that the proposed highway cannot reasonably be built without appropriating the right of way already granted to the use of the railway company; and the petition which was presented to the board of county commissioners for the location of the highway did not ask that it should be established upon the right of way of the Union Pacific Railway Company, but only as near to the right of way of the company as a good road could be made. When the track of the railway company was first built, and the business of the company was limited, all of its grant was not necessary for a right of way; but in giving such an extensive right of way it is evident that congress intended it might be enjoyed or used by the railway com-

pany whenever its business or necessities demanded.

In the brief filed by the defendants it is alleged that there is a defect of parties because the board of commissioners of Wyandotte county is not joined as a defendant. We think the county of Wyandotte might very properly have been made a defendant at the instance of either party or of the court; but as no demurrer was filed to the petition, and as the alleged defect was not taken advantage of by answer, the defendants have waived the same. Section 91, Civil Code; Poirier v. Fetter, 20 Kan. 47. Upon the findings of fact, the judgment will be reversed and the cause remanded, with direction to the court below to grant the injunction prayed for; all the justices concurring.

(43 Kan. 145)

SOUTHERN KAN. RY. CO. v. ROBBINS.

(Supreme Court of Kansas. Feb. 8, 1890.)

DEPOSITIONS—MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

1. A deposition taken in the absence of the opposing party, a short distance from the office stated in the notice, will not be suppressed, where it appears that on the same day the counsel for the opposing party appeared, and by consent of all the deposition was opened, and the witness recalled and cross-examined.

2. Where one of the issues to be tried is whether the person injured was in the exercise of ordinary care, and there were eye-witnesses as to his conduct at the time of the injury, the opinions of experts as to whether he was generally a careful and skillful man is not competent evidence.

3. Evidence of the practice and usage of others in climbing the ladder of a box-car when a train is in motion, such as deceased fell from, is not admissible to prove due care on his part at the time of the accident.

(Syllabus by the Court.)

Error from district court, Franklin county; A. W. BENSON, Judge.

George R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error. H. P. Welsh and John W. Deford, for defendant in error.

JOHNSTON, J. On June 30, 1886, John F. Patterson was employed in the service of the Southern Kansas Railway Company, as a passenger conductor. At that time a Sunday-School assembly was in session at Ottawa, and the railway company were running excursion trains from several points in the state to that place. On the morning of the day mentioned Patterson went from Ottawa to Lawrence in charge of a passenger train, where it was loaded with excursionists bound for the assembly at Ottawa. On the return trip he stopped at Baldwin City, where there were a number of people intending to join the excursion to Ottawa, and, being short of passenger cars to accommodate them, the company had placed two cabooses and a box-car, temporarily arranged for passengers, on a side track, and directed Patterson to attach them to the rear of his train, for the use of passengers. There is testimony to the effect that Patterson was directed to place

the cars in his train in the same order that they were standing,—first a caboose, then the box-car, and then another caboose; and this was the order in which they were attached to the train. After the train left Baldwin City, Patterson proceeded to collect fares, beginning at the front, and passing towards the rear, of the train. When he had completed taking fares in the first caboose, he passed out of the reardoor, and proceeded to climb over the box-car, in an effort to reach the other caboose, in which there were passengers. There were no doors in the ends of the car, nor any platforms on the ends of the same, and the only way to get over the car was to climb up a ladder on the side and near the corner of the car, made of iron rods, called "hand-holds" or "rungs," which were screwed to the side and top of the car. These rods were about a foot apart, and extended out from the side of the car about three inches. While he was in the act of ascending this ladder, the train was running at a rapid rate, and just as it passed over a bridge he in some way fell from the car, and was fatally injured. The witnesses who saw the occurrence state that he had nearly reached the top of the car, when he appeared to grasp with one hand for a rung which should have been upon the top of the car, but probably was not, and at the same time let go his hold upon the top rung on the side of the car with the other hand, when he reeled back, and fell from the train. He was found lying in the angle of two braces of the bridge, his skull fractured, and his left leg broken. He was unconscious when found, and remained so until his death, which occurred the day of the accident. This action is brought by the representative of the deceased, to recover damages for the benefit of the widow and child, it being alleged that his life was lost in consequence of the negligence of the railway company. The company alleged and contended that Patterson was guilty of negligence contributing to the accident. The plaintiff prevailed, and recovered a judgment for \$5,500.

Errors are assigned here upon the rulings of the court in admitting evidence. The deposition of a witness was received that was not taken in the exact place stated in the notice. The notice named the office of Winslow P. Hyatt, Colorado street, Pasadena, Los Angeles county, Cal., as the place of taking the deposition; but, as he had moved about a block away on another street, the notary met the plaintiff's attorney at that place at the proper time, and adjourned the taking of the deposition to another office, on another street in Pasadena, and there the deposition was continued, completed, sealed up, and properly addressed. In the afternoon of that day, the attorney for the defendant was found, and informed what had been done, and, by consent, the deposition was then opened, and the witness was recalled and cross-examined by defendant's attorney. The court properly refused to suppress the depo-

sition. The taking of a deposition at another place than that stated in the notice, in the absence of the opposing party, is a sufficient objection to the deposition; but the irregularity was cured by the voluntary appearance of the defendant's counsel at the place where the deposition was taken, and his participation in the proceeding. It is important that the deposition should be taken at the place mentioned in the notice; but the notice is only given to furnish the opposing party an opportunity to appear, and therefore the appearance waives a defect in the notice or the irregularity of a change in the place of taking the deposition. None of the objections to the deposition can be sustained.

A witness was asked, and over objection was permitted to state, whether the deceased was a careful and skillful railroad man. This was clearly erroneous. The question whether Patterson exercised due care in this particular instance was an important issue. It was alleged that he was guilty of negligence, and it was contended that the absence of the hand-hold on the top of the car was an obvious danger, and apparent to any one, and that to ascend a perpendicular ladder in the manner in which he did, by letting go his hold of the rung on the side of the car before laying hold of the rung on the top of the car, was negligence. The issue of his want of ordinary care was before the jury, and there was much testimony submitted concerning his conduct at the time of the injury. There were eye-witnesses present who at the trial described the manner in which he ascended the ladder, and the care which he exercised at the time the accident occurred; and hence there was no necessity nor propriety in admitting the opinion of an expert as to whether he was generally a careful and skillful man. The determination of whether he was exercising due care when he fell from the car does not depend upon the care exercised by him at other times, or whether he was usually careful in the performance of his duties as a railroad man, but does depend upon his conduct at the time of the accident. The witness who gave the testimony was a conductor on the same railroad, had been acquainted with him for a year, and claimed to have the means of knowing as to whether he was a careful railroad man, and his testimony may have had much weight with the jury in determining that the deceased was in the exercise of due care. With the evidence before them as to the care he used at the time, the jury could determine better than any expert whether or not he was negligent; and the fact that he was generally careful would be unavailing if the testimony showed that his negligence in this instance contributed to the injury. Testimony of this character is no more admissible than an offer by the railroad company to show his want of care at the time of the accident by proving that he was negligent at other times, or generally careless. Exceptions are made in some cases where there are no eye-witnesses of

the accident, and better evidence cannot be obtained as to whether the injured person exercised due care; but all the authorities hold such testimony to be inadmissible where the testimony of persons who witnessed the accident is available. *Bryant v. Railroad Co.*, 56 Vt. 710; *Dunham v. Rackliff*, 71 Me. 345; *Hays v. Millar*, 77 Pa. St. 238; *Tenney v. Tuttle*, 1 Allen, 185; *McDonald v. Savoy*, 110 Mass. 49; *Chase v. Railroad Co.*, 19 Amer. & Eng. R. Cas. 356; *Morris v. Town of East Haven*, 41 Conn. 252; *Baldwin v. Railroad Co.*, 4 Gray, 333; *Railroad Co. v. Roach*, 64 Ga. 685; *Railroad Co. v. Clark*, 108 Ill. 113; *Elliot v. Railroad Co.*, 41 N. W. Rep. 758; 1 Greenl. Ev. § 84. Neither was the testimony introduced in regard to how railroad men should and do ascend the ladder of a box-car relevant nor competent. The practice followed by others throws no light on the care used by Patterson in this case. It is not claimed that the opinions of experts are necessary in the case, and to allow testimony as to how others climbed the ladder would be to create collateral issues as to the prudence of their conduct, and to unnecessarily protract the trial. The question of whether Patterson was guilty of such negligence as would preclude a recovery was an issue before the jury, and the practice or usage of others would not tend to prove care on his part, and such testimony should not have been received. *Railroad Co. v. Clark*, supra; *Lawrence v. Hudson*, 12 Heisk. 671; *Railroad Co. v. Moranda*, 108 Ill. 576; *Railway Co. v. Evansich*, 61 Tex. 8; *Bryant v. Railroad Co.*, supra; *Bailey v. Northampton Co.*, 107 Mass. 496; *Koons v. Railroad Co.*, 65 Mo. 592; *Crocker v. Schureman*, 7 Mo. App. 358; *Cleveland v. Steam-Boat Co.*, 5 Hun, 523; *Lawson, Usages & Cust.* 328.

To account for the fall, a witness, who was not present at the time, gave the following testimony: "Question. You say you have passed over this road a great many times? Answer. I have. Q. And over this bridge? A. Yes, sir. Q. Now, can you state to the jury, under the circumstances which surrounded Mr. Patterson there, whether or not there was any cause why he should have ascended that car with great speed and haste, and, if so, what that cause was? Explain to the jury. A. Well, the way that man started in to go up the side of the car, he couldn't see the bridge when he started; and at the speed the train was running, and him climbing up the side of the car, by the time the engine struck the bridge, he would be towards the top, and, when he heard the thundering noise that the engine makes when it strikes a bridge, he hurried to get on top of the car." This testimony was given over the objection of the plaintiff in error. The witness was the conductor of another train, who was far away when Patterson fell from the box-car. He did not know and could not state whether Patterson could see the bridge when he started to ascend the ladder, nor how far he had ascended when the bridge was reached; nei-

ther was he competent to state what causes operated on the mind of Patterson that led him to ascend the ladder with great speed and haste. The admission of the incompetent testimony was error, for which the judgment will be reversed, and the cause remanded for a new trial; all the justices concurring.

(2 Idaho [Hash.] 658)

TERRITORY v. EVANS.

(*Supreme Court of Idaho. Feb. 24, 1890.*)

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—EXPORTATION OF FISH.

Section 7193, Rev. St. Idaho, prohibiting the exportation of fish from this territory, being in conflict with section 8, art. 1, of the constitution of the United States, providing for the regulation by congress of commerce between the states, is void. (*Syllabus by the Court.*)

Appeal from district court, second district; C. H. BERRY, Judge.

Hawley & Reeves, for appellant. R. Z. Johnson, Atty. Gen., for the Territory.

BEATTY, C. J. The appellant, Thomas Evans, was indicted with George Rae for a violation of section 7193 of the Revised Statutes of Idaho, which, as amended by act of the fifteenth legislative assembly, reads: "It is unlawful for any person in this territory to make any dam, or use any nets, seines, fish-traps, or any similar device or measures for catching fish, or to ship the same out of this territory for speculative purposes." The appellant, Evans, alone, was tried upon this charge, and from the judgment rendered against him upon his conviction thereof he has appealed to this court. While the record contains various specifications of alleged error, the appellant has in his argument of the cause referred to but two, viz.: That the statute does not prohibit the exportation of fish, and, if it does, it is in violation of section 8, art. 1, of the Constitution of the United States.

It is true, the statute does not read as it undoubtedly was intended it should, and it is surprising that it passed unchallenged the ordeal of six readings in the presence of careful legislators. Construed as it reads, it prohibits the exportation from this territory only of dams, and the use of nets, fish-traps, and other devices for catching fish, and not the fish themselves. As dams cannot be shipped, and the use of a thing is an incorporeal right, this statute, if construed by its words, undertakes to prevent the performance of an impossibility, hence, in effect, is void. Conceding, however, that it may be construed to prohibit the exportation of fish, as the legislature undoubtedly designed it, is it in violation of the section referred to of the supreme law of the land? This question was involved in the court below, in the demurrer to the indictment, on the exceptions to the instructions, and in the motion for arrest of judgment, and is saved by appellant's exception to the ruling of the court in those matters. The provision of section 8, art. 1, of the Constitution of the

United States, that "congress shall have power * * * to regulate commerce with foreign nations and among the several states," having been so frequently and fully considered by the ablest, including the highest, courts in the nation, it will not be expected we shall, to any length, now attempt its discussion. It is clearly settled and conceded by all, that the above provision of the constitution confers upon congress the exclusive power to regulate commerce between the states, and any statute which attempts to prohibit the shipment into or out of a state of any lawful commodities or articles of commerce or trade is in conflict therewith, and necessarily void. To each state is reserved the power of regulating commerce within its borders, but not that extending across its boundary lines. The state may also, under its police power, enact such laws as are necessary to the protection of the lives, the health, and comfort of its citizens, and for the promotion of good order within its limits. But whenever, under the pretense of an exercise of its police power, the state enacts any statute which operates to prevent the free exchange between the states of lawful articles of trade, it is void because in conflict with that constitutional provision. This is clearly illustrated in a number of recent and interesting cases. *Railroad Co. v. Husen*, 95 U. S. 468, is a case in which the state of Missouri, under the claim of exercising its police prerogative, and to prevent the spread of contagious cattle disease in the state, enacted a statute forbidding the unloading of Texas cattle within the state, but allowing their passage through it on board of cars or vessels. The court held that cattle were subjects of lawful commerce, and could not be excluded, except when diseased; that the statute practically operated, not in the exclusion of diseased cattle alone, but of all Texas cattle, and was void. The business of butchering cattle, and shipping the dressed fresh meat into the surrounding states from the place of slaughter, has in recent years become an important pursuit, but one which came in conflict with local dealers. To prevent this, statutes were enacted in several of the western states, purporting to be in pursuance of their police power, and to promote the health of their inhabitants by preventing the importation of diseased meat. They required that all animals should be inspected within 24 hours before their slaughter, and the sale of meat of animals not so inspected should be prohibited. The courts have uniformly held that such statutes are not within the police power of the state, and that, whatever their design, they operate as a prohibition to the importation of dressed meat, which is a lawful article of trade, and whenever these statutes have come before the courts for consideration, they have been held void. The following cases on this subject will be found of interest, and in them the whole subject is fully reviewed: *Swift v. Sutphin*, 39 Fed. Rep. 630; *In re Barber*,

(Cir. Ct. U. S. D. Minn.) Id. 641; *In re Christian*, (State Dist. Ct. Minn.) Id. 636; *Harvey v. Huffman*, (State Cir. Ct. Ind.) Id. 646; *Ex parte Kieffer*, (Cir. Ct. U. S. D. Kan.) 40 Fed. Rep. 400. In the state of Indiana a statute prohibiting the exportation of natural gas from the state through pipes has, upon the same principle, recently been held void. The state of Kansas has had a statute to prevent the shipment therefrom of fowls and other game. For a violation of this, an express agent was indicted for shipping to Chicago four prairie chickens. The act only prevented the exportation of chickens, and did not prevent their capture and use by the denizens of Kansas, but seemed rather to preserve them for their exclusive use and comfort. It was held void in *State v. Saunders*, 19 Kan. 128. By the law of this territory we recognize fish as a lawful article of trade. The statute only attempts to preserve them for us, and to deprive our neighbors of their use, which, in the light of the authorities, we must conclude is in violation of the constitutional provision referred to, and therefore void. It follows that the demurrer to the indictment above referred to should be sustained, and it is therefore ordered that the judgment appealed from be set aside, and the indictment dismissed.

BERRY, J. I concur that the act, so far as it prohibits the shipping of fish out of this territory for speculative purposes, is unconstitutional. I think the statute is not against the shipping of dams, etc., but is against shipping of fish only.

SWEET, J., concurs.

(2 Idaho [Hasb.] 651)

TERRITORY v. NELSON.

(Supreme Court of Idaho. Feb. 24, 1890.)

Appeal from district court, Bear Lake county. *Smith & Smith*, for appellant. *R. Z. Johnson*, Atty. Gen., for the Territory.

BEATTY, C. J. This cause involves the same question disposed of in *Territory v. Evans*, ante, 115, and both causes were heard and considered together. Upon the authority of the other case, it is ordered the judgment in this be set aside, and the indictment be dismissed.

BERRY and SWEET, JJ., concur.

(82 Cal. 607)

PEOPLE v. NAYLOR. (No. 20,569.)

(Supreme Court of California. Jan. 27, 1890.)

PERJURY—INFORMATION—INSOLVENCY—FALSE INVENTORY.

1. An information from which it appears that an insolvent is charged with committing perjury in this: that as part of his assignment he made an inventory in compliance with Civil Code Cal. § 3461, which requires the inventory to show all the insolvent's creditors; that the insolvent collusively and willfully omitted one of his creditors therefrom; and that he then made an affidavit, in compliance with section 3462, that the inventory was "just and true," well knowing that what he swore to was false and corrupt,—is sufficient to give the insolvent to understand that he is charged with

willfully, corruptly, and falsely swearing to a matter material in the assignment proceedings.

2. Under Pen. Code Cal. § 128, which provides that in a prosecution for perjury it is sufficient to show that the false statement might have been used to affect the proceeding in which it was made, an information for perjury which charges that an agreement was entered into between an insolvent and one of his creditors in pursuance of which the creditor's name was omitted from the insolvent's inventory, to which the insolvent afterwards swore as "just and true," is good.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; JOHN R. AITKEN, Judge.

Hunsaker & Britt and George A. Johnson, Atty. Gen., for the People. Luce, McDonald & Torrance and Geo. W. Hardacre, for respondent.

FOOTE, C. The defendant was accused by an information of perjury. A demurrer was interposed on the ground that the information did not substantially conform to sections 950-952 of the Penal Code; that it did not state facts sufficient to constitute a public offense. The demurrer was sustained and from the judgment rendered the people appeal.

The sections of the Code with which it is alleged the information does not comply contain a few plain rules tending to simplify the method of charging offenses by information or indictment. The information in question, taking it in its entirety, seems to charge that the defendant has committed perjury by corruptly and collusively, through an agreement with a certain creditor named Foss, omitting such creditor from the inventory which the law required him to make as a part of his assignment as an insolvent, under title 3, pt. 2, div. 4, of the Civil Code, which inventory was filed in the proper public office, and sworn to by affidavit, in due form, before the proper officer, which was attached to the inventory, and filed with it, and which affidavit was false in that the defendant swore in it that his inventory was "just and true" when he well knew it to be false and corrupt.

The law required that all creditors of the insolvent should be shown by the inventory, and that the oath that it was "true and correct" should be taken, annexed to, and filed with the inventory. If, then, such an inventory was prepared, which purported to show all the defendant's creditors, and it was sworn to as "just and true," annexed, and filed as required, and a collusive agreement had been entered into by which the creditor was omitted from the inventory, and the oath was false, it would appear that the defendant was charged properly with perjury, if it was further charged that the false oath was as to a material matter. It is charged that the matter falsely sworn to was material; but the defendant claims that the fact that Foss was a creditor, and was omitted from the inventory by his consent, would render the omission immaterial; that Foss could not profit by it as against other creditors; and that they would not suffer by reason of such omission.

It may be remarked, in passing, that this kind of argument admits that the information shows that there were other creditors named in the inventory; and this nullifies the defendant's contention, viz., that it does not appear from the information that he is charged with having made such an inventory as purported to show all his creditors, as the law requires, because from the information it does not appear that he had any other creditor than Foss. But conceding, without deciding, that the matter about which the false oath was taken is not alleged in the information as in itself alone material to affect the proceeding, yet it does appear in the pleading that it might affect such proceeding, because, if a creditor collude with the insolvent to have his name omitted from the inventory as a creditor, it would probably appear upon the trial that he did so because the debtor was concealing some of his property, which this creditor was aware of, and the agreement to omit might be shown to carry with it, and include, a promise to pay the creditor in full if he would permit the assignment as to other creditors to become effectual and the debtor released by paying them a part only of their debts; or the taking of any other such unjust advantage, might be shown to be in contemplation, the unfairness and fraud of which would defeat the assignment. In this point of view, the allegation is sufficient to be within the provisions of section 123 of the Penal Code.

In all necessary respects, we think there can be no doubt but that the information is sufficiently full in its allegations. It does not appear from it that it is not within the power of the defendant easily to understand and appreciate that he is accused of perjury, in this: that he filed an inventory which purported to comply in all respects with a certain law, (Civil Code, § 3461,) which law requires, among other things, that the inventory shall show all his creditors; that such showing in the inventory omitted therefrom a creditor, one Foss; that this omission was willfully and collusively done; that the defendant then filed the inventory containing this false statement in the proper public office, with an affidavit attached, in which he swore that the inventory was "just and true," (Id. § 3462,) well knowing that what he swore to was false and corrupt. This, we think, was amply sufficient to make him know and understand that he was charged with willfully, corruptly, and falsely swearing to a matter which was material in the proceedings of his assignment as an insolvent. We think the information was sufficient, and advise that the judgment be reversed.

We concur: GIBSON, C.; VAN CLIFF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed.

(83 Cal. 188)

In re WILLIAMS. (No. 20,631.)

(Supreme Court of California. Dec. 26, 1889.)

BAIL—AMOUNT.

1. The discretion of the trial court in fixing the amount of bail will not be interfered with by the supreme court unless it appear *per se* that the amount is disproportionate to the offense.

2. Forgery, being a felony punishable by imprisonment at from 1 to 14 years, in California, \$8,000 bail for one who has been indicted for that crime will not be deemed disproportionate to the offense, as the determination of the amount does not depend alone on the sum of money involved, but rather on the turpitude of the crime, its dangerous nature to the public, and the punishment imposed.

On *habeas corpus*.

Carrol Cook, for petitioner. James D. Page, for respondent.

Fox, J. The return to the writ in this case shows that the petitioner is held on a bench warrant regularly issued out of the superior court of the city and county of San Francisco, upon an indictment found by the grand jury, charging him with the crime of forgery, a felony punishable by imprisonment in the state-prison not less than 1 nor more than 14 years, and upon which warrant an order has been regularly indorsed, admitting the prisoner to bail in the sum of \$8,000. The application is in form to be admitted to bail, but upon the hearing the party asks for a reduction of bail.

This court, or its justices, will not interfere with the discretion exercised by the court in which the indictment is found, in the matter of fixing the amount of bail, unless it shall appear *per se* that the amount fixed is unreasonably great, and clearly disproportionate to the offense involved. *Ex parte Ryan*, 44 Cal. 555; *Ex parte Duncan*, 53 Cal. 410, 54 Cal. 75.

The determination of what is disproportionate to the offense involved does not depend alone upon the amount of money which may have been lost to one party, or secured to another, by means of the offense; but it depends rather upon the moral turpitude of the crime, the danger resulting to the public from the commission of such offenses, and the punishment imposed or authorized by law therefor. I cannot say that in this case there has been any abuse of discretion, or that the amount already fixed is disproportionate to the offense involved. The writ is discharged, and the prisoner remanded.

(83 Cal. 474)

SCHURTZ v. ROMER *et al.* (No. 13,312.)

(Supreme Court of California. Jan. 6, 1890.)

PARTNERSHIP—SALE OF INTEREST.

1. One who agrees to buy the interest of a partner in a firm business, and also the partner's interest in the leased premises occupied by the firm, is not discharged from paying the agreed purchase price by the fact that the extent of the interest which the purchaser will take under the executed bill of sale is uncertain.

2. The fact that the partnership property, at the time of the sale, was in the hands of a receiver, pending an accounting between the partners, does

not prevent one of them from selling his interest, with the consent of the other.

3. The delivery to the purchaser of the keys to the partnership premises, together with a notification by both partners to the receiver that the dispute between them had been settled, and a direction to him to turn over the property to the purchaser, followed in due time by an order of court discharging the receiver, is a "delivery" within the meaning of Civil Code Cal. § 1784, which provides that "a buyer must pay the price of the thing sold on its delivery."

Department 1. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Gage & Roberts, for appellant. Wells, Guthrie & Lee, for respondent.

Fox, J. The action is *indebitatus assumpsit*, by the plaintiff, Schurtz, against the defendants, Romer and Kerkow. Judgment for plaintiff, motion for a new trial denied, and this appeal is taken by the defendant Romer from the judgment, and the order denying the motion for a new trial. On a separate appeal taken by the defendant Kerkow, (case No. 13,311, 22 Pac. Rep. 657,) this court held that the findings were sufficient to sustain the judgment. As to the defendant Romer there was a cross-complaint, asking for affirmative relief, to which there was an answer, raising issues not directly raised under the answer of Kerkow. But as to those issues the court has also fully found, and we are still of opinion that upon all the issues the findings are sufficient to support the judgment. The case will therefore be considered upon the question of whether the evidence supports the findings, and upon the assignment of errors of law. The facts in the case, briefly stated, are these: The plaintiff, Schurtz, and the defendant Kerkow were partners, carrying on a saloon and restaurant business at Los Angeles, known as the "Vienna Bouffet," under the firm name of Kerkow & Schurtz. The partners fell out, and a suit was brought by Kerkow against Schurtz, for a dissolution of the partnership, in which a receiver was appointed to take charge of the business and property of the partnership pending the litigation. While the receiver was in charge, the defendant Romer opened negotiations, with the approval of Kerkow, to buy out the interest of Schurtz. This negotiation was carried on through a third party, Romer not allowing himself to be publicly known in the matter until about the time of its consummation. It culminated in a parol agreement, or rather in a proposition, to buy the Schurtz interest at the price of \$4,000 cash, and to assume the payment of one-half the debts of the old firm, they being estimated at and not to exceed the sum of \$5,000. It does not appear, and the court does not find, that there was any representation or guaranty that the debts of the concern did not exceed that amount, but that was the limit of the amount for which Romer was to assume the payment of one-half. Negotiations having reached this point, the parties all met to prepare the necessary papers and complete the transaction. A bill of sale

was prepared in writing, in form running from Schurtz to Romer, but a question arose as to the liability for the other half of the indebtedness, and, as a result of the conversation then had with all the parties, the counsel of Schurtz and Kerkow, and the active agent of Romer present and participating, the paper was changed and made to read, and was executed by all three of the parties, as follows:

"Los Angeles, May 12, 1888. For and in consideration of four thousand dollars, and the assumption of the liabilities of the indebtedness of the firm of Kerkow & Schurtz to the sum not exceeding five thousand dollars, I hereby sell, transfer, and assign unto Max Romer and F. Kerkow all my right, title, and interest in and to my interest in the firm of Kerkow & Schurtz and the business conducted by them known as the 'Vienna Bouffet,' and situate at the corner of Main and Requena streets, city of Los Angeles. And I agree to assign to said Romer and Kerkow my right and interest in and to the lease of above premises, and hereby do assign the same. The schedule of liabilities of Kerkow & Schurtz hereunto attached is the basis of said settlement, and is regarded as nearly correct in the absence of the books and better evidence.

"JOSEPH SCHURTZ. [Seal.]
 "MAX ROMER. [Seal.]
 "F. KERKOW. [Seal.]"

To this instrument was attached a schedule of liabilities, amounting to the sum of \$5,248. Romer informed Schurtz at the time that his money was in Chicago, and that he would have to wait for it about 12 days, as it would take about that time to send for it and get returns; but he paid Schurtz \$100 on account, and thereupon the parties all repaired to the Vienna Bouffet, where the receiver was in charge with a constable, also claiming to be in possession under a writ of attachment. The constable was given security for his money, and departed. Counsel on both sides in the suit of Kerkow against Schurtz then informed the receiver that the matter had been settled by a sale of Schurtz's interest to Romer, settled with him as to the measure of his compensation, and directed him to surrender the possession to Romer, which was done, and in due time thereafter the receiver was discharged by order of court. The keys were given up to Romer, and, after a little time spent in drinking and congratulations, Romer handed the keys to Kerkow, it then being late at night, and the parties departed, Romer having been first introduced to the employes about the place as the new proprietor. This was late on Saturday night. On Monday, it seems, some one had told Romer that under his bill of sale he got only a one-fourth interest in the business, and thereupon he refused, and has ever since refused, to pay the balance of the purchase price, and it is for the recovery of such balance, with interest, that this action is brought.

These are substantially the facts as shown

by the pleadings and evidence, and found by the court. It may be that there is an ambiguity as to the extent of the interest which Romer will take under this paper, but it is not sought to reform the instrument, or to determine the question of the extent of such interest in this action. It will be time enough to consider that question when such a question arises, if ever, between Romer and Kerkow. There is no ambiguity as to the fact that Schurtz sold his interest for the sum of \$4,000, and no dispute that only \$100 of that sum has been paid. We think there can be no doubt that under the instrument Romer became liable for that balance, whether severally or jointly and severally with Kerkow makes no difference on this appeal. The written instrument supersedes all antecedent negotiations, and by it, rather than any conversations which preceded it, the parties are bound. Civil Code, § 1625. The evidence of the appellant conflicts somewhat with that of the other witnesses as to what occurred at the time of the delivery of possession, but we have read the entire evidence with care, and we cannot say that there is not evidence to support every finding made by the court.

It is true, as claimed by appellant, that the property was at the time in the hands of a receiver; but it was so pending an accounting between Kerkow and Schurtz, and that fact did not prevent one of the parties, with the consent of the other, from selling his interest to a third party; nor did it prevent the receiver from restoring it to the parties in interest, or to such third person as they should direct, upon a settlement of their dispute, especially when, as appears in this case, his act in so doing was subsequently approved by the court, and he was regularly discharged from further service in that behalf. Even if he had retained possession, the interest of Schurtz in the property was one which he had full power and right to sell, and a sale so made by him would not be void, as claimed by appellant. *Noonan v. McNab*, 30 Wis. 280; *Noonan v. Orton*, 31 Wis. 280. It is true that in both those cases a question arose as to the right to make such a sale, under the peculiar stipulations of the contract of partnership, but the court held that whatever the stipulations in the contract were, upon the appointment of a receiver, pending an accounting, as in this case, one of the partners had such a residuary interest as that he was then at liberty to sell the same, and the sale would be valid and binding.

It is also true, as claimed by appellant, that the purchaser was not bound to pay until delivery of possession, (Civil Code, § 1784;)¹ but the court finds that possession was delivered on the 12th day of May, and there is evidence to support that finding. Under the facts of this case, section 1753, Civil Code, cited by appellant, has no application.

¹ Civil Code Cal. § 1784, provides: "A buyer must pay the price of the thing sold on its delivery."

The court did not err in overruling the objections taken by the appellant to the examination of the witness Gottschalk. The objection was too general to avail the defendant. Besides, if there was any merit in the objection intended to be taken, the force of the objection was afterwards destroyed by the defendant himself, who twice testified while on the stand that Gottschalk was not his attorney in that matter.

We have examined each of the other specifications of errors of law made by appellant, although put to much unnecessary labor in doing so, by reason of the absence of a proper index to the testimony and exceptions, and fail to find that in any instance the court erred in its rulings. Judgment and order affirmed.

We concur: PATERSON, J.; WORKS, J.

(82 Cal. 628)

SAYWARD v. HOUGHTON *et al.* (No. 13,310.)

(Supreme Court of California. Jan. 27, 1890.)
CHANGE OF VENUE—PARTIES—CORPORATIONS—
TRANSFER OF SHARES.

In an action to compel a shareholder in a corporation to transfer his shares in fulfillment of an alleged agreement, the corporation, though not improperly made a defendant, is not a necessary party; and, it never having manifested any interest in the case, the shareholder is entitled to a change of venue to the county in which he resides.

Department 2. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

Curtis & Otis and *Estee, Wilson & McCutcheon*, for appellant. *Kellogg & King*, for respondent.

SHARPSTEIN, J. Plaintiff appeals from an order granting defendant Houghton's motion for change of place of trial from the county of San Bernardino to San Francisco, where defendant Houghton resides. If Houghton had been the sole defendant, his right to have the place of trial changed would be undoubted. If the complaint states no cause of action against the corporation defendant, the right of Houghton to have the place of trial changed is not affected by making said corporation a defendant in the action. *Sewing-Machine Co. v. Cole*, 62 Cal. 311.

The *graves* of the complaint is the refusal of the defendant Houghton to transfer to plaintiff 3,000 shares of the stock of the corporation defendant, in the fulfillment of an alleged agreement to do so. The relief demanded is that said defendant Houghton be required to transfer said shares of stock, and to account for, and pay over to plaintiff, the dividends received thereon, and, incidentally, that defendants, and each of them, their attorneys, servants, and employes, be perpetually enjoined and restrained from selling, transferring, or permitting to be transferred, any of the said 3,000 shares of said capital stock of said corporation defendant. There

is nothing in the complaint showing, or tending to show, that the corporation defendant is in any sense interested in this action. So far as can be seen from reading the allegations of the complaint, the attitude of the defendant corporation towards its co-defendant Houghton and the plaintiff is one of absolute indifference. Quite as much so as any stakeholder could be between conflicting claimants to a fund, in his hands, to which he had no claim himself. Not having any interest in the action which can be affected in any degree by the result of a trial, it makes no difference to the corporation defendant where the action is tried. Although not improperly made a party, the corporation defendant is not a party in interest; and it does not appear that it has ever manifested any interest in the case. We think the corporation defendant is not a necessary party to the action. The plaintiff might obtain all the relief he demands without making it a party. Order affirmed.

We concur: MCFARLAND, J.; THORNTON, J.

(82 Cal. 611)

YOUNGMAN v. TONNER. (No. 13,217.)

(Supreme Court of California. Jan. 27, 1890.)

OPENING DEFAULT JUDGMENT.

On motion to open a default, defendant's only excuse for his neglect was that one day after the time to answer had expired "he became suddenly and violently ill," and was forbidden by his physicians to do any business whatever, and that this condition continued until about four days after the default. He, however, showed no meritorious defense, except that he was advised by counsel that he had a "good and substantial defense, on the merits of the action, to the extent of \$450;" nor did he offer any explanation of his neglect to answer, or of his two-months delay in moving to have the default opened. Held that, as the court, on the showing made, had the right to deny his motion unconditionally, defendant could not complain of an order granting him leave to answer as to the \$450 on condition that he pay the balance of the judgment within 10 days.

Commissioners' decision, Department 2. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

J. R. Scott and *F. D. Howard*, for appellant. *Brousseau & Hatch*, for respondent.

VAN CLIEF, C. There was a judgment by default against the defendant upon a non-negotiable promissory note, the judgment being for \$1,894.07, rendered November 8, 1888. On December 27, 1888, the defendant gave notice that he would move the court on January 7, 1889, to set aside the default and judgment on the ground that his default was entered "through his mistake, inadvertence, surprise, and excusable neglect." The motion was heard on the affidavit of the defendant, and the affidavit of one of the attorneys for the plaintiff. There was no showing by the defendant of any mistake, inadvertence, or surprise; and the only excuse offered for his neglect is that on the 7th day of November, 1888, —one day after

the expiration of the time allowed him by law in which to answer,—“he became suddenly and violently ill,” and was forbidden by his physicians to attend to any business whatever, and “that he remained under the care and instructions of his physicians until about four days after his default: * * * and at the time of the entry of said default, and one day prior thereto, defendant was confined to his bed, and so ill that he was unable to appear personally, or to instruct others to enter such appearance for him, in the above-entitled cause, and during all of said time defendant was unable to act or think intelligently on business matters.” He shows no meritorious defense except that, in the stereotyped form, he states that he is advised by his counsel, and verily believes, “that he has a good and substantial defense on the merits of the action to the extent of \$450,” but does not state the nature of such defense. He further states that one Mrs. Perly claims the ownership of the note in suit, or the money secured thereby, and that he had been informed by plaintiff that he (plaintiff) had assigned said note to Mrs. Perly. All this part of the affidavit relating to Mrs. Perly is disputed by the affidavit of plaintiff's attorney, who deposes that he is also the attorney for Mrs. Perly, and that she does not claim the ownership of the note, nor the money thereby secured, and that the only interest she has is one undivided half of the judgment rendered by assignment from the plaintiff. Defendant was served with summons within the county in which the suit was brought, yet states no reason why he did not answer within 10 days after service. Nor does any reason appear why he delayed giving notice of his motion to open the default nearly two months after the judgment. Upon the hearing of the motion the court made the order appealed from, as follows: “Upon payment within ten days from this date, by the defendant to the plaintiff, of all the said judgment over and above the sum of \$450, that he be allowed to come in and answer and defend as to the said sum of \$450; otherwise, the judgment to stand in full force and effect.” Upon the showing made, I think the court would have been justified in denying the motion unconditionally. Granting the defendant the privilege of answering as to \$450, upon the condition that within 10 days he should pay the remainder of the judgment, which he did not dispute, may therefore be regarded rather as matter of grace than of right, from which it does not follow, as contended by appellant's counsel, that the court must necessarily have found that the negligence of defendant was entirely excusable, and that he had a meritorious defense to a part of the judgment. Under the circumstances, the terms upon which the court ordered the default to be opened cannot be said to be unjust, or to indicate an unwarrantable exercise of the discretionary power of the court; and I therefore think the order should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

(82 Cal. 617)

PEOPLE v. RYAN. (No. 20,555.)

(Supreme Court of California. Jan. 27, 1890.)

CRIMINAL LAW—WITHDRAWN PLEA OF GUILTY.

Under Pen. Code Cal. § 1018, which provides that “the court may, at any time before judgment upon a plea of guilty, permit it to be withdrawn, and the plea of not guilty substituted,” a withdrawn plea of guilty, for which a plea of not guilty is substituted by authority of court, is not admissible in evidence against defendant.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; J. W. MCKINLEY, Judge.

Weed S. Chelf, for appellant. George A. Johnson, Atty. Gen., for the People.

FOOTE, C. The defendant was convicted of burglary in the first degree. From the judgment rendered against him, and an order denying a motion for a new trial, he has appealed. The error relied on to reverse the judgment and order is that the people were allowed, over the defendant's objection, to introduce in evidence his plea of guilty in the same cause before the same court, after, by the permission of that court, his plea of guilty had been withdrawn, and he had been permitted to enter a plea of not guilty, according to the provisions of section 1018 of the Penal Code, which contains, among other things, this language: “The court may, at any time before judgment upon a plea of guilty, permit it to be withdrawn, and a plea of not guilty substituted.” The counsel for the people in his brief contends that the admission in evidence of the former plea of guilty stands upon the same rule of law as the admission of “confessions” of a defendant, and concludes in this language: “In this case there could have been no conviction without the confession,”—that is, the plea of guilty. The case stands thus, without the evidence of a withdrawn plea of guilty, for which, by authority of law and the court a plea of not guilty was “substituted,” the defendant could not have been legally proven or found guilty. Can it be that a privilege thus conceded to a defendant of substituting one plea for another is to have the inevitable effect of defeating the whole object of the “substituted” plea? We do not think that the legislature, in passing the law under which the defendant was allowed to nullify and render *functus officio* his plea of guilty, by substituting or putting in place of it a plea of not guilty, intended to say that, notwithstanding such substitution and doing away with the first plea, it may be given in evidence, and sometimes serve as the only conclusive proof of a man's guilt under the plea of not guilty. Of what use, practically, would such a privilege to a defendant be, as that granted by section 1018 of the Penal Code, if its construction is to be such as that contended for by the re

spondent? The counsel for the people says in his brief: "No cases are cited by appellant, and I have found none, where the question has arisen whether a plea of guilty withdrawn by permission of the court can be introduced in evidence. But on principle I see no reason why it cannot be, if shown to be voluntary." It is perfectly true that no such case can be found, but we cannot agree that, upon principle, where a plea is withdrawn and another legally substituted therefor the one withdrawn can be introduced in evidence to nullify any defense under the last plea, which would be the practical result, in this case, of such a doctrine. For these reasons we advise that the judgment and order be reversed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

(82 Cal. 640)

BRANT v. PHILLIPPI *et al.* (No. 12,777.)

(*Supreme Court of California.* Jan. 27, 1890.)

EJECTMENT—RIGHT OF POSSESSION—LEASE.

Where plaintiff in ejectment leased the premises before the action was brought, and, when defendants were found in possession, authorized the lessee to sue in plaintiff's name, it will be presumed that the lease was abandoned by mutual consent, and it cannot be urged as a defense that plaintiff was not entitled to possession.

Commissioners' decision. In bank. Appeal from superior court, Kern county; R. E. ARICK, Judge.

J. W. Mahon and C. C. Cogwill, for appellants. Allen & Miller, (B. Brundage, of counsel,) for respondent.

VAN CLIEF, C. Ejectment for a section of land in Kern county. Defense that, although plaintiff was the owner of the land in fee, he was not entitled to the possession at the time of the commencement of this action, (February 10, 1888,) for the reason that he had leased the land some two weeks before to Tyler & Bro. for the term of one year. It appears that plaintiff, who was a non-resident of this state, executed a lease of the land to Tyler & Bro. on January 26, 1888, for the term of one year, but never gave them possession under the lease. When they went to take possession they found the land occupied by the defendants, who claimed to hold it under a lease from plaintiff, through the agency of one W. T. Oden; but it appears that Oden had no authority from plaintiff to lease the land. Defendants refused to let Tyler & Bro. into possession, and thereupon the plaintiff authorized Tyler & Bro. to commence an action for him and in his name against the defendants to recover the possession. In pursuance of this authority this action was commenced and prosecuted through the agency of Tyler & Bro.

From the foregoing facts it is fairly inferable that Tyler & Bro. waived their rights under the lease, and that the lease was aban-

doned by mutual consent of the parties thereto. *Camarillo v. Fenlon*, 49 Cal. 207; *Skaggs v. Emerson*, 50 Cal. 6; *Dengler v. Michelsen*, 76 Cal. 125, 18 Pac. Rep. 138; *Austin v. Mining Co.*, 72 Mo. 535; *Gear, Landl. & Ten.* §§ 163, 168. Tyler & Bro. were under no obligation to the plaintiff to sue the defendants for possession. It was the duty of the plaintiff to put his lessee in possession, and until he did so he could recover no rent. See authorities above cited. If Tyler & Bro. declined to sue, as they might, and apparently did, the plaintiff would not only have lost his rent for the term, but would have been deprived of the possession of his land until after the end of the term, unless he was entitled to bring this action. I think the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(3 Cal. Unrep. 204)

HEILBRON *et al.* v. CAMPBELL, Judge.
(No. 13,478.)

(*Supreme Court of California.* Dec. 23, 1889.)

JUDGE—DISQUALIFICATION.

Under Code Civil Proc. Cal. § 170, disqualifying judges to act who are interested in the controversy, where three parties are adversely claiming to be the owners of a certain tract of land, one of whom is the judge, and the other two adverse litigants before him, asking him to determine which of them is the owner of the land which he claims to own, and to appoint a receiver for said land, a writ of prohibition will issue to prevent him from acting further in said cause.

In bank.

S. C. Denson, Geo. R. B. Hayes, and A. L. Hart, for petitioners. Garber, Boalt & Bishop, (Craig & Meredith, of counsel,) for respondent.

WORKS, J. This is an application by the petitioners against the respondent, as judge of the superior court of the county of Fresno, to prevent him from proceeding further in an action pending in said court, in which Charlotte F. Clarke *et al.* are plaintiffs and the petitioners are defendants. The petition shows, in substance, that in 1880 an agreement was entered into by and between the petitioners and one Jeremiah Clarke by which the petitioners leased from said Clarke, for a term of years, a certain tract of land in said county of Fresno, being a part of what was known as the "Laguna de Tache Rancho," and in which agreement it was provided that the petitioners should have the option, during said lease, to purchase said property at the price and on the terms therein named; that the petitioners took possession of said property under said lease and contract, and complied with all its terms and conditions; that the said Charlotte F. Clarke, who was the wife of Jeremiah Clarke, made application for and procured letters of guardianship over

the property of her said husband on the ground of his unsoundness of mind, and before the expiration of said lease, and before the time given the petitioners by said lease and contract to exercise their option to purchase said property, she, as such guardian, brought an action in said court to set aside said contract on the ground that said Clarke was at the time he executed the same of unsound mind; that said cause was tried before the respondent as judge of said court, and findings and judgment rendered in favor of the plaintiff, and a motion for a new trial has been made, and is pending before the respondent; that a motion has also been made by said plaintiff for the appointment of a receiver to take charge of said property, which is also pending. As a reason why the respondent should be prohibited from acting further in said cause, it is alleged that during the pendency thereof before him he purchased a certificate of purchase for a certain tract of land, consisting of 257 acres, which is a part of the land included in said lease and contract, and of which the petitioners took and held possession thereunder, and a part of the land claimed by each of the parties in said action and in controversy between them, and that the respondent still holds and owns said certificate, and claims to own said property. There are also other allegations, not necessary for us to notice particularly. The respondent demurs to the petition, and also answers the same. In his answer he denies that the land purchased and claimed by him is a part of said ranch, but he does not deny that the parties to said action are claiming it to be a part thereof, or that the petitioners are in possession of it, claiming it to be within their contract, or that it is in controversy between the parties in said action.

So, putting the matter in the most favorable light for the respondent, we have a case in which three parties are adversely claiming to be the owners of a certain tract of land, one of whom is a judge of the court, and the other two adverse litigants before him, asking him, by his judgment, to determine which of them is the owner of the land which he claims to own. Not only so, but he is asked to appoint a receiver to take possession of land which he claims to own, and account to him for its management. He is called upon by the application for a receiver, or may be, to determine what lands shall go into the hands of such receiver. As he claims a part of the land, and asserts that it is not within the larger tract in dispute, the temptation to exclude it in making his order will at once arise; and, if his land is to go into the hands of a receiver, it must be of some interest to him who shall become such receiver, and take charge of and manage the land. It seems to us that neither argument nor authority is necessary to show that a judge should be prohibited from sitting in a cause under such circumstances; but we cite Code Civil Proc. § 170; *Mining Co. v. Keyser*, 58 Cal. 315; *Stockwell v. Board*, 22 Mich. 341; *Hall v.*

Thayer, 105 Mass. 219; *Cottle's Appeal*, 5 Pick. 482; *Sigourney v. Sibley*, 21 Pick. 101; *Coffin v. Cottle*, 9 Pick. 287; *Gay v. Minot*, 3 Cush. 352; *Moses v. Julian*, 45 N. H. 52; *Oakley v. Aspinwall*, 8 N. Y. 517.

It is contended that our statute only disqualifies a judge where he has a direct interest in the result of the suit, and that, as in this case a judgment for or against either of the parties, determining the controversy between them, could not bind the judge, or affect his title to the land claimed by him, he was not disqualified. But we cannot give the statute this narrow construction. It should be the duty and desire of every judge to avoid the very appearance of bias, prejudice, or partiality; and to this end he should decline to sit, or, if he does not, should be prohibited from sitting, in any case in which his interest in the subject-matter of the action is such as would naturally influence him either one way or the other. We have shown how a judge might, and probably would, be influenced to act in the appointment of a receiver. In the decision of the action on its merits, the temptation to decide in favor of one party or the other might be equally strong. It might become very important to him to have the land go to one of the claimants rather than the other. One might be friendly to him, and his claim, and the other not. With one a compromise might be easy, and with the other difficult. One might be much more inclined, and more able, peculiarly or otherwise, than the other, to litigate his claim against him. And, aside from what might influence the judge under such circumstances, it appears to us to be unseemly for a judge to sit in an action involving the title, as between the litigants, to a subject-matter of which he claims to be the sole owner, and must in the end litigate as between himself and the litigant who succeeds to the property by his judgment.

The question whether the taking of testimony was necessary was discussed at the argument. The view we have taken of the issues renders this unnecessary. Let the writ issue prohibiting the respondent, Campbell, from acting further in said cause.

We concur: MCFARLAND, J.; SHARPESTEIN, J.; FOX, J.; PATERSON, J.

(3 Cal. Unrep. 202)

LABISH v. HARDY. (No. 12,479.)

(*Supreme Court of California*. Dec. 27, 1889.)

HUSBAND AND WIFE—COMMUNITY PROPERTY.

1. A husband and wife occupied a tract of land belonging to the United States from 1847 until 1856, when the wife died. The husband continued to occupy the land until 1871, when he received a deed to it from the town of Santa Cruz under Act Cong. July 23, 1866. *Held*, that the occupation by the husband and wife during her life did not operate to render the land community property, or vest the wife with any ownership whatever. Following *Labish v. Hardy*, 19 Pac. Rep. 531.

2. In an action by a daughter of the first marriage against a second wife, to whom the land had been deeded, to recover the interest claimed by plaintiff as heir of her deceased mother, the deed

will not be vacated on the ground that it was a gift, and the husband was indebted to plaintiff, and did not leave sufficient property to pay her.

Department 2. Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

Action by Isabella Labish against Jane Hardy to set aside a deed and quiet title to certain premises in the city of Santa Cruz. In 1847, plaintiff's parents went into possession of the land in dispute, which was then public land of the United States, and continued to occupy it, together with their children, as their home, until the death of plaintiff's mother, which occurred in June, 1856, at which time plaintiff was seven years old. After the death of plaintiff's mother, the father of plaintiff continued to occupy said premises as his home until his death, in 1883. In June, 1860, plaintiff's father married the defendant. In May, 1871, plaintiff's father took a deed for the premises from the corporate authorities of the town of Santa Cruz, under the act of congress approved July 23, 1866, entitled "An act to quiet title to certain lands within the corporate limits of the city of Benicia and the town of Santa Cruz;" said premises then being within the corporate limits of the town of Santa Cruz and public lands of the United States. On August 8, 1881, plaintiff's father made a deed of gift of the premises to the defendant. This deed was recorded, but is alleged not to have been properly acknowledged when this action was commenced. At the time this deed was made, the premises constituted all the property of plaintiff's father, and he never afterwards acquired any property. The defendant claims the premises under this deed. This action was commenced August 7, 1885. Plaintiff alleged that before that time she acquired and then owned any interest in said premises that might have descended from her mother; that after his first marriage W. H. Hardy received property and money in trust for the plaintiff upon the understanding and express promise on his part to invest and pay over the proceeds thereof to the children of his first wife, plaintiff being one of those children; that this trust was never repudiated by him, but was never carried out, and that at the time of his death he owed several hundred dollars to plaintiff on account of said trust property; that plaintiff did not know of the deed of gift to defendant until after her father's death, and did not know until then that her father had not left sufficient property to pay her demand, exclusive of said real property. These and other pertinent facts were set up in the complaint and amended complaint. The defendant demurred, and the demurrer was sustained. The plaintiff declining to further amend, judgment of dismissal was entered; and plaintiff appeals from such judgment.

W. D. Storey, for appellant. Henry P. Route, for respondent.

PER CURIAM. We have examined the rec-

ord in this case, and find no error in it. The case is determined by *Labish v. Hardy*, 77 Cal. 327, 19 Pac. Rep. 531. Judgment affirmed.

(32 Cal. 273)

In re NEUSTADT. (No. 20,602.)

(Supreme Court of California. Dec. 30, 1889.)

FALSE PRETENSES—PUNISHMENT—JURISDICTION.

1. Pen. Code Cal. § 1205, providing that "a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which must not exceed one day for every dollar of the fine," does not apply to a conviction for obtaining money by false pretenses, under section 532, which prescribes as a penalty "imprisonment in the county jail not exceeding one year, and by a fine not exceeding three times the value of the money or property so obtained," as the legislature did not intend by this provision to make it possible to impose a penalty of life imprisonment for a misdemeanor.

2. The police judge's court has no jurisdiction of the offense of obtaining money by false pretenses, as the fine may exceed \$1,000.

BEATTY, C. J., and THORNTON, J., dissenting.

In bank. *Habeas corpus*.

This was an application for a writ of *habeas corpus* made by one Neustadt, who was convicted by the superior court of the city and county of San Francisco of obtaining money by false pretenses.

Carroll Cook, for petitioner. J. D. Page, Dist. Atty., for respondent.

PATERSON, J. The petitioner was convicted of obtaining money by false pretenses, and sentenced on March 31, 1888, to imprisonment in the county jail for the term of one year, to pay a fine of \$2,249, and, in default of payment thereof, to be imprisoned one day for every dollar remaining unpaid, the latter imprisonment to commence at the end of the one-year term of imprisonment first ordered. The penalty provided by section 532, Pen. Code, under which the petitioner was convicted, is "imprisonment in the county jail not exceeding one year, and by fine not exceeding three times the value of the money or property so obtained." The legislature did not intend, we think, by this provision, to make it possible to impose a penalty of life imprisonment for a misdemeanor such as the offense named in section 532, or any other. In *People v. Righetti*, 66 Cal. 184, 4 Pac. Rep. 1063, 1185, the court in department held that section 1205 of the Penal Code applies to cases of fine, whether the fine be coupled with a sentence of imprisonment, or whether the fine stand alone as the only punishment. The correctness of that decision may be doubted. The section provides: "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of imprisonment, which must not exceed one day for every dollar of the fine." An adherence to the letter of this section would make it inapplicable to cases in which the court imposed a term of imprisonment, and also a fine. We do not, however, intend to express

any opinion as to the correctness or incorrectness of the decision referred to. It is sufficient to say that, taking all the provisions of the Code together, it is manifest that the legislature did not intend section 1205 to apply to cases of this kind, where the amount of the fine is not left discretionary with the court, and where the extreme penalty which may be imposed is left uncertain and dependent upon evidence as to the value of the property taken. The Penal Code provides that "all provisions are to be construed according to the fair import of their terms, with a view to effect its object, and to promote justice." Section 4. Of course, the legislature has the power to provide, for the collection of fines by imprisonment at a certain rate per day, in cases where a fixed term of imprisonment is also imposed, but in such cases it should clearly appear that such is the intent of the legislature.

The petitioner claims that the superior court had no jurisdiction of the offense with which he was charged, and that under the decision in *Green v. Superior Court*, 78 Cal. 556, 21 Pac. Rep. 307, 541, the judgment should be declared void for that reason. The case referred to is not in point. The offense named in section 532 is punishable by imprisonment in the county jail not exceeding one year, and by fine not exceeding three times the value of the property. A fine must in all cases be imposed; there is no alternative. It must be three times the value of the property. It may be more than \$1,000. The police judge's court, therefore, has not jurisdiction of this offense. As the petitioner has served more than the term of imprisonment prescribed by the statute, he is entitled to his discharge: It is ordered that the petitioner be discharged from custody.

We concur: FOX, J.; WORKS, J.; SHARPSTEIN, J.; MCFARLAND, J.

Wedissent: BEATTY, C. J.; THORNTON, J.

(82 Cal. 284)

HAYNE v. JUSTICE'S COURT. (No. 13,559.)

(Supreme Court of California. Dec. 31, 1889.)

INSOLVENCY—STAT OF OTHER PROCEEDINGS—WRIT OF PROHIBITION.

Code Civil Proc. Cal. p. 686, provides that "no creditor whose debt is provable under this [the insolvency] act shall be allowed, after the commencement of proceedings in insolvency, to prosecute to final judgment any action therefor against the debtor until the question of the debtor's discharge shall have been determined, and any such suit or proceeding shall, upon the application of the debtor or any creditor, * * * be stayed to await the determination of the court in insolvency on the question of discharge." An action was brought against the petitioner in the justice's court on a promissory note, and an attachment levied on his property, and he filed his petition in insolvency, and the property attached was released, and he filed his answer in the justice's court, setting up the insolvency proceedings; but plaintiff obtained, from the superior court in which the insolvency proceedings were pending, an order permitting the justice's court to proceed to judgment. *Held*, that a writ of prohibition would be granted.

In bank. Writ of prohibition to justice's court, Monterey county.

This is an application for a writ of prohibition by Hayne to prevent the justice's court of Monterey county proceeding to judgment in a cause pending before it.

Geil & Morehouse, for petitioner. *N. A. Dorn* and *W. M. R. Parker*, for respondent.

WORKS, J. This is an application for a writ of prohibition to prevent the respondent proceeding to trial and judgment in a cause pending before it. An action was brought against the petitioner in the justice's court on a promissory note, and an attachment was issued, and levied on his property. The petitioner filed his petition in insolvency, and the property attached was released. He filed his answer in the justice's court, setting up the insolvency proceedings; but the plaintiff applied to the superior court, in which the insolvency proceedings were pending, and procured an order from that court permitting the justice's court to proceed with the cause. The petitioner moved the justice's court to desist from further proceedings, but his motion was denied; and, the court being about to proceed to judgment, this writ was applied for.

Section 45 of the insolvency act (Code Civil Proc. p. 686) provides: "And no creditor whose debt is provable under this act shall be allowed, after the commencement of proceedings in insolvency, to prosecute to final judgment any action therefor against the debtor until the question of the debtor's discharge shall have been determined; and any such suit or proceeding shall, upon the application of the debtor or any creditor, or of the assignee, be stayed to await the determination of the court in insolvency on the question of discharge." There are certain provisions in the section authorizing the continuation of proceedings in certain cases, but this case is not within any of them. This is a plain and direct prohibition against any further proceedings in the justice's court; and the petitioner, having brought himself within the statute, is entitled to the writ prayed for. The respondent does not contend that it has the right to proceed, but claims that in doing so it would not exceed its jurisdiction, but would only commit an error that could be reached by appeal. We cannot agree to this proposition. A court that proceeds in the trial of a cause against an express prohibition of a statute is exceeding its jurisdiction, and may be prevented by prohibition from this court. The case of *Bandy v. Ransom*, 54 Cal. 87, is not in point. At the time it was decided the insolvency act in force contained no prohibition against proceedings in other courts after the commencement of insolvency proceedings. The provision of the statute referred to is a salutary one, calculated to prevent the swallowing up of insolvent estates in unnecessary litigation, and should be enforced. Conceding that an appeal might have been taken, it was not an

adequate remedy. It would only add to the costs of litigation, the very thing that the statute was intended to prevent. Let the writ issue as prayed for.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; FOX, J.; THORNTON, J.; MCFARLAND, J.; PATERSON, J.

Rehearing denied.

(52 Cal. 480)

LANDERS v. LANDERS *et al.* (No. 13,464.)

(Supreme Court of California. Jan. 8, 1890.)

BILL OF EXCEPTIONS—SETTLEMENT.

1. Code Civil Proc. Cal. § 652, which provides that "if the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same," does not apply to a case where the trial judge has refused to settle a statement or bill of exceptions, but to a case where, in settling a bill, he refuses to allow an exception that ought to be allowed.

2. Though no rules on the subject have been prescribed by the supreme court, one who applies to it under this section should set forth in his petition fully and specifically the very exception which he presented to the trial judge, and which he avers the judge wrongfully refused to put in the bill, and also the evidence on which he bases the truth of his proposed exception, so that the supreme court can see on the face of his petition what his alleged grievance is.

In bank. Application to settle bill of exceptions in superior court, city and county of San Francisco; F. W. LAWLER, Judge.

T. I. Bergin, for plaintiff. D. L. Smoot, for defendants.

MCFARLAND, J. This cause is now before this court upon a petition of defendants, in which it is set forth that the judge of the superior court, in which the cause was pending, "refused to settle and certify" a bill of exceptions presented to him by petitioners; and they pray that this court "will settle, and have certified, the said bill of exceptions in accordance with the provisions of section 652 of the Code of Civil Procedure." Plaintiff demurs to the petition upon various grounds, which present the question whether or not it is sufficient.

Section 652 was not intended to apply, and does not apply, to the case where a trial judge has refused to settle a statement or bill of exceptions. The remedy for such a refusal, if wrongful, is *mandamus* to compel him to act. The law does not impose upon the appellate court the general duty of settling a bill of exceptions. Section 652 applies to a case where the trial judge, in settling a bill, refuses to allow an exception which ought to be allowed. The language is, "If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same,"—that is, to prove the exception which the judge is alleged to have refused to allow in accordance with the facts. The section further provides that "the application may be made in the mode and manner, and under such regulations, as that court may pre-

scribe." No regulations on the subject have been prescribed by this court, for rule 29 does not apply. But, in the absence of such regulations, the petitioner should set forth fully and specifically the very exception or exceptions which he presented to the judge, and which he avers the judge wrongfully refused to put into the bill, and also, we think, the evidence upon which he bases the truth of his proposed exceptions, so that this court can see on the face of the petition what his alleged grievance is. Section 189 of the old practice act was on this subject the same as section 652 of the Code; and, referring to the former, this court said in *Wormouth v. Gardner*, 35 Cal. 228: "A motion to correct a statement or exceptions, where the court below refuses to make the same conform to the facts, is an original proceeding in this court, and must be instituted by a petition in writing, setting forth at length the exceptions which were taken at the trial, and not allowed by the judge, and so much of the evidence as may be necessary to illustrate them. * * * The fact that this court has not as yet prescribed any rules for the government of such proceedings does not relieve a party from the necessity of inaugurating them in the manner dictated by the statute." In the case at bar the petition does not contain a copy of the exception alleged to have been presented to the judge, or of any evidence. The averments are merely that a bill of exceptions was presented, and that the judge "refused to settle and certify the said bill of exceptions." The theory of the petition seems to be that this court, with a few general averments before it about the conduct, in the premises, of the judge of the trial court, will put itself generally in the place of that court, and proceed to construct for it an original and complete bill of exceptions. Such is not the meaning of the Code. We think that the petition is entirely insufficient. Prayer of petition denied, and proceeding dismissed.

We concur: BEATTY, C. J.; WORKS, J.; PATERSON, J.; SHARPSTEIN, J.; FOX, J.

(33 Cal. 83)

HYDE v. BOYLE *et al.* (No. 13,481.)

(Supreme Court of California. Feb. 1, 1890.)

In bank. Application by Thornton and others, appellants, to settle bill of exceptions in superior court, city and county of San Francisco; J. P. HODGE, Judge.

George H. Buck and Edward F. Fitzpatrick, for petitioners. T. M. Osment, for respondents.

FOX, J. This is an original proceeding in this court to settle a bill of exceptions, taken on behalf of petitioners, who are appellants in the above-entitled cause.

We have examined the petition and answer thereto, and are of opinion that on at least one of the points made on their appeal the petitioners are entitled to take an appeal, and be heard thereon; and that under the decision of this court in the case of *Herrlich v. McDonald*, 80 Cal. 473, 23 Pac. Rep. 209, the proper mode of bringing the matter up on an appeal is by bill of exceptions. They are therefore entitled to have a bill settled and allowed. But

this court, in bank, has recently held, in the case of *Landers v. Landers*, ante, 126, (No. 13,464, filed January 8, 1890,) that this is not the proper remedy in a case like the one here presented; that this court cannot substitute itself for the court below in the settlement of a general bill of exceptions. On the authority of that case this application must be denied, and the parties left to the remedy therein suggested, if the judge below still persists in his refusal to settle the bill. So ordered.

We concur: WORKS, J.; PATERSON, J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

(32 Cal. 250)

CASTAGNINO v. BALLETTA et al. (No. 11,713.)

(Supreme Court of California. Dec. 30, 1889.)

MECHANICS' LIENS—PLEADING—LIMITATION OF ACTIONS—NONSUIT.

1. A complaint in an action to enforce a mechanic's lien, in which the special contract between contractor and owner is stated, can be changed by amendment into an action on the contract, in which the contract may be counted on specially, or the common counts in *indebitatus assumpsit* may be used, and the special contract is admissible in evidence under the common counts.

2. Where a waiver of matters stated in requests for instructions may be inferred by the jury from the evidence, it is error to give the requested instructions, which omit all reference to a waiver, and ask that a verdict be rendered on the facts stated in the requests.

3. Where defendants move for a nonsuit on the ground that the claim is barred by the statute of limitations, but ask no direction to the jury on this point, and the court makes no charge in regard to it, the point as to the bar of the statute of limitations cannot be considered on the record presented to the appellate court.

4. A motion for nonsuit on the ground "that the proof shows that the claim is barred" is properly denied where the cause of action is set up in three counts, and the statute is only pleaded to two.

In bank. On rehearing. For opinion in department, see 21 Pac. Rep. 1097.

This action was originally brought by Castagnino against P. Balletta et al. to foreclose a mechanic's lien. Judgment for plaintiff, and defendants appeal.

Tilden & Tilden, for appellants. *M C Hassett*, for respondent.

THORNTON, J. This action was originally brought to foreclose a mechanic's lien for \$1,395.50 on a block of buildings in the city of San Francisco. The buildings were erected by plaintiff for defendants under a written contract which provided that plaintiff should furnish all the materials, and do the work, according to plans and specifications made by George Bordwell, architect, and receive therefor the sum of \$9,800, payable in installments as the work progressed, the last payment to be made "when the houses shall be completed, each in all its parts, and accepted by the architect." The \$1,395.50 consisted of an unpaid balance of the contract price, and \$375 alleged to be due for extra work and materials. The case was tried, and judgment rendered for plaintiff. An appeal was taken by defendants from the judgment and an order denying them a new trial, and the judgment and order were reversed on authority of *Loup v. Railroad Co.*, 63 Cal. 97. The

case came on again for trial, and the plaintiff was allowed, over the objections of defendants, to file an amended complaint in *indebitatus assumpsit*. It contained three counts. The first alleged an indebtedness from defendants to plaintiff of \$1,020.50 for work and labor done, and materials furnished, in the erection of a block of buildings in the city of San Francisco. The second alleged an indebtedness of \$270 for extra work done and materials furnished in the erection of the said block of buildings. And the third alleged an indebtedness of \$105 for putting a door in defendants' building, and constructing a sidewalk in front thereof, at their special instance and request. The prayer was for judgment for \$1,395.50, the aggregate of these amounts, with interest and costs. The defendants, by their answer, denied that they were indebted to plaintiff in the sum of money named in the complaint, or in any sums or sum whatever; and to the first two counts they pleaded the statute of limitations. They then alleged that the labor and materials sued for, except the last item of \$105, were furnished under a written contract, which was executed by the parties on the 26th of April, 1876, and a copy of which was set forth and made a part of the answer. They further alleged that they complied with all the conditions of the contract on their part, and paid plaintiff during the progress of the work the sum of \$9,104, but that plaintiff failed to comply with the conditions of the contract on his part; that he omitted to put in the buildings many things required by the contract and specifications, and that the value of the articles and work omitted was \$150; that the buildings were not completed within the time named in the contract, and defendants were damaged thereby in the sum of \$900; that the foundation was not put down to solid ground, and by reason thereof the buildings settled, to the damage of the same in the sum of over \$1,000. The prayer was for judgment against the plaintiff for \$1,500, and costs of suit. The case was tried before a jury, and the verdict and judgment were for plaintiff. Defendants moved for a new trial, which was denied, and have appealed from the judgment and order.

When the trial commenced, the plaintiff first introduced in evidence the building contract, a copy of which is set out in the answer, and the specifications referred to therein. He then introduced evidence showing: That the terms of the contract were subsequently changed in certain respects by agreement of the parties. That he proceeded to construct and complete the buildings according to the plans and specifications; that he performed certain extra work, which was provided for by an indorsement on the contract, and for which he was to receive \$270. That he also placed an extra door in one of the houses, by direction of the architect, at a cost of \$15, and by an agreement with defendants laid a new sidewalk in front of the building, for which they were to pay him

§90. That he was prevented by defendants from completing the whole work at the time named in the contract. That after it was in fact completed the architect suggested certain items of work which he wished to have done, saying that when they were done to his satisfaction he would accept the buildings as complete, and that he (plaintiff) did the suggested work so far as it was called for by the contract. That a few days afterwards, at a meeting of the plaintiff, defendant Balletta, and the architect, the architect said he was satisfied with the building, and would accept it. That at this meeting the architect also said to plaintiff's attorney, who was present, that "he [plaintiff] had a hard contract, anyhow, and that he was glad that he had finished it up, and that he had advised him not to take the contract in the first place; that he knew he lost a great deal of money on it. He said he knew he lost not less than \$2,000 on the contract. He was glad it was finished." That it was then arranged that another meeting of the parties should be held at the architect's office to figure up the amount due plaintiff, and settle the whole matter, and that in pursuance of this arrangement the parties met, the amount due plaintiff was figured up and agreed to be, including the extra work, \$1,395.50, and that after that the architect called plaintiff's attorney aside, "and spoke in a low tone, and said that he wanted plaintiff to pay him \$100; that he had been to a great deal of trouble in superintending the buildings, and that the amount paid him by defendant for his services was not sufficient." That plaintiff, on being informed of this demand, refused to pay it; and the architect then said that he would charge plaintiff for lost time, and would not receive the buildings. That defendant was present, with a bag of money on the table, ready to pay plaintiff if the architect had not stopped him from doing so. The defendants objected to the admission in evidence of the contract and specifications, on the ground that they showed an entirely different contract from the one set up in the complaint, and were, therefore, irrelevant and immaterial; and to all the evidence showing that the terms of the contract were varied and changed; and to all evidence offered to excuse or explain the delay in the completion of the contract according to its terms, on the ground that it was incompetent and inadmissible under the pleadings. They also moved for a nonsuit on similar grounds. The objections and motion were all overruled, and exceptions reserved.

The above statement, which we find to be correct, is taken from the opinion of Commissioner BELCHER, filed July 1, 1889, after which a rehearing was granted. 21 Pac. Rep. 1097. The objection to the permission of the court below, granted plaintiff, to file an amended complaint, on which the cause was tried, is without merit. There is no change of the cause of action which inhibits the court from allowing the amendment. A

complaint in an action to enforce a mechanic's lien, in which the special contract between contractor and owner was stated, can be changed by amendment into an action on the contract, which contract may be counted on specially, or the common counts in *assumpsit*, in certain cases which will be hereafter pointed out, may be made use of by the pleader. That the common counts may be resorted to in actions on contracts, within certain defined limits, has been too long and too well settled in this state to be the subject of further debate or controversy. It is only necessary to refer to the cases which adjudge this to be the law, a course of decision which commenced in this court at an early day in its history, following the rulings of the courts of New York on a statute similar to our own, and which has continued to the present time. See *De Boom v. Priestly*, 1 Cal. 206, (decided in 1850;) *Reynolds v. Jourdan*, 6 Cal. 108, (decided in 1856;) *Adams v. Pugh*, 7 Cal. 151; *O'Connor v. Dingley*, 26 Cal. 20. There are many other cases which may be found by reference to the digests, and need not be cited here. The rule is stated as fully settled in *O'Connor v. Dingley*, *supra*, in which case it was held not applicable for the reason stated in the opinion of the court in that case. There the contract had been fully performed, on which performance money was not to be paid, but a note was to be executed, payable 12 months after date. It did not appear that the parties disregarded that stipulation in the contract, or in any manner waived the execution of the note. There was no breach of the contract set up for the non-execution of the note. The breach alleged was the failure to pay the money. The money was not due. It there appears that there was no breach of the contract in the matter alleged. The court held that an action might have been maintained for a failure or refusal to execute the note, but the use of the common count by the pleader was not available, at least until the period of credit had expired. See 26 Cal. 22, 23. The rules of pleading in regard to the employment of the common counts in actions on contracts are well stated by Prof. Greenleaf in the second volume of his work on Evidence, (section 104,) as follows: "The law on this subject may be reduced to these three general rules: (1) So long as the contract continues executory, the plaintiff must declare specially; but when it has been executed on his part, and nothing remains but the payment of the price in money by the defendant, which is nothing more than the law would imply against him, the plaintiff may declare generally, using the common counts, or may declare specially, on the original contract, at his election. If the mode of payment was any other than in money, the count must be on the original contract. And if it was to be in money, and a term of credit was allowed, the action, though on the common counts, must not be brought until the term of credit has expired. This election to

sue upon the common counts, where there is a special agreement, applies only to cases where the contract has been fully performed by the plaintiff. (2) Where the contract, though partly performed, has been either abandoned by mutual consent, or rescinded and extinct by some act on the part of the defendant. Here the plaintiff may resort to the common counts alone for remuneration for what he has done under the special agreement. But, in order to do this, it is not enough to prove that the plaintiff was hindered by the defendant from performing the contract on his part, for we have just seen that in such case he must sue upon the agreement itself. It must appear from the circumstances that he was at liberty to treat it as at an end. (3) Where it appears that what was done by the plaintiff was done under a special agreement, but not in the stipulated time or manner, and yet was beneficial to the defendant, and has been accepted and enjoyed by him. Here the plaintiff cannot recover upon the contract, from which he has departed, yet he may recover upon the common counts for the reasonable value of the benefit which, upon the whole, the defendant has derived from what he has done." The decisions sustaining the points stated in the above extracts are cited in the notes to the section referred to. See, also 2 Smith, Lead. Cas., notes of Wallace to Cutter v. Powell, pp. 47-49, where the rules are clearly and fully stated, and cases cited. In this case there is evidence tending to show that the architect accepted the building; that all other preliminaries were complied with by the plaintiff, and nothing remained but the payment of the money. The pleader, under such a state of facts, could set forth his cause of action under the common counts adopted by him in accordance with the rules above set forth; and under such counts the special contract was admissible in evidence. See Reynolds v. Jourdan, 6 Cal. 109, where it was held that the special contract was admissible under the common counts as an admission of the standard of value, or as proof of any other fact necessary to the recovery, and should be allowed to go to the jury whenever it can aid them in attaining a sound conclusion. See, also, above reference to 2 Smith, Lead. Cas. pp. 47-49 et seq., and cases there cited. Such has always been the course of procedure in this state. The cases will be found in the digests. There was no error in admitting the contract.

The defendants moved for a nonsuit on five grounds. The only one urged in the points of the defendants is that the plaintiff set forth his cause of action on the common counts, and in proof of them introduced the special contract. The other grounds are not adverted to in the points, and will not, therefore, be noticed. We perceive no error in this for the reasons given above. There was evidence tending to prove a full compliance by plaintiff with the terms of the contract, and nothing remained to be done but the payment of the money by the defendants.

The court therefore did not err in denying the motion for a nonsuit.

The defendants attack several instructions given by the court below; and here it may be observed that the decision on the former appeal became the law of the case, and must be always applicable as long as the facts presented in the case appear to be the same. Jaffe v. Skae, 48 Cal. 543. The cases on this point are cited in the concurring opinion of the writer in Sharon v. Sharon, to which reference may be had. 79 Cal. 633, 22 Pac. Rep. 26, 131. On the former appeal the judgment and order were reversed on the authority of Loup v. Railroad Co., 63 Cal. 97. The opinion in the case is simply a statement of the reversal on the authority of the case cited. See 11 Pac. Coast Law J. 277. In Loup v. Railroad Co., just cited, the reversal was in consequence of a failure to aver the estimates of the engineer as provided for in the contracts, as preliminary to payment, or legal cause for the non-production of such estimates; also, on a failure of proof of the matters just referred to. In the complaint on the former appeal there was a lack of averment that the buildings when completed had been accepted by the architect, and of a compliance with other preliminaries as to receipted bills; and for this lack, we presume, the judgment and order were reversed, and the cause sent back for a new trial.

The defendants made several requests for instructions which were refused by the court, and exceptions were reserved. They specify as erroneous requests numbered 1, 2, 3, and 4. Objections are also made to the charge of the court. On examination of these objections, we are of opinion that the court did not err in refusing the requests, and that the charge to the jury was a fair exposition of the law applicable to the case as presented on the trial. In relation to the requests for instructions, we remark that there was evidence before the jury from which a waiver of the matters stated in the request might have been inferred. We refer to what occurred between plaintiff and Bordwell, in presence of defendants, at Hassett's office, a few days after the 19th of December, 1876, and the occurrence on the next day at Bordwell's office. These matters will be found in the detailed statement. As a waiver of the matters stated in the requests might have been inferred by the jury from the evidence, it would have been erroneous to give the requested instructions, which omitted all reference to a waiver, and asked that a verdict might be rendered on the facts stated in the requests in favor of defendants. This would have withdrawn the evidence bearing on the point of waiver from the consideration of the jury, and would have directed a verdict for defendants on a partial statement of the facts bearing on the points presented by the requests for their determination. This would have been error, and violative of the just rule laid down in Gallagher v. Williamson, 23 Cal. 332, approved and followed

in *Barker v. State*, 48 Ind. 167, that where a court instructs a jury upon what state of facts they may find a verdict for a party the instruction should include all the facts in controversy material to the right of plaintiff or defense of defendant. The material point as to waiver was left out in the requested instructions, in derogation of plaintiff's right to have it submitted to the jury. We think the evidence tends to show that the placing of the extra work set up in the third count in the contract was in effect waived by the conduct of the parties, and that hence the failure to put it in the contract is no obstacle to a recovery of it. The charge of the court does not in any manner violate or contravene the rule as to the law of the case.

As to the statute of limitations, which was pleaded as above stated, to the first two counts, and not pleaded as to the third count of the complaint: One of the grounds on which defendants moved for a nonsuit was "that the proof shows that the claim is barred" by section 337 of the Code of Civil Procedure, and also by section 339, Id. These sections are portions of the statute of limitations. Conceding that the cause of action set forth in the first two counts, to which the statute was pleaded, were barred, the statute was not pleaded to the third count, and therefore the bar could not, on a motion for a nonsuit, be urged against it. As the word "claim," used in the grounds, includes the whole claim set forth in the three counts of the complaint, and the statute, by reason that it was not pleaded, could not be urged against the third count, the trial court did not err in denying the motion for a nonsuit. The action, in its entirety, could not be held to have been barred; and the court would have erred if it had granted the motion.

We cannot see that the point as to the bar of the statute of limitations can be urged or presented by the defendants on the record before this court. The presentation of it on the motion for a nonsuit has already been considered and disposed of. There is no question of this kind presented on any exception to the charge of the court. The counsel for defendants asked no direction to the jury on this point to which, if refused, he might have reserved an exception. The court did not direct the jury at all in regard to it. The failure of a court to charge on a point, if not asked to do so, is not error. If counsel desire to have the direction of the court on a point, he must request it; and, if refused, he must reserve an exception to the refusal, and present the point in this court for review on a statement or bill of exceptions. This must be done, or the appellant cannot urge it for the consideration of this court as error in the ruling of the court. In such a state of the case, there has been no ruling by the court; and hence there can be no exception, and no consideration of an exception, here. Let it be conceded that in this case the evidence was insufficient to justify the verdict by reason of the fact that the causes of action

set forth in the first two counts were barred by the statute of limitations. There are not in the statement any such specifications of insufficiency of the evidence, and they cannot, for that reason, be considered here. We have examined the record, and find no error in it. The judgment and order are therefore affirmed.

We concur: FOX, J.; McFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; WORKS, J.

Rehearing denied.

(32 Cal. 437.)

THOMPSON *et ux.* v. SOUTHERN CAL. M. R. CO. (No. 13,382.)

(Supreme Court of California. Jan. 9, 1890.)

DEEDS—DESCRIPTION.

1. A deed to a railroad company of a right of way "along the line as surveyed and laid out" by the company's engineer is not void for uncertainty where it appears that when the deed was executed the line of the road had been surveyed and distinctly marked by stakes stuck in the ground, and that subsequently the road was constructed following the exact line of the survey.

2. Extrinsic evidence is always admissible to explain the calls of a deed for the purpose of applying them to the subject-matter, and thus to give effect to the deed.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; JAS. A. GIBSON, Judge.

Rowell & Rowell, Curtis & Otis, and *John Brown, Jr.*, for appellants. *H. C. Rolfe*, for respondent.

BELCHER, C. C. The plaintiffs seek by this action to obtain a decree restraining the defendant from going upon, or in any way interfering with, two lots of land, described as lots 2 and 5, in block 32, in the city of Colton, San Bernardino county, and to recover damages for past trespasses. The plaintiffs claim ownership of the lots, and the defendant claims a right of way over the same for the operation of its railroad, known as the "Motor Road." At the trial, the defendant, in support of its claim of a right of way over the lots, offered in evidence a deed made by plaintiffs to defendant, with the map attached thereto, marked "Exhibit A." That part of the deed which describes the property conveyed reads as follows: "A perpetual right of way over and across lots 2 and 5, in block 32, in said city of Colton, according to the Colton Land & Water Company's survey, for the purpose of constructing, maintaining, and operating said motor road. Such right of way to be along the line as surveyed and laid out by H. C. Kellogg, civil engineer of said corporation, being a distance in length of eleven hundred and thirteen feet, more or less, and running in a northerly and southerly direction, a map of which is hereto attached, and made a part hereof." The plaintiffs objected to the deed being received in evidence on the ground that it was void for uncertainty, and therefore irrelevant and immaterial. The defendant then proposed to introduce further evidence showing that

when the deed was executed the road had been commenced, and the line of the right of way claimed under the deed, and now occupied by the road, had been surveyed and designated by stakes stuck in the ground so that it could be easily traced. The court thereupon overruled the objection, and the plaintiffs reserved an exception.

H. C. Kellogg was then called by defendant as a witness, and, having testified that he was by profession a civil engineer and surveyor, and that he made the map attached to defendant's deed, proceeded as follows:

Question. You may state whether a survey or line was ever laid out from which the map was made, or which that map was made to designate. *Answer.* That map was made from an actual survey on the ground. *Q.* You may state whether or not that line was marked on the ground. *A.* Yes, sir; the line was marked on the ground by the stations every 100 feet. The stations were stakes eighteen inches long and an inch square, and were brought from a definite starting-point upon the center line of the survey,—the line marked red on the plat. *Q.* You know where the road of defendant now exists, across lots 2 and 5, in block 32, of the city of Colton, the lots designated on Exhibit A? *A.* The road was constructed, and now exists, on the line indicated in red on this plat, in accordance with the survey. The center line of the railway is on the red line,—in the center of the line marked yellow. *Q.* If you were an entire stranger to this deed, Exhibit A, and the map and locality of the ground, could you, being shown this deed with the map, and being told where the line was located by H. C. Kellogg,—could you locate the right of way purported to be conveyed by this deed? *A.* Yes, sir. The witness further stated that "that survey was laid out, and the cross-sections were made, before the deed was executed." And on cross-examination the witness said: "As an engineer, I can take that deed—supposing I knew nothing in regard to the exact location, and had never seen it—from that instrument, as a civil engineer, I can locate that road under the description. *Q.* Tell me from the in which the instrument reads—mind you, you never saw it—take it from the instrument itself, and its description; take that map, not knowing anything about it, and tell me how, and by what means, you could locate the road. *A.* I certainly could locate it. The deed was made after the first station survey was made. *Q.* Suppose there were no marks on the ground to show where the survey was made,—there were no marks left of it at all that Captain Topp had made the survey,—and here was a description of the premises intended to be conveyed, and where it was to be,—that is all you knew about it. Could you take that instrument and diagram, and make a survey of the road? *A.* I could, by inquiring from parties that knew something about the survey. If the points were all out of the way, I could have nothing to

start from; but, as a matter of fact, I made the survey, and put the stakes, and if any of the stations were left I could easily make the survey."

J. F. Sublette was also called by defendant as a witness, and testified: "My business is railroading, and was such in August, '88. At that time I was constructing track,—laying the line on the Southern Motor Company road, the Southern California Motor Road Company. I am familiar with this road where it goes across the lands of plaintiffs in this action, Albert Thompson and wife, in the city of Colton. *Question.* You may state whether you ever saw anything to indicate the line of that road as laid out by an engineer. *Answer.* Yes, sir; I saw the stakes drove,—center stakes. The line of the road as now constructed, with reference to the line run out and marked by these stakes spoken of, run to the stakes that were drove there. It ran to them,—the center stakes, I mean,—ran through them. The line of stakes occupied the center of the road-bed."

At the conclusion of the trial the court found the facts, and rendered judgment, in favor of the defendant; and from this judgment, and an order denying them a new trial, the plaintiffs appeal.

The contention of appellants is that the deed was void for uncertainty, and that the explanatory evidence was inadmissible, and, if admissible, was insufficient to remove the ambiguity of the deed. We do not think this contention can be sustained. It is true that a deed must so describe the land sought to be conveyed thereby that it can be identified, but that is certain which can be made certain. Civil Code, § 3538. And extrinsic evidence is always admissible to explain the calls of a deed for the purpose of their application to the subject-matter, and thus to give effect to the deed. *Reamer v. Nesmith*, 34 Cal. 624. In construing a doubtful description in a grant, the court must assume as nearly as possible the position of the contracting parties, and consider the circumstances of the transaction between them, and then read and interpret the words used in the light of these circumstances. *Truett v. Adams*, 66 Cal. 218, 5 Pac. Rep. 96. Now, if we assume the position of the contracting parties, and consider the circumstances of the transaction, we shall see a railroad in process of construction by the defendant. The proposed line of the road extends across the plaintiff's lots. The defendant is desirous of obtaining a right of way over the lots for its road. Without objection, its engineer has gone upon the lots, and has surveyed and distinctly marked, by stakes stuck in the ground, the line of the road. A map of this survey has been made, and is before the parties. Under these circumstances the deed in question is made, granting a right of way over the lots for the construction and operation of a railroad, "such right of way to be along the line as surveyed and laid out" by the engineer of the grantee. The road was then

constructed across the lots, following the exact line of the survey. Looking at the transaction in the light of these circumstances, we think that the rulings of the court were proper, and its conclusions correct. The pleadings were sufficient, the extrinsic evidence was admissible, and the deed was not void. We therefore advise that the judgment and order be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(3 Cal. Unrep. 209)

HUTCHINSON v. McNALLY *et al.* (No. 12,579.)¹

(Supreme Court of California. Jan. 1, 1890.)

EJECTMENT—PLEADING—HOMESTEAD.

1. Where the complaint in ejectment simply sets forth a deraignment of title, and then alleges that "while plaintiff was the owner, and entitled to the possession, as hereinbefore mentioned and set forth, the defendant entered," the allegation as to ownership will be disregarded, as stating a mere conclusion.

2. Where the complaint alleges that the land in controversy was set off as a homestead to the widow of a deceased owner, it must state whether the land was set off in fee or for life, since an assignment of a homestead to a widow in fee out of her deceased husband's estate, though erroneous, is conclusive unless appealed from.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county.

T. M. Osment, for appellant. Charles F. Hanlon, for respondents.

HAYNE, C. Ejectment. Judgment for defendants upon demurrer to the complaint. Plaintiff appeals. The complaint sets forth a deraignment of title, and then alleges that "while the plaintiff was the owner, and entitled to the possession, as hereinbefore mentioned and set forth," the defendant entered, etc. From the manner in which this statement as to ownership is put, it is evidently a mere conclusion, referring to, and limited by, the deraignment, and is therefore to be disregarded. *Turner v. White*, 73 Cal. 300, 14 Pac. Rep. 794; *People v. Reed*, 22 Pac. Rep. 475.

Then does the deraignment show a right of recovery in the plaintiff? The facts alleged are in substance as follows: In May, 1878, one Esther C. C. Hutchinson, who was the wife of Charles C. Hutchinson, declared a homestead upon the property in controversy, which was the separate property of the husband. In the following June the husband died, leaving a will, which was admitted to probate, and by which the property was devised to the plaintiff. In April, 1880, the proper court made an order "setting off said homestead to Esther C. C. Hutchinson, surviving widow of the decedent." In 1881 the widow died. The case is very like *Gruwell v. Seybolt*, 22 Pac. Rep. 938, (No. 12,072, filed December 9, 1889.) There it was held

that while it was erroneous to set off a homestead selected out of the separate property of the decedent to the widow "absolutely, as her sole and separate property," yet that the error was to be corrected by appeals, and that if the order was not appealed from it was conclusive. Under this decision it is very material to know what was the purport of the order setting off the homestead. Did it purport to set it off to the widow in fee, or only for life, or for a less period? The complaint is silent in this respect. It simply says that the homestead was set off to the widow. This ambiguity was pointed out by special demurrer. The specification of the demurrer was that "it does not appear therefrom whether or not the order setting aside the property to E. C. C. Hutchinson set apart the property to her in fee or for life." This demurrer was sustained, and we think properly so; and, the plaintiff having elected to stand upon his complaint, we advise that the judgment be sustained.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(32 Cal. 604)

WITKOWSKI *et al.* v. HERN *et al.* (No. 13,425.)

(Supreme Court of California. Jan. 27, 1890.)

CONSTABLES—BOND—APPEAL—PLEADING—WAIVER OF OBJECTION.

1. A constable, and the sureties on his official bond, are liable to the owner of property, seized under a proper writ, for damages thereto, while in his custody, occasioned by his carelessness or negligence.

2. There is no implied exception to an order denying a nonsuit, as it is not an appealable order.

3. The objection to an amended complaint that it contains a new cause of action arising after the institution of the suit, is waived by an answer thereto.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

E. W. Holland, for appellants. J. S. Clack and W. B. Wallace, for respondents.

FOOTE, C. This action was brought against a constable, his sureties on his official bond, and two other persons, John McGinley and F. M. Shultz, for damages resulting from the carelessness of the defendant, as such officer, in not preserving and taking care of the personal property of the plaintiff, P. H. Nelson, (now dead,) so that it became damaged. The cause was revived after the death of Nelson in the name of his executors, S. Witkowski and Albert Nelson, and upon the overruling of a demurrer filed to the third amended complaint the defendant answered; and the cause was tried before a jury. A motion for a new trial was denied, except as to McGinley and Shultz, and the jury returned a verdict for the plaintiff in the sum of \$300 against the constable, Hern, and his

¹ Reversed in banc. See 24 Pac. 1071, 85 Cal. 619.

sureties. From the judgment thereupon rendered, and an order denying a new trial, this appeal is aken.

The demurrer, it is claimed, should have been sustained because, as is asserted, the complaint does not show any facts which would entitle the plaintiff to recover against the constable and his sureties. The argument is that no trespass is claimed, and that the other facts alleged do not show any violation of official duty imposed by law. The gist of the action, as brought, and the evidence in support of the plaintiff's contention, shows that the negligence of the constable in allowing the plaintiff's property, after seizure under a writ of attachment, to become damaged, was what was relied on to enable the plaintiff to recover. Conceding that the complaint shows that the defendant Hern, as a constable, seized the property in dispute under a proper writ, yet, if he so used the property in his custody as that by his carelessness or negligence it was damaged, he and his sureties were responsible for the non-performance of his official duty; and hence the demurrer was properly overruled.

The answer admits that Hern, as constable, by virtue of the writ of attachment, held possession of the property involved here until about a year after its seizure, when he returned it to Nelson, the plaintiff, but denies that during such time as he held it as an officer any damage resulted to it from his carelessness or negligence, so that the whole matter as to the claim for damages turned upon the question as to whether or not the property was so carelessly and negligently cared for by the constable while it was in his official custody, for about a year, that the plaintiff suffered the damages which he claimed and recovered. The evidence showed, as we think, that the officer was grossly negligent, and that such negligence damaged the plaintiff to the extent for which recovery was had; hence the verdict of the jury should be upheld.

The appellant makes the further point that in his complaint the plaintiff states "that said defendant Samuel J. Hern well and faithfully executed and performed all the duties of the office of constable of Tulare township, Tulare county, Cal.," and then inquires, "can the respondents be permitted to deny facts set forth in the complaint?" An inspection of the complaint at folio 99 of the transcript shows that this language was in reference to the alleged condition of the bond, and that what was meant was that the sureties were "bound in the penal sum of \$1,000 each * * * that said defendant Samuel J. Hern well and faithfully executed and performed all the duties of the office of constable of Tulare township, Tulare county, Cal." As the appellant, after the respondent's explanation in his brief, does not urge this point again in his reply, we must conclude that he perceives, after consideration, its want of force.

It is also urged that the motion for a non-

suit ought to have been granted. But the defendants did not except to the action of the court in refusing their motion, and an order refusing a nonsuit is not appealable, and, not being appealable, it is not an order which is deemed excepted to; hence the action of the court in refusing the motion cannot be reviewed here. *Schroeder v. Schmidt*, 74 Cal. 460, 16 Pac. Rep. 243; *Christie v. Christie*, 53 Cal. 27; section 647, Code Civil Proc.

The point is also taken that the third amended complaint alleges a new cause of action, arising after the institution of the suit, and this amendment is claimed not to be allowable. Even if the amendment thus made alleged a new cause of action arising after suit brought, and the amendment was wrongfully allowed, the appellants are not now in a position to object. They answered the third amended complaint. If they had any good ground of objection, they waived it by the course they pursued. *Cox v. Railroad Co.*, 47 Cal. 90; *Secor v. Law*, 9 Bosw. 163. We perceive no error in the record, and advise that the judgment and order be affirmed.

We concur: VAN CLIEF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(32 Cal. 595)

DURGIN v. NEAL *et al.* (No. 13,135.)

(*Supreme Court of California*. Jan. 27, 1890.)

SURFACE WATER—NEGLIGENCE—DAMAGES.

1. The complaint stated that defendants dug and excavated the street and sidewalk of the public street in front of and adjoining the premises occupied by plaintiff in such a manner as to allow the rain and water to accumulate and flow into the adjoining premises of plaintiff, and cover and damage his merchandise. *Held*, that there was a sufficient showing of negligence to sustain the complaint on general demurrer.

2. Judgment was rendered against defendants for the amount of damages to his merchandise caused, as the court found, by the water being turned into plaintiff's premises by obstructions placed in the street and gutter by defendants, "together with other obstructions therein placed by other parties." *Held* error, within Civil Code Cal. § 3333, which confines the measure of damages to compensation for detriment "proximately" caused by breach of an obligation not arising from contract.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Shaw & Damron, for appellant. *Brousseau & Hatch*, for respondents.

GIBSON, C. This was an action to recover damages for injury to plaintiff's merchandise caused by the negligence of defendants in flooding a cellar wherein the same was stored. At the trial, which was before the court without a jury, the defendant Neal, the owner of the premises upon which her co-defendants were erecting a building for her, and who does not appear to have either demurred or answered, moved for and obtained

a nonsuit. The trial then proceeded against the defendants McNally and Young, and resulted in a judgment against them for \$321 damages and \$53.15 costs. From that judgment McNally and Young appeal.

The first point urged by them as a reason why the judgment should not stand is that the court erred in overruling their general demurrer to the complaint, because the second allegation thereof fails to state facts showing any negligent or unlawful acts upon their part. The portion of the complaint referred to, shorn of its verbiage, in substance states that in January, 1888, the defendants dug and excavated the street and sidewalk of the public street in front of and adjoining the premises occupied by plaintiff, in such a manner as to allow the rain and water to accumulate and flow into the adjoining premises of plaintiff, and cover his merchandise, consisting of books and albums, with water and filth, to his damage in the sum of \$384. The gist of the action was not in merely making the excavation in front of the adjoining premises, for that they had a right to do, but in negligently allowing the rain-water to accumulate and flow into plaintiff's cellar. Such negligence sufficiently appearing, the demurrer was properly overruled. *Hoffman v. Water Co.*, 10 Cal. 413.

An attempt was made in the complaint to show that plaintiff was not guilty of contributory negligence, by alleging that the damage was caused without the consent of plaintiff; but as plaintiff was not required to show this, the allegation was immaterial. *Yik Hon v. Water-Works*, 65 Cal. 619, 4 Pac. Rep. 666; *Robinson v. Railroad Co.*, 48 Cal. 410.

The other point urged by the appellant is, that the findings are outside of the issues. The main issue tendered by the pleadings was as to whether, in excavating in the street in front of and adjoining the premises of plaintiff, the defendants negligently permitted the rain-water to accumulate and escape into plaintiff's premises, to the injury of his merchandise. Upon this the court found: "(5) The excavation itself was made in the ordinary way, and with ordinary care, and without any negligence, except as hereinafter found, on the part of the defendants. But in making the excavation, and constructing the said building and the elevator hole, the said defendants, McNally and Young placed obstructions in the street and gutter in front of said premises, which obstructions, together with other obstructions therein placed by other parties, caused the rain-water which fell during the night, at the date when the damage was done to plaintiff, as hereinbefore found, to overflow the street, gutter, and sidewalk, and to flow into said elevator hole, and into said excavation on the lot of the said defendant Neal, and also into the premises occupied by the plaintiff," and thereby damaged his merchandise to the extent of \$321. In *Berry v. Railroad Co.*, 50 Cal. 435, which was an action to recover for injuries to plaintiff's premises caused by the defendant cor-

poration entering upon the same, making surveys, tearing down his fences, and destroying his crops, etc., upon the trial, evidence was received from plaintiff, against the objection of defendant, that hogs had invaded plaintiff's land, because the fences were down, and damaged and nearly destroyed his wheat crop. The admission of such evidence was held to be erroneous because the damage it tended to prove was not the direct result of the trespass of the defendant. So in this case, as shown by the findings, the damage sustained by the plaintiff did not wholly result from the acts of defendants in placing the obstructions in the street, in making the excavation, so as to cause the water to flow into plaintiff's premises, and damage his merchandise, but resulted in part from other obstructions there placed by other persons. Therefore, applying the same principle that was applied in the above case, it follows that, as the defendants could not be held liable for damages not proximately caused by their negligence, the court erred in finding that they were liable for damages resulting from the acts of other persons, with whom they do not appear to have had any connection. See Civil Code, § 3333, which confines the measure of damages to compensation for all detriment, whether it could have been anticipated or not, proximately caused by the breach of an obligation not arising from contract. The trial court, in finding as it did, went beyond the issues presented; and the judgment should therefore be reversed, and the cause remanded for a new trial.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

(32 Cal. 600)

LANKERSHIM RANCH LAND & WATER CO. v. HERBERGER. (No. 13,360.)

(*Supreme Court of California*. Jan. 27, 1890.)

CORPORATIONS—STOCK—UNPAID INSTALLMENTS—LIEN.

1. A subscriber for shares of the capital stock of a corporation, who has received a transferable certificate showing his payment of all installments due on his shares, as well as his agreement to pay for installments not yet due, is the owner of the shares, subject to the unpaid installments; and, as the certificate gives him complete possession of the shares, the corporation has no seller's lien therein.

2. In the absence of contract, a corporation has no special seller's lien on shares of its capital stock for unpaid installments of the purchase price, as the only lien not dependent on possession given by statute (Civil Code Cal. § 381) is to secure the payment of assessments levied for the purpose of paying debts and expenses incurred in conducting the business of the corporation.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by the Lankershim Ranch Land & Water Company against Theobald Herberger for an unpaid call on defendant's subscrip-

tion to plaintiff's capital stock. A writ of attachment issued against defendant, and a levy was made on his property. His motion to dissolve the attachment was granted, and plaintiff appeals.

Scarborough & Waterman, (Brunson, Wilson & Lamme, of counsel,) for appellant. *Allen & Miller,* for respondent.

GIBSON, C. This appeal is from an order dissolving an attachment. In 1887 a syndicate known as the "Lankershim Syndicate," composed of certain persons, not including the respondent, purchased 12,000 acres of land, and agreed among themselves to organize a corporation, under the state laws, "for the purpose of dividing, developing, and selling said land." On the 2d of August, 1887, the respondent, among others, signed and delivered to the syndicate an offer and agreement in writing, in which it was set out that the syndicate was about to create a corporation for the purposes above mentioned, with a capital stock of \$780,000, divided into 7,800 shares of the par value of \$100 per share. By this instrument the respondent agreed, when the corporation should be formed, to take 25 shares of its capital stock, and pay therefor as follows: 15 per cent. cash; 25 per cent. September 10, 1887, without interest; 30 per cent. July 1, 1888, with interest at 5 per cent. per annum; and 30 per cent. July 1, 1889, with the same rate of interest; all upon condition, however, that, should the corporation not be formed, or the land not be conveyed to it, for any reason, then the amount paid by respondent should be returned to him. In September, 1887, the corporation was formed, and by a conveyance made on or about January 1, 1888, it acquired the land mentioned from the syndicate; also, the offer and agreement of respondent, together with the money paid by him to the syndicate, and 25 shares of the capital stock of the corporation, to meet the offer of respondent. The appellant thereupon accepted the offer of respondent, and issued to him a certificate which reads as follows: "Office of the Lankershim Land and Water Company, Los Angeles, Cal., Jan. 21, 1888. This is to certify that Theobald Herberger has subscribed for twenty-five shares of the capital stock of the Lankershim Ranch Land and Water Company, of the par value of \$100 each, aggregating \$2,500, payable as follows, to-wit: 15 per cent. cash; 25 per cent. on or before September 10, 1887, without interest; 30 per cent. on or before July 1, 1888, with interest at 5 per cent. per annum; and 30 per cent. on or before July 1, 1889, with interest at 5 per cent. per annum. This receipt is assignable by indorsement, upon first giving notice to the undersigned at the office of the company. Deferred payments bear interest from ——. F. C. GARBUTT, Secretary." Upon the above stock the following payments have been made, to-wit: "(1) Received of Theobald Herberger the sum of \$375, being first installment of the above

stock, this 18th day of August, 1887. F. C. GARBUTT, Secretary. (2) Received of Theobald Herberger the sum of \$675, being second installment of the stock, this 3d day of September, 1887. F. C. GARBUTT, Secretary." June 15, 1888, the appellant, by a resolution of its board of directors, called for the payment of the third installment, due July 1, 1888, on the 25 shares of respondent, amounting to \$750, together with interest thereon. Respondent having failed to respond to this call, an action was instituted, and a writ of attachment issued, and a levy thereunder made upon his property. A motion to dissolve the attachment was then made by him on the ground "that the payment of the obligation sued on was secured at the making by a retention of the evidences of title to such personal property, and the certificates of stock for which said obligation was created by plaintiff as security for said debt." The motion prevailed, hence this appeal.

In granting the motion the court below evidently proceeded upon one of two theories: *First*, that as the corporation had sold the stock to defendant, but had not issued to him a paid-up certificate of stock, it still retained the stock, and had a special seller's lien thereon for the unpaid installments of his subscription, under section 331 of the Civil Code; or, *second*, that as it had not issued a certificate for full-paid stock, whether it thereby retained possession of the stock or not, it had a general lien thereon for the unpaid installments. For if a lien existed in either case an attachment would not lie. Code Civil Proc. § 537. A corporation for profit may give credit to the subscribers to its capital stock for the stock, and may, by proper provision in its by-laws, issue certificates to such subscribers prior to full payment for the stock. Civil Code, § 323; *Mitchell v. Beckman*, 64 Cal. 117. The defendant in this case, therefore, upon paying the installments due, and receiving the transferable certificate showing his subscription to and payment of all installments due on 25 shares of the capital stock of plaintiff, thereby became the owner of such shares of the capital stock evidenced by such certificate, subject to the unpaid installments mentioned in the certificate; and such certificate gave him as complete possession of the shares evidenced by it as though it were a certificate in the ordinary form issued for paid-up stock. Hence, as the plaintiff, at the time the installments sued for became due, did not have possession of the defendant's stock, it could not have a seller's lien thereon.

Did the corporation have a general lien upon the stock of defendant not dependent upon possession? We think not. Under our statutes, the only lien given to corporations for profit upon their subscribed capital stock, and which does not depend upon the possession of the certificate of stock, is to secure the payment of assessments levied for the purpose of paying expenses, conducting business, and paying debts. Civil Code, § 331.

It has been doubted, even, whether a lien upon stock can be created by a by-law, in view of section 924 of the Civil Code, which provides that certificates of stock may be transferred by indorsement and delivery of the certificate, but that such transfer is not valid, except between the parties thereto, until the same is properly entered upon the books of the corporation. *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359. But, however that may be, a lien not dependent upon possession of the certificate of stock may, by a contract between a corporation and its stockholders, be created in favor of the corporation, to secure the indebtedness of the stockholders to the corporation. *Jennings v. Bank*, 79 Cal. 323, 21 Pac. Rep. 852.

It is claimed by the respondent that a contract was made between himself and the corporation whereby the latter was to retain possession of his stock, and have a lien thereon for the unpaid installments of the subscription; but the record fails to show such a contract. Our conclusion is that, as no lien existed upon defendant's stock in favor of the plaintiff, to secure the installment sued for, the court erred in granting the order dissolving the attachment, and it should therefore be reversed.

We concur: VAN CLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order dissolving the attachment is reversed.

(83 Cal. 44)

FRANKEL v. DEIDFSHEIMER et al. (No. 13,412.)

(Supreme Court of California. Feb. 1, 1890.)

BILL OF EXCEPTIONS—SETTLEMENT OF EXCEPTION.

Plaintiff and defendant, by stipulation, submitted the settlement of the proposed statement to the judge on briefs, and further stipulated that, as soon as the statement was settled, plaintiff's motion for a new trial should be deemed to be made and submitted to the judge for his decision without argument, without further notice of the settlement or hearing. The motion for a new trial was denied, and notice of the appeal from the order denying the motion was served. *Held*, that plaintiff had lost his right, provided by Code Civil Proc. Cal. § 652, to petition the supreme court to prove an exception disallowed by the judge.

In bank. Appeal from superior court, Sierra county; G. G. CLOUGH, Judge.

Wm. F. Herrin and H. L. Gear, for appellants. *Hundley & Gale*, S. S. Davidson, and *Smith & Ford*, for respondents.

PATERSON, J. This is an application, based upon the provisions of section 652, Code Civil Proc., to prove an exception which it is alleged the court refused to allow in accordance with the facts. It appears from the petition and from the record that the statement was served on October 23, 1888, and the amendment thereto December 28, 1888. That the statement was settled on May 9, 1889. That, under a stipulation of counsel for plaintiff and defendants, the settlement of the

proposed statement was submitted to the judge upon briefs. This stipulation provided that, as soon as the statement was settled, plaintiff's motion for a new trial should be deemed to be made and submitted to the judge for his decision without argument; and that any further notice of the time of the settlement of the statement, and of the hearing of the motion for a new trial, should be waived by both parties. On May 10, 1889, the attorneys for plaintiff filed a written motion for a new trial, stating that "this motion is made upon said settled statement, and the judgment roll in said action. * * * The above motion is submitted without argument, pursuant to stipulation on file herein." On May 10, 1889, the judge made a written order denying the motion for a new trial, which was filed on May 14, 1889. Notice of appeal from the order denying the motion for a new trial was served July 11, 1889. This application was made August 20, 1889.

The petitioner comes too late to this court with his application for relief. He was charged with notice that the judge might strike out the matter which was in fact stricken out, and, of course, had notice of the fact, when the statement was settled and filed, that the exception which he now asks to prove had not been allowed by the judge. It does not appear that any request was made of the judge below to delay the settlement of the bill, or a ruling on the motion for a new trial, until an application could be made to this court to prove the exception desired. By submitting the settlement of the statement and his motion for a new trial in the manner stated above, we think he lost his right to apply to this court for redress of the grievance complained of. It is too late after the court below has acted upon a statement, duly settled, to prove an exception in this court; certainly too late after an appeal has been perfected. If this application should be granted, the appeal from the order denying a new trial would be heard upon matters which were not in the record, and which were not considered by the court below on motion for a new trial. Motion denied.

We concur: FOX, J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

(82 Cal. 647)

TRIMMER v. BODE. (No. 12,238.)

(Supreme Court of California. Jan. 30, 1890.)

SCHOOL LANDS—RIGHT TO PURCHASE—EJECTMENT—DEFENSES.

Pol. Code Cal. § 3495, provides that any person desiring to purchase any of the state school lands must make an affidavit that he is a citizen of the United States, or has filed his intention to become such. By the amendment of 1880 to this section, he must state that he is an actual settler on the land. *Held*, that a defendant in ejectment who is in possession of certain school lands, which he has made application to purchase, can attack plaintiff's certificate of purchase on the ground that he was not a citizen, had not declared his intention to become such, and was not an actual settler on the land, at the time of making his affidavit.

Department 2. Appeal from superior court, Monterey county: JOHN K. ALEXANDER, Judge.

Ejectment by O. S. Trimmer, administrator of John McBride, deceased, against Charles Bode, for school lands claimed under a certificate of purchase from the state to said John McBride. Pol. Code, § 3495, provides that any person desiring to purchase any of the state school lands must make an affidavit that he is a citizen of the United States, or has filed his intention to become such.

Gell & Morehouse, for appellant. *Webb & Sherwood*, for respondent.

THORNTON, J. Ejectment for N. $\frac{1}{2}$ of section 36, township 24 S., range 10 E., M. D. M. Judgment for plaintiff. Appeal by defendant from the judgment, and from an order denying his motion for a new trial. The plaintiff bases his right to recover on a certificate of purchase for the land in controversy issued to his intestate, John McBride. The defendant assails this certificate on the following grounds: *First*, that McBride was not, when he made his application to purchase, a citizen of the United States, nor had he declared his intention to become such; *second*, that McBride never was an actual settler on the land.

If defendant can urge these grounds, and their truth, or the truth of either of them, is established by the evidence, the judgment and order are erroneous. It is clear that there is no evidence in the record that McBride was ever a citizen of the United States, or had ever declared his intention to become such citizen. Whatever evidence was admitted on this subject at the trial was before its close stricken out by the court. The evidence fails to show that McBride was at any time an actual settler on the land. McBride states in his testimony that his home for the last 10 or 12 years, which includes the time he claims to have been a settler on the land, had been at Pinkerton's. Pinkerton's place was not on the land. We cannot hold that McBride was a settler on the land when at the same time he had his home at a different place. The defendant went on the land in November, 1885, and has resided on it ever since. During this period he has erected a house on it. He has plowed about five acres, dug a well, and fixed a road to the place. He possessed all the qualifications to purchase the land when he made the application required by law to buy it, in January, 1886. When he made this application, and at the time of the trial, he owned no other land. That the land is suitable for cultivation is proved by the evidence in the case. When defendant made application to purchase this land, there was no one in occupation of it. He entered on it for his own benefit, and to make it his home. He has made no contract with any one in regard to this land. Defendant made application to purchase this land in January, 1886. His application is in all re-

spects in compliance with law. On the 29th of January 1886, the surveyor general of this state made an order referring the claims of McBride and defendant to the superior court of Monterey county, in which county the land is situate, for adjudication. Defendant has brought suit under this order, which suit was pending at the time of the trial. We are of opinion that the defendant, on his mere possession, could attack the certificate of purchase to McBride—*First*, because the land was suitable for cultivation, and McBride was never an actual settler on it, (section 3, art. 17, Const.); *second*, because McBride was never a citizen of the United States, and had never declared his intention to become such citizen. On these grounds his application and certificate are void. If defendant could not assail the certificate of purchase of McBride on his possession, his application placed him in privacy with the state, and therefore in a condition to attack it. The decision of the court below, for the reasons above given, is not justified by the evidence.

It may be added that the statute in force January, 1885, when McBride made his application, requires that the applicant must be an actual settler on this land in order to purchase it of the state. Pol. Code, § 3495, amended in 1880. See amendments to Codes 1880, p. 109. By this amendment of section 3495 of the Political Code, he must state in his affidavit to purchase that he is an actual settler on the land. Actual settlement on the land is therefore a necessary qualification to purchase, whether the land is suitable for cultivation or not.

The court erred in its findings of fact in regard to McBride's qualifications to purchase, as pointed out above; therefore McBride's application and certificate must be held void, as they conferred no title upon him. The judgment and order are therefore reversed, and the cause remanded for a new trial.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

(83 Cal. 46.)

WOODS v. VARNUM. (No. 13,534.)

(*Supreme Court of California*. Jan. 30, 1890.)

OFFICER—REMOVAL—APPEAL—SUPERSEDEAS.

Pen. Code Cal. § 770, which provides that a judgment of removal from office is appealable like a judgment in a civil action, but pending appeal the office must be filled as in case of a vacancy, defendant being suspended therefrom until reversal, applies to removals of public officers by summary proceedings, under section 772. BEATTY, C. J., dissenting.

In bank. Appeal from superior court, San Diego county.

On motion for *supersedeas*.

Luce, McDonald & Torrence and *Mulford & Hammack*, for appellant. *James L. Copeland*, Dist. Atty., and *Hunsaker & Britt*, for respondent.

PATERSON, J. This is a proceeding based upon the provisions of section 772 of the Pe-

nal Code, for the removal of the defendant from the office of tax collector in and for the county of San Diego. The judgment was entered on October 2, 1889, depriving defendant of his office, and on the same day an appeal was taken therefrom to this court, and an undertaking in due form and with sufficient sureties was filed. On October 5th following, the board of supervisors appointed Henry Weineke to fill the vacancy caused by the removal of defendant, and on October 7th the court below made an order directing the sheriff to put Weineke in possession of the office. A writ for the execution of this order was issued accordingly, and on October 7th the sheriff made return showing that he had installed Weineke in the office of tax collector. On October 21, 1889, the appellant submitted a motion in this court for an order directing the court below to stay all proceedings herein during the pendency of the appeal. The motion is made upon the ground that the appeal which has been perfected operates as a *supersedeas* of all proceedings in the court below, and that the order of the court directing the sheriff to remove appellant and deliver possession of the office to Weineke is void.

Section 770 of the Penal Code provides that "from a judgment of removal an appeal may be taken to the supreme court in the same manner as from a judgment in a civil action; but until such judgment is reversed the defendant is suspended from his office. Pending the appeal, the office must be filled as in case of a vacancy." We think that this provision is applicable to proceedings under section 772, which provides for the removal of public officers by summary proceedings. Both sections are in chapter 2, pt. 2, tit. 2, Pen. Code, which provides for "the removal of civil officers otherwise than by impeachment." If there be any provision of law in any other title of the Code, or in any statute which conflicts with or contravenes the provisions of this chapter, the latter "must prevail as to all matters and questions arising out of the subject-matter" thereof. Pol. Code, § 4481. In the case of *Covarrubias v. Board*, 52 Cal. 622, relied on by appellant, the statute under consideration was the act of March 30, 1874, providing for the removal of civil officers, which contained no provision with respect to appeals. The court there said that the proceeding was one "had under the provisions of the act of March 30, 1874, and not under the provisions of the Penal Code, § 772." In view of the fact that the question before the court in that case was whether the perfecting of an appeal operated a *supersedeas*, the above remark of the court is significant, and indicative of an opinion that, if the proceeding had been one under section 772, the appeal would not have operated a *supersedeas*. Motion denied.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

FOX, J. I concur in the order denying the

motion, for the reason that it would be a vain act now to grant the motion; but do not express any opinion as to whether or not the provisions of sections 770 of the Penal Code apply to proceedings had under section 772.

BEATTY, C. J. I dissent.

(3 Cal. Unrep. 235)

TOGNAZZINI v. MORGANTI *et al.* (No. 13,362.)

(*Supreme Court of California*. Feb. 6, 1890.)

PATENTS—LOCATION—OPINION EVIDENCE.

The lines described in a patent must be located by the court according to the calls of the patent. Witnesses can testify only as to the existence and condition on the ground of what is called for in the writing; and it is error to admit their opinions, speculations, or conjectures as to the location of the lines.

Department 2. Appeal from superior court, Santa Barbara county; R. M. DILLAR, Judge. *W. C. Stratton*, for appellant. *S. E. Crow* and *John J. Boyce*, for respondents.

THORNTON, J. Ejectment for a parcel of land in Santa Barbara county. Judgment for defendants. Plaintiff moved for a new trial, which was denied, and from this order of denial plaintiff appeals. The controversy herein is as to the location of the eastern patented line of the Casmalia rancho. The parcel litigated is triangular in shape. The base of the triangle is a portion of the southern patented line of the rancho. The plaintiff contends that the eastern line of this triangle is the true patented line. The defendants' contention is that a line further west is the line as patented. The length of the base line is 20.20 chains. The other lines start from the ends of the base line, and converge in a north-westerly course until they meet. Of these converging lines, the westerly line is and will be called the "Harris Line," and the eastern is and will be called the "Cooper Line." The plaintiff contends for the Cooper line; the defendants for the Harris line. The court decided in favor of the Harris line, and thus upheld the contention of defendants. This eastern line of the Casmalia is thus described in the patent: It commences at a post which designates a station, and is marked "C. No. 2;" "thence descending ridge south, fifty degrees east, eighty-eight chains and fifty links, enter Canada; thence down through some one hundred and fifty-five chains, leaving Canada bearing south-east; thence over low running hills three hundred and ninety-four chains and fifty links; leaves hills, and crosses road, course south-west and north-east, three hundred and ninety-five chains and fifty-five links, to old post in the entrance of the Canada Verde, marked 'T. S. No. 5 and 6, No. 3.'"

There is one very controlling call in the field-notes of the patent, and that is the road which the eastern line is described as crossing. The testimony shows this road, or the remains of an old road about where it is designated, near the entrance of the Canada Verde

There is testimony that a surveyor's post was erected at this point corresponding with the course and distance of the field-notes. That course is south, 50 east, and the distance 395 chains 55 links from post marked "C, No. 2." We are of the opinion that the Cooper line is the true line, or near the true line, of the patent. There is evidence that there was no post found at what plaintiff contents is the true location of post C, No. 3. If this post cannot be found, the question would then be very simple. The line must be run according to course and distance, and fixing the corner C, No. 3, at the south end of that line, taking care, however, that the line so run shall cross the road called for.

The court, in trying the cause, let in a mass of evidence which had no relevancy to the matter in issue. The witnesses, most of them surveyors, seem to have been permitted to locate the line according to their opinions. This was not the proper mode of trying the issues or locating the line. In adopting the mode above mentioned, the court abdicates its functions, and turns them over to the witnesses. The witnesses should depose to facts only. The calls of the patent are admitted in evidence, and the line must be located according to these calls. The court must determine what the calls are. The evidence is admissible to identify those calls, to show their location on the ground. To illustrate: A line is called for running from a tree marked "B" to a rock on which is marked in paint the letter "A." The witness can testify only to the existence of the tree and the rock called for. When they are ascertained, the court fixes the line by running a straight line over from B to A. A line is here called for running from a fixed point, C, No. 2; a course specified, south, 50 deg. east; a specific distance, 395 chains 55 links, to a post, C No. 3, T No. 5. Before it reaches the post last mentioned, it crosses a road. That line only is correct which crosses the road referred to. A line suggested or testified to which does not cross the road must be rejected at once. If post C, No. 3, is found stuck in the ground at the end of the line, that would certainly fix it. A post found 20 chains east of this point, or 20 chains west of it, lying on the ground, should not be considered a moment. If no post is found where the line ends, a line run in accordance with the calls of the patent is the true line. In regard to the road, we wish to be understood as saying, if the road is shown to exist, the line must cross it; if no road is found, the line must end when the distance called for is measured; say, 395 chains 55 links. We repeat, a court fails to discharge its duty when it fixes a line not in accordance with the calls of the written instrument in evidence. The court must make the location. A witness should only be allowed to testify as to the existence and condition on the ground of what is called for in the writing. His opinions or speculations or conjectures are inadmissible, and should have no weight. In

this case we are convinced that the testimony shows that the Harris line is not the true line, and therefore the order denying plaintiff's motion for a new trial must be reversed. Cooper's line seems to be nearly correct. His course is a little variant from the course called for in the patent. It is, however, correct, if at the southern end of the line the post called for, C 3, T 5, is found. Order reversed, and new trial ordered.

SHARPSTEIN, J. I concur.

McFARLAND, J. I concur on the ground that the court erred in admitting the evidence referred to in Mr. Justice THORNTON's opinion.

(82 Cal. 144)

JEWELL v. McKAY et al. (No. 12,480.)

(Supreme Court of California. Dec. 20, 1899.)

MECHANICS' LIENS — PROCEDURE — ATTORNEY'S FEES.

1. In an action to foreclose 11 mechanics' liens, some of the notices of lien designated one of the employers as "W. F. H.," others as "Fred H.," and others as "Frank W. H.," and it was averred and proved that the employer thus designated was called and known by these several names, and was one and the same person. *Held*, that the notices of lien sufficiently showed the employer's name.

2. The complaint, in an action to foreclose mechanics' liens, is not ambiguous and uncertain, in that it does not state the nature of the alterations or repairs made, or whether the various lienholders separately or jointly contributed to the work.

3. Under Code Civil Proc. Cal. § 1187, which prescribes what a notice of mechanic's lien shall contain, the notice need not state that the owner of the soil had personal or actual knowledge that the work was being done, as that is not one of the requirements of the statute, but it is sufficient, under section 1192, providing that every building constructed on any lands with the knowledge of the owner shall be subject to a mechanic's lien, to charge the interest of the owner of the soil, if such knowledge be alleged and proved.

4. Under Code Civil Proc. Cal. § 1187, which provides that the notice of mechanic's lien filed shall contain "a statement of his demand, * * * with a statement of the terms, time given, and conditions of his contract," the notice need not state the value of the labor or materials furnished, nor give an itemized account of the labor and materials for which liens are claimed, nor state facts showing a performance of the contract.

5. The allowance of \$250 attorney's fees, in an action to foreclose 11 mechanics' liens, is reasonable.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; J. J. DE HAVEN, Judge.

Action by William S. Jewell, appellee, against Charles T. McKay, W. F. Harmon, and C. S. Ricks, appellants, to foreclose 11 mechanics' liens, of which plaintiff filed one and was the assignee of the others. The court found for plaintiff on seven of the liens filed, and allowed plaintiff \$250 for attorney's fees in foreclosing the liens. Judgment thereon. Defendants appealed. Code Civil Proc. Cal. § 1187, provides that notices of mechanic's lien, when filed, shall contain "the name of the owner, or reputed owner, if known," of the premises affected; and shall also contain "a statement of his [claimant's] demand, * * * with a statement of the

terms, time given, and conditions of his contract." Section 1192 provides that "every building * * * constructed upon any lands with the knowledge of the owner, or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with" this act, unless the owners or claimants shall give notice within three days after obtaining knowledge that they will not be responsible for the same.

John A. McQuaid and C. M. Wheeler, for appellants. *J. G. H. Weaver and E. W. Wilson*, for appellees.

HAYNE, C. This was a suit to foreclose 11 mechanics' liens, which are set forth in separate counts of the complaint. The liens claimed were for labor and materials furnished to McKay and Harmon in the alteration and repair of a building owned by them. The ground upon which the building stood did not belong to McKay and Harmon, but belonged to one Ricks, whose interest was sought to be charged on the theory that he had knowledge of the work, but did not give notice that he would not be responsible therefor, as required by section 1192 of the Code of Civil Procedure. The trial court gave judgment for the defendants upon the third, fourth, fifth, and tenth counts; and, as the plaintiff has not appealed, these counts are not before us for consideration. Judgment upon the other counts was given for the plaintiff, and the defendants appeal therefrom, and from certain orders in relation to costs.

1. The appellants base objections upon the fact that the complaint alleges that the name of one of the employers was "W. F. Harmon," while some of the notices of lien designate him as "Fred Harmon," and some as "Frank W. Harmon." The first count, however, has the following allegation: "That said defendant W. F. Harmon is the same person referred to in said verified claim as 'Fred Harmon,' and that said defendant was usually known, designated, and called 'Fred Harmon.'" Each of the other counts has a similar allegation with reference to the name stated in the corresponding notice of lien, and the court found as follows in relation to it: "That the defendant W. F. Harmon is called and known sometimes as 'Fred Harmon,' and at other times and by other persons as 'Frank Harmon;' that is to say, that he is called both by the name of 'Fred' and 'Frank' Harmon, and the evidence does not disclose of what particular Christian name the letter 'F' preceding the name of Harmon is the initial." This finding is not attacked by the specifications, and, under the circumstances, we think that the objections are not well taken.

2. It is contended that the demurrer for ambiguity, etc., should have been sustained, in the first place, because the complaint does

not state the nature of the alterations or repairs made; and, in the second place, because it does not appear from the complaint "whether each person performed a separate job, or contributed to a separate alteration or repair, or whether all contributed to the same thing." We do not think there is any merit in these positions, and the other matters in this connection do not require special notice.

3. It is objected that some of the notices of lien do not state that the owner of the soil had personal or actual knowledge that the work was being done, and that the other notices contained no statement on the subject. But, while the knowledge is to be alleged and proved in order to charge the interest of the owner of the soil, (Code Civil Proc. § 1192) it need not be stated in the notice of lien. What the notice must contain is prescribed by section 1187, which does not require the matter in question. The knowledge, etc., was alleged and established, which was all that was necessary.

4. It is contended that the notices do not give any items, and are not sufficiently particular in statement. In this regard the notices contain the following statements, respectively: Jewell, (in first count:) That said Jewell "furnished materials to be and which were actually used," etc. That said Harmon and McKay "entered into a contract with said Wm. S. Jewell, under and by which said Jewell was to furnish the materials for the construction, alteration, and repair of said building, and the following is a statement of the terms, time given, and conditions of said contract, to-wit: That said Wm. S. Jewell was to furnish said materials, and the same were to be paid for in cash, gold coin, upon the delivery thereof to said Charles T. McKay and Fred Harmon by said Wm. S. Jewell. * * * That the amount of the contract price for said materials furnished as aforesaid is \$101.27 in U. S. gold coin." Wilds, (in second count:) "That said Wilds performed certain work and labor in the construction, alteration," etc. "That on the 10th day of October, A. D. 1886, said F. H. Wilds entered into a contract with said Frank W. Harmon and Charles T. McKay, whereby he was to work on said building in making said alterations and repairs for the sum of \$3 per day, payable when he quit work. The following is a statement of the terms, time given, and conditions on which said work and labor was performed, to-wit: It was to be paid for in lawful money of the United States when he quit work on said building. * * * That said F. H. Wilds commenced said work and labor on said alterations and repairs of said building on the 11th day of October, A. D. 1886, and finished said work and labor on the 6th day of December, A. D. 1886, and on that day quit work. That said work and labor, performed as aforesaid, amounts to the sum of \$104, in lawful money of the United States." Graham, (in sixth count:) That said Graham "performed cer-

tain work and labor in the construction, alteration," etc. "That said A. W. Graham on the 9th day of October, A. D. 1886, entered into a contract with said Frank W. Harmon and Charles T. McKay, whereby said Graham was to work on said building in making said alterations and repairs. That the following is a statement of the terms, time given, and conditions upon which said work and labor was performed, to-wit: The same was to be paid for in lawful money of the United States when the work was completed. * * * That said A. W. Graham commenced said work and labor on said building in making said alterations and repairs on the 11th day of October, A. D. 1886, and finished work on the same on the 17th day of December, A. D. 1886, and on said day quit work thereon. That said work and labor performed amounts to the sum of \$232." Appleby, (in seventh count:) That said Appleby "performed certain work and labor in the construction, alteration, and repair," etc. "That on the 19th day of October, A. D. 1886, said J. W. Appleby entered into a contract with said Frank W. Harmon and Charles T. McKay, whereby he was to work on said building in making said alterations and repairs for the sum of \$2 per day, payable when he quit work. There was no agreement as to the times of payment for said work and labor, but the same was to be paid for in lawful money of the United States on demand. * * * That said John W. Appleby commenced said work and labor on said alterations and repairs on said building on the 5th day of October, A. D. 1886, and finished said work and labor on the 17th day of December, A. D. 1886, and said last-named day quit work. That said work and labor, performed as aforesaid, amounts to the sum of \$132 lawful money of the United States." Moore & Olmstead, (in eighth count:) That said Moore & Olmstead, "as tinsmiths and plumbers, performed certain work and labor upon that certain building or structure hereinafter described, in the alteration, construction, and repair thereof, in tinning and plumbing the same, and furnished certain materials, consisting of pipe, tin," etc. "The following is a statement of the terms, time given, and conditions of said contract, to-wit: Said work and materials were to be paid for in lawful money of the United States on the completion of the construction, alteration, and repairs of said building or structure. * * * That the amount of the contract price for said work so done and materials so furnished as aforesaid is \$306.83 in lawful money of the United States." Hulse, (in ninth count:) That said Hulse "furnished certain materials, consisting of bolts and iron rods and plates, which were to be used," etc. "The following is a statement of the terms, time given, and conditions upon which said materials as aforesaid were furnished, to-wit: Such materials were to be paid for when said alterations and repairs on said building were completed and finished, in lawful money of the United States. * * * That said ma-

terials so furnished as aforesaid amount to the sum of \$24.70." Hopkins, (in eleventh count:) That said Hopkins "furnished certain materials, consisting of nails, rope, cords, pipe," etc. "The following is a statement of the terms, time given, and conditions of said contract, to-wit: The same were to be paid for in lawful money of the United States on delivery. * * * That the amount of the contract price for said materials so furnished as aforesaid is \$20.90 in lawful money of the United States."

Two objections are made to these notices in the respect mentioned, viz:

(a) It is urged that the notices do not state the value of the labor or materials. This position is based partly upon the provision of section 1184 of the Code of Civil Procedure, as amended in 1885, to the effect that the persons entitled to liens may give to the owner a notice of their claims, stating, among other things, "the amount in value as near as may be," etc.; and that it shall thereupon be the duty of the owner to "withhold from his contractors" a sufficient sum to cover the claims so notified. This notice, however, is not the notice of lien which is to be recorded. It is merely a measure of extra precaution on the claimant's part, and it is optional with him whether to give it or not. The position is further based upon section 1183, as amended in 1885, which provides that certain designated persons shall have a lien "for the value" of labor done and materials furnished. In the first place the phrase is not used in contradistinction from "price" or "agreed value." It cannot possibly have been the intention that a contractor, material-man, or laborer who agrees for a certain sum can have a lien for a greater sum upon the ground that the value of what he furnished is greater. It is probably true that where a subcontractor, material-man, or laborer agrees with the original contractor for more than he is entitled to, upon the understanding between them that it shall be made out of the property, there would be such a fraud as would vitiate the claim. But, aside from such a case, we think that the word "value" in the above provision is to be construed so as to mean "agreed value," in cases where there is an agreed value. In the second place, the provision of section 1183 merely defines the class who are entitled to liens. It does not purport to prescribe the contents of the notice to be recorded, which matter is regulated by section 1187.

(b) It is argued that the notices do not give itemized accounts of the materials and labor for which liens are claimed. But we do not understand that this is necessary, under the decisions of this state. The statute as it stood in 1858 required that the notice should give "a just and true account of the demand." Wood, Dig. p. 537, § 2. And under this provision it was held in *Brennan v. Swasey*, 16 Cal. 141, that an itemized account was not necessary, the court, per COPE, J., saying: "It was unnecessary to set out the

items of the account. Nothing more was required than a statement of the demand, showing its nature and character, and the amount due or owing thereon." See, also, *Selden v. Meeks*, 17 Cal. 181; *Heston v. Martin*, 11 Cal. 41; *Davis v. Livingston*, 29 Cal. 283. The provision under which the present liens were filed (Code Civil Proc. § 1187, as amended in 1874) required that the notice should contain a statement "of his demand," "with a statement of the terms, time given, and conditions of his contract." The word "demand" was construed in *Brennan v. Swasey*, above quoted, and under that decision it must be held that that word does not mean an itemized account. Does the other clause, viz., "the terms, time given, and conditions" of the contract, require such an account? There are many contracts which deal with details of quantity, time, value, etc. But even with regard to such contracts it seems questionable whether it is necessary for the notice of lien to set forth items. Even in a pleading, "it is not necessary for a party to set forth the items of an account therein alleged." *Id.* § 454. And we cannot think that the statements in a notice of lien are required to be made with greater fullness or formality than is necessary in a pleading. We are not prepared to say that as much fullness or formality is required. And it seems probable that even in the case of a contract which went into details of amount, etc., a general statement thereof would be sufficient in the notice of lien. But it is not necessary to express a definite opinion upon this question; for it is obvious that there are many contracts which do not go into details of amount, time, value, etc. For example, a contractor may go to the owner of a lumber yard and say: "I am building such and such a building. Will you let me have lumber for it, as I need it, at ruling rates?" If this should be agreed to, and the lumber supplied, without anything further being said, it seems plain that an itemized account would not be involved in a statement of the "terms, time given, and conditions" of the contract. So, if a laborer should be employed at a fixed rate for an indefinite period, the number of days he worked would not be a part of the contract, and consequently would not have to be stated in the notice. So, if he should be employed without a fixed rate of compensation, such compensation could not be said to be a part of the "terms, time given, or conditions" of the contract. The Code does not require the notice to state implications made by law. For example, if there was nothing but a request for labor or materials, and a silent compliance with it, we do not think that a statement of the implied promise to pay what the labor or materials were reasonably worth would be necessary. It seems to us that the statute requires only the agreement which is expressly made to be stated in the notice. This we understand to be the principle of the decision in *Hills v. Ohlig*, 63 Cal. 104, where it

was held that if no distinct time was agreed on, but the time of payment was left to the rule fixed by the law on such a state of facts, the "time given" need not be stated. Nor do we think that it is necessary to state facts showing a performance of the contract, or other facts necessary to complete the cause of action. For example, in the cases above put, it would not be necessary to state that the labor and materials were in fact furnished, as provided by the contract, or that they were reasonably worth the sum claimed. The statute does not require the notice to state anything subsequent to or outside of the contract. Tested by the foregoing rules, we think that all the notices of lien were sufficient. The only notices about which there can be any question in this regard are those of *Graham and Hulse*. And with respect to these we think that the statement that "the following is a statement of the terms," etc., of the contract, must be taken to mean the only terms which were in fact agreed upon; and upon this construction the notices are sufficient. The counsel fees were properly allowed, and we think were reasonable in amount.

We have noticed all the points of counsel which we think require special notice. There may be other objections to the notices of lien, but we do not think it is incumbent on us to raise them. We therefore advise that the judgment and orders appealed from be affirmed.

We concur: BELCHER, C. C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and orders appealed from are affirmed.

(82 Cal. 275)

JACKSON v. BROWN *et al.* (No. 12,527.)
(*Supreme Court of California*. Dec. 31, 1899.)

APPEAL—NOTICE—CONSENT JUDGMENT—AUTHORITY OF ATTORNEY.

1. Where a judgment, by consent of counsel of all parties, is rendered in an action of damages for trespass against three defendants, and one of them appeals from an order denying his motion to vacate it, notice need not be served on his co-defendants.

2. Where an appeal is taken from a consent judgment by one of the defendants, who swears that his co-defendants were unauthorized to employ counsel for him and consent to said judgment, but said co-defendants testify that they were authorized to employ an attorney and compromise or settle the action, and the counsel who appeared for appellant testifies that he had no personal communication with appellant, but was employed through the co-defendants, an appellate court will not reverse on the ground that the lower court erred in denying the motion to vacate the judgment.

Department 2. Appeal from superior court, city and county of San Francisco, WALTER H. LEVY, Judge.

This was an action of damages for trespass, brought by Jackson against Brown, Alexander, and Samuels. There was a judgment by consent entered, which Samuels

moved to vacate; and upon the denial of his motion defendant Samuels appealed.

Spencer & Henning and Garrett W. McEnerney, for appellant. *C. H. Jackson and Thornton & Merzbach*, for respondents.

MCFARLAND, J. Motion to dismiss appeal of defendant Samuels from the judgment, and from order denying his motion to vacate the judgment, and for leave to answer. The action was brought to recover damages of defendants, Brown, Alexander, and Samuels, for a continued trespass on the rights of plaintiff, and for an injunction enjoining defendants from the continuance of the trespass. The complaint was filed on the 14th of April, 1887. The record shows an appearance for defendants by George A. Knight, an attorney of this court, who, on the 27th of April, 1887, filed a demurrer to the complaint. The summons had been served on Samuels on the 23d of the same month. On the 27th of May, 1887, the demurrer was overruled. On the same day, judgment was, by consent of counsel of all parties, rendered against defendants for one dollar damage, and costs of suit, with a perpetual injunction as prayed for in the complaint. This judgment was entered on the 31st day of May, 1887. Samuels subsequently moved to vacate the judgment, and for leave to answer, and on the 30th of September, 1887, this motion came on to be heard, and, after the court had heard counsel for each party, was on the same day denied. The motion was made on several grounds, mainly on the ground that he (Samuels) never consented that any judgment should be entered against him, and that the judgment was entered without any authority from him. The motion to dismiss the appeal is rested on the ground that there was no service of the notice of appeal on the other defendants, Brown and Alexander, who are stated in the notice to dismiss to be adverse, and opposed in interest to Samuels upon the record in this action.

How Brown and Alexander are adverse parties to Samuels herein we cannot perceive. The judgment against them will stand, though it is reversed as to Samuels. What recourse Brown and Alexander will have against Samuels, or Samuels against them, on a reversal of the judgment, we cannot perceive; nor would there be any if the judgment should be affirmed. The same is true of the order. This case comes within the rule laid down in *Randall v. Hunter*, 69 Cal. 80, 10 Pac. Rep. 130, and must be decided the same way. Motion to dismiss appeal denied.

The appeals of Samuels have also been submitted for decision. The evidence on the point of authority from Samuels to employ counsel, and to allow judgment to be entered against him, in this action, is conflicting. Samuels testified one way, and Brown and Alexander the other; the latter stating distinctly that they were authorized by Samuels to employ counsel, for him and themselves,

to defend, compromise, or settle the action with plaintiff, and that it was agreed between Samuels and them that they and their attorney should have the right and power to bind him in every step of the action, and by any entry of judgment in, or compromise of, the same; and further, in substance, that Samuels knew of the employment of Knight for him, and knew of the entry of judgment, and made no objection to any of the proceedings. Knight's testimony is not in conflict with any of these statements. It shows that he had no communication with Samuels personally, never saw him during the whole course of the business, and that his authority to appear for all the defendants came from and through Brown and Alexander. Under such a state of facts as is above set forth, we cannot say that the court erred in denying the motion to vacate the judgment. It must then be held that the judgment herein was rendered by consent of Samuels. A consent to a judgment is a waiver of errors by a party consenting thereto, and on an appeal from such a judgment it must be affirmed. *Consensus tollit errorem*. *Holmes v. Rogers*, 13 Cal. 191; *Conniff v. Kahn*, 54 Cal. 284. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; PATERSON, J.

(82 Cal. 613)

POWELSON v. LOCKWOOD, Justice of the Peace. (No. 13,326.)

(*Supreme Court of California*. Jan. 27, 1890.)

JUSTICE OF THE PEACE—JURY TRIAL—WRIT OF PROHIBITION—APPEAL—STIPULATION.

1. The denial of a jury by a justice of the peace on a trial for misdemeanor does not affect his jurisdiction; and the error, if any,—for which there is a plain, speedy, and adequate remedy by appeal to the superior court,—cannot be arrested or corrected by the writ of prohibition.

2. Where an opinion on defendant's right to a jury trial would have no bearing on any material question to be decided on his application for a writ of prohibition, nor any proper effect as an authority, a stipulation by counsel to present no points on the question of prohibition, and to confine themselves to the question of defendant's right to a jury trial, will be disregarded.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; J. W. McKINLEY, Judge.

Powelson, the petitioner, was charged with vagrancy, and the justice of the peace, Lockwood, before whom he was to be tried, was about to refuse him a jury trial. An alternative writ of prohibition issued to the justice, which was subsequently discharged. Petitioner appeals. Counsel for both parties entered into the following stipulation, as appears from paragraph 2, pp. 5, 6, of appellant's brief: "Now, so that this court should not be annoyed with a useless consumption of time with collateral matters, the attorneys for the appellant and respondent have agreed upon the sole feature of the case to be considered on this appeal. We have agreed that, if the defendant is entitled to a jury trial in such misdemeanor case in the said justice's

court, the judgment and decision of the said superior court herein may be reversed, with the direction to the court below to enter an order that appellant have prohibition directed unto respondent here and his said court to desist from all further proceedings in the case of the people against Powelson, without a jury in said cause, until appellant here be allowed a trial by jury. * * * And counsel hereto have also agreed that, if appellant be found not entitled to a jury trial in such misdemeanor case, then the decision of the lower court herein shall be affirmed."

Gage & Roberts, for appellant. *Frank P. Kelly*, Dist. Atty., and *B. M. Marble*, Dep. Dist. Atty., for respondent.

VAN CLIEF, C. Alternative writ of prohibition issued by the superior court of the county of Los Angeles, on the petition of the appellant, to the respondent, a justice of the peace of Los Angeles city, to prohibit said justice from trying the petitioner on a charge of vagrancy, under section 647 of the Penal Code, without a jury. The appeal is from the judgment discharging the writ. It appears that the respondent denied the petitioner's demand for a new trial, properly made, if he was entitled to a jury trial; and that the justice proposed and was about to try him upon said charge without a jury. Upon the trial the application was opposed on two grounds: (1) That prohibition was not the proper remedy; (2) that defendant was not entitled to a jury trial.

The court sustained the opposition on the first ground, and declined to consider the second. I think the court properly sustained the opposition to the writ on the first ground above stated, and for the reasons that the justice's court had jurisdiction of the subject-matter—the misdemeanor charged—and of the parties; that in denying a jury trial, even if appellant was entitled to it, and in trying or in proposing to try the case without a jury, the justice's court did not exceed, nor propose to exceed, its jurisdiction; and that, even if this action or proposed action of the justice's court was erroneous, it was so only as to the mode of procedure in an action of which that court had jurisdiction. The commission of such an error cannot be arrested or corrected by the writ of prohibition. In *re Miller*, 22 Pac. Rep. 1113, (opinion filed January 2, 1890.) If there was any exception to this general rule at common law, which is doubtful, it has been repealed by our Code of Civil Procedure as heretofore expounded and enforced by this court. *Clark v. Superior Court*, 55 Cal. 199; *Wreden v. Superior Court*, Id. 504; *More v. Superior Court*, 64 Cal. 345. Besides, the appellant had a plain, speedy, and adequate remedy by appeal to the superior court. Pen. Code, §§ 1237, 1466, 1467.

No point has been made or argued by counsel on this branch of the case, though the decision of it seems to be well sustained by

an able opinion of the learned judge of the lower court, brought up with the record. But counsel have stipulated "that, if the defendant is entitled to a jury trial in such misdemeanor case in the said justice's court, the judgment and decision of the superior court herein may be reversed, with the direction to the court below to enter an order that appellant have prohibition directed unto respondent and his said court, to desist from all further proceedings in the case of the people against Powelson, without a jury." As to this stipulation, respondent's counsel says: "The real issue in this case being as to whether or no the defendant is entitled to a jury trial, and the people, as well as appellant, being desirous of having the question finally settled on this appeal, the respective counsel have entered into the stipulation set forth in paragraph 2, pp. 5, 6, of appellant's brief; and, in accordance therewith, present no points on the question of prohibition, but confine themselves to the question as to whether appellant is entitled to a jury trial, and respectfully ask the court to pass upon that point solely." Inasmuch as counsel have very ably argued the question which, alone, they have stipulated to submit, I regret to say that, in my opinion, their stipulation must be disregarded. I think that the lower court properly declined to consider the question as to whether the justice's court merely erred in denying a jury trial. The court exhausted its authority, on the application for the writ of prohibition, in determining, as it did, that the act sought to be prohibited was not in excess of the jurisdiction of the justice's court, and that the defendant had a remedy by appeal. It could not, on that application, arrest or review the mere errors of the justice's court about to be committed within the province of its jurisdiction, and thus make the writ of prohibition, or the application for it, serve the purpose of an appeal. The same rule must be applied to the case here on this appeal; otherwise this court must exercise mere appellate jurisdiction by means of a writ of prohibition, without any appeal, and in a case to which the appellate jurisdiction of this court does not extend. It is therefore unnecessary, for any purpose of this appeal, to decide whether or not the appellant was entitled to a jury trial in the justice's court, and the expression of an opinion upon this question would be improper, notwithstanding the stipulation of counsel, for the reasons that such an opinion would have no bearing upon any material question to be decided, and no proper effect as authority or otherwise. *State v. McGlynn*, 20 Cal. 276. I think the judgment should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(32 Cal. 585)

PEOPLE v. MAHLMAN. (No. 20,567.)

(Supreme Court of California. Jan. 27, 1890.)

EMBEZZLEMENT—INFORMATION.

Pen. Code Cal. § 504, provides that every officer of any association who fraudulently appropriates to any use or purpose, not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, is guilty of embezzlement. *Held*, that it is not necessary for the information, charging such officer with embezzlement, to state the persons composing the association, as the fact of the officer's being a member would not change the offense.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; D. J. TOOHY, Judge.

R. Percy Wright, for appellant. *Atty. Gen.* Geo. A. Johnson, for the State.

FOOTE, C. The defendant was convicted of the crime of embezzlement. From the judgment rendered therein, and an order refusing a new trial, he has appealed. His first contention is that the information filed against him was defective, and did not state any offense, in that it did not specify the person whose property he had embezzled. That part of the information material to this discussion is: "The said Henry Mahlman on or about the 13th day of April, A. D. 1886, at the said city and county of San Francisco, was an officer, to-wit, the treasurer of Germania lodge No. 7, Order of Hermann Sons, an association existing under and pursuant to the laws of the state of California, and, as such officer, there, then, and there came and was under his control and in possession, by virtue of his trust as such officer, one hundred and ninety-four dollars and forty-five cents, in lawful money of the United States. And the said Henry Mahlman, while said money and personal property was so in his possession and under his control by virtue of his trust, as such officer, then and there, to-wit, on or about said 13th day of April, 1886, at said city and county of San Francisco, did willfully, unlawfully, feloniously, and fraudulently appropriate said money and personal property to his own use, and not to a use in the due and lawful execution of his said trust, the said money and personal property then and there being the property of said association." Section 503 of the Penal Code reads: "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted." Section 504 reads: "Every officer of this state, or of any county, city, city and county, or other municipal corporation or subdivision thereof, and every deputy, clerk, or servant of any such officer, and every officer, director, trustee, clerk, servant, or agent of any association, society, or corporation, (public or private,) who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement." The in-

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formation, it will be seen, is drawn substantially in the language of the statute, and is sufficient, unless, as the defendant claims, it was necessary to state who were the persons composing the association. The rules with relation to the framing of indictments and informations are, in this state, purely matters of statutory control, and their sufficiency is to be tested by the terms of the statutes pertaining thereto. *People v. Tomlinson*, 66 Cal. 344, 5 Pac. Rep. 509; *People v. Goggins*, 22 Pac. Rep. 207. The sections of the Penal Code just adverted to show that it was the legislative intent that "every officer, director, trustee, or agent of any association, society, or corporation, (public or private,)" who fraudulently appropriates money or property in his possession and under his control, by virtue of his trust, to his own use, and not to a use in the due and lawful execution of his trust, shall be guilty of embezzlement. It does not say that, being an officer, if he is a member of the association he shall not be guilty, if he commits the act denounced; but it makes no exception, and enacts a sweeping declaration that all "officers," etc., whatsoever, without any reserve, who do the acts described therein, shall be held as embezzlers, and punished as such. It is clear, therefore, that much of the argument of the appellant on this point must fall to the ground, because he claims, as a reason why the persons composing the association should be named, that it might then appear that the defendant was a member of the association, an owner in part of the property or money alleged to be embezzled, and therefore could not be guilty of the crime charged, because he must, to be guilty, embezzle the money or property of a person other than himself. The statute, we think, was intended to include just such officers as the defendant was, if he was guilty of the act charged, whether he was a member of the association or not. And we see no necessity for framing the information in any other way than in accordance with the statute, which was done. The association whose property he was alleged to have embezzled was fully named, and he was thereby accurately informed that it was the property or money of that association which he had embezzled. This, it seems to us, was sufficient. And this view of the matter disposes of the defendant's second contention, that is, that the evidence showed that he had been guilty of no offense, since, if he converted the property to his own use, he might do so without being guilty of embezzlement, because he was a member of the association, and a part owner of the money he converted. We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

Rehearing denied.

(82 Cal. 564)

BURROWS v. BURROWS et al. (No. 12,835.)*(Supreme Court of California. Jan. 27, 1890.)***APPROPRIATION OF WATER-RIGHTS.**

Civil Code Cal. § 1415, requires a person desiring to appropriate water to post a notice thereof, and section 1416 requires work to be commenced within 60 days after the notice is posted. Section 1418 provides that "by a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted." Section 1419 provides that "a failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith." *Held*, that one who actually appropriates water without complying with the rules acquires the right to its use as against any subsequent claimant who has not complied with the rules. Following *De Necochea v. Curtis*, 20 Pac. Rep. 563.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; **JOHN K. ALEXANDER**, Judge.

R. M. F. Soto, (*Hermann & Soto*, of counsel,) for appellant. **Geil & Morehouse**, for respondents.

GIBSON, C. The parties to this suit are the owners of and cultivate separate farms in Monterey county, lying upon, and embracing a natural stream known as "Muddy Creek," and flowing into Clear creek, which has its source easterly of their farms, and, when running, flows in a westerly direction, — first through the land of respondent Olds, next through that of respondent Burrows, and then through the land of appellant. During the winter and spring of each year, and in times of great freshets, it flows in a large stream down to and across the lands of appellant, but in the summer, and during dry seasons, the waters of the stream are much diminished, and but a small quantity, if permitted to flow uninterruptedly, would reach the land of appellant. The appellant acquired title to his land from the government of the United States by a patent issued to him on April 30, 1883, prior to which time the land was a part of the public domain. The respondents, from 1876, for over six years prior to the issuance of the patent, had owned, occupied, and cultivated their respective farms, and continued to own, occupy, and cultivate them until suit brought. During the year 1877, and more than six years before appellant acquired title to his land from the government, the respondents each dug a ditch from Muddy creek, above its junction with Clear creek, down to and across his own land to his residence, and thereby diverted and appropriated a small stream of water from Muddy creek for domestic and irrigating purposes. They continuously maintained their respective ditches from that time until this suit was brought, and during the dry season of each year they, through their respective ditches, appropriated, diverted, and used for beneficial purposes, upon their respective farms, a small stream of water. At the time the ditches were dug, both banks of Muddy creek were a portion of the public domain, and the appro-

priation and diversion of water from the creek were not objected to or interfered with until the commencement of this suit. The land that appellant now owns was, at the time of respondents' settlement on their separate farms, and when they dug their separate ditches, open, unoccupied, and unclaimed land; and it was not until long afterwards that appellant settled upon his said land. The flow of water in Muddy creek, notwithstanding the appropriation and diversion by respondents, was and is, during the greater portion of each year, sufficient for all the wants of appellant to which he applies the water; but during about three months of the summer of each year, viz., from July 1st to October 1st, the flow of water extends below the respondents' several points of diversion to within 100 to 150 yards of plaintiff's land, where it sinks, and is lost in the sand. A small quantity would, but for the diversions of respondents, reach the land of appellant, and would thereby, it seems, prevent appellant's well from drying up.

On this state of facts, the court decreed that all the parties had equal rights to the use of the waters of Muddy and Clear creeks for beneficial purposes, and that such waters be divided between all the parties from the 1st day of July until the 1st of October in each year, and until the setting in of the rainy season of each year, as follows: Five days each, first to the appellant, next to the respondent Burrows, and next to the respondent Olds, and thereafter, during the prescribed period, to alternate in the same manner; and that all parties be perpetually enjoined from interfering with the natural flow of the waters of said creek, except in accordance with the decree. The appeal is from all that portion of the decree that adjudges respondents to have equal rights with appellant to the use of the waters of the creeks in dispute, and that apportion the use of the waters to respondents, and enjoins the appellant from interfering with or using the waters during the periods that respondents are given the use thereof; also, from an order denying a new trial. There is no brief for respondents on file.

The first point urged by the appellant in his brief is that, although the court found that he obtained the patent to his land on April 30, 1883, and that the respondents had made their several diversions of the waters in question in 1877, the court erred because it did not find at what time he (appellant) acquired a vested interest in his land. The statement on motion for a new trial does not contain any such specification of error, nor statement of evidence upon which such a specification could be based; hence it must be disregarded.

The principal contention of appellant, however, is that, as the respondents failed to show that they had severally complied with the provisions of sections 1415 and 1416 of the Civil Code, or with the local rules and customs, (of the latter of which there is no evi-

dence in the record, and therefore needs no further notice,) the court erred in finding that their several appropriations were valid as against the appellant, a lower riparian proprietor upon the same stream, because the respondents severally failed to prove that they had posted, and caused to be recorded, in the office of the county recorder, the notices required by section 1415 of the Civil Code. The undisputed findings show that the respondents had settled upon their respective farms, and had each appropriated and diverted to their several farms portions of the waters of the streams in controversy, where they were used continuously, for beneficial purposes, for over six years prior to the time appellant settled upon his farm, and acquired title thereto from the United States government. The findings were justified without proof of posting and recording of the notice prescribed by section 1415 of the Civil Code. *De Necochea v. Curtis*, 80 Cal. 407, 20 Pac. Rep. 563, and 22 Pac. Rep. 198. There the plaintiff, who was the owner of a tract of land across which a natural stream extended, which had its source in a large spring one-half mile from his land, in 1880, in order to better utilize the water of the stream, without posting, or causing to be recorded, the notice provided for in said section 1415, constructed a ditch from the spring to his land, and diverted the water of the spring through it to his land, where he applied the water to beneficial uses. Five years afterwards, in 1885, the plaintiff, pre-emptioner, settled upon, and acquired title to, the land upon which the spring was situated, and shortly afterwards made a ditch, and thereby diverted the water of the spring upon her land for proper uses. The question thereby presented was whether the defendant took the title to her land subject to the prior appropriation of plaintiff, notwithstanding his non-compliance with section 1415. It was held that she took the title to her land from the government, subject to the right of plaintiff to divert and use the water of the spring. Mr. Chief Justice BEATTY, in considering the effect of plaintiff's failure to post the notice provided for in section 1415, said, (80 Cal. 399, 22 Pac. Rep. 198:) "In this case, it is clear from the findings that the respondent's right to purchase did not become a vested right prior to the year 1885, and that as early as the year 1880 the appellant had completed the diversion, and was in full enjoyment of the use, of the water of the spring, for the irrigation of his land. But the respondent contends that he was nevertheless not an appropriator, and had no vested right to the use of the water recognized or acknowledged by the laws of this state, because, having commenced and completed his diversion of the waters of the spring after the enactment of the Civil Code, he failed and neglected to post or record the notice prescribed by section 1415. As this is the point upon which our decision must turn, we will endeavor to state our views with respect to

it somewhat more fully and explicitly than we have hitherto done. Sections 1415 and 1416 of the Civil Code read as follows: 'Sec. 1415. A person desiring to appropriate water must post a notice in writing, in a conspicuous place, at the point of intended diversion, stating therein: (1) That he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure; (2) the purposes for which he claims it, and the place of intended use; (3) the means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it. A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted. Sec. 1416. Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain.' It may be conceded that, if these provisions of the law stood alone and unqualified, strict, or at least substantial, compliance with their requirements would be, as counsel claim, a *sine qua non* to the acquisition of any right to divert running water from its natural channel. But these provisions do not stand alone. Section 1418 reads as follows: 'Sec. 1418. By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted.' In this provision we begin to see the purpose and object of the legislature, which, in our opinion, was merely to define with precision the conditions upon which the appropriator of water could have the advantage of the familiar doctrine of relation, upon which it had always been held, before the statute, that one who gave sufficient notice of his intention to appropriate, and followed up his notice by diligent prosecution of the work, was, upon its completion, to be deemed an appropriator from the date of his notice, and was therefore prior in time, and stronger in right, than an intervening appropriator, notwithstanding his diversion of the water might be first completed. We are not, however, left to any doubtful implication to be drawn from section 1418. Section 1419 reads as follows: 'Sec. 1419. A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith.' This language clearly and necessarily implies that there is a right to the use of running water, acknowledged by the legislature and cognizable by the courts, which is good against all the world except a claimant who has complied with the rules prescribed in sections 1415 and 1416. Now, what is this right? What can it be, except the right of one who has fully completed the diversion of running water, and applied it to a beneficial use, before the initiation of an adverse right of appropriation under the law, or the acqui-

tion of an adverse right in the land to be affected by the diversion? And why should not such a right be recognized and enforced?"

In the case before us, as we have seen, the respondents had acquired the prior right to divert and use nearly all the waters of the stream, yet the court divided the use of the waters during the irrigating season equally between all the parties. In this, perhaps, it went too far, and awarded the appellant more than he was entitled to; but the respondents must have been satisfied, as they have acquiesced in the judgment. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(43 Kan. 201)

WELLS et al. v. ROBB et al.

(Supreme Court of Kansas. Feb. 8, 1890.)

CORPORATIONS—LIABILITY OF STOCKHOLDERS—NOTICE—PRIORITIES.

1. The judgment creditor of an insolvent corporation, who first moves in conformity to the provisions of section 32, c. 23, Gen. St. 1889, to charge a stockholder of the corporation on his liability under the statute, acquires a priority of right to recover against such stockholder, with which a creditor subsequently moving cannot rightly interfere.

2. Where the notice in writing to a stockholder sought to be charged with the debt of an insolvent corporation to the extent of his liability under the provisions of section 32, c. 23, Gen. St. 1889, informs the stockholder that a motion will be made, at a time and place therein stated, by the judgment creditor, before a justice of the peace who has rendered a judgment in favor of the creditor against the corporation, for an order that the stockholder pay the sum of \$100, being the amount of his capital stock in such corporation, to satisfy a judgment rendered against the corporation, and, after due service of such motion,—the stockholder not appearing,—the judgment creditor moves the justice of the peace that judgment be rendered and execution issued against such stockholder for the amount of his stock, and the justice, after hearing the evidence, finds that such person is the owner of the stock, as alleged in the motion, and renders judgment against the stockholder for the amount necessary to pay the judgment, and orders execution to issue, *held*, that such notice and order are sufficiently regular to charge the stockholder, and to authorize an execution thereon.

3. Where several persons act together as a society for social purposes under the name of the "Ivy Grange," and in such names subscribe for stock in a corporation, and subsequently a judgment creditor of the insolvent corporation attempts to charge, upon written notice, the members of the grange as stockholders of the corporation, a notice to the master or presiding officer of the grange is not notice, under the provisions of section 32, c. 23, Gen. St. 1889, to the members of such grange sought to be charged as stockholders.

(Syllabus by the Court.)

Error from district court, Lyon county; CHARLES B. GRAVES, Judge.

M. D. Wells & Co. commenced an action against C. M. Robb et al., before a justice of the peace of Lyon county, on the 5th day of May, 1887. The following is a copy of the

bill of particulars, omitting title: "Plaintiffs allege that they are now, and for more than six years last past have been, copartners, doing business as M. D. Wells & Co.; that the defendants and others, whose names are to these plaintiffs unknown, are, and for more than six years last past have been, members of a society or association known as the 'Ivy Grange'; that the Lyon County Co-operative Association is now, and for more than six years last past has been, a corporation duly organized and existing under and by virtue of the general laws of the state of Kansas; that the said Ivy Grange subscribed to and became, and still is, the owner of twenty shares, of five dollars (\$5) each, of the capital stock of said the Lyon County Co-operative Association; that on the 20th day of November, A. D. 1884, in the district court of Lyon county, Kan., in an action therein pending, wherein the plaintiffs herein were plaintiffs, and the said Lyon County Co-operative Association was defendant, said plaintiffs duly recovered a judgment against said defendant therein, in the sum of \$1,583; that an execution has been issued upon said judgment to the sheriff of Lyon county, and by him returned unsatisfied; that said judgment is still unpaid; that, on the 25th day of November, 1884, said Ivy Grange was duly served with a notice of such judgment, and that execution would be ordered against the shareholders in said Lyon County Co-operative Association. Wherefore plaintiffs demand judgment against the defendants and each of them in the sum of \$100. F. A. BROGAN, Attorney for Plaintiffs."

A judgment was rendered in the justice's court in favor of the plaintiffs, and against the defendants. An appeal was taken to the district court of Lyon county, and the case was tried there at the February term for 1888, upon the following agreed statement of facts:

(Title of cause omitted.) "It is agreed that this case shall be submitted to the court upon the following agreed statement of facts: That the plaintiffs, on the 20th day of November, 1884, obtained a judgment in the sum of \$1,500, in the district court of Lyon county, Kan., against the Lyon County Co-operative Association, which was a corporation organized under the laws of the state of Kansas; that on the 27th day of October, 1884, defendants W. L. McLaughlin & Co. and Samuel Bliss each obtained a separate judgment against said company or corporation in a justice court in the county of Lyon, for the sum of \$47.75, and \$85.25, respectively; that the other defendants were each members of a society or association known as the 'Ivy Grange,' an unincorporated society organized for social purposes, its members being generally known as 'grangers'; that F. H. Lyon was also a member of said grange, and during the year 1884 was its master, and presided at the meetings of the Grange, and had the usual powers of a presiding officer; that said Grange, during the

year 1884, owned twenty shares of the capital stock of the Lyon County Co-operative Association, of the face value of five dollars per share; that in November, 1884, executions were issued upon the judgment in favor of the plaintiffs, and upon the judgments in favor of the defendants McLaughlin & Co. and Samuel Bliss against the said Lyon County Co-operative Association, and each of said executions was returned wholly unsatisfied. That thereafter, and in the year 1884, and after the return of the execution on the judgment in favor of plaintiffs unsatisfied, the plaintiffs caused a written notice to be served upon said Ivy Grange by delivering the same to F. H. Lyon, of which the following is a true copy, save and except the title of cause omitted, and the names of the parties to whom it was addressed omitted; but that it included in the names of the parties to whom said notice was addressed, amongst whom was the Ivy Grange and others, stockholders of the Lyon County Co-operative Association, to-wit:

"You and each of you will take notice that the plaintiffs in the above-entitled cause of action did, on the 20th day of November, 1884, at the September, 1884, term of said district court, by the consideration of said court, recover a judgment against the defendant, the Lyon County Co-operative Association, for the sum of \$1,583 damages, and the costs of the action, taxed at \$10.75; that an execution has been issued upon said judgment to the sheriff of Lyon county, Kan., and by him returned wholly unsatisfied, there having been no property belonging to defendant in said action found whereon to levy such execution. Now, this is to notify each one of you who are hereinbefore named, that on Tuesday, the 3d day of March, 1885, at the hour of 10 A. M. on said day, or as soon thereafter as counsel can be heard, plaintiffs will, at the court-house in the city of Emporia, in open court, move the district court of Lyon county, state of Kansas, for an order, ordering an execution to be issued upon such judgment against each person hereinbefore named, to an amount equal to the amount of stock owned by such person in the Lyon County Co-operative Association, at the date of said judgment, as appears from the books of said association. Each of the above-named persons are further notified that they can save all costs by paying to the clerk of the district court an amount equal to the amount of stock so held by them, to be applied in satisfaction of said judgment. C. N. STERRY, Attorney for Plaintiffs."

"That thereafter, and at the March, 1885, term of said district court, an order was entered upon said motion, that upon proof of service of the same upon the presiding officer of the said Ivy Grange, an execution be issued on the judgment in favor of the plaintiffs and against the Lyon County Co-operative Association, against the said Ivy Grange, for the amount of one hundred dollars and the costs in said motion; which said

execution was issued, and returned wholly unsatisfied. That in April, 1887, defendants W. L. McLaughlin & Co. and Samuel Bliss each served a notice on each of the above-named defendants other than themselves, a copy of which said notice so served by McLaughlin & Co. upon Elza Moore and others was and is as follows, to-wit:

"To Mr. Elza Moore et al.: You are hereby notified that on the 30th day of April, 1887, at ——— o'clock —. M., a motion will be made by the undersigned, as attorneys for W. L. McLaughlin & Co., before E. N. Evans, justice of the peace of Emporia city, Lyon county, Kan., at his office in Emporia, for an order against you that you pay the sum of one hundred dollars, the amount of the capital stock you hold in the Lyon County Co-operative Association, as member of the Ivy Grange; the same being to satisfy a judgment rendered by said justice of the peace, in which the said W. L. McLaughlin & Co. were plaintiffs, and the said Lyon County Co-operative association was defendant. Yours, truly, CUNNINGHAM & MCCARTY."

"That the notice served on behalf of Samuel Bliss was precisely the same, except the name of Samuel Bliss was substituted for the name of W. L. McLaughlin & Co. That said notice was served in April, 1887. That on the 5th day of May, 1887, the plaintiffs commenced this action, and that on the 12th day of May, 1887, the plaintiffs obtained, before said justice of the peace, judgment against each of said defendants, except the said McLaughlin & Co. and said Bliss, for the sum of \$100; which said judgment was duly appealed from. That on April 30th, 1887, the following judgment was entered by the said justice of the peace, E. N. Evans, upon the notices served by McLaughlin & Co. and Bliss, as aforesaid:

"April 30th, 1887. In open court come now the plaintiffs, by their attorneys, Cunningham & McCarty, and move the court that judgment be rendered and execution issued against the following stockholders of said defendant corporation, as members of the Ivy Grange, in the several sums set opposite their respective names, or so much thereof as may be necessary to satisfy the foregoing judgment with interest and costs, to-wit: Elza Moore, \$100; C. M. Robb, \$100; E. C. Payne, \$100; Sidney Putnam, \$100; and E. Best, \$100; and it appearing to the court that proper and reasonable notice in writing of the hearing and presentation of said motion had been duly given each of said stockholders, and it further appearing to the court that each of them is the owner of \$100 worth of stock in and of the said Lyon County Co-operative Association, and the court so finds, it is therefore ordered that said motion be granted, and that said plaintiffs have and recover of the said Elza Moore and others, each, the said sum of \$100, and that each shall pay plaintiffs the sum of \$100, or so much thereof as may be necessary to pay this judgment and the judgment hereinbefore ren-

dered, and the costs of all proceedings in said cause. And hereof let execution issue, and the same is hereby ordered. E. N. EVANS, Justice of the Peace.' (Successor to F. P. PAYNE, justice of the peace, before whom the original judgment in favor of McLaughlin & Co. and Bliss was rendered.)

"That the justice rendered like judgment in the case of Bliss, the above judgment being rendered in the case of McLaughlin & Co. That in said proceedings before said justice, which culminated in the aforesaid judgment, no bill of particulars was filed, no summons was issued, and the whole of said proceedings and said judgment were based solely and entirely upon said plaintiffs' oral motion for judgment, the notice hereinabove copied and set forth, and its service upon the parties named in said judgment, and also upon the original judgments rendered in favor of McLaughlin & Co. and Bliss against the Lyon County Co-operative Association, and upon nothing else. It is further agreed by and between the parties hereto, that the sole and only questions to be determined are as to whether the said McLaughlin & Co. and the said Bliss acquired any lien upon the liability of the members of said Ivy Grange by the service of said notice, and the judgment so rendered upon the same by the said justice of the peace. If such a lien was acquired, then the question to be determined is whether it is prior to the lien obtained by plaintiffs under their motion and service and proceedings had thereon, if the same could be enforced in this action commenced by plaintiffs before said justice, upon said bill of particulars; it being agreed that if the defendants McLaughlin & Co. and Bliss obtained a lien upon such liability superior to the liens and rights of the plaintiffs acquired under their said motion, or by this action commenced before said justice, and by said bill of particulars, judgment shall be rendered for the defendants in this action. If, however, the said defendants McLaughlin & Co. and Bliss obtained no lien, or no lien prior to the lien of plaintiffs, or to the rights of plaintiffs obtained by the commencement of this action, or superior thereto, or if the said justice had no power to render any judgment upon the notice served by them, (it being admitted that upon the hearing before said justice upon said notice there was no trial, but a judgment rendered as upon a default upon proof of the former judgment and the issuance and return of the execution therein, and the proof of the service of said notice upon the defendants other than McLaughlin & Co. and Bliss,) then the plaintiffs to recover judgment against each of the defendants named in the bill of particulars, save and except only McLaughlin & Co. and Bliss."

Upon the agreed statement of facts the district court determined that McLaughlin & Co. and Bliss had acquired a prior lien upon the liability of the defendants, as stockholders, and rendered judgment against the plaintiffs for costs, dismissing their action.

The plaintiffs excepted, and bring the case here.

C. N. Sterry and F. A. Brogan, for plaintiffs in error. *Cunningham & McCarty*, for defendants in error.

HORTON, C. J., (*after stating the facts as above.*) M. D. Wells & Co., on the 20th of November, 1884, obtained a judgment for \$1,500 in the district court of Lyon county, against the Lyon County Co-operative Association, a corporation organized under the laws of the state. On the 27th of October, 1884, W. L. McLaughlin & Co. and Samuel Bliss each obtained a separate judgment against the same corporation, before a justice of the peace in the county of Lyon, for the sums of \$47.75 and \$85.25, respectively. In all these cases executions were issued against the property of the corporation, and returned unsatisfied. Subsequently, these creditors of the insolvent corporation attempted to obtain payment of their judgments from certain stockholders of the corporation to the extent of their statutory liability. The Ivy Grange, an unincorporated society, organized for social purposes, owned, in 1884, 20 shares of the capital stock of the corporation, of the face value of five dollars per share. The defendants were members of the Grange. F. H. Lyon was its master, or presiding officer.

The principal question presented in this case is whether W. L. McLaughlin & Co. and Samuel Bliss have acquired prior liens against the defendants as stockholders of the Co-operative Association. Involved in this question, two others arise. These are: (1) Did the plaintiffs, by the notice served upon the presiding officer of the Ivy Grange in the fall of 1884, and the order for an execution against such Grange, made by the district court at the March, 1885, term, create a lien upon this liability? (2) Did the proceedings of W. L. McLaughlin & Co. and Samuel Bliss, before Justice Evans, in April, 1887, in any way attach or create a lien upon this liability against the members of Ivy Grange? The first question must be answered in the negative, and the last question in the affirmative. "Neither at law nor in equity are stockholders, contributing to the capital of an incorporated company, individually liable for the payment of the debts of the corporation. The liability arises solely by constitutional or statutory provision. As a consequence the matter here is wholly governed by the statute, and the rights of the party claimant under the statute must be ascertained by it." *Hentig v. James*, 22 Kan. 326; section 32, c. 28, Gen. St. 1889. The statute prescribes that "no execution shall issue against any stockholder except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and upon such motion, such court may order

execution to issue accordingly, or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment." *Id.* The notice of M. D. Wells & Co. to F. H. Lyon, the master or president of the Grange, was not a notice "in writing to the persons sought to be charged;" that is, it was not a notice to the defendants in this action. F. H. Lyon is not a defendant, although he is the only person who was served with a notice by the plaintiffs. Again, the execution ordered to be issued under the notice of plaintiffs was against the Ivy Grange. The notices served upon the stockholders of the Co-operative Association at the instance of W. L. McLaughlin & Co. and Samuel Bliss, in April, 1887, were not as precise as they might have been, and the proceedings before the justice are a little irregular. An execution, however, was ordered to be issued by the justice of the peace against the stockholders, to the extent of their liability. At most, the notices and proceedings are irregular, not void. The stockholders are not complaining of the notices, or of the order of the justice of the peace. In this action, we do not think the errors, if any, of the justice, can be revised or corrected. The service of the notices by W. L. McLaughlin & Co. and Samuel Bliss, and the order entered thereon, give them, as creditors, prior liens and claims against the stockholders. *Cole v. Butler*, 43 Me. 401; *Ingalls v. Cole*, 47 Me. 541; *Jones v. Wiltberger*, 42 Ga. 575; *Marsh v. Burroughs*, 1 Woods, 463. As this action was not brought until after the notices of McLaughlin & Co. and Bliss were served, and orders had been entered thereon, this action was brought too late to interfere with the prior liens or claims. As the notices and orders referred to are fully set forth in the statement of facts, we do not repeat them. The judgment of the district court will be affirmed; all the justices concurring.

(43 Kan. 225)

ATCHISON, T. & S. F. R. CO. v. COCHRAN.

(Supreme Court of Kansas. Feb. 8, 1890.)

CORPORATIONS—LIABILITY OF STOCKHOLDERS FOR NEGLIGENCE—RAILROAD COMPANIES—LEASE AND CONSOLIDATION.

1. A stockholder of a railroad company is not liable for the negligence of the officers, agents, or employes of the company in the operation of its road.

2. Under the laws of Kansas, a railroad company has the lawful right to purchase and hold stock of any other railroad company, the line of whose railroad, constructed or being constructed, connects with its own.

3. Where the rights and powers of a railroad company are those of a stockholder, only, in a connecting railroad, the railroad company, on account of being a stockholder, is not liable for the negligence of the connecting railroad.

4. Where two connecting railroad companies use a station jointly, or hire one person to discharge the duties of ticket agent for both, and such person sells a ticket for carriage over one of the roads, the other company is not responsible for the road over which the ticket carries the passenger.

(Syllabus by the Court.)

Error from district court, Johnson county; J. P. HINDMAN, Judge.

On the 31st day of May, 1887, Joel Cochran, administrator of the estate of John M. Gibson, deceased, filed his petition in the district court of Johnson county, Kan., against the Atchison, Topeka & Santa Fe Railroad Company, alleging that: "The said plaintiff herein complains of the said defendant herein for that, on the 30th day of May, A. D. 1887, he was duly appointed and qualified, and letters of administration of the estate of John M. Gibson, deceased, were issued to him by the probate court of Johnson county, state of Kansas, as the administrator of said estate. And the said plaintiff further states that the said defendant herein is now, and was at the date hereinafter first mentioned, a railroad corporation, duly organized under and by virtue of the laws of the state of Kansas, and then owned and operated, and now owns and operates, a railroad known as the Atchison, Topeka & Santa Fe Railroad Company, and as such corporation and railroad company was then, and is now, operating, and exclusively managing and controlling, the Southern Kansas Railroad Company, a corporation duly organized under the laws of the state of Kansas; that the Atchison, Topeka & Santa Fe Railroad Company was then, and still is, a common carrier of passengers for hire upon its trains into and through Douglas and Johnson counties, Kan., and that the said Southern Kansas Railroad Company, so operated, managed, and controlled by the said Atchison, Topeka & Santa Fe Railroad Company, was then, and still is, a common carrier of passengers for hire upon its trains of cars into and through Johnson county, Kan., and then run its trains of cars over and used defendant's tracks from Kansas City, Mo., to Holliday, Kan.; and that the town or village of Holliday was then a regular station and depot in Johnson county, Kan., of the said Atchison, Topeka & Santa Fe Railroad Company, on the main line of its said railroad; and that said town or village of Holliday and the city of Olathe, in Johnson county, Kan., were then regular stations or depots on the line of the Southern Kansas Railroad. Plaintiff further states: On the 21st day of March, A. D. 1887, the plaintiff's intestate, John M. Gibson, had ridden, as a passenger on a regular passenger train of cars of the defendant company, from Lawrence and Eudora, Kan., to said station, Holliday, and that upon said day at Holliday, aforesaid, the said John M. Gibson, now deceased, purchased from said defendant company's ticket agent at Holliday depot, aforesaid, a ticket entitling him to be transported on that day, as a passenger, thence to Olathe, Kan., by and upon a regular passenger train of cars of—and then used by the defendant in the name of—the said Southern Kansas Railroad Company, and that in order for the said John M. Gibson, now deceased, to get upon said regular passenger train of cars, so then being operated, man-

aged, and controlled by said defendant company, to be carried from Holliday to Olathe, aforesaid, it became and was necessary for the said John M. Gibson, now deceased, to walk across the interjacent railroad tracks belonging to said defendant company, and then being used by said defendant company and said Southern Kansas Railroad Company with their locomotive engines and passenger and freight trains of cars,—there being no other way for said decedent to get to and upon said train,—and that while the said decedent was in the act of walking across said interjacent railroad tracks, aforesaid, at the station, and upon the invitation of said defendant company, and for the sole purpose of boarding the regular passenger train of cars of the Southern Kansas Railroad Company, as aforesaid, to be carried thence to Olathe, aforesaid, upon said train of cars, which was then at rest, about two or three tracks remote from the platform of the said defendant's depot or ticket office, which said Southern Kansas train of cars did not then come to, nor did it intend to then come to, the platform of said depot, and which train was then about ready to start for Olathe, aforesaid, and there then being no regular crossing across said interjacent tracks, and no person there to warn him of danger, the said defendant company then and there, to-wit, on the 21st day of March, A. D. 1887, at Holliday, aforesaid, carelessly, grossly, negligently, wantonly, and recklessly, by and through its said servants and employes then in charge of, and operating and running, one of its freight trains of cars, with a locomotive engine attached thereto and in motion, on one of said interjacent tracks of said defendant company, permitted the locomotive so attached to said freight train of cars last aforesaid, without any warning of any character to said decedent of danger, to run against, strike, come in contact with, and knock down, and drag in a violent and forcible manner, the said John M. Gibson, now deceased, without any fault, negligence, or want of care on the part of the said decedent, and that by reason of said locomotive engine so striking him, and so knocking him down, and dragging him, the said decedent was greatly bruised, cut, and mangled in and about his head, back, legs, arms, and body, internally, and his right leg was broken, and in consequence thereof the said decedent became sick, sore, and lame, and in consequence of said injuries, so received as aforesaid, he was confined to his bed, and suffered much mental and bodily pain and agony, from the said 21st day of March, A. D. 1887, until on or about the 30th day of March, A. D. 1887, when he died, intestate, at Olathe, Kan., and that said injuries, all and singular, so received by him as aforesaid, were the cause of the death of the said John M. Gibson, without any fault, negligence, or want of care on the part of said decedent contributing thereto. Plaintiff further states that the said John M. Gibson, now deceased, left Mary E. Cochran, *née* Gibson,

and Elizabeth J. Adams, *née* Gibson, his only children, him surviving, and are his only next of kin him surviving; and that by reason of the premises, all and singular, the said Mary E. Cochran and Elizabeth J. Adams, sole surviving children and sole next of kin, aforesaid, have been greatly damaged by the death of the said John M. Gibson, now deceased, in and to the amount of ten thousand (\$10,000) dollars, no part of which hath been paid. Plaintiff therefore, as such administrator, demands judgment against the defendant company herein for the sum of ten thousand (\$10,000) dollars, so as aforesaid sustained, with costs of suit and equitable relief."

Trial had at the September term of the court for 1887, before the court with a jury. The court, among other things, charged the jury as follows: "(1) In this case the plaintiff charges the defendant company as being the owner, or operator, controller, and manager of the Southern Kansas Railroad Company, at the time his intestate, Gibson, received his alleged injuries, and therefore I charge you that the question of liability and responsibility of the defendant company is one of fact, to be determined by you from all the testimony in the case. (2) In determining the liability of the defendant company, the true test is, what company had the control, direction, and management of said Southern Kansas Railroad, and of the men then operating the engines and passenger trains on said road, and especially the engine and passenger train on which the plaintiff's intestate was endeavoring to take passage, if any? and in determining these questions it is your duty to take into consideration all the facts and circumstances proven by the evidence. (3) The fact that the officials of one railroad company are officials of another railroad company, standing alone, would not make the one responsible for the negligence or default of the other; neither would the mere fact of the one railroad owning stock or bonds of another railroad company make the former company responsible for the acts of the latter. But if you find from the evidence that the Southern Kansas Railroad Company, for all practical purposes, was, at the time alleged, managed, controlled, and operated by the defendant company, being used as an auxiliary and a part of the defendant company's system of railroads, then and in that event the defendant company would ordinarily be responsible for the negligence, default, or miscarriage of the Southern Kansas Railroad Company, its agents and employes. (4) If in fact the defendant company exercised and assumed the actual control of the management and operation of said Southern Kansas Railroad at the time of the alleged injuries, it would be liable for the negligence, if any, of the men in operating and managing the engines and passenger trains of the Southern Kansas Railroad Company, in failing to bring its passenger trains to the platform of the depot to receive passengers, if they did so fail,

even though the men were at the time engaged in the business of another railroad company, namely, the Southern Kansas Railroad Company. (5) If the jury find that the general management of both roads is under the control of the same officials; that the boards of directors of both roads are substantially the same persons; that a majority of the said stock of said Southern Kansas Railroad Company is owned by the Kansas City, Topeka & Western Railroad Company, which latter company is leased and operated by said defendant company for its use and benefit, and that the balance of the stock of the said Southern Kansas Railroad Company is owned by the defendant company; that both the defendant and the Southern Kansas Company use and occupy the same line of track from Kansas City, Mo., to Holliday, Kan.; that the same person is agent and ticket seller for both companies at said station, Holliday; that the treasurer of said Southern Kansas Railroad Company is also treasurer of the defendant company, and that the clerical work for said treasurer, pertaining to the Southern Kansas Company, is performed by the employes of the defendant company; and that the general officers and offices of both companies are both one and the same,—you have a right to give such facts and circumstances due weight and consideration in arriving at your verdict. * * * (18) If you believe from the evidence that the defendant company was managing and operating and controlling the Southern Kansas Railroad Company on March 21, 1887, and that said defendant company caused the said Southern Kansas Railway Company's passenger train to stop at Holliday to receive passengers, on said day, to be carried for hire to Olathe, and that said defendant company then had a depot building, and platform therewith connected, at Holliday, aforesaid, for the purpose of receiving and discharging passengers to and from its own passenger trains, and for the sale of tickets, and did then sell over said several railroads, then I charge you that it was the lawful duty of the defendant company to provide or furnish reasonably safe and convenient approaches to their several passenger coaches owned and managed, operated and controlled, by said company, and it was the duty of said company to also use such approaches with care and due regard for the safety of passengers who were attempting to get upon such coaches by means of such approaches; and if, upon the said company failing to do so, an injury ensued to such passenger, then the said company will be held liable for injuries resulting therefrom, provided such injured person was not guilty of any fault, or want of ordinary care, or of any negligence contributing thereto. (19) If the jury believe from the evidence that the deceased, on the 21st day of March, 1887, was a passenger on the defendant company's passenger train from Eudora to Holliday, and that on reaching Holliday the deceased immediately purchased a ticket from the defend-

ant company's ticket agent at Holliday entitling the deceased to be carried as a passenger on the Southern Kansas Railroad passenger train from Holliday to Olathe on said day, then managed, operated, and controlled by said defendant company, and that said deceased on said day attempted to reach the Southern Kansas passenger train, bound for Olathe, in the only way provided by the company to reach said train, which was then in waiting on a track at Holliday for passengers to Olathe, then I charge you that the deceased was a passenger at the time, and entitled to all the rights of such. (20) I charge you that a person who has a railroad ticket, and who is present to take the train at the ordinary or usual point of departure designated by the railroad company, is a passenger, though he has not entered the car of the particular train, and in the duties towards him directly involving his safety the company is bound to extraordinary diligence, and in these duties touching his convenience or accommodation the company is bound to ordinary diligence, and this rule of extraordinary diligence applies to the receiving of passengers. (21) When a carrier of passengers for hire by railway does not receive passengers into the car at the platform erected for that purpose, and either directs or impliedly invites passengers to enter the car at an out of the way place, or at a place remote some distance from such platform, it is the bounden duty of such company to use the utmost care in preventing injuries to passengers while so approaching to enter such car; and if you find, in this case, that the defendant company was negligent, within the meaning of this instruction, and that the deceased was injured thereby; that the deceased did not contribute to such injury by his negligence,—then the plaintiff is entitled to recover. * * * (23) When the arrangement of a passenger railroad station or depot, whether permanent or temporary, is such that a passenger has to cross a track before entering, then such passenger has a lawful right to assume that such track may be crossed safely, and that the company will not expose him to unnecessary danger; and, while the passenger himself must exercise reasonable care and prudence, his watchfulness may be naturally diminished by his reliance upon the discharge by the company of its duty to passengers to provide them with a safe passage to the train of cars."

The jury returned a verdict against the railroad company for \$900, and also found, among others, the following special findings of fact: "(1) Was John M. Gibson, now deceased, carried by the defendant company, on one of its passenger trains, as a passenger, from Eudora, Kan., to Holliday, Kan., on March 21, A. D. 1887? *Answer.* Yes. (2) Did the deceased, on reaching Holliday, purchase a ticket from the defendant's ticket agent at Holliday entitling him to be carried on said day from Holliday to Olathe on a passenger train of the Southern Kansas Railway Company? *A.* Yes. (3) Had the defendant com-

pany the control, direction, and management of the Southern Kansas Railroad, and of the men then operating the engines and passenger trains of the Southern Kansas Company, and especially the engine and passenger train upon which the deceased then intended to take passage? A. Yes. * * * (6) Was a majority of the stock of said Southern Kansas Railroad Company then owned by the Kansas City, Topeka & Western Railroad Company? A. Yes. (7) Was the said Kansas City, Topeka & Western Railroad Company then leased and operated by the Atchison, Topeka & Santa Fe Railroad Company, for its use and benefit? A. Yes. (8) Was the balance of the stock of the Southern Kansas Railroad Company then owned by the Atchison, Topeka & Santa Fe Railroad Company? A. Yes. * * * (26) Was it negligence on the part of the defendant company, when considered with all the other circumstances, in not bringing the said Southern Kansas train up to the platform so that passengers might get upon it at the time referred to. A. Yes. (27) At the time the passengers, including the deceased, left the platform to cross the tracks to get upon said Southern Kansas train, did any person connected with either the defendant company or the Southern Kansas Railroad Company forbid or warn passengers not to cross the tracks? A. No. * * * (30) Did the deceased then leave the platform of the depot building, and attempt to cross the track intervening the platform and the Southern Kansas passenger train referred to, for the purpose of getting upon said train to be carried from Holliday to Olathe as a passenger? A. Yes. Judgment was entered upon the verdict of the jury. The railroad company excepted, and brings the case here.

George R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error. A. Smith Decenney, for defendant in error.

HORTON, C. J., (after stating the facts as above.) This was an action brought by Joel Cochran, administrator of John M. Gibson, deceased, against the Atchison, Topeka & Santa Fe Railroad Company, to recover damages for the killing of Mr. Gibson at Holliday, in this state. At the time of his death, Mr. Gibson was a widower with two married daughters, and no other children. He was the owner of a farm in Douglas county, which was occupied by a tenant. One daughter resided at Eudora, and the other at Olathe. He sometimes made his home with one, and at other times with the other, daughter. He was about 65 years of age. About 8 o'clock A. M. on the 21st day of March, 1887, he left Eudora, and took passage on a regular passenger train of the Atchison road for Holliday. The latter is a junction of the Atchison road and the Southern Kansas Railroad in Johnson county. Mr. Gibson left the train at Holliday, and at once purchased a ticket at the office there, over the Southern Kansas Railroad, for Olathe. He was compelled to

wait the coming of the Southern Kansas train from Kansas City, Mo., from about 9:30 A. M. until 11:30 A. M. The Southern Kansas train pulled into Holliday, on the second track, about 11:30 A. M.; and at this time there were six or seven passengers for Olathe and the south-west waiting. When the Southern Kansas came up, some of the passengers were on the south side of the platform, next to the first or main track. Among them were Mr. Gibson, the deceased, Johnson, and Owens. Just as the Southern Kansas train had come to a rest, one passenger crossed the first track, and the mail carrier crossed, and got over; and he was followed by Mr. Gibson. As he got upon the track, a freight train of the Atchison road came in from the west, in front of the platform, and on the main track. The engine struck Mr. Gibson, knocked him down, and dragged him some distance between the north rail and the platform. His head was badly cut, his leg was broken in two places, and he was greatly bruised about the body, internally and externally. His daughter Mrs. Cochran came to Holliday, took him to her house at Olathe, where he died, intestate, on the 30th day of March, 1887.

It is clearly apparent from the instructions of the court and the findings of the jury that the recovery for the plaintiff below against the railroad company was upon the theory that Mr. Gibson, at the time of his injury, was entitled to the rights and privileges of a passenger of the Atchison Company. This, upon the claim that the Atchison Company controlled, directed, and managed the Southern Kansas Railroad. The testimony in the record will not sustain a verdict upon this ground. The ticket which Gibson purchased at the station read: "Southern Kansas Ry. Co. 1st class ticket. Holliday to Olathe. (When stamped by agent at 1st named station.) S. B. HAYNES, G. P. A. (2882.) [Reverse side stamped:] A. T. & S. F. R. R. Co. Holliday, Mar. 21st, 1887. Ex. I, A. P. R." At the station of Holliday, the second track south of the depot was used by the Southern Kansas Railway Company for its passenger trains, and the main track next to the depot, and south thereof, was used by the Atchison, Topeka & Santa Fe Railroad Company. The jury found that the majority of the stock of the Southern Kansas Railroad Company was owned by the Kansas City, Topeka & Western Railroad Company; that the balance of the stock of the company was owned by the Atchison Company; and that the Atchison Company leased and operated the Kansas City, Topeka & Western Railroad Company. The two companies, according to the testimony, are separate and independent corporations. The Atchison Company, by virtue of controlling the stock of the Southern Kansas Railway Company, was enabled to elect directors of that company. These directors elected several persons who were also officials of the Atchison Company.

In *Railroad Co. v. Davis*, 34 Kan. 209, 210.

8 Pac. Rep. 530, it is said: "That corporation had the power to purchase and hold the stock and bonds of the Wichita & Western Railroad Company, or to guaranty the payment of the principal and interest of the bonds of that company, and thereby, as a stockholder or bondholder, or as a guarantor of the bonds, to aid that company to construct its road; but, by so doing, the Santa Fe Company did not make the Wichita & Western Company its servant or agent, and did not thereby make itself responsible for the negligence or other default of the Wichita & Western Company. Laws 1873, c. 105; Const. Kan. art. 12, § 2; Comp. Laws 1879, c. 23, § 32. * * * Where a parent company, operating a long line of road in the state, takes the necessary steps to construct an auxiliary railroad for the purpose of a local line in the name of another company, and, in strictly pursuing the provisions of the statute, merely furnishes aid as a stockholder or bondholder, or a guarantor of bonds, to the auxiliary company, and such auxiliary company constructs its road in its own name, it is not the servant or agent, in such construction of its road, of the parent company; and the parent company is not, on account of being a stockholder or bondholder, or guarantor of bonds, of the auxiliary company, responsible for the negligence or other default of the auxiliary company in constructing its road in its own name."

In the case of *Car Co. v. Railway Co.*, 115 U. S. 587, 6 Sup. Ct. Rep. 194, the former company claimed that the St. Louis, Iron Mountain & Southern Railway Company was controlled by the Missouri Pacific Company, and therefore that the Missouri Pacific Company was bound, under its contract, to haul the palace cars over it. In that case, as in this, it was shown that the Missouri Pacific Company owned stock in the railway company, and in that way selected its directors. The court, however, decided that this did not give it the control of the road. Chief Justice WARRE, in delivering the opinion of the court, said, among other things, that "the Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain & Southern Company, and has effected a satisfactory election of directors; but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically, it may control the company; but the company alone controls its road. In a sense, the stockholders of a corporation own its property; but they are not the managers of its business, or in the immediate control of its affairs. Ordinarily, they elect the governing body of the corporation, and that body controls its property. Such is the case here. The Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain & Southern to control the election of directors; and this it has done. The directors now control the road through their own agents and executive officers, and these agents and officers are in no way under the direction

of the Missouri Pacific Company. If they or the directors act contrary to the wishes of the Missouri Pacific Company, that company has no power to prevent it except by the election, at the proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and its powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business, or the control of the corporate property."

There is no testimony in the record tending to show that the Atchison road leased the Southern Kansas road, or that it was the owner of the road. The rights and powers of the Atchison road were those of a stockholder only. Therefore the Atchison road was not the Southern Kansas corporation, in the sense of that term as applied to the management of the corporate business, or the control of the corporate property, of the Southern Kansas.

Under the laws of this state, a railroad company has a lawful right to purchase and hold stock of any other railroad company, the line of whose railroad, constructed or being constructed, connects with its own. *Railroad Co. v. Fletcher*, 35 Kan. 236, 10 Pac. Rep. 596.

The stockholders of a railroad company may be said, in a certain sense, to control, direct, and manage the road; but an action for the negligence of the officers, agents, or employes of the railroad company must be brought against the company, not against the stockholders. Therefore, as the rights and powers of the Atchison road in the Southern Kansas Railroad Company were those of a stockholder only, the Atchison Company is not responsible for the wrongful acts of omission or commission of the Southern Kansas road. As the rights and powers of the Atchison road in the Southern Kansas were those of a stockholder only, the instructions of the court that the jury might find from the testimony that the Southern Kansas Railroad Company, for all practical purposes, was managed, controlled, and operated by the Atchison Company, was misleading. The finding of a verdict upon this and similar instructions cannot be sustained. The fact that Mr. Gibson purchased a ticket to ride over the Southern Kansas road at the station of the Atchison road at Holliday did not make him a passenger of the Atchison road, or make the Atchison road responsible for the negligence of the Southern Kansas road.

The jury found that the person in charge of the ticket office at the station of Holliday was agent both for the Atchison Company and the Southern Kansas Company; but even if the ticket agent at Holliday acted for the Atchison road, and the Atchison road sold the ticket for the Southern Kansas road, this would not make the Atchison road liable for the negligence of the Southern Kansas. The ticket purchased by Mr. Gibson shows that

the contract of carriage was made on behalf of the Southern Kansas Railway Company.

Upon a retrial, unless different testimony is presented, the case should not go to the jury upon the theory that the Atchison Company controlled, directed, and managed the Southern Kansas Railroad. If the Southern Kansas road was guilty of negligence in not running its passenger trains close or near to the station, that company is responsible, not the Atchison. If the Atchison road operated its freight train negligently, and, without any contributory negligence on his part, Mr. Gibson was killed thereby, then the Atchison Company is liable, not the Southern Kansas. They were two separate corporations, and the one is not responsible for the negligence of the other. The judgment of the district court will be reversed, and the cause remanded; all the justices concurring.

(43 Kan. 121)

STATE V. WELLINGTON.

(Supreme Court of Kansas. Feb. 8, 1890.)

CRIMINAL LAW—EVIDENCE—LETTERS—WITNESS—EXAMINATION.

1. In a criminal prosecution, a letter was introduced in evidence by the state over the objections of the defendant. This letter had previously been addressed by the defendant's mother to the defendant in an assumed name, but it does not appear that the defendant ever received the same. The letter could have rightfully been introduced in evidence for the purpose of impeaching the testimony of the mother, who testified on the trial as a witness for the defendant, and for that purpose only; but the record apparently shows that it was introduced upon the merits of the case, and for the purpose of tending to prove the defendant's guilt. Afterwards the defendant asked the court to instruct the jury that the letter could be considered by the jury only for the purpose of contradicting or impeaching the testimony of the mother, and the court refused to give such instruction. *Held* error.

2. The mother's name was indorsed upon the information as a witness for the state, and she and the defendant were the only persons then living who were present at the time of the commission of the acts for the commission of which the defendant was charged with committing the offense. The mother being present, and the state not introducing her as a witness, the defendant requested the court to require the state to call her as a witness on behalf of the state, and the court refused the request. *Held* not error.

(Syllabus by the Court.)

Appeal from district court, Morris county; M. B. NICHOLSON, Judge.

E. F. Robinson, Muloy & Kelly, and Miller & Ritchie, for appellant. L. B. Kellogg, Atty. Gen., and J. K. Owens, for the State.

VALENTINE, J. The defendant, Guy Wellington, was prosecuted for murder in the first degree, and was convicted of and sentenced for murder in the second degree, and from such conviction and sentence he now appeals to this court. In all probability, from the evidence introduced on the trial, the verdict and sentence are correct; and yet, for error occurring during the trial, the judgment of the court below must be reversed. During the trial, which was before the court and a jury, a letter from the defendant's

mother, Anna B. Crandall, addressed to him under the assumed name of G. A. Mitchell, was introduced in evidence. It does not appear that the defendant ever received the letter, or saw it, at any time before the trial. At the close of the evidence the defendant's counsel asked the court to instruct the jury, among other things, as follows: "(20) The court instructs the jury that the letter put in evidence by the state, and written to the defendant by his mother, was only permitted to be received and read in evidence for the purpose of contradicting or impeaching any testimony given by the mother on the witness stand, and for no other purpose, and can only be considered by the jury for that purpose; it cannot be considered as defendant's act, or to criminate him." This instruction the court refused to give, and the defendant excepted, and this refusal is now assigned for error. On the oral argument in this court the county attorney stated that this letter was introduced in evidence only for the purpose of impeaching the testimony of Mrs. Crandall, and for no other purpose; but, unfortunately for the interests of the prosecution, the record does not so show, and apparently shows that the letter was introduced, over the objections of the defendant, upon the merits of the case, and for the purpose of tending to prove the defendant's guilt. If it was introduced only for the purpose of impeaching the testimony of Mrs. Crandall, and if it had been so stated to the jury at the time of its introduction, so that the jury could not have been misled, then no error would have been committed by the court in refusing to give the foregoing instruction. With regard to this letter, counsel for the defendant say in their brief as follows: "This letter was one which the jury might, in ignorance of the fact that it was competent only to contradict Mrs. Crandall, give an effect to that was very unjust to the defendant, and the refusal of the court to give it [the instruction] we regard as an unfortunate error on the part of the court, which must have left the minds of the jury greatly prejudiced against the defendant." If the letter was in fact used as evidence upon the merits, it was certainly very damaging to the defendant's case; and the record apparently shows that it was so used, and when the facts are disputed we can be governed only by the record.

As this case must be remanded to the district court for a new trial, it would perhaps be well for us to refer to some other matters presented as errors by counsel for the defendant. We think the information is sufficient, and no error was committed by the court in permitting the county attorney to indorse the names of additional witnesses upon the information. We do not think the court erred in refusing the request of the defendant to require the state to call Mrs. Crandall as a witness on behalf of the state. It is true her name was indorsed as a witness upon the information, and it is also true that she and the

defendant were the only persons living at the time of the trial who were present at the time of the commission of the acts by the defendant for the commission of which he is now charged with committing murder. E. E. Crandall was the victim of the homicide. Mrs. Anna B. Crandall was his wife, and the defendant, Guy Wellington, who was then about 26 years old, was Mrs. Crandall's son, and Crandall's step-son. Crandall died from the effects of a pistol shot fired by the defendant, and these three persons were the only persons present at the time when the shooting was done. The state gave excellent reasons for not calling Mrs. Crandall as a witness. Indeed, it would have been extremely foolish for the state, knowing what its counsel then knew or believed, to have called Mrs. Crandall as a witness. Mrs. Crandall, however, was a witness at the trial. She was introduced as a witness on behalf of the defendant. But as this permitted the state to impeach her testimony, and as the state did in fact to a great extent so impeach it, her testimony, so far as it differed from that of the other witnesses, or so far as it was favorable to the defendant, was probably considered by the jury as of but very little value.

It is also claimed that the court below erred in admitting in evidence a written statement of what purported to be a dying declaration of Mr. Crandall. It would seem from the authorities that, to admit statements of the victim of the homicide as dying declarations, "they must be made, not merely *in articulo mortis*, but under the sense of impending death, without expectation or hope of recovery." 6 Amer. & Eng. Cyclop. Law, 107, and cases there cited; 1 Bish. Crim. Proc. § 1212. Now, it is thought by this court, or at least by a majority of its members, (the writer of this opinion having doubts,) that it has not been sufficiently shown in this case that the supposed dying declaration of Crandall was in fact made "under the sense of impending death, without expectation or hope of recovery," and therefore it is thought that it was not admissible as a dying declaration. With a proper foundation laid, however, it might have been introduced as impeaching testimony, so far as it impeached the testimony of Mrs. Crandall; for she admitted at the time that it was made that it was true and correct, and undoubtedly it was true and correct, so far as it tended to show guilt on the part of the defendant; but it was not introduced as impeaching evidence, but it was introduced as a dying declaration. The judgment of the court below will be reversed, and the cause remanded for a new trial; all the justices concurring.

(43 Kan. 125)

STATE v. LAWRENCE.

(Supreme Court of Kansas. Feb. 8, 1890.)

INFORMATION—DESCRIPTION OF OFFENSE—AIDING ESCAPE OF PRISONER.

An information, under section 177 of the Crimes Act, which alleges that a prisoner has

been committed by a magistrate to the county jail to await an examination upon a charge of embezzlement; that the commitment was placed in the hands of the under-sheriff, who employed a private individual to guard the prisoner; and that while he was so held, and before he had been confined in jail, the defendant unlawfully and feloniously aided the prisoner to escape; and that, by means of such aid, he in fact did escape; but which does not allege the acts done by the defendant, nor that he had knowledge that the prisoner was in legal custody, is insufficient.

(Syllabus by the Court.)

Appeal by the state from the rulings of the district court of Barber county quashing an information. The information, omitting the heading and verification, is as follows: "Comes now R. A. Cameron, the undersigned county attorney of the said county of Barber, and in the name and by the authority of the state of Kansas gives the court to understand and be informed that on the 23d day of April, 1889, at the county of Barber, and state aforesaid, one Harry W. Stevens, then and there being the under-sheriff of the said county, brought one L. M. Spencer before O. C. Howe, then and there being one of the justices of the peace within and for the said county; and the said L. M. Spencer was then and there charged before the said O. C. Howe by one A. D. Mercer, upon the oath of the said Mercer, that the said L. M. Spencer had then lately before, on the 15th day of April, 1889, at the county of Barber, and state of Kansas aforesaid, committed the crime of embezzlement, by then and there unlawfully and feloniously taking, secreting, and making away with the property of the Parlin & Orendorff Company, a corporation duly existing and organized under the laws of the state of Illinois; and the said L. M. Spencer was then and there held for examination before the said O. C. Howe, the justice of the peace aforesaid, touching the said offense so to him charged as aforesaid, the hearing of which examination was adjourned to the first day of May, 1889, and the said L. M. Spencer was required by the said justice of the peace to enter into a recognizance in the sum of twenty-five hundred dollars (\$2,500) for his appearance at that time; and the said L. M. Spencer, failing to give such recognizance, was, by the said justice of the peace, duly adjudged to stand committed to the jail of said county in default thereof; and the said justice of the peace duly issued his order of commitment therefor, which order of commitment is of date and in words and figures as follows, to-wit: 'The State of Kansas, Plaintiff, vs. L. M. Spencer, Defendant. Before O. C. Howe, a justice of the peace of Medicine Lodge township, in Barber county, Kansas. State of Kansas, Barber county, ss.: The State of Kansas, to the sheriff or any constable of said county, greeting: Whereas, upon good cause shown, the above cause was, this 23d day of April, 1889, continued for trial to the 1st day of May, 1889, at 9 o'clock A. M., at my office in said township, and the said defendant, L. M. Spencer, was by me required

to enter into recognizance in the sum of twenty-five hundred dollars, with sufficient sureties for his appearance at such time and place to answer the complaint in said cause alleged against him; and said defendant did fail and refuse to enter into said recognizance: You are therefore commanded to take and commit the said defendant to the jail of Barber county, there to remain until the day fixed for said trial. Witness my hand at Medicine Lodge township, in said county, this 23d day of April, 1889. O. C. Howe, Justice of the Peace.' Which said order of commitment was, by the said justice of the peace, duly delivered to the said Harry W. Stevens, under-sheriff as aforesaid, under and by virtue of which the said Harry W. Stevens took and held the lawful custody of the said L. M. Spencer, and that afterwards, to-wit, on the 24th day of April, 1889, and while the said L. M. Spencer was in the custody of one Charles Kidd, a person then and there having the lawful charge of the said L. M. Spencer, under and by virtue of his employment by the said Harry W. Stevens, under-sheriff as aforesaid, as a guard to take charge and hold the custody of the said L. M. Spencer, under and by virtue of the commitment aforesaid, and before conviction of the offense aforesaid, and while he continued in such custody, and before he was delivered by the said Harry W. Stevens to the jailer and keeper of the jail of said county, the said Harry W. Stevens then and there having in his possession the said warrant of commitment against the said L. M. Spencer, James T. Lawrence, defendant herein, then and there being, did then and there unlawfully and feloniously aid and assist him, the said L. M. Spencer, in escaping from the custody of the said Charles Kidd, who then and there held and had the lawful custody and charge of the said L. M. Spencer as aforesaid. And while the said L. M. Spencer was in the lawful charge of the said Kidd, as aforesaid, as such guard, to-wit, on the 24th day of April, 1889, at the town of Kiowa, in the county aforesaid, the said defendant did unlawfully, feloniously, voluntarily, and contemptuously aid and assist the said L. M. Spencer to escape from the said Charles Kidd, and to go whithersoever he would; by means of which unlawful, felonious, voluntary, and contemptuous wrong of the said defendant, and by means of the assaulting of the said Kidd, as aforesaid, he, the said L. M. Spencer, did then and there, on the said 24th day of April, 1889, at the county of Barber, and state of Kansas, unlawfully and feloniously escape from the custody of the said Kidd, and went whithersoever he would; against the peace and dignity of the state of Kansas, and contrary to the form of the statute in such case made and provided."

R. A. Cameron and Sample & Long, for the State. Thomas George, for appellee.

JOHNSTON, J., (after stating the facts as above.) James T. Lawrence was prosecuted

under section 177 of the Crimes Act, for aiding a prisoner to escape from legal custody. The sufficiency of the information is the only question presented. It sets out fully and sufficiently that an offense had been committed by one Spencer; that he had been arrested and taken before a magistrate, who adjourned the hearing until a later time; and that the prisoner, failing to give the required recognizance, was duly committed to the jail of Barber county until the day fixed for the examination; that under this warrant the under-sheriff took the prisoner into custody, and placed him in charge of a guard until the prisoner could be taken to and confined in the county jail; that while he was in charge of the guard the defendant, Lawrence, unlawfully and feloniously aided and assisted him to escape; and that, by means of the assistance rendered by defendant, the prisoner in fact did escape. It thus appears that the information sufficiently states the custody of the prisoner, and that it was lawful; but while it alleges that the defendant aided in the escape, it fails to charge that he had knowledge that Spencer was in legal custody, and does not set out the acts done which aided the prisoner to escape. In the absence of these allegations the information was defective, and the motion to quash was properly sustained. An indispensable ingredient of the offense sought to be charged is the knowledge of the accused that the person assisted was in legal custody; and unless this knowledge is alleged, or the acts charged to have been done by the defendant necessarily imply knowledge, an offense is not adequately pleaded. A person may do many things which would aid a prisoner in an escape without any criminal intent or liability. If he should receive and entertain one for a night, in ignorance that his hospitality was extended to a fugitive criminal, or if he should overtake him on a highway and innocently give him a ride, he might materially aid the prisoner to escape, but certainly he would not be guilty of wrong, nor punishable under the statute. A well meant hospitality, or an innocent charity, should not subject a person to criminal prosecution and punishment; but before an act can be held to be criminal it must be done with a criminal intent. *State v. Fry*, 40 Kan. 311, 19 Pac. Rep. 742. If the acts done by way of assistance were alleged, as they should be, they might be of such a character that guilty knowledge would necessarily be inferred, and an express allegation of such knowledge might not be essential. For instance, if the defendant had furnished a prisoner confined in the jail instruments which could only have been intended to facilitate an escape, or had broken the prison door, or had forcibly assaulted or obstructed an officer who had a prisoner in charge, an express allegation of knowledge that the prisoner was in legal custody might not be necessary; but where the acts done are in their nature innocent, such knowledge should be stated. An information which does not allege the acts of

assistance rendered, and also fails to charge a knowledge which would make the intent criminal, is bad. *Com. v. Filburn*, 119 Mass. 297; *State v. Hilton*, 26 Mo. 199; 2 Bish. Crim. Proc. § 945. In the present case, the prisoner was not in jail, nor yet in the immediate charge of one known as a public officer. He was in charge of a private individual, designated for the time being as a guard, and hence there was a still greater necessity that the acts done by the defendant to aid in the escape, or that the defendant had knowledge that Spencer was in legal custody, should be alleged. The judgment of the district court will be affirmed; all the justices concurring.

(43 Kan. 119)

STATE v. SPENCER.

(*Supreme Court of Kansas. Feb. 8, 1890.*)

INFORMATION—VERIFICATION.

An information charging a defendant with a criminal offense must be verified by the oath of the prosecuting attorney, complainant, or some other person.

(*Syllabus by the Court.*)

Appeal from district court, Barber county; C. W. ELLIS, Judge.

R. A. Cameron and Sample & Long, for the State. *Thomas George*, for appellee.

HORTON, C. J. The information against the defendant was drawn under section 183 of the Crimes Act. The defendant filed his motion to quash, upon the following grounds: "Because the offense pretended to be charged is not clearly set forth in plain and concise language without repetition; because the information does not state facts sufficient to constitute an offense against the laws of the state of Kansas; because the information is not properly and duly verified; and because the court has no jurisdiction to hear and determine said case." It does not appear from the record that the information was verified by the oath of the prosecuting attorney, the complainant, or any other person. Sections 67, 67a, Code Crim. Proc. All presumptions are in favor of the ruling of the court below, and as there is not attached or annexed to the information any verification, we may assume that the court quashed the same for that reason, if for no other.

The following appears in the record: "State of Kansas, Barber county,—ss.: R. A. Cameron, being duly sworn, deposes and says: That he is the county attorney of Barber county, Kansas; that he has read the above and foregoing information, and that the facts and statements therein set forth are as he is informed and verily believes. R. A. CAMERON. Subscribed and sworn to before me this 8th day of May, 1889. FRANK HOLMES, Clerk of the District Court, by S. L. ALLEN, Deputy. [Seal.]" This, however, is not attached to the information, nor does it purport to be a part thereof. Following the information is the motion to quash, and the bill of exceptions. Then comes upon a separate paper the alleged verification, but even

this is defective in form, because it is not stated therein that the facts and statements of the information are true according to the information and belief of the prosecuting attorney. The word "true" is omitted. As the record comes to us, we cannot infer that this alleged verification is a part or portion of the information, and therefore, as the information was never verified, the order and judgment of the district court must be affirmed; all the justices concurring.

(43 Kan. 114)

STATE v. SPENCER.

(*Supreme Court of Kansas. Feb. 8, 1890.*)

INFORMATION—AMENDMENT—DESCRIPTION OF OFFENSE—EMBEZZLEMENT.

1. An information may be amended on the trial as to all matters of form, at the discretion of the court, when the same can be done without prejudice to the rights of the defendant.

2. *State v. Lillie*, 21 Kan. 723, followed.

3. *State v. Spaulding*, 24 Kan. 1, followed.

(*Syllabus by the Court.*)

Appeal from district court, Barber county; C. W. ELLIS, Judge.

On May 8, 1889, there was filed in the district court of Barber county the following information, omitting caption and indorsement:

"Now comes R. A. Cameron, the county attorney of the said county, and in the name and on behalf of the state of Kansas gives the court to understand and be informed that on or about the 15th day of April, 1889, in the county of Barber and state of Kansas, one L. M. Spencer, whose more full Christian name is to the said county attorney unknown, was then and there the agent, employe, bailee, and trustee of an express trust of a certain corporation duly organized, existing and incorporated under the laws of the state of Illinois, and named and known as 'Parlin & Orendorff Company,' and he (the said L. M. Spencer) then and there being a person over the age of sixteen years, and that the said L. M. Spencer was by the said Parlin & Orendorff Company duly appointed as such agent, employe, bailee, and trustee of an express trust for the said Parlin & Orendorff Company on the 7th day of February, 1889, and so continued to be such agent, employe, bailee, and trustee of an express trust, under and by virtue of the said appointment, up to and inclusive of the said 15th day of April, 1889. And that the said L. M. Spencer, on or about the said 15th day of April, 1889, in the county of Barber aforesaid, under and by virtue of his said appointment as such agent, employe, bailee, and trustee of an express trust, did have, receive, and take into his possession and under his care, of and from the said Parlin & Orendorff Company, a large amount of goods, wares, and merchandise theretofore obtained by the said L. M. Spencer of the said Parlin & Orendorff Company under and by virtue of a certain provision in a certain contract in writing, duly signed by the said defendant, L. M. Spencer, which said

provision is in the words and figures following, to-wit: 'All goods, and the proceeds of all sales of goods received under this contract, whether the proceeds are in notes, cash, or book-accounts, we agree to hold the same as collateral security in trust and for the benefit of, and subject to the order of, Parlin & Orendorff Co. until we have paid in full, in cash, all our obligations due the said Parlin & Orendorff Co.,'—which said goods, wares, and merchandise are more particularly described as follows: [items omitted;] all of the aggregate value of four thousand nine hundred and forty-nine dollars and thirty-seven cents, (\$4,949.37.) And the said L. M. Spencer the said property, and the proceeds thereof, as aforesaid, then and there feloniously and fraudulently did take, embezzle, and convert to his own use, without the assent of the said Parlin & Orendorff Company, the principal employer, bailor of the said L. M. Spencer, and the beneficiary of the express trust aforesaid, which said goods, wares, and merchandise had come into the possession, care, and control of the said L. M. Spencer by virtue of his being the agent, employe, bailee, and trustee of an express trust of the said Parlin & Orendorff Company as aforesaid.

"*Second Count.* And for a second and further count comes the said R. A. Cameron, in the name and on behalf of the state of Kansas, and gives the court to understand and be informed that on or about the 15th day of April, 1889, in the county of Barber and state of Kansas, one L. M. Spencer, whose more full Christian name is to the said county attorney unknown, was then and there the agent, employe, bailee, and trustee of an express trust of a certain corporation duly existing, organized, and incorporated under the laws of the state of Illinois, and named and known as 'Parlin & Orendorff Company,' and he, the said L. M. Spencer, then and there being a person over the age of sixteen years; and that the said L. M. Spencer was theretofore, to-wit, on the 7th day of February, 1889, by the said Parlin & Orendorff Company, duly appointed as such agent, employe, bailee, and trustee of an express trust for the said Parlin & Orendorff Company, and so continued to be such agent, employe, bailee, and trustee of an express trust, under and by virtue of the said appointment, up to and inclusive of the said 15th day of April, 1889. And the said L. M. Spencer, on or about the 15th day of April, 1889, in the county of Barber as aforesaid, under and by virtue of his appointment as such agent, employe, bailee, and trustee of an express trust, did have, receive, and take into his possession and under his care, of and from the said Parlin & Orendorff Company, a large amount of goods, wares, and merchandise theretofore obtained of the said Parlin & Orendorff Company, under and by virtue of a certain provision in a certain contract in writing, duly signed by the said defendant, L. M. Spencer, which said provision

is in the words and figures following, to-wit: 'All goods, and the proceeds of all sales of goods received under this contract, whether the proceeds are in notes, cash, or book-accounts, we agree to hold the same as collateral security in trust, and for the benefit of and subject to the order of Parlin & Orendorff Co., until we have paid in full, in cash, all our obligations due the said Parlin & Orendorff Co.,'—which said goods, wares, and merchandise are more particularly described as follows, to-wit: [items omitted;] all of the aggregate value of four thousand nine hundred and forty-nine dollars and thirty-seven cents, (\$4,949.37.) And the said L. M. Spencer the said property, and the proceeds thereof, as aforesaid, then and there feloniously and fraudulently did take, make way with, and secrete, with the intent the said property, and the proceeds thereof, unlawfully, feloniously, and fraudulently to embezzle and convert to his own use, without the assent of the said Parlin & Orendorff Company, which said goods, wares, and merchandise had come into the possession, care, and control of the said L. M. Spencer, under and by virtue of his being the agent, employe, bailee, and trustee of an express trust of the said Parlin & Orendorff Company, contrary to the form of the statutes in such cases made and provided.

"R. A. CAMERON, County Attorney.

"State of Kansas, Barber County—ss.: R. A. Cameron, being first duly sworn, deposes and says that he is the county attorney of Barber county, Kansas; that he has read the above and foregoing information; that the facts and statements therein set forth are true, as he is informed and verily believes.

"R. A. CAMERON.

"Subscribed and sworn to before me, this 8th day of May, 1889.

"FRANK HOLMES,

"Clerk of the District Court."

The defendant filed his motion to quash upon the following grounds: "(1) Because the information is not direct and certain as regards the offenses charged; (2) because the offenses therein pretended to be charged are not clearly set forth in plain and concise language, without repetition; (3) because the offenses pretended to be charged are not stated with such a degree of certainty that the court may pronounce judgment upon conviction, according to the right of the case; (4) because of the duplicity; (5) because the same do not state facts sufficient to constitute an offense against the laws of the state of Kansas; (6) because said defendant did not have a preliminary examination upon the charges therein set forth, as does and will appear upon the face of the transcript and papers of the examining magistrate filed herein, and upon which the information in this action is based." The motion was sustained by the court, and the defendant discharged. The state excepted to the rulings and decision of the court, and brings the case here.

R. A. Cameron and Sample & Long, for the State. Thomas George, for appellee.

HORTON, C. J., (*after stating the facts as above.*) The defendant in the court below presented a motion to quash and set aside the information. This motion was sustained, and thereupon the state asked leave to amend the information, which request was denied. No brief has been filed upon the part of the defendant, nor any appearance made by him in this court, and therefore it is impossible to determine from the record the grounds upon which the district court acted. We have examined the information, and it seems to us sufficient. Our attention is not called to any alleged defects. If it were defective, the application to amend should have been granted. Section 72 of the Criminal Code provides that "an information may be amended in matter of substance or form at any time before the defendant pleads, without leave. The information may be amended on the trial as to all matters of form, at the discretion of the court, when the same can be done without prejudice to the rights of the defendant. No amendment shall cause any delay of the trial, unless for good cause shown by affidavit." The information was evidently drawn under section 88 of the Crimes Act, (Comp. Laws 1885, p. 335.) The venue is properly laid. The full given name of the defendant is not stated; but the reason for this omission is given, and is sufficient. The offense is alleged to have been committed within the time fixed by the statute of limitations for the commencement of the action, and in the county and state within which the offense was triable. The defendant is alleged to have been the agent, employe, bailee, and trustee of an express trust of a certain corporation therein named. It is stated that under and by virtue of his appointment as such agent, employe, bailee, and trustee of the corporation he had in his possession and under his care a large amount of the property of the corporation. This property is particularly described and set out. Its value is stated to be \$4,949.37. It is further alleged that the defendant feloniously took, embezzled, and converted to his own use this property, which had come into his possession by virtue of his being the said agent, employe, bailee, and trustee of an express trust of the corporation.

The second count of the information is like the first, with the exception that it is therein charged that the defendant feloniously took, made way with, and secreted the said property with the intent to embezzle and convert the same to his own use. Under the authority of *State v. Lillie*, 21 Kan. 728, it was proper to charge the defendant with embezzling certain property received by him as agent, employe, bailee, and trustee of the corporation. If the motion to quash the information be considered in the nature of a plea in abatement upon the ground of no proper preliminary examination having been

had, the point is not tenable. In *State v. Spaulding*, 24 Kan. 1, the syllabus reads: "A preliminary examination was had upon a complaint charging defendant with the embezzlement, as city clerk, of certain moneys of the city of Leavenworth. Afterwards an information was filed containing several counts, each charging the embezzlement of the same moneys at the same time, and as the property of the same party, but differing in this, that one charged him with embezzling as clerk, another as agent, another as servant and so on. *Held*, that a special plea, that defendant had had no preliminary examination, except upon the charge of embezzling as clerk, and that therefore all the other counts should be stricken out, was properly overruled." The order and judgment of the district court will be reversed, and the cause remanded; all the justices concurring.

(43 Kan. 157)

SECURITY INVESTMENT CO. *et al.* v. LOVE.

(*Supreme Court of Kansas. Feb. 8, 1890.*)

REPORT AND CASE MADE—TIME OF TAKING.

Where a motion to extend the time granted for making and serving a case for the supreme court is duly filed, but is not submitted to the court until the time already granted has elapsed, the court has no authority to make any further extension.

Error from district court, Cowley county; M. G. TROUP, Judge.

Petition in error by Security Investment Co., James Benedict, E. E. Meeker, F. P. Schiffbauer, and B. F. Childs against John Love.

Hackney & Asp, for plaintiffs in error. *J. C. Stanley and J. Mack Love*, for defendant in error.

PER CURIAM. On January 11, 1889, the judgment in this case was rendered in the district court of Cowley county, in favor of the plaintiff below, John Love, who is now the defendant in error, and against the defendants below, who are now the plaintiffs in error, and on January 15, 1889, a motion filed by the defendants below for a new trial was overruled, and 90 days were given to the defendants within which to make and serve a case for review in the supreme court. On February 10, 1889, the defendants filed a motion in the district court for the purpose of procuring an order of the court further extending the time for making and serving a case for the supreme court. On May 3, 1889, this motion was submitted to the court, and the court granted the motion, and a journal entry was made giving to the defendants "sixty days, in addition to the time heretofore given, to make and serve a case made for review for the supreme court." On June 29, 1889, the above journal entry was amended so as to give the defendants 60 days from May 3, 1889, within which to make and serve a case for the supreme court. The case was made and served on July 2, 1889, and on October 22, 1889, the case, with a petition in

erro., was brought to this court, and the plaintiff below, who is now the defendant in error, now moves to dismiss such case and the petition in error from this court, for the reason that the case was not made and served within proper time. We think the motion must be sustained. We do not think that the mere filing of a motion in a court to extend the time for making a case for the supreme court can have the effect to so extend the time, nor even to extend the power or jurisdiction of the court or judge, so that the court or judge could entertain the motion to extend the time after the time fixed by law or by a previous order of the court or judge, within which the case should have been made and served, had already expired. Under the original order of the court the defendants below had up to April 15, 1889, within which to make and serve a case for the supreme court, and up to that time the court or judge had the power to extend such time further; but when that time passed, then the court or judge had no further power to extend the time. Such power had then passed away forever. *Insurance Co. v. Koons*, 26 Kan. 215. The mere filing of a motion in the court without submitting it to the court or judge, or even calling the attention of the court or judge to the same, could certainly not have the effect to extend the power of the court to grant a further extension of time, after the time given by the previous order had elapsed. The motion of the defendant in error to dismiss this case from this court will be sustained, and the case dismissed.

(43 Kan. 188)

In re TILLERY et al.

(Supreme Court of Kansas. Feb. 8, 1890.)

STATUTES—REPEAL—SUMMONING OF GRAND JURY.

In February, 1889, and under chapter 167 of the Laws of 1887, a grand jury was regularly ordered, drawn, and summoned. On March 8, 1889, a new act took effect, (Laws 1889, c. 153,) which provided in substance, among other things, that no grand jury should be ordered, drawn, or summoned except "when a petition, signed by one hundred of the tax-payers of the county, praying for said grand jury, shall be presented to the judge of the district court of said county at least twelve days before the commencement of the term of court at which such grand jury may be desired by said petitioners." The old law was repealed. The only new thing in the new law was the requirement that a petition, as above mentioned, should be presented to the judge before he ordered the grand jury. In less than 12 days after the taking effect of the new law, and, indeed, within 10 days thereafter, and on March 18, 1889, the district court convened; and on the next day the grand jury previously drawn and summoned were impaneled and sworn, and served as a grand jury. *Held*, under section 1 of the act relating to the construction of statutes, that the proceedings in ordering, drawing, and summoning the grand jury which took place before the taking effect of the new act were not destroyed by the taking effect of such act, and that the grand jury impaneled and sworn after the taking effect of the new act was a legal and valid grand jury. *HORTON, C. J., dissenting.*

(Syllabus by the Court.)

Original proceeding in *habeas corpus*.
Petition refused.

Oscar Foust, for petitioners. *H. A. Ewing* and *C. E. Benton*, for respondent.

VALENTINE, J. This is a proceeding in *habeas corpus*, brought originally in this court by John Tillery, Cary Crisler, Richard C. Mattox, Jesse Ford, Calvin Ford, and J. W. Drake, wherein it is set forth that D. D. Britton, the sheriff of Allen county, is unlawfully restraining the petitioners of their liberty. The sheriff makes return that he is holding each of the petitioners under a state warrant issued from the district court of Allen county, upon an indictment charging each of the petitioners with the commission of the crime of murder. Both the warrant and the indictment appear to be regular and valid; but the petitioners claim that the grand jury which found and returned the indictment were not legally impaneled, and were not in fact a grand jury, and therefore that the imprisonment of the petitioners upon such indictment is unlawful. The facts appear to be substantially as follows: On February 4, 1889, and in accordance with the laws of Kansas as they then existed, (Laws 1887, c. 167,) a grand jury was regularly ordered and drawn, and was afterwards summoned to attend the March term of the district court of Allen county, which was to convene on March 18, 1889. Afterwards, and on February 27, 1889, a new act relating to grand juries was passed by the legislature, which act took effect on March 8, 1889. Laws 1889, c. 153. Afterwards, and on March 18, 1889, the district court of Allen county convened in regular session; and on the next day the grand jury previously drawn and summoned for such term were impaneled and sworn, and commenced to serve, as a grand jury. On March 30, 1889, such grand jury returned the indictment aforesaid, charging the petitioners with the offense of committing murder in the first degree. On April 1, 1889, the warrants were issued under which the petitioners are now held in custody.

The new act purports to be an amendment of section 1 of the old act, and repeals sections 1 and 4 of the old act by the use of the following words: "Sec. 2. Sections one and four of chapter one hundred and sixty-seven of the Session Laws of 1887 be, and the same are, hereby repealed." The grand jury were regularly ordered, drawn, summoned, impaneled, and sworn as provided by the old act; and they were also regularly ordered, drawn, summoned, impaneled, and sworn as provided by the new act, except that there was no petition filed or presented to the district judge praying for a grand jury, as the new act requires. Under the new act, a grand jury is never ordered, drawn, or summoned except "when a petition signed by 100 of the tax-payers of the county, praying for said grand jury, shall be presented to the judge of the district court of said county at least twelve days before the commencement of the term of court at which such grand jury may be desired by said petitioners." Such a peti-

tion was never presented to the judge of the district court in this case, and, indeed, could not have been, under any statute; for the new act did not take effect 12 days before the commencement of that term of court, and the old act did not require any such petition. And for the reason that no such petition was presented, and for no other reason, it is now claimed by the petitioners that all of the proceedings connected with or relating to the grand jury were and are utterly null and void. On the other side, and by the state of Kansas, it is claimed that all the proceedings in ordering, drawing, summoning, impaneling, and swearing the grand jury, and their finding and returning the indictment, and the issuing of the warrant, and the imprisonment of the petitioners thereon, were and are wholly and entirely legal and valid, for the following reasons: Each and all of these proceedings, events, occurrences, or whatever they may be called, were each severally legal and valid at the time when they each took place, and were each in conformity with the laws of Kansas which were in force when each took place, and the change in the laws during the time while they were taking place did not invalidate or render void any of them. And the state, in support of this claim, refers, among other things, to section 1 of the act of the legislature concerning the construction of statutes, which act was passed in 1868, and is still in force, and provides, among other things, as follows: "Section 1. In the construction of the statutes of this state, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute: *First*. The repeal of a statute does not revive a statute previously repealed, nor does such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under or by virtue of the statute repealed. The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions, and not as a new enactment." Comp. Laws 1885, p. 919. This and similar statutes have often been construed by the supreme court. See the following cases: *Gordon v. State*, 4 Kan. 489; *Willets v. Jeffries*, 5 Kan. 473; *Bowman v. Cockrill*, 6 Kan. 327; *Gilleland v. Schuyler*, 9 Kan. 569; *State v. Boyle*, 10 Kan. 113, 116, 117; *Morgan v. Chapple*, Id. 224; *State v. Crawford*, 11 Kan. 32; *City of Troy v. Railroad Co.*, Id. 519, 531; *Jennness v. Cutler*, 12 Kan. 511, 512; *In re Petty*, 22 Kan. 477, 481, 487, 488; *Society v. Welch*, 26 Kan. 632, 640, 641; *Jockers v. Borgman*, 29 Kan. 109, 112, 113; *Board v. Linscott*, 30 Kan. 240, 260, 261, 1 Pac. Rep. 81; *State v. Commissioners*, 31 Kan. 460, 2 Pac. Rep. 562; *State v. Showers*, 34 Kan. 269-271, 8 Pac. Rep. 474. It would seem that the word "proceeding," as used in the statute, relating to the construction of statutes, is broad enough to include any proceeding; and it is certainly

broad enough to include any proceeding of a judicial or official character. It would seem that it should include the proceedings of any court, or any official board, or any officer; and there is some room for a claim that it might include still other proceedings. In the case of *Gordon v. State*, 4 Kan. 489, it was held by the supreme court, in construing a similar statute, that the word would not apply to county-seat proceedings; and the decision in that case was followed, though reluctantly, in the case of *State v. Commissioners*, 31 Kan. 460, 2 Pac. Rep. 562. There is no other decision in Kansas that attempts to limit the signification or meaning of the word "proceeding." In the case of *Bowman v. Cockrill*, 6 Kan. 327, the supreme court, in construing section 113, c. 118, Laws 1866, used the following language, to-wit: "Section 113 of this new act contains a saving clause which reads as follows: 'All proceedings, titles, etc., not completed at the time of the taking effect of this act shall be carried to final determination and execution according to the laws in force under which they originated.' The case of *Gordon v. State*, 4 Kan. 489, referred to by the plaintiff below, has no application in this case. The word 'proceedings' in the statute referred to in that case (Comp. Laws, 838) may mean judicial proceedings; but the word 'proceedings' in said saving clause undoubtedly means tax proceedings, the same as it does in that clause of section 10, c. 198, Comp. Laws, p. 878, which reads as follows: 'Such deed, duly witnessed and acknowledged, shall be *prima facie* evidence of the regularity of such proceedings, from the valuation of the land by the assessor, inclusive, up to the execution of the deed.'"

The legislature of Kansas has often used the word "proceedings" in a manner to show that it meant tax proceedings; and the very same legislature that passed the above-mentioned act of 1868, concerning the construction of statutes, also passed an act concerning assessment and taxation, in which act it used the word meaning tax proceedings. Gen. St. 1868, c. 107, § 112. In the case of *Morgan v. Chapple*, 10 Kan. 224, it is held that the word "proceeding," as used in the act relating to the construction of statutes, applies to mechanics' liens filed. In the case of *City of Troy v. Railroad Co.*, 11 Kan. 531, it is held that the statute applies to city ordinances; and in such case the following language is used: "Since the decision in *Gordon v. State*, 4 Kan. 489, the legislature has established a new rule as to the effect of changes in the statutes. The last sentence of the first paragraph of section 1, c. 104, Gen. St. p. 999, reads: 'The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions, and not as a new enactment.'" In the case of *Society v. Welch*, 26 Kan. 632, 640, 641, it is held, under the foregoing statute, as follows: "Proceedings commenced by a life

insurance company to obtain the right to discontinue its business in the state of Kansas, and to withdraw its securities from the state treasury, commenced under section 20, [of the insurance act,] before it was amended in 1881, are not destroyed or obliterated by the amendment of the section, and by the repeal of the original section; but the proceedings are as valid as though no repeal had been had." In the case of *Board v. Linscott*, 30 Kan. 240, 260, 261, 1 Pac. Rep. 81, it is held, under the foregoing statute, that the change of the boundary lines of counties will not invalidate tax proceedings already commenced.

It is admitted by the petitioners and their counsel, that the word "proceedings," as used in the statute relating to the construction of statutes, will include a judicial proceeding. Now, is not the ordering, drawing, and summoning of a grand jury a judicial proceeding? No grand jury could be drawn under the old law, and cannot be drawn under the present law, except upon the order of the judge of the district court. The grand jury must attend the court, and all their proceedings and business have an intimate connection with the court. The ordering, drawing, summoning, and impaneling of a grand jury are a portion of the proceedings provided for by law whereby criminal prosecutions are commenced in the district court; and it would certainly seem fair to call them judicial proceedings. The petitioners, we suppose, would answer that they are not proceedings connected directly with their particular cases; but this, we think, does not make any material difference. They are nevertheless proceedings, and judicial proceedings; and the statute does not require that they should be connected directly with any particular case or cases. And, further, they were valid when they took place; and we think they are valid still. In this connection, we might state that the statute does not say that no grand jury shall be impaneled or sworn unless the petition above mentioned has first been presented to the judge of the court. It simply says, in substance, that no grand jury shall be ordered, drawn, and summoned unless such a petition has first been presented. Now, the ordering, drawing, and summoning of the grand jury had already been done, and legally done, before the statute took effect; and we do not think that the taking effect of the statute had the effect to overturn or destroy what had already been done. The new statute could not have been complied with in the present case at all. It took effect only 10 days before the court convened, while under it the petition must be presented to the judge at least 12 days before the court convenes. We do not think that the statute was intended to be retroactive in its operation. Suppose that the statute had not taken effect until after the grand jury had been impaneled and sworn. Would the taking effect of the statute then have destroyed the grand jury? Or suppose that the statute had not taken effect

until after the indictment found in the present case had been returned and filed in the court. Would the taking effect of the statute at that time have invalidated the indictment? We do not think that the change in the statute in the present case affected the grand jury in the least. This proceeding will be dismissed, and the petitioners remanded to the custody of the sheriff.

JOHNSTON, J., concurring.

HORTON, C. J., dissenting.

(43 Kan. 159)

In re BECKWITH.

(*Supreme Court of Kansas. Feb. 8, 1890.*)

PARENT AND CHILD—CUSTODY OF CHILDREN.

The cases of *Chapsky v. Wood*, 26 Kan. 650, and *In re Bullen*, 28 Kan. 731, followed.

(*Syllabus by the Court.*)

Original proceedings in *habeas corpus*. The petition denied.

Keller & Noble, for petitioner. *Hayden & Hayden and Broderick, Rafter & Robinson*, for respondent.

PER CURIAM. This is an application in *habeas corpus*, brought in this court by George A. Beckwith for the possession of his minor child, Leonard N. Beckwith, aged 13 years. George A. Beckwith resides at Malta, Ohio. Grove R. Beckwith, who has the custody and control of Leonard N. Beckwith, resides at Holton, in this state. He is a son of George R. Beckwith, and a brother of Leonard N. On or about the 8th day of November, 1888, Grove R. Beckwith visited his father's home in Ohio, and, finding his mother, Sarah L. Beckwith, in poor health, with the consent and approval of his father, brought her and his brother Leonard N. and his sister Fannie to Holton at his own expense. The mother died at Holton on the 9th of August, 1889. A short time before her death she requested her son Grove R. to keep the custody and control of his brother Leonard N., and to properly care for and educate him, and not allow him to return to his father in Ohio. This Grove R. Beckwith promised to do. After the death of his mother, Grove R. applied to the probate court of Jackson county to be appointed guardian of the person and estate of Leonard N. Beckwith, and on the 27th day of August, 1889, the probate court of Jackson county appointed him his guardian. On the 29th day of August, 1889, George A. Beckwith came to Holton and stated to his son Grove R. that he had come to obtain possession of Leonard N. Grove R. then told him he promised his mother in her last illness, and after she knew she was approaching death, to keep and care for Leonard N., and in pursuance of that promise, and at Leonard's request, he had been appointed his guardian. George A. then applied to the probate court for an order requiring Grove R. to give an

additional bond in the sum of \$500, conditioned that he would care for and educate Leonard N. without charge to him. Pending this application, and before any order was made by the probate court, Grove R. voluntarily gave the additional bond, which on the 30th day of August, 1889, was filed and approved by the probate court. George A. Beckwith is by occupation a drayman. He is a poor man, living in a rented house. He is somewhat intemperate in his habits, and often uses vulgar and profane language in his family. He has living with him in Ohio one son and one daughter, both nearly of age. His daughter expresses her intention of leaving her father, and of coming to Kansas as soon as she is of age. Grove R. Beckwith is a young man of about 25, of good business habits, sober, and industrious. He is clerking in a drug-store, and is living in Holton, having with him two of his sisters. One teaches school, and the other takes care of the house and does the work for the family. Grove R. and his sisters in Kansas are very much attached to their younger brother, Leonard N. Grove R. is willing and anxious to retain the custody of his brother, and will support and educate him until he is capable of taking care of himself. He has given a bond of \$500 to relieve the father from all expense for his board, clothing, and education. Leonard N. expresses a decided preference to remain in Kansas with his older brother. It has already been decided in this court that "a parent's right to the custody of a child is not like the right of property, an absolute and uncontrollable right. It will never be enforced where its enforcement will obviously destroy the happiness and well-being of the child." *Chapsky v. Wood*, 26 Kan. 650. It has been further decided by this court that "above all things, [in a case like this,] the paramount consideration is, what will promote the welfare of the child?" *Id.*; *In re Bullen*, 28 Kan. 781.

After considering all the testimony presented in the case, we do not believe that the welfare of Leonard N. will be promoted by his being taken away from Grove R. Beckwith and given to his father to be taken to Malta, Ohio. He is being well taken care of by his brother and sisters at Holton. He is going to school, and is surrounded by good influences. Not believing it to be wise or proper to advise or consent to a change in the custody of the minor, the petition of George R. Beckwith will be denied, and Leonard N. Beckwith will be remanded to the custody and control of his brother, Grove R. Beckwith. George A. Beckwith, the petitioner, must pay the costs of this proceeding.

(42 Kan. 162)

AULD v. McALLASTER.

(*Supreme Court of Kansas. Jan. 11, 1890.*)

TAXATION—PAYMENT—SALE—TAX-TITLES.

1. The owner of three quarter sections of land that have been assessed and taxed as entire and complete quarter sections cannot pay taxes on an

undivided half of each of such quarter sections.

2. The county treasurer has no authority to sell an undivided interest in real estate for delinquent taxes and charges. The case of *Corbin v. Inslee*, 24 Kan. 154, followed.

3. A tax-title holder who seeks to recover the possession of an undivided half of three quarter sections of land by an action of ejectment against the original owner, and is defeated in such action, is entitled to be paid by the successful claimant the amount of the taxes, together with the proper charges, interest, and costs paid by him to procure his invalid tax-deeds; and such taxes, interest, costs, and charges are a lien upon the land until they are paid by the owner, or some person liable therefor.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Jefferson county; **ROBERT CROZIER, Judge.**

Mills & Wells, for plaintiff in error. *W. F. Gilluly*, for defendant in error.

SIMPSON, C. Action of ejectment by McAllaster against Auld, to recover possession of the undivided half of three quarter sections of land situate in Jefferson county. McAllaster claims by virtue of three tax-deeds executed August 30, 1883, and filed for record February 1, 1887, for taxes of 1878. The action was commenced on the 25th day of August, 1887. At the trial at the October term, 1887, McAllaster offered his deeds in evidence to prove title. They were objected to, and the objection sustained. The record does not disclose the nature of the objection, or the cause of the rejection of the deeds as evidence of title. McAllaster then offered his tax-deeds in evidence to show the amount of taxes he had paid. The deeds were admitted for this purpose, and to this ruling an exception was saved by Auld. It was then admitted by the parties that the three quarter sections of land in controversy were subject to taxation for the year 1878, and were assessed and entered upon the tax-roll of the year 1878 separately, and as entire quarter sections, and that the undivided half of each of said quarter sections was entered on the sale record of 1879 as delinquent for one-half the taxes assessed against said lands for 1878 as entire or full quarter sections. No other evidence was introduced by McAllaster. Auld then introduced the following tax-receipt:

"1,332. Treasurer's Office, Jefferson county, Kansas, Oskaloosa, Dec. 20, 1878. Received of D. Auld the sum of thirty-one and 27-100 dollars, being full of taxes on the following-described property for A. D. 1878:

Descrip.	Sec.	Town.	Range.	No.	Acres.	Total Val.	Total Tax.
Und. of S. W. ¼.....	28	7 18	80			\$100	\$10 21
N. E. ¼.....	33	7 18	80			490	10 53
N. W. ¼.....	33	7 18	80			480	10 53
							\$31 27

"[Signed] A. McLOUTH, County Treasurer. By I. SOUTHWARD, Deputy."

No other evidence was offered by either party. The trial court found the facts as follows:

"(1) That the land described in plaintiff's petition, to-wit: The S. W. $\frac{1}{4}$ of section 28, and the N. E. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of section 33, all in township 7, range 18, in Jefferson county, state of Kansas, was subject to taxation, and assessed for taxes, for the year A. D. 1878, and placed upon the tax-rolls of said county of Jefferson as separate and full quarter sections. (2) That on the 20th day of December, 1878, the defendant, David Auld, paid to the county treasurer the sum of \$31.27, and received a receipt therefor, as and for the taxes of the undivided half of each of the three quarter sections above named. (3) That thereafter the undivided one-half of each of said quarter sections were by the county treasurer carried on the tax-sale record of the year A. D. 1879 as being delinquent on the undivided one-half of each of said quarter sections for the year 1878, and on the 2d day of September, A. D. 1879, the county treasurer of Jefferson county offered for sale the undivided one-half interest in each of the three quarter sections aforesaid, each being offered separately; and such one-half interest was on said date, by said county treasurer, sold to J. E. McAllister, the plaintiff in this suit, and certificates of sale for the undivided one-half interest of each of said three quarters issued to said purchaser. The taxes paid at the date of sale, and subsequently indorsed on the certificate, are as follows, with amounts and dates of payment: 'Certificate No. 2,165. Undivided $\frac{1}{2}$ of S. W. $\frac{1}{4}$, Sec. 28, Town. 7, range 18. Paid September 2d, 1879, \$12.33.' Indorsed on certificate January 16, 1880, \$15.80. 'Certificate No. 2,167. Undivided one-half of N. E. $\frac{1}{4}$, Sec. 33, Town. 7, range 18. Paid September 2, 1879, \$12.77.' Indorsed on certificate January 16, 1880, \$18.96. 'Certificate No. 2,168. Undivided $\frac{1}{2}$ of N. W. $\frac{1}{4}$, Sec. 33, township 7, range 18. Paid September 2d, 1879, \$12.77.' Indorsed on certificate January 16, 1880, \$18.96. (4) Thereafter, and on the 30th day of August, A. D. 1883, the county clerk issued and delivered to the plaintiff three tax-deeds, one deed for the undivided half of each of the above-described quarter sections. Each of the deeds recite the same facts, and are alike in all particulars, except the description of undivided half interest in different tracts, and the amount of taxes. Each of said deeds were filed for record, in the office of the register of deeds in and for Jefferson county, on the 1st day of February, 1887, and recorded, respectively, in Volume 4 of Tax-Deeds, at pages 360, 363, and 365. That the cost of the three tax-deeds, and recording the same, is \$——."

The trial court found the following conclusions at law: (1) The plaintiff has no title to the land described in his petition, and is not entitled to the possession thereof. (2) The sales made by the county treasurer, and the tax-deeds issued in pursuance thereof, are void. (3) The plaintiff is entitled to judgment for the taxes paid by him, with interest from dates of payment to date of deeds

at the rate of 24 per cent. per annum, and 20 per cent. after date of deeds to the date of this judgment, with costs of deeds and recording the same."

The following judgment was entered: "It is therefore considered, ordered, and adjudged by the court here, upon the conclusions of fact and the conclusions of law, that the plaintiff have and recover the sum of \$334.66, being the whole amount of taxes, interest, and costs by said plaintiff paid, and to him accrued, to this date, and the amount of taxes, charges, and costs paid on each quarter section aforesaid be, and the same is hereby, declared and adjudged a lien on each of said quarter sections, to-wit: \$103.10 on the S. W. $\frac{1}{4}$ of section 28 and \$115.20 on the N. E. $\frac{1}{4}$ of section 33, and \$115.36 on the N. W. $\frac{1}{4}$ of section 33, all in township 7, range 18 east, in the county of Jefferson, state of Kansas; and that, unless said amount is paid in to the clerk of this court in thirty days from the date hereof, that an execution and order of sale issue, directed to the sheriff of said county, to appraise, advertise, and sell each of said quarters, respectively, to pay said respective judgment. It is also ordered and adjudged that the plaintiff pay all the costs made in this case to this date, to be taxed by the clerk, and that the defendant pay all costs hereafter made to collect or enforce said lien."

Auld brings the case here; and his counsel urges as errors for reversal—*First*, that the receipt is not sufficient to sustain the finding of the court, "that on the 20th day of December, 1878, the defendant, David Auld, paid to the county treasurer the sum of \$31.27, and received a receipt therefor, as and for the taxes on the undivided half of each of the three quarter sections." Counsel argue this question as if nothing else appeared to show the amount of land paid upon than the abbreviation "Und.," while the receipt itself shows that only 80 acres of each quarter section were paid upon, and all the subsequent entries in the sale-book, the sale, and the deeds show that only one-half of each quarter section was embraced in the receipt.

As a second cause for reversal, they argue that in cases where there has been no legal sale of land for delinquent taxes the only remedy of a purchaser at such a sale, or pretended sale, is to cause the county commissioners to have refunded to the purchaser the money he has thus expended; that it is only in cases in which it is proper that a sale is to be had that a purchaser can have any remedy against the land, or the owner thereof. *Corbin v. Young*, 24 Kan. 201, is cited; and it is said that the following language of the court in that case is very significant: "If his deed be adjudged invalid, as in this case, on account of a defect in the sale, then, under section 146, he may recover his money, and 10 per cent. interest, from the county." This language occurs in connection with a statement, made by the judge writing the opinion, of the remedies the tax-title holder in this

particular case would have to recover the taxes and interest if he had brought a legal action, instead of filing a petition to quiet title, and cannot possibly bear the construction that counsel attempt to give it. In the same volume (the case of Fairbanks v. Williams, page 16) will be found a construction of the various provisions of the tax-law on this question. This view has been uniformly held by this court since that decision. The law is now substantially what it was then, and is that in all cases in which the holder of a tax-deed is defeated in an action by him to recover possession of the land the successful claimant shall be adjudged to pay the holder of the tax-deed the amount of taxes he has paid, with costs and interest. This is done when for any reason the holder of the tax-deed is defeated. The taxes are a lien from the 1st day of November of the year they are levied until they are paid by the owner of the property, or other person liable to pay the same. In this view, it does not make any difference, on the question we are considering, whether the county treasurer had authority to sell, or that he omitted some essential requirement of sale, such as notice, as either would be sufficient to defeat the tax-title holder in his action, and give him the benefit of the statute. But, if the law was as claimed by counsel for the plaintiff in error, this land was subject to sale in 1879 for the unpaid taxes of 1878. The attempt of Auld to pay on an undivided half of the three quarter sections was a nullity, as the county treasurer has no legal authority to receive a payment on an undivided part of the land, and no authority to sell an undivided interest for non-payment of taxes. *Corbin v. Inslee*, 24 Kan. 154.

The third cause for reversal is that the judgment of the court below makes the taxes, interest, and costs paid by the tax holder a lien on all the land,—that unsold as well as that sold. Counsel reverse their position now, and claim there was a sale; while the correct view is that, the sale being invalid, the lien that attached to the whole land on the 1st day of November, 1878, for the taxes assessed and levied thereon, still exists upon the whole land, and will until the taxes are paid by the owner of the land, or other person liable to pay the same; and it is this lien that the court can enforce in favor of the holder of the invalid tax-deed, if the owner does not pay. There is no error in the findings or judgment, and we recommend that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(42 Kan. 789)

BROWN et al. v. MILLIKEN, County Clerk,
et al.

(Supreme Court of Kansas. Nov. 9, 1889.)

ESTOPPEL—IN PAIS—CONSTITUTIONAL LAW—SPECIAL LAWS—LIMITATIONS.

1. Where a township has duly issued bonds in aid of the construction of a railroad, and after-

wards a compromise with the holders of such bonds is effected, and in exchange therefor funding bonds are issued, and the original bonds are taken up and canceled, and afterwards such township levies and collects taxes in payment of said funded indebtedness, and more than one-third of said funding bonds are thus paid, and where it is shown that such bonds are in the hands of innocent and *bona fide* holders, held, that thereafter such township is estopped from alleging any irregularities in the proceedings leading up to and the issuing of such funding bonds, and such estoppel is equally effective against the individual taxpayer of the township.

2. That the act of the legislature authorizing the city of Chetopa to incorporate as a city of the second class, being chapter 59, Laws 1871, is unconstitutional and void, being in contravention of section 1, art. 12, of the constitution, which provides that the legislature shall pass no special act conferring corporate powers, (*Corporate Powers of City of Council Grove*, 20 Kan. 619;) and further held, if said city had been legally incorporated as a city of the second class it would still be liable for its proportionate share of such funding bonds, although such funding bonds were issued after the city was made a city of the second class; and further held, that plaintiffs, tax-payers of said city of Chetopa, are in no condition to claim protection, by reason of the statute of limitations, from the payment of said tax.

(Syllabus by Clogston, C.)

Commissioners' decision. Error from district court, Labette county; JOHN R. RITTER, Judge.

This was an action brought by the plaintiffs in error, tax-payers of the city of Chetopa, to enjoin a tax levied in the year 1888 to pay the interest, and an installment of the principal, of certain funding bonds issued by Richland township in the years 1879-80, to compromise and cancel \$50,000 in bonds issued by the township in July, 1870, in payment of a subscription to the capital stock of the Missouri, Kansas & Texas Railway Company. The record shows that, at the time the bonds were voted to the Missouri, Kansas & Texas Railway Company, Richland township embraced the city of Chetopa, then a city of the third class. In 1871 an act was passed by the legislature, being chapter 59, Laws 1871, making said city a city of the second class, and since that time the city has been acting as a city of the second class. After the voting of the \$50,000 bonds by Richland township, no interest was paid upon them; and afterwards suits were brought in the United States circuit court, and judgments duly obtained against the township, declaring said bonds legal and valid; and afterwards, in 1878, a compromise was made between the township and the bondholders, by which the bonds were to be taken up and canceled by the issue of funding bonds, at the rate of 60 cents on the dollar, for the original indebtedness. At that time the bonds and interest amounted to about \$80,000; and, in order to issue the funding bonds, a proposition was submitted to the electors calling for an election on the 1st day of August, 1878, and notice of the election was published in a newspaper in the township, the first insertion being on July 15th. Afterwards an election was held which resulted in a majority

of the votes in favor of the issuing of said funding bonds called for in the proposition voted on, being the sum of \$33,000. Afterwards funding bonds were issued in the amount of \$49,000. In the proceedings and the election, the city of Chetopa, then claiming to be a city of the second class, took no part or interest. Afterwards taxes were duly levied upon the property of the township, not including the city of Chetopa, from the year 1879 up to the year 1888, and more than one-third of this bonded indebtedness was paid. In the year 1888 a tax was spread upon the tax-rolls of the township, including as well the property of the city of Chetopa, to pay an installment of principal and interest upon the remaining funding bonds, and this action was brought by taxpayers of the city of Chetopa to enjoin the collection of that tax. Trial by the court, and judgment for the defendants.

Case & Glasse, for plaintiffs in error.
Kimball & Osgood, for defendants in error.

CLOGSTON, C., (*after stating the facts as above.*) The plaintiffs in error now contend that the tax-payers of Chetopa are not liable for this tax for the reasons—*First.* That the city of Chetopa is no part of the township of Richland. *Second.* That the funding bonds were illegally issued, (1) because in excess of the amount authorized by law; (2) in excess of the amount stated in the notice and proclamation of election; (3) because the notice of election gave only 15 days' notice, whereas the statute required that 30 days' notice of such election be given the electors. *Third.* That the funding bonds created a new obligation upon Richland township, and was created after the city of Chetopa became a city of the second class, and had ceased to be a part of the township. *Fourth.* and lastly, they claim that they are protected by the statute of limitations. Plaintiffs in error base their claim that the city of Chetopa is a city of the second class, and no longer a part of the township of Richland, upon chapter 59 of the Laws of 1871, which by title is an act authorizing certain cities therein named to incorporate as cities of the second class. This statute was an act to incorporate the city of Chetopa and the city of Garnett, in Anderson county, cities of the second class; and plaintiffs in error contend that under the authority of Corporate Powers of City of Council Grove, 20 Kan. 619, they are at least a *de facto* city of the second class, and, being a *de facto* city, that the defendants cannot question its organization. In other words, that the state, having attempted to incorporate the city as a city of the second class, alone can question the regularity of that proceeding; while, on the other hand, it is claimed that this act is in violation of section 1, art. 12, of the constitution. This statute is in direct violation of the constitution, and conferred no powers upon the city by which it could become a city of the second class. It is true, as stated in Corporate Powers of

City of Council Grove, *supra*, that the city was a *de facto* city of the second class, and as such might not defend against its own acts done while purporting to act as a city of the second class; but this case presents a different question. Here the city is claiming protection by reason of its organization under an act which violates the constitution. The city is claiming protection from the payment of a debt which was created when it was a part of the township of Richland, and is seeking immunity from taxation by reason of this unconstitutional act of the legislature. This we think they cannot do. And as far as this act of the legislature is concerned, the city of Chetopa must be held to be still a part of Richland township, and a city of the third class.

The next proposition, that the city of Chetopa is not liable, because these funding bonds must be collected of the township only, as the city is no longer a part of the township, falls with the first proposition. It was a part of the township, and therefore a part of Richland township, at the time of the voting and issuing of the bonds last named. However, if not a part of the township at the time of the issuing of the funding bonds, that, under the authority of Commissioners v. Commissioners, 26 Kan. 181, would not protect the city against the tax. In that case bonds were issued while the territory sought to be taxed was a part of Marion county. Afterwards a township was detached and added to Harvey county, and, at the time the funding bonds were issued, this township was so detached. Mr. Justice BREWER in that case said: "There were therefore, at the time of the division, certain bonds outstanding, which were a lien upon the detached territory, and the indebtedness evidenced by which bonds has never in fact been paid. The funding amounts to this, and nothing more: In lieu of one certain evidence of debt, another is issued. In consideration, it is true, of a change in the time and interest, a change was made in the amount promised to be paid. But this change was a reduction, and therefore a benefit to the debtor. Still, neither the one paper nor the other was the debt itself, but only the written evidence thereof. The debt remains the same. The change was in the evidence of that debt."

The plaintiffs still insist that, even if this be true, the city is not liable for this debt, for the reason that these funding bonds were illegally and irregularly issued; that a greater amount was issued than was authorized to be issued; that the notice of election gave 15 days' notice, when under the law there ought to have been given 30 days' notice. It is true that these defects did exist, and, if properly raised and at the proper time, would defeat and destroy the bonds issued thereunder.

One fact is not disclosed by this record, and it is an important fact to be considered in connection with these irregularities,—who owned the bonds at the time this suit

was brought? If in the hand of the original purchasers, one question is presented; but if in the hands of innocent purchasers, a very different question. The plaintiffs are seeking to relieve themselves of a liability. They admit their original liability under the original indebtedness, and now, if they can escape this tax, it must be upon the ground of irregularity in the issue of these new bonds. As above said, the question whether or not these bonds can now be declared void must be largely determined by the question as to who owned the bonds. Before this court would be warranted in restraining and enjoining a tax, it must be shown that the tax is absolutely void; not void under a possible condition of facts, but void under the facts as they actually exist. The plaintiffs have given us no information in their petition, and the court does not aid us in its findings, and does not show whether these bonds were held by innocent purchasers or not, and, in the absence of that showing, we must hold against the plaintiffs, and that they are held by innocent purchasers.

But to go back to the question. Defendants in error claim, admitting the irregularities, that this could not avail the plaintiffs, for the reason that, after the issue of these bonds, Richland township levied taxes, and paid for some nine years the interest and principal, and at the time this action was brought more than one-third of the funded debt had been paid; and they say that that township would be estopped from setting up these irregularities if suit was brought upon the bonds, because at the time the bonds were issued the bondholders gave up to that township a valid indebtedness against it of \$80,000, and took in lieu thereof these funding bonds for \$49,000; that after this had been done the township could not keep the original bonds, and then say that the funding bonds were void on account of these irregularities on the part of the municipal corporation or its officers. Against this argument plaintiffs urge that they are now called upon for the first time to pay taxes for this debt, and up to this time have never had any cause of complaint, and no ground upon which they could have founded an action to enjoin the payment of the bonds; and this claim, so far as the facts go, is true. Can this avail them? Why did they not take part in the proceedings leading up to the issuing of the funding bonds? And why is it that no tax has been levied upon their property? It is by reason of their claim that they were outside of and no part of the township. It is perhaps true that the people of the township thought that the city was outside of the township, and for that reason the tax was not carried out upon the property of the city. This was a mistake of facts. Can this mistake on the part of the township serve as a protection to the city from this tax? In the first place, the city is in a better condition than it was before the original indebtedness of \$80,000 had been cut down and merged into this new

indebtedness, now less than \$30,000. In equity can plaintiffs be allowed to say that by reason of these things they should not pay? We think not. The findings of the court show that these bonds were voted by a majority vote of Richland township. It also shows that the city took no part in the election, but there is no showing but that the votes cast at that election were a majority of all the votes, even if the city had voted. The strong probability is, however, that the city had the larger number of voters, but no presumption can be indulged in to assist the plaintiffs in this action, and therefore we can fairly presume that the finding of the court was supported by the facts; that the votes cast at that election were a majority of the votes in the township, including the vote of the city. We see no reason why the rule of estoppel should not be applied as against the township, and, if good against the township, then as to every inhabitant and tax-payer of the township; and for the purpose of this action the plaintiffs are estopped, as well as every other tax-payer, and the fact that they have escaped taxation heretofore is no ground why the doctrine should not be applied to them as well as against the township. The township paid taxes many years. The township received and canceled the bonds of the original indebtedness; and while standing in this relation, with the presumption that the bonds are in the hands of innocent holders for value, we think that the township, as well as the plaintiffs, is estopped from alleging and setting up the irregularities complained of by plaintiffs. *Commissioners v. Hinchman*, 31 Kan. 729, 3 Pac. Rep. 504; *Brown v. City of Atchison*, 39 Kan. 37, 17 Pac. Rep. 465; *County of Tipton v. Locomotive Works*, 103 U. S. 523; *Marcy v. Township of Oswego*, 92 U. S. 637; *Ward v. Johnson*, 95 Ill. 215; *Thatcher v. People*, 98 Ill. 632; *Meyer v. Brown*, 65 Cal. 583, 4 Pac. Rep. 25, 625; *Arms Co. v. Barlow*, 63 N. Y. 65; *Insurance Co. v. Bruce*, 105 U. S. 328; *Block v. Commissioners*, 99 U. S. 686.

The last claim made by plaintiffs is that the statute of limitations has run in favor of the plaintiffs. The action of the township or township authorities determines this question. By an oversight, or by mutual mistake, the city has been left out, and has paid no part of this indebtedness during the nine years since the issuing of the funding bonds. Does this omission protect them from the payment of the balance of this indebtedness? The township is liable still for the debt. There is no bar that the township could plead, and no limitation that it could claim, to protect it against suits, and we think that these individual tax-payers of the city of Chetopa are in no condition to claim protection from such a bar. It is therefore recommended that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(14 Colo. 30)

CONWAY v. JOHN *et al.*

(Supreme Court of Colorado. Feb. 14, 1890.)

CORPORATIONS—STOCK—TRANSFER—ATTACHMENT—EVIDENCE—NOTICE—REDEMPTION.

1. Under the laws of this state, title to stock in a corporation, as against creditors, can only pass by transfer on the books of the company.

2. The proper foundation being laid, the character and contents of the missing files in a cause tried before a justice of the peace may be established by oral evidence.

3. Under the act of 1879, in relation to attachments before justices of the peace, requiring notices in certain instances to be posted in three of the most public places within the precinct, evidence showing that one of such notices was posted on the front door of the court-house, one on the side of the stairs leading to the justice's office, and one on a certain *corral* fence, and that "these places were then regarded, and would now be, three about as public places as could be found in the precinct," shows a sufficient compliance with the statute, as against a collateral attack upon the proceedings.

4. Ordinarily, inadequacy of price paid is not alone sufficient cause for setting aside a judicial sale, particularly of personal property of fluctuating value.

5. The right of redemption from a judicial sale of personal property does not exist in this state.

(Syllabus by the Court.)

Appeal from district court, El Paso county.

On July 26, 1881, one of the appellees, viz., the Trinidad Gas Company, a defendant below, issued to David H. Irland its certificate of stock No. 25 for 15 shares of the capital stock of said company, the shares being of the face value of \$100 each, and registered upon the company's books in Irland's name. On April 19, 1882, said shares of stock were still standing upon the books of the defendant company in the name of Irland, and on that day the Rifenburg Coal Mining Company, a copartnership composed of the defendants James M. John and Caldwell Yeaman, commenced an action before a justice of the peace, by attachment against Irland, and caused said shares of stock to be attached as the property of said Irland. Such proceedings were thereafter had in said cause that on May 5, 1882, judgment was rendered against Irland, and the shares of stock ordered by the justice to be sold to satisfy such judgment, which was done on May 22, 1882, the defendant John becoming the purchaser thereof at the constable's sale, for the sum of \$50. Prior to the commencement of said attachment suit, viz., on November 22, 1881, Irland had assigned the certificate of stock to appellant, Conway, but no assignment or transfer thereof to Conway was ever made upon the books of the defendant company, nor was there any request to have such transfer made until November, 1883, long subsequent to the purchase of said stock at constable's sale by the defendant John. Neither of the appellees had any knowledge or information, prior to November, 1883, that Irland had assigned said certificate, or that the plaintiff, Conway, made any claim thereto. The agreed value of the 15 shares of stock at the time of the purchase at constable's sale by defendant John is \$550. This action was brought to set aside this sale, on

account of the alleged invalidity of the judgment of the justice and the inadequacy of the price paid. The plaintiff also seeks, in the alternative, to redeem. The trial below resulted in a judgment for the defendant.

Wells, McNeal & Taylor, for appellant. *J. M. John*, for appellees.

HAYT, J., (*after stating the facts as above.*) The attack upon the judgment of the district court sustaining the title of appellee John to the stock in controversy is based upon four grounds: (1) That the stock was not, at the time of the attachment proceedings, subject to attachment as the property of Irland, because of the previous assignment to appellant. (2) That the stock could not be attached upon a writ issued by a justice of the peace. (3) Irregularities in the proceedings in court, and attending the sale, sufficient, as it is claimed, to avoid the judgment and vitiate the sale. (4) Inadequacy of the price paid.

It is admitted by the pleadings that the certificate of stock in controversy provided upon the face thereof that it was "transferable only upon the books of the company, in person or by attorney, on the surrender of this certificate." This was inserted by virtue of the following by-law of the company: "Transfers of stock shall be made on the books of the company either in person or by attorney, and the possession of the script shall not be regarded as evidence of ownership, unless it shall so appear on the books of the company." Express statutory authority for the making of such by-law is given the corporation in section 241, Gen. St. 1883, in this language: "The shares of stock shall not be less than ten nor more than one hundred dollars each, and shall be deemed personal property, transferable as such in the manner provided by the by-laws." In addition to this, we find a subsequent section, requiring, *inter alia*, that a book shall be kept by the secretary or clerk of such corporation showing the names of all stockholders, with their places of residence, the number of shares of stock held by each, etc., and providing, further, that "no transfer of stock shall be valid for any purpose whatever, except to render the person to whom it shall be transferred liable for the debts of the company, * * * unless it shall have been entered therein, as required by this section, within sixty days from the date of such transfer." Section 269, Id.

Here we have a clear provision of statute taking from the owner of stock the right to transfer it in accordance with the known rules of the common law, and substituting therefor another and different mode. This change was doubtless made for the purpose of furnishing record evidence of the title, and, in view of the plain and explicit language employed, the statute cannot be disregarded. Under its provisions, we are clearly of the opinion that, notwithstanding the attempted transfer from Irland to appellant, the stock remained subject to attachment at the suit of

the former's creditors. *Fiske v. Carr*, 20 Me. 301; *Bank v. Cutler*, 49 Me. 315; *Bank v. Gridley*, 91 Ill. 457; *Association v. Cory*, 129 Mass. 435; *Northrop v. Turnpike Co.*, 3 Conn. 544; *Weston v. Mining Co.*, 5 Cal. 186; *Naglee v. Wharf Co.*, 20 Cal. 530; *Murphy's Case*, 51 Wis. 519, 8 N. W. Rep. 419.

We are aware that in some jurisdictions somewhat similar provisions have been held to relate solely to the government of the corporation in the transaction of its corporate business, to advise it of the names of those entitled to vote, receive dividends as stockholders, etc., and that creditors should not be allowed to take advantage of any failure to comply with such requirements. Such decisions have usually, however, been based upon statutes essentially dissimilar from those here under consideration, and frequently upon the construction to be given a by-law of the company, in the absence of express statutory restriction. But the decided weight of authority, as well as the better reason, we think, unite in support of the conclusion that when, as in this state, the statute of the state, as applicable to corporations, requires that shares shall be transferred in a particular mode, there must be at least a substantial compliance with the requirement in order to protect the property against future assignments or levies. *Bank v. Gridley*, *supra*.

At the time of these proceedings it was provided by statute that shares of the defendant in any corporation should be subject to be taken upon writs of attachment, and sold to satisfy any judgment rendered against the defendant. Sess. Laws 1879, p. 20, § 7. Every detail of procedure necessary to making the levy and sale seems to be fully provided either in this act, or by sections 1447 to 1452, inclusive, of the General Laws of 1877. And an examination of the chapter in which these sections occur convinces us that said sections apply as well to attachments issued out of a justice's court as to those emanating from courts of record. It was shown upon the trial below that the files in the attachment case had been lost, and could not be produced. Oral testimony of the character and contents of the lost papers was therefore properly admitted; and it has been held that, if the record does not show the jurisdiction of the justice, the fact may be proved by evidence *alibi*. *Liss v. Wilcoxon*, 2 Colo. 85; *Hittson v. Davenport*, 4 Colo. 169; *Behymer v. Nordloh*, 12 Colo. 352, 21 Pac. Rep. 37; *Bacon v. Bassett*, 19 Wis. 54.

There can be no question, under the evidence, in reference either to the form or number of the notices posted in this case; but it is claimed that the evidence failed to show that such notices were posted in three of the most public places within the precinct, as required by section 20 of the act of 1879. Said section reads as follows: "Sec. 20. Whenever affidavit shall be made that the defendant resides without the state of Colorado, and cannot be found therein, so that service of

process cannot be personally had on him, or that he conceals himself or stands in defiance of an officer, with intent to prevent service of process upon him, it shall be the duty of the justice of the peace to cause notice of the attachment to be published by posting three notices of the levy of such attachment, and of the day and hour at which the trial of the cause will be had at his office, in three of the most public places within his precinct. If at the time set for trial the defendant does not appear to defend the action, the justice shall proceed to hear the cause, and render judgment, as in cases where the summons has been personally served: provided, that such notices shall be posted at least ten (10) days prior to the day set for trial: and provided, further, that the constable shall in such cases retain the summons until the day set for trial, so that personal service of the summons may be had before the day set for trial, if practicable."

The testimony of Judge Yeaman is to the effect that the constable, by his direction, posted the notices; that one of them was posted on the front door of the court-house, one on the side of the stairs leading to the justice's office, and one on the fence in front of the Park livery stable corral; and the witness further testifies that "these places were then regarded, and would now be, three about as public places as could be found in the precinct." It would certainly be very difficult for a witness to swear positively that three particular places in a town of several thousand people were the most public places in the precinct, and a construction of the statute which would require this to be done would be unreasonable. We think the evidence of the witness, in the absence of showing to the contrary, warranted the court below in finding that the requirements of the act in this particular had been complied with. The constable retained the summons for service until the day of trial, while appellant contends that it should have been returned at or before the time of filing of affidavit of non-residence, and an *alias* summons issued. It will be noticed, however, that under this act authority to publish notice of the attachment is derived from the affidavit, and not from the officer's return. The affidavit may be filed before any attempt is made to obtain personal service; and the order may be made at the time of the institution of the suit, or at any time thereafter. The act required the summons to be retained by the officer until the day set for the trial, and we see no objection to the course pursued in this case. An examination of the evidence shows that all requirements of the statute were closely followed in the proceedings before the justice; and we must therefore hold that the same are valid, at least, as against this collateral attack; and, in obedience to well-established principles, the sale cannot be set aside solely on account of the smallness of the price paid. Ordinarily, inadequacy of price paid is not alone sufficient cause for set-

ting aside a judicial sale, and this is particularly applicable to sales of personal property of fluctuating value. *Ror. Jud. Sales*, § 354. *Swires v. Brotherline*, 41 Pa. St. 135. This sale appears to have been fairly conducted at a time and place previously advertised, as required by law. We discover no circumstances tending to impeach the transaction. The ruling of the court below refusing to set aside the sale cannot, therefore, be disturbed. Neither can the courts decree a right of redemption. Such right does not exist, in the absence of statutory enactment conferring it. *Ror. Jud. Sales*, § 906 et seq.; *Freem. Ex'ns*, § 314 et seq. The statutes of this state confer the right only in cases of sales of real estate. The judgment is affirmed.

(14 Colo. 27)

BRAHONEY et al. v. DENVER, U. & P. R. Co.

(*Supreme Court of Colorado*. Feb. 14, 1890.)

APPEAL — MATTERS NOT APPARENT ON RECORD — OBJECTIONS WAIVED.

1. Objections and exceptions relating to evidence and instructions given at the trial cannot be considered on error or appeal unless properly preserved in the record filed in this court.

2. Objections to a complaint on the ground of misjoinder of parties, or that several causes of action are improperly united, and other like objections, if not taken by demurrer or answer, will be deemed waived.

(*Syllabus by the Court.*)

Appeal from superior court of Denver.

Broune & Putnam, for appellants. *Wolcott & Vaile*, for appellee.

ELLIOTT, J. From the abstract of the record upon which this appeal is prosecuted, it appears that prior to the institution of this action in the court below each of the appellants, seven in number, had commenced his separate suit in the superior court of Denver against appellee, claiming damages to certain real estate, or to some interest therein, owned by them in severalty, by reason of the occupation of certain streets, alleys, or lands by said appellee for its railroad. Thereupon, appellee, a railroad corporation organized and doing business in this city, county, and state, commenced this action in said superior court against appellants, and in its complaint, by appropriate averments, set forth, among other things, certain facts showing that it was in no wise liable to appellants for the damages claimed in their several suits, and asked that said appellants, respectively, be enjoined from prosecuting the same, and that the compensation and damages claimed in their said several suits, if it should be found they, or either of them, were entitled thereto, might be ascertained and assessed by commissioners appointed by the court, or by a jury of freeholders, as provided by the act of eminent domain. Appellants filed their answer to the complaint, and by consent the several complaints in their original suits were made a part of said answer. In their answer they also prayed that the compensation and dam-

ages claimed by them might be assessed by a jury to be selected by the court pursuant to the statute, etc. Replication being filed, the cause was, by consent of the parties, tried to a jury of six persons, who, upon consideration of the evidence and instructions of the court, returned a verdict in favor of appellee. Motion for a new trial being overruled, judgment was entered on the verdict perpetually restraining appellants from prosecuting their several original suits. To reverse this judgment the case is brought here by appeal, under the act of 1885.

The abstract of the record filed in this court contains no bill of exceptions, nor any part of the evidence or instructions to the jury. Hence we are not advised that appellants made any objections, or reserved any exceptions, upon which to base assignments of error relating to the merits of the trial. They did not by demurrer or answer make the objection that there was a misjoinder of parties defendant, or that several causes of action had been improperly united, or other objection of like character. Hence they must be held to have waived all such objections. *Civil Code*, § 55. The objection that the complaint does not state facts sufficient to constitute a cause of action might now be considered, if error had been properly assigned upon that ground, but from a careful examination of the pleadings we are satisfied that such an assignment would not be well taken. The facts stated were sufficient to constitute a cause of action, even though appellants might, if they had not waived the same by their mode of pleading, have successfully attacked the complaint on other grounds. *Mining Co. v. Johnson*, 13 Colo. —, 22 Pac. Rep. 459.

It is assigned for error that the court exceeded its jurisdiction in entertaining the complaint of appellee against appellants, and that the whole proceeding in said superior court was irregular, and without authority of law. It must be admitted that the suit or proceeding was somewhat anomalous, though not altogether without precedent, as a bill of peace, or proceeding to avoid expense and multiplicity of suits. *Railroad Co. v. Steiner*, 44 Ga. 546. The court was one of general jurisdiction, within the limits of the city of Denver, in all civil causes both at law and in equity. *Gen. St. c. 103*, § 5. This cause was an equitable one, though it contemplated, in a certain contingency, the assessment of compensation and damages to appellants according to the act of February 12, 1877, providing for the exercise of the right of eminent domain. The court was not without jurisdiction over the parties or the subject-matter. By joining in this proceeding without objection or exception, appellants must be held to have waived all objections to mere irregularities or errors of form. As neither the evidence nor the instructions are before us, we must presume that the verdict of the jury upon the merits was fully warranted; and, the court having

by its decree approved and confirmed the same, we see no reason for disturbing it. The judgment is accordingly affirmed.

(5 N. M. 356)

LEYSER v. FIELD.

(*Supreme Court of New Mexico. Jan. 18, 1890.*)

MALICIOUS ATTACHMENT—LIABILITY OF ATTORNEY.

1. In an action against an attorney for maliciously issuing an attachment, it is error to refuse to instruct the jury that defendant "had a right to act on facts and circumstances brought to his knowledge through the usual and ordinary business channels, if he believed them to be true, and if such facts and circumstances were of such character, and came from such sources, that lawyers generally, of ordinary care, prudence, and discretion, would act on them, under similar circumstances, believing them to be true, then such facts and circumstances, if believed by said defendant to be true, will constitute probable cause."

2. In such a case, it is error to refuse the instruction that "the mere termination of the attachment suit in favor of plaintiff does not raise the presumption of want of probable cause for suing out the writ, nor can the jury presume that defendant acted maliciously from this fact alone."

Appeal from district court, Socorro county; BRINKER, Judge.

John H. Knaebel, for appellant. *Warren & Fergusson*, for appellee.

LEE, J. This is an action of trespass on the case, brought by Simon Leyser against Louis Lieberman, Joseph C. Mannheimer, Neill B. Field, Henry C. Lewis, and S. E. Ulman, in which the plaintiff charges in his declaration that the said defendants, on the 1st day of May, 1888, at the county of Socorro, and territory of New Mexico, not having good and reasonable or probable cause to believe that the said plaintiff had fraudulently disposed of his property so as to defraud and hinder his creditors, or was about to dispose of his property with such intent, but wrongfully, maliciously, and unlawfully contriving and intending to injure, harass, and oppress, did wrongfully, falsely, and maliciously procure or caused to be issued out of the district court of the second judicial district in and for the county of Socorro a certain writ of attachment, at the suit of Lieberman & Mannheimer, whereby the sheriff was commanded to attach the goods, lands, and tenements of the plaintiff in a suit in said district court by the said Lieberman & Mannheimer for the recovery of a demand against the said Simon Leyser for the sum of \$728; that said defendant Field caused said sheriff to levy said attachment upon a stock of goods and merchandise of the said plaintiff; that the plaintiff, in order to procure a release of said goods, was obliged to and did pay off said demand, though said debt was not yet due; that he was injured in his business; and that he had to pay out the sum of \$1,000 in and about the premises for getting his property released; wherefore he demanded judgment against the defendants for \$5,000. The defendants Lieberman & Mannheimer were not served with process, and did not appear. The other defendants pleaded not guilty to said

declaration. A jury trial was had upon the issue thus formed, with the result of a verdict of not guilty as to all of said defendants who appeared except Neill B. Field, against whom a verdict was returned for the sum of \$400. After a motion for a new trial had been overruled by the court below, judgment was entered upon said verdict against defendant Field, from which he appealed to this court.

The evidence is set out in the bill of exceptions. The following is a brief statement of the evidence of Leyser and Field: Leyser testified that he was engaged in the mercantile business; that he was responsible; he denies that he was about to dispose of his property with intent to hinder, delay, or defraud his creditors; that a day or two before the bringing of the attachment proceedings the defendant Field, as one of the attorneys of Lieberman & Mannheimer, came to him, and presented a bill for payment, in favor of said firm, for the sum of \$728; that the claim was on an open account; that he refused to pay it for the reason that it was not due; that a day or two afterwards suit was commenced by attachment; that the sheriff came with a writ, and levied upon his goods; that he paid off said claim in order to have his property released. The defendant Field testified that he was an attorney at law; that he received the claim for collection from Lieberman & Mannheimer; that he presented the same to the said Leyser, and demanded payment; that said Leyser refused, claiming that the account was not due; that he was informed that Leyser had been reported by the commercial agency as about to make a fraudulent assignment; that an attachment had already been commenced by one Staab, and that other claims were in the hands of other attorneys for collection; that he commenced attachment proceedings by direction of his clients; that he acted in good faith in the premises; that he had no ill will against said Leyser, and did not desire to harass or oppress him. The appellant assigns some 24 grounds of error, but we do not deem it necessary to decide other than such points as we think decisive of the case.

The errors to which we will direct our attention arise in the charge given by the court to the jury, and in certain instructions asked by the defendant and refused. The court below, in its charge to the jury, submitted to them alike the questions of malice and probable cause as matters of fact to be determined by them, and did not instruct them as to what facts or circumstances would or would not constitute probable cause, though the defendant asked instructions to that effect, two of which are as follows: "(2) The court instructs the jury that the mere termination of the attachment suit in favor of plaintiff does not raise the presumption of want of probable cause for suing out the writ, nor can the jury presume that the defendant Field acted maliciously from this fact alone." "(10) The court instructs the jury that the defend-

ant Field had a right to act upon facts and circumstances brought to his knowledge through the usual and ordinary business channels, if he believed them to be true; and if such facts and circumstances were of such character, and came from such sources, that lawyers generally, of ordinary care, prudence, and discretion, would act upon them, under similar circumstances, believing them to be true, then such facts and circumstances, if believed by said Field to be true, will constitute probable cause." The court refused to give these instructions, to which the defendant excepted, and thus raises the question upon which we think the case must be decided. The supreme court of the United States, in the case of *Stewart v. Sonneborn*, 98 U. S. 187, quite clearly sets forth the law in a case very similar to the one under consideration. In that case they refer to the ancient case of *Farmer v. Darling*, 4 Burrows, (1971,) where Lord MANSFIELD instructed the jury that "the foundation of the action was malice, and malice, either expressed or implied, and the want of probable cause, must both concur." And, says the supreme court, "from 1766 to the present day, such has been constantly held to be the law both of England and this country, * * * and the existence of malice is always a question exclusively for the jury." Malice, it is admitted, may be inferred by the jury from the want of probable cause. But the want of probable cause cannot be inferred from any degree of even expressed malice, but what amounts to probable cause is a question of law, in a very important sense. In the celebrated case of *Sutton v. Johnstone*, 1 Term R. 493, the rule was thus laid down: "The question of probable cause is a mixed question of law and of fact. Whether the circumstances alleged to show it probable are true, and existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law." This doctrine is generally adopted. *McCormick v. Sisson*, 7 Cow. 715; *Besson v. Southard*, 10 N. Y. 236; *Barron v. Mason*, 31 Vt. 189; *Driggs v. Burton*, 44 Vt. 124; *Stewart v. Sonneborn*, 98 U. S. 194. "It is," says the supreme court in the last case cited, "the duty of the court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what facts it proves, with instructions that the facts found amount to probable cause, or that they do not." What facts or circumstances will, when proven, authorize the court to instruct the jury, if they find such facts and circumstances to be true, what will constitute probable cause, must, in the nature of things, vary with every different case; but there are some general principles that underlie all cases, and frequently, when applied, will settle the case in question. For instance, in this case the conduct of the defendant is to be weighed in

view of what appeared to him when he filed the proceedings in attachment; not what the facts proved to be afterwards, but had he reasonable cause for his action when he took it? Not what the actual fact was, but what he had reason to believe it was. *Faris v. Starke*, 3 B. Mon. 4; *Raulston v. Jackson*, 1 Sneed, 128. If the defendant acted in good faith, with an honest purpose to collect a just claim for his clients, the mere wrongful resort to legal process affords no ground of action. It is *damnum absque injuria*. And further than the cost, which is the legal penalty for bringing a groundless suit, there could be no other damages. *McKellar v. Couch*, 34 Ala. 336. The misuse of legal process in a civil proceeding must have been wrongful, corrupt, and malicious; for if the defendant had an honest and reasonable conviction that Leyser was justly indebted to his clients for the claim he held for collection against him, and it was reported, and he believed the report to be true, that plaintiff was about to make a fraudulent assignment of his property, he had a right to act upon facts and circumstances brought to his knowledge through the usual and ordinary business channels, if he believed them to be true; and if such facts and circumstances were of such character, and came from such sources, that lawyers generally, of ordinary care, prudence, and discretion, would act upon them, under similar circumstances, if they believed them to be true, then such facts and circumstances, if believed by Field to be true, would be probable cause for instituting the attachment proceedings, and if such facts were found by the jury to be true his defense would have been complete. And we think the court erred in not giving instruction No. 10 asked for by defendant, which is hereinbefore set forth.

The defendant also asked the court to instruct the jury that the mere termination of the attachment proceedings in favor of the plaintiff does not raise the presumption of want of probable cause. The supreme court, in the case before referred to, holds, in every case of an action for malicious prosecution or suit, it must be averred and proved that the proceeding instituted against the plaintiff has failed; but its failure has never been held to be evidence of either malice or probable cause. The same is held in *Cloon v. Gerry*, 13 Gray, 201; *Adams v. Lisher*, 3 Blackf. 445. The instruction was a fair and clear expression of the law material to the defendant, and it should have been given; and it was error to refuse it.

Having come to the conclusion that this case must be reversed, we do not give any opinion upon the other points raised. The judgment will be reversed, and the cause remanded for a new trial.

LONG, C. J., and McFIE and WHITEMAN, JJ., concur.

KIRCHNER v. LAUGHLIN.

(Supreme Court of New Mexico. Jan. 19, 1890.)

EVIDENCE—TESTIMONY OF WITNESS ON FORMER TRIAL—STENOGRAPHER—DECLARATIONS.

1. The testimony of a witness on a former trial cannot be proved by another, except in case of the death or insanity of the witness, or where it appears at the time of the trial that by reason of physical disability of a permanent character he is unable to be examined, and that by the exercise of due diligence his deposition could not have been taken, or where the witness is beyond the seas or absent from the territory, and his whereabouts cannot by due diligence be ascertained, or where, by the procurement of the opposite party, the witness absents himself from the jurisdiction of the court after having been duly summoned.

2. Under Comp. Laws N. M. 1884, § 543, which provides that the stenographer of the court shall take an oath faithfully to discharge his duty, and that the short-hand notes taken by him shall be deposited in the office of the clerk of the court, but which does not declare the legal value of the notes as evidence, the testimony of the stenographer, after refreshing his memory by referring to his notes, as to the testimony of a witness on a former trial, is hearsay.

3. In an action on a contract, declarations of persons as to defendant's admissions of the contract cannot be received in evidence until the agency of those persons for defendant has been proved independently of the declarations.

Appeal from the district court, Santa Fe county; REEVES, Judge.

Gildersleeve & Preston, for appellant. *Catron, Knuebel & Clancy* and *Thos. Smith*, for appellee.

WHITEMAN, J. This is an action in *assumpsit* brought by August Kirchner, appellee, to recover damages for the breach of a contract alleged to have been made by the plaintiff with the appellant, Saron N. Laughlin, and Joseph H. Wiley, on the 9th day of August, A. D. 1879, the contract having been signed and sealed by Wiley for himself and as the agent of Laughlin. Under this contract, Kirchner delivered to Wiley 2,000 ewes, which Laughlin and Wiley were to care for for the period of 5 years, and to pay and deliver to Kirchner annually, for the use of the same, 500 wethers and 500 fleeces of wool, and at the end of 5 years Laughlin and Wiley were to deliver to Kirchner 200 ewes of like age, quality, and condition as those which should be delivered to them. Some time later, 500 additional ewes and 23 rams were delivered by Kirchner upon an unsealed written agreement, dated September 14, A. D. 1881, which was signed in the name of Laughlin by Wiley as agent, and also for himself. This agreement provides, in effect, that the original contract should be enlarged so as to include the additional ewes and rams, under the same terms and conditions as were specified in the original contract. The plaintiff prayed damages for the sum of \$3,500, with interest and cost of suit. The defendant, Laughlin, interposed the pleas of *non assumpsit* and *non est factum* to the declaration, denying his signature to the instrument in writing sued on, and the authority of any one to execute it for him. The case was

tried at the July term, A. D. 1885, of the district court of Santa Fe county, at which trial the court instructed the jury to return a verdict for the defendant, Laughlin. The plaintiff then carried the case by writ of error to the supreme court, which court, at the January term, 1888, reversed the judgment of the district court, and directed a new trial, (17 Pac. Rep. 132,) which was had at the August term, A. D. 1888, and the plaintiff recovered a judgment in the sum of \$3,200, and the defendant brings the case upon appeal to this court.

The appellant insists that the district court erred in permitting Harry S. Clancy, a witness in behalf of the appellee, to testify as to what William Breeden had testified to upon the former trial of the cause. The witness Clancy was the official stenographer of the court, and, upon being sworn as a witness, testified that he acted as stenographer upon the former trial; that upon that trial William Breeden was sworn and examined as a witness in behalf of plaintiff; and, upon being further interrogated, the witness Clancy testified as follows: "Question. Where is William Breeden? Answer. I am informed

— I have seen a letter written by Mr. Breeden within the last two weeks from the state of Ohio. Q. State whether or not, on the former trial of this case, the paper I now hold in my hand was identified by Col. Breeden under oath. A. From my memorandum made on that paper it appears that it was introduced in evidence upon the former trial of this cause as an exhibit. Q. State whether or not the memorandum in pencil, 'A. H. S. C.' is an original note made by you as stenographer on this exhibit, when introduced in evidence. A. It is. Q. Are you acquainted with the handwriting of William Breeden? A. I am. Q. State, if you know, in whose handwriting the body of this instrument is written. A. It is in the handwriting of Col. William Breeden. Q. Do you recollect, in substance, what Col. Breeden testified to as to the signatures to this paper? A. I am able to testify on that point, after refreshing my memory by referring to the original short-hand notes. Q. Have you looked at these notes? A. Yes, sir. Q. State, in substance, what Col. Breeden testified then on that subject. A. Col. Breeden testified that this paper was in his handwriting, and that it was executed by Joseph Wiley, for himself and for Saron N. Laughlin, and also that the additional agreement on the last page was signed by Mr. Wiley for himself and for Mr. Laughlin."

The testimony of the witness Clancy was permitted to go to the jury, notwithstanding the objection of the defendant Laughlin. It was shown upon the trial by the testimony of M. A. Breeden, who is the brother of the absent witness, William Breeden, that he, William Breeden, his wife and family, resided in the town of Santa Fe, N. M.; that he left the territory of New Mexico in July, and that the witness believed him to be in the state of Ohio at that time; that he had re-

ceived a letter from him within a week or 10 days previous to that time; that he could not state positively whether his brother was on the road or in the territory, but that his understanding was that he was in the state of Ohio, and he did not know when he was expected to return. In the decisions of the courts of the several states that have passed upon the question of the admissibility of the evidence of a witness given upon a former trial of a case, there is great lack of uniformity, and the law is far from being settled. Several courts have held that, where a witness is beyond the jurisdiction of the court, evidence is admissible of his testimony given at a former trial between the same parties, with reference to the same subject-matter. *Magill v. Kauffman*, 4 Serg. & R. 317; *Clinton v. Estes*, 20 Ark. 235; *Scheerer v. Harber*, 36 Ind. 536; *Long v. Davis*, 18 Ala. 801; *Wilder v. St. Paul*, 12 Minn. 192, (Gil. 116); *People v. Devine*, 46 Cal. 45; 1 Greenl. Ev. § 163. It is held, on the contrary, that where the residence of the witness is known, his deposition should be taken, unless it be shown that the circumstances of the case are such as to prevent the taking of his deposition. *Wilbur v. Selden*, 6 Cow. 164; *Gershauser v. Insurance Co.*, 7 Nev. 174; *Berney v. Mitchell*, 34 N. J. Law, 341; *Le Baron v. Crombie*, 14 Mass. 234; *Bergen v. People*, 17 Ill. 427. There would seem to be less force in the position maintained in the cases first cited, at the present time, than there may have been a quarter of a century ago. The imperfect mail facilities and slow methods of travel which existed then made the taking of a deposition of a witness residing or being in another state difficult and uncertain of accomplishment, and consumed a great deal of time; whereas, under the fast mail system and rapid railroad communication with all parts of the country maintained at the present day, the taking of a deposition of a witness in another jurisdiction is accomplished with comparatively little expenditure of time, trouble, or money. In *Burton v. Driggs*, 20 Wall. 133, cited by the appellee, the court held that, a deposition taken in the case having been lost, a copy of the deposition taken under the direction of the clerk, and by him compared and certified to be a true copy, might be read in evidence in place of the original, (the witness being out of the jurisdiction of the court.) The objection was made that "the copy was not the original." "This, as a fact," the court say, "was self-evident, but, as a ground of objection, it was wholly indefinite." There was no suggestion made "that the place of the lost deposition could only be supplied by another one of the same witness, retaken, and that secondary evidence was inadmissible to prove the contents of the former;" and the case, for that reason, was decided upon the ground that the contents of any written instrument, judicial records, and all other documents of a kindred character, lost or destroyed, may be proved by competent evidence; that there

was nothing in the objection made to the introduction of the copy to take the case out of the general rule; and the decision seems to intimate that, if a proper objection had been made, the case would have been decided differently. The requirements of the statute of New Mexico (Comp. Laws 1884, § 548) are that the stenographer of the court shall take an oath faithfully to discharge his duty as such, and that the short-hand notes taken by him shall, at the end of each term of court, be deposited in the office of the clerk of the court, but the statute does not declare the legal value of such notes as evidence. The testimony of the witness Clancy, as to what the witness William Breeden had testified to upon the former trial, therefore, was but hearsay evidence, his memory being refreshed by a reference to his short-hand notes of the former trial; which notes may have possessed a measure of value, as evidence somewhat higher than hearsay evidence, by reason of their having been taken by a sworn officer of the court, and the notes having been in the custody of the clerk of the court during the interval between the first and second trial, but were lacking in value as evidence of a high degree, because of the failure of the statute to declare their legal value. The record of this case does not suggest any reason why the deposition of the witness William Breeden could not have been taken. We are of the opinion that neither legal principle nor sound policy will justify the admission of the evidence given on a former trial, between the same parties and about the same subject-matter, except in case of the death or insanity of the witness, or where it appears at the time of the trial that, by reason of physical disability of a permanent character, he is unable to be examined, and that, by the exercise of due diligence, his deposition could not have been taken, or where the witness is beyond the seas, or where the witness is absent from the territory, and his whereabouts cannot, by due diligence, be ascertained, or where, by the procurement of the opposite party, the witness absents himself from the jurisdiction of the court, after having been duly summoned to the trial.

Upon the trial of the case, the appellee, August Kirchner, was permitted to testify in his own behalf, as to what Col. Breeden stated to the appellee and Joseph H. Wiley, in the absence of appellant, viz., that a certain letter, which was the subject of a conversation between the persons named, was in the handwriting of appellant, and also as to the contents of the letter, and the admission of this testimony is assigned by the appellant as error. The testimony of the appellee upon this point was as follows: "The first year I received my '*partido*' complete. The second year comes Mr. Wiley, and says: 'Chiquito, I received a letter from Mr. Laughlin. We are having a bad year this year, and now I want you to do something for me.' I said: 'All right; you come to Col. Breeden's office.' We went there, and he took out his letter

from Mr. Laughlin. Col. Breeden read it, and said: 'Chiquito, that is Mr. Laughlin's handwriting. He says he want you to release him from the *partido* for this year.' I said: 'I will do so.' I told Mr. Breeden, 'I will do so, because it is a bad year.' The appellant objected to the testimony. The objection was overruled. The court, in passing upon the objection, stated that anything that was said between Kirchner, Col. Breeden, and Wiley was competent. The evidence would be competent only in the view that Breeden and Wiley were the agents of Laughlin, and were at that time acting within the scope of their authority. If they were not his agents, then any statement they may have made concerning the letter would not be competent. The case was prosecuted upon the theory that Wiley was the agent of Laughlin, and the purpose of this evidence was to show that Laughlin, by asking to be released from paying the *partido* for that year, admitted his liability under the contract made by Wiley in his name. Laughlin testified that Wiley was not his agent; that he never authorized him to make such a contract, or to sign his name; and that he did not know until the year 1883 that such a contract had been made in his name, and that, when informed of it, he immediately repudiated the contract, and went to Kirchner and demanded that his name be taken off. Wiley testified that "Laughlin was never in any way interested in the contract, and never gave me at any time permission or authority to sign his name to the Kirchner sheep contract, or to enter into any contract for him with Mr. Kirchner in regard to sheep, and Mr. Laughlin never at any time or place ratified the contract with Kirchner sued on in this cause." His testimony is entirely silent upon the point as to whether he did or did not sign Laughlin's name to the contract, and in this connection the testimony of the witness M. A. Breeden may have some significance. This witness testified that the name of Saron N. Laughlin, on the last page of the contract, was in the handwriting of William Breeden. We think the evidence of the appellee, Kirchner, as to the declarations of Breeden and Wiley concerning the letter claimed to have been written by Laughlin, was improperly admitted, for the reason that the evidence in the case does not satisfactorily establish that either Breeden or Wiley was, at the time, an agent of Laughlin. The declarations of an agent are only admitted when the agency is proved. To permit the proving of an agency by proving the declarations of the agent would be assuming it without that which is a prerequisite to the admissibility of the declarations. It would be without reason or logic to say that an agent's declarations were admitted because he was an agent, and that he was an agent because his declarations were admissible. "Hence the rule is settled that such declarations cannot be received until there be proof of the agency *aliunde*." Whart. Ev. § 1183; Breckenridge v. McAfee, v.23p.no.3—12

54 Ind. 144; Jordan v. Stewart, 23 Pa. St. 244; Williams v. Davis, 69 Pa. St. 21.

Other errors are assigned by the appellant, but, believing that the determination of the questions already considered in favor of the appellant will entitle him to a new trial, we will not stop to consider the other questions presented by the record. The judgment of the district court will be reversed, and the cause remanded for a new trial.

LONG, C. J., and LEE and McFIE, JJ., concur.

(2 Idaho [Hash.] 642)

CHAMBERLAIN v. WOODIN.

(Supreme Court of Idaho. Feb. 13, 1890.)

ELECTIONS—IRREGULARITY AND FRAUD—NONSUIT—EVIDENCE—REVERSAL.

1. When a motion for nonsuit is made by defendant at the close of plaintiff's testimony because of its insufficiency, and overruled, if defendant then introduces his testimony, he waives his right to have the error in overruling the motion reviewed.

2. A judgment will not be reversed when there is a substantial conflict in the testimony, or unless it seems the result of passion or prejudice.

3. When an election is so irregular and fraudulent that the true result cannot be ascertained from the returns of the poll, they should be rejected, and the true result shown by other evidence.¹

(Syllabus by the Court.)

Appeal from district court, Bingham county; C. H. BERRY, Judge.

Hawley & Reeves and W. H. Savidge, for appellant. Smith & Smith and John T. Morgan, for respondent.

BEATTY, C. J. At the general election held in November, 1888, the parties to this action were opposing candidates for the office of sheriff of Bingham county, to which the appellant was declared elected. The respondent, in pursuance of our statute for "Contesting Certain Elections," beginning with section 5026, commenced this action of contest, alleging as the ground thereof—*First*, malconduct of the board of judges of election in Rexburg precinct, in said county; and *second*, that illegal votes were cast in said precinct, and counted for appellant. At the trial of the cause, when respondent closed, appellant interposed his motion for nonsuit, which being overruled, he proceeded with the introduction of his testimony. By the judgment of the court the respondent was declared elected to said office, and the appellant here asks its reversal.

All the alleged errors complained of by appellant may be considered under the following subdivisions: (1) That the court erred in overruling his motion for nonsuit because respondent's testimony was insufficient to warrant a judgment in his favor; (2) that the findings do not support the judgment; (3) that the court failed to find on all the issues raised; and (4) that the judgment is not warranted by the facts and the law.

The consideration of these questions has required an examination of perhaps the most voluminous record that has ever been sub-

¹ See note at end of case.

mitted to the review of this court, and it has been found a most onerous duty to comply with the closing suggestion of appellant's brief, in which he "commends it to our careful attention and thorough consideration." We earnestly urge a closer observance of the provisions of our statutes which forbid the incumbering of the record with "redundant and useless matter." Even when an appeal is taken upon the ground of the insufficiency of the evidence, it is entirely unnecessary to incorporate all that has been said by witnesses, including questions and answers. The statute will protect the appellant who inserts in his record, in narrative form, only such evidence as is pertinent to the material issues, and procures thereto the proper certificate of the judge, showing that all such evidence is included.

Motion for nonsuit on account of insufficiency of evidence is waived by the subsequent introduction of testimony by the mover. Did the court err in overruling the motion for nonsuit? The motion, as above stated, was based upon the alleged insufficiency of the evidence. In the determination of this question, examination of the testimony is unnecessary, for any error the court may have made in this matter was entirely waived by the subsequent introduction of appellant's testimony. It is so settled by the highest authority, to which, for the justification of our ruling, we refer. *Bradley v. Poole*, 98 Mass. 179; *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493; and *Insurance Co. v. Crandal*, 120 U. S. 530, 7 Sup. Ct. Rep. 685.

Do the findings support the judgment? The appellant claims the findings do not justify and support the judgment. It is admitted they would be more satisfactory if more specific, but, being "proceedings" under our statute, they must likewise be liberally construed. They are, in effect, that "the judges of said election in said precinct permitted legal voters to be arrested, intimidated, and prevented from voting;" "that they permitted legal voters to be arrested for challenging illegal voters;" "that they permitted a large number of persons, whom they suspected were illegal voters, to vote without challenge;" "that they themselves were terrorized by threats of arrest, if they challenged illegal votes;" "that one of the clerks was violently arrested and taken away because he had challenged illegal votes;" "that they conducted the election almost the entire day without any election register;" "that they and others were intimidated and prevented from challenging any person offering to vote by armed men who were sent there from without the precinct by the United States marshal." Our statute does not define what constitutes malconduct of the officers of election, but it must be held that any proceedings which result in unfair elections, that deprive the qualified elector of the opportunity of peaceably casting his ballot and having it counted as cast, or that permit illegal votes

to be cast and counted, are within the statutory provisions. Section 570 of our statutes directs that the judges of election must challenge any person offering to vote whom they know or suspect not to be qualified; also it is required the "election register" must be at the polls. That the judges themselves were intimidated does not justify such conduct on their part as results in an unfair election. The design of the law is that the election shall be so conducted as to result in the free expression of the legal voters' will. If this fails from any conduct on the part of the judges, regardless of the cause, the law is not fulfilled. It cannot be doubted from these findings that the election was irregular in the highest degree. The findings further show that those irregularities procured the appellant to be declared elected, when he had not received the highest number of legal votes; that illegal votes were cast for him; that, if the illegal votes cast and counted for him were deducted from his total vote, it would leave him with fewer legal votes than respondent had, and upon these findings the court rendered judgment that defendant was elected to the office, and appellant was not, which we think they fully sustain.

Were all necessary findings made? The appellant's next assignment of error is that the court did not find upon all the issues. This question seems for the first time to be suggested in his argument, as the record does not disclose that he asked any additional findings, or excepted to those found as insufficient, or made any objection whatever. It is noted that his objection now is not to a failure to find on all material, but on all issues raised in the case. By numerous decisions it has been held that findings must be made upon all material issues, but even this ruling is modified in various ways; as that, "when the court fails to find on a material issue, * * * judgment will not be reversed if the finding must have been adverse to the appellant." *Hutchings v. Castle*, 48 Cal. 156; *People v. Center*, 66 Cal. 564, 5 Pac. Rep. 263, and 6 Pac. Rep. 481; *California S. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 65, 7 Pac. Rep. 123. Also, if the facts found sustain the judgment, there is no necessity to go further, and find on other issues, (*Roberts v. Haley*, 65 Cal. 402, 4 Pac. Rep. 385;) and this court has said: "It must be held that all questions put in issue, and not found upon, would have been found against the appellants, or they were deemed immaterial." (*Gamble v. Dunwell*, 1 Idaho, 271.) However, the question before us is not the establishment of a rule for the formulation of findings, but was it necessary in this case to find others than those in the record? This is solved by the pleadings themselves. The findings made are almost in the language of the allegations in the complaint, and substantially responsive to all thereof, while the answer simply denies those allegations, and hence raises no additional issue. It is held by numerous authorities that findings which follow the language

of the pleadings are sufficient; and, these being responsive to all the material issues tendered by the pleadings, we deem others are unnecessary.

Is the judgment sustained by the evidence?

The only remaining question for consideration is whether the testimony is sufficient to justify the decision of the trial court. The reversal of a judgment on this ground must be only upon clear and convincing evidence that the court erred in its conclusion. In *Ainslie v. Printing Co.*, 1 Idaho, 643, it is held that whenever "there is a substantial conflict in the testimony it will not disturb the verdict or the decision of the court below." Other courts have gone even further, and by abundant authority it has become the established rule to sustain the conclusion of the trial court, unless it appears it is supported by so little evidence, and contradicted by so much, that it must be inferred it was reached through passion or prejudice. We will briefly consider the testimony concerning—*First*, the alleged irregularities of the election; and, *second*, the rejection by the court, as illegal voters, of those persons who claimed to have withdrawn from the Mormon Church just prior to the election.

It was claimed in argument that the deputy-marshals were there in pursuance of law, and only for the purpose of preserving the peace and the purity of the ballot-box. Attention has been directed to the chapter on the "Elective Franchise," commencing with section 2002, Rev. St. U. S., as containing the authority under which the marshal acted. The only section therein at all relevant provides that "when an election at which representatives or delegates to congress are to be chosen is held in any city or town of 20,000 inhabitants or upwards, the marshal shall, on application in writing of at least two citizens residing in such city or town, appoint special deputy-marshals." No power under this section is given for such appointment, the place not having the necessary population. Section 2023 provides that, when an arrest is made, "the person so arrested shall forthwith be brought before a commissioner, judge, or court of the United States for examination." Instead of the record showing any compliance with this provision, it appears therefrom that most of the parties arrested were simply held as prisoners until the polls closed, and were then discharged. This being so, the marshals, instead of upholding the law, were, in its name, violating the rights of citizens. It is also in testimony that they were armed; that in a threatening manner they dictated how the election should be conducted; that they arrested and carried away those who were peaceably and lawfully challenging those suspected of being illegal voters; that they arrested election officers; that unauthorized persons that day registered illegal voters, who were permitted to vote; that part of the time the necessary election books were not at the polls,—all of which is disputed by other witnesses, who further testified that other

persons, representing the opposite party, were there with a large number of warrants, with the design of intimidating registered voters by arresting them. From this mass of conflicting testimony, the court undertook to sift the truth, and, from the record and statements made in argument, it appears the court concluded the election was attended with such irregularities as to wholly vitiate it, and it set the poll aside. With such a conflict in the testimony it cannot be concluded the court erred, but, on the contrary, the testimony shows the election was a farce. It was a scramble between contending parties, in which the law was ignored. The indulgence of such methods would speedily convert the beneficent power of the ballot into an engine of fraud and lawlessness. The lower court properly treated it as void, and set the returns aside, which is justified by the law as well as the facts. McCrary on Elections, (2d Ed.) §§ 302, 416, lays down the rule that when there are such irregularities, and disregard of the law, as that the real expression of the legal voters is not had,—when the true result cannot be ascertained by the returns,—the poll must be set aside; but he adds: "It does not follow that legal votes cast at such poll must be lost. They may be proven by secondary evidence, * * * [the poll being primary,] and, when thus proven, may be counted." Other authorities sustain the view, which we see no reason to condemn. In this case, the court having treated the election as irregular and invalid, permitted the parties to produce those who had voted, and by inquiring into their qualifications, and how they voted, ascertain the true result. This examination involves one of the questions most complained of by the appellant. A large number of those who had voted for him had been members of the Mormon Church, and shortly prior to the election had, in form, severed their connection therewith. Appellant insists this was done in good faith; that they thereby became qualified electors, and, having been registered as such, were entitled to vote; that the court, if it inquired into their qualifications, was bound to so hold, because they were no longer members of that proscribed organization.

There can be no doubt of the court's power, in a case of an election contest, to inquire into the qualification of those who voted, and reject all disqualified. If in this case it found the alleged withdrawal from the church by those parties was a mere form,—a pretense to avoid the letter of the law,—and that in faith and practice they still adhered to such organization, it would be justified in rejecting them as legal voters. These persons were before the court, and from their own statements and the facts of the case we may judge them. A very large number withdrew on the same day, and all within about two weeks immediately prior to the day of election. They say this was absolutely without counsel or advice from any one, and generally without knowledge that others were doing

the same. In most of the cases it was done by a written resignation, which each claimed he had written out himself. Yet appellant in his brief says these withdrawals were by "notices in writing, and in substantially the following forms." Then follows the form. It is most remarkable that so many persons, at about the same time, but without instructions or concert of any kind, should sever their association with this organization in a form of words so similar that appellant can reproduce what he alleges is substantially the form used. They also testified their reason for leaving the church was their desire to vote, and be endowed with all the privileges of American citizenship; that, while they had two years prior been denied the privilege of voting for the same reason, they had not until shortly before the last election been impressed with the gravity of the situation, and that the desire to change their *status* came upon them rather suddenly. While claiming they had acted in good faith, most of them admitted they still wore their "endowment garments." The general explanation of this was, they would wear them until they wore out, but one explained, "they will never wear out." Should it prove true that they acted in good faith, we will much regret our present doubts. Gladly would we see them in the enjoyment of all the rights accorded to American citizenship, but only through voluntary allegiance to the government, and full obedience to all its laws. In view of all the testimony, we must conclude, with the court below, that those people did not act *bona fide*; that such withdrawals resulted from a concert of action, most likely through the counsel of their leader, and for the sole purpose of evading the law; and that they were not entitled to vote. Even should the evidence in the record justify a reversal, we would be precluded therefrom by another fact contained therein. On page 654 it is certified that testimony, in the form of exhibits, used by the parties at the trial, is not included in the record, and respondent claims it is important. There is no certificate of the judge showing that the omitted testimony is immaterial. Without all the material testimony upon all material issues, it cannot be found the evidence is insufficient to support the decision of the lower court. Its judgment is therefore affirmed.

BERRY and SWEET, JJ., concur.

NOTE.

ELECTION CONTESTS—EVIDENCE. Where a ballot is so defective that it cannot be counted, an elector cannot testify that he cast it, and intended it for a particular candidate. *Anderson v. Winfree*, (Ky.) 4 S. W. Rep. 351. While properly made and certified poll-books and tally sheets, and the ballots themselves, are the primary evidence of the result of the election, secondary evidence is admissible if they are lost or destroyed. The voters may testify as to how they voted, if they choose to do so. *Dixon v. Orr*, (Ark.) Id. 774. Evidence that ballots were fraudulently put into the box, or corruptly changed, is admissible, though all persons and officers who have had charge and custody of the election papers and ballot-boxes testify that the ballots have not been disturbed, nor the seals of

the boxes broken. *Pedigo v. Grimes*, (Ind.) 18 N. E. Rep. 700. A voter whose ticket is alleged to have been tampered with after he cast it may be asked for whom he voted. Evidence is admissible, also, that a certain ballot was voted, though it does not appear among the ballots on the recount. *Kreitz v. Behrensmeier*, (Ill.) 17 N. E. Rep. 232. The return of the judges is not conclusive. They may testify as to the number of votes cast, counted, and declared, *Stemper v. Higgins*, (Minn.) 87 N. W. Rep. 95; and when the judges in a certain precinct receive many illegal votes, cause fictitious names to be placed on the poll-books, and put spurious ballots in the box, the entire returns from that precinct should be rejected, *Blue v. Peter*, (Kan.) 20 Pac. Rep. 442.

(22 Or. 296)

KANE v. RIPPY et al.

(Supreme Court of Oregon. May 1, 1890.)

VENDOR AND VENDEE—ABSTRACT OF TITLE.

1. The object of an abstract of title is to enable the purchaser or his counsel to determine the sufficiency of the title. It should contain whatever concerns the source of the title, and its condition.

2. It may be admissible as evidence, not for the purpose of proving title, but to show that the abstract furnished to show title did not disclose such evidence of title as the defendants had agreed to convey by their contract.

(Syllabus by the Court.)

Appeal from circuit court, Jackson county; L. R. WEBSTER, Judge.

H. K. Hanna, for appellant. C. W. Kahler and A. S. Hammond, for respondent.

LORD, J. This is an action to recover money paid on a contract for the sale of land. It arose out of substantially these facts: That the defendants agreed with plaintiff, in writing, to convey to him, "in fee-simple, clear of all incumbrances whatsoever, by a good and sufficient deed and abstract of title, the following parcel of land," etc.; that at the execution of said agreement the plaintiff paid to the defendants the sum of \$500, as provided therein, and as the first payment on said land, and that prior to bringing this action the plaintiff tendered the further sum of \$3,000 as a second payment, and was ready and willing to perform his covenants and agreements, etc., and that he then and there demanded of said defendants that they execute and deliver to him a deed of land, etc., and that the defendants refused to execute the same; that the title to said land is defective, and that they cannot execute or deliver a clear title, etc., and make him a good and sufficient deed and abstract of title therefor; and that the defendants have not repaid any part of the sum of \$500 to them paid as a part of the purchase price, etc. The material facts were put in issue; and, after the plaintiff had introduced his evidence and rested, the defendants moved for a nonsuit, which was granted by the court, and judgment entered for the defendants. Two causes of error are assigned: (1) That the court erred in refusing to allow the plaintiff to introduce in evidence the abstract of title furnished plaintiff by the defendants; and (2) in taking the cause from the consideration of the jury, and rendering a judgment of nonsuit in favor of the defendants.

It is disclosed by the bill of exceptions that, when the plaintiff offered in evidence the abstract of title, the court refused to admit it on the ground, as it would seem, that it was not the proper evidence of title, but that the records or original conveyances were the only legal proof admissible of title. The court evidently regarded the action as one in which the validity of the title, and its proper proof, was involved, as it is only upon this theory that the ruling of the court below can be sustained. The difficulty arises out of the somewhat involved manner in which the facts are alleged, but it is plain that the action is based on the contract, and that the real contention is as to its meaning and proper construction. The plaintiff was not endeavoring to show that the abstract conveyed title, but that the abstract of such title furnished the plaintiff by the defendants did not exhibit the "good title, free from incumbrances," that the defendants had agreed to convey. His position, in substance and effect, was that the defendants had agreed by their contract to assure him a good title, and to furnish him an abstract thereof, from which its validity and marketable quality might be ascertained and determined, but that the abstract furnished him by them for this purpose, and which the plaintiff offered in evidence, and the court rejected, showed that the title was defective, or not such as would be in accordance with the terms of such contract. The defendants had agreed to convey and assure to the plaintiff, in fee-simple, clear of all incumbrances, by a good and sufficient warranty deed and abstract of title, etc., the lands described. The object of the abstract is plain. It is to enable the purchaser or his counsel to pass readily on the validity of the title, as it should contain whatever concerns its source and condition. Mr. Curwen says: "The object of the abstract is to furnish the buyer and his counsel with a statement of every fact and abstract of the contents of every deed on record upon which the validity and marketableness of the title depend, so full that no reasonable inquiry shall remain unanswered, so brief that the mind of the reader shall not be distracted by irrelevant details, so methodical that counsel may form an opinion on each conveyance as he proceeds in his reading, and so clear that no new arrangement or dissection of the evidence shall be required. The buyer has a right to demand a marketable title. He has a right to demand that the abstract of title shall disclose such evidence of that title as will enable him to defeat any action to recover or incumber the land." Curw. Abs. § 36. In contracts for the sale of real estate, the principle is of constant application that it is implied that the vendor will exhibit a good, marketable title before the contract is consummated; and until he does so the buyer is not bound to accept a deed, or pay the purchase money.

In the case at bar the contract is written, and the defendants agree to convey a good title, free from all incumbrances whatsoever,

and to furnish an abstract of such title. What was the object of this abstract? Plainly, to enable the plaintiff and his counsel to determine readily on the sufficiency of the title agreed to be conveyed by the contract; in a word, an abstract which would disclose such evidence of title as would show the title free from all incumbrances whatsoever, and defeat any action to recover the land. This being the object of the abstract, when the plaintiff submitted it to his counsel, as the record shows, he refused, upon an inspection of it, to say that it disclosed such title as the defendants had agreed to convey. Whether it does or not, the abstract is not before us for that purpose, but only to show its object as applied to the contract. When, therefore, the abstract was offered in evidence, it was not for the purpose of proving title by the abstract, but of showing that the abstract furnished did not disclose evidence of such title as the defendants had agreed to convey. It results that we think that the abstract was admissible for the purpose offered, and that it was error to exclude it. This being so, it becomes unnecessary to consider the other error assigned. The judgment must be reversed, and a new trial ordered.

HAYNES v. WHITSETT *et al.*

(Supreme Court of Oregon. Jan. 6, 1890.)

EQUITY — JURISDICTION — VENDOR AND VENDEE —
BONA FIDE PURCHASERS.

1. When a court of equity acquires jurisdiction of a cause for one purpose, it maintains it for all purposes, and administers complete relief. It will neither invoke the aid of other courts, nor permit them to interfere with its process.

2. The defense that a party is a *bona fide* purchaser for value, without notice, is personal, and can only be made or relied upon by such purchaser, or some one derailing title through him.

(Syllabus by the Court.)

Appeal from circuit court, Douglas county;
ROBT. S. BEAN, Judge.

This suit was brought against the administrator of J. J. Whitsett, deceased, the heirs at law of said deceased, and Samuel Marks and Hyman Wollenberg. The object is to correct a mistake in the description of the property in each of two mortgages,—one given to the plaintiff, in the life-time of the deceased, for \$2,740, and the other to Sol. Abraham, for \$2,004.85, and to fore-close such mortgages. The only interest that the defendants Marks and Wollenberg had in the controversy was that, at a sale of said property made by the administrator of deceased to pay the debts generally of said deceased, they bought the property, but paid no money thereon. They simply retained the purchase money in their possession until they should receive a deed by the administrator. Upon a trial in the court below, the plaintiff had a decree in his favor for the relief prayed for against all of the defendants, from which the administrator of J. J. Whitsett alone has appealed. Neither the interest of Whitsett's heirs, nor of Marks and Wollenberg, is before us on this appeal.

Wm. R. Willis, for appellant. *J. W. Hamilton*, for respondent.

STRAHAN, J., (*after stating the facts as above.*) It will be observed from the foregoing statement that every person who had an estate in or title to the premises in controversy has acquiesced in the decree in favor of the plaintiff; and, if the doctrine of *Humphreys v. Taylor*, 5 Or. 260, were applied to this case, as I am inclined to think it ought to be, the appellant, as administrator of J. J. Whitsett, deceased, would have no standing in this court to prosecute this appeal, or interpose the defense upon which he relies.

But waiving that question, and assuming that he has such standing, all of the equities of the case are with the plaintiff. No one can read the evidence, and apply ordinary common sense to this transaction, and thus doubt for one moment as to the merits of the plaintiff's case. There is no question of law arising upon the evidence that it is necessary to discuss, and therefore a particular statement of the facts as they appear in evidence is unnecessary. Counsel for appellant was inclined to apply a very stringent and highly technical rule, both to pleading on the part of the plaintiff as well as the evidence offered to support it. There was no demurrer to the pleading in the court below; and, as far as I am able to discover, this objection to the evidence is made here for the first time. Under such circumstances, such objections do not receive so favorable a consideration as if made at the first opportunity that the party has to make them. Counsel for appellant specially insisted upon the argument here that this court, after reforming the mortgages, ought to direct the county court of Douglas county, where the administration is pending, to apply the proceeds of the sale to Marks and Wollenberg in payment of the plaintiff's claim, and that a resale under a decree of foreclosure would thus be avoided. No authority was cited for this, nor was it shown in what lawful manner it can be accomplished. It may be sufficient to say, in answer to this suggestion, that it is contrary to one of the most important rules upon which courts of equity proceed in the administration of justice; and that is, when they acquire jurisdiction for one purpose they maintain it for all purposes, and administer complete relief. They neither invoke the aid of other courts, nor permit their interference with their process.

Finally counsel for appellant insisted that Marks and Wollenberg were *bona fide* purchasers for value, without notice of the plaintiff's equity. There are two answers to this objection. The first is that it is a defense personal to Marks and Wollenberg, or those in privity with them, and no person other than themselves, or some one deriving title to the premises through them, could be heard to make such defense; and the other is that Marks and Wollenberg have not appealed

from the decree, and their interests are not before us, neither have they paid their money or received a deed. Let the decree appealed from be affirmed.

(18 Or. 199)

BINGHAM v. KERN *et al.*

(*Supreme Court of Oregon. Nov. 21, 1889.*)¹

ACTION TO RECOVER REALTY—COMPLAINT—RIGHT OF POSSESSION.

In an action to recover the possession of real property, under the Code of this state, it is necessary that the plaintiff allege in his complaint that he is entitled to the possession of the property. Section 318 of the Code peremptorily makes such an allegation material to the plaintiff's cause of action.

(*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

J. R. Stoddard and *E. R. Watson*, for appellants. *Edward W. Bingham*, pro se.

THAYER, C. J. The respondent commenced an action in the said circuit court against the appellants herein to recover the possession of certain real property situate in said county, and known as the south half of lot 5, in block 10, in the town of Brooklyn. The issues were duly made up in the action, and the case was tried by the court without a jury. The court found as conclusions of fact and law substantially the same as it found in the case of *Hicklin v. McClear*, decided in this court upon appeal. 22 Pac. Rep. 1057. A judgment was entered upon the said findings, from which the appeal herein was taken; and the two cases were heard together in this court. The decision in *Hicklin v. McClear* is decisive of this case as to its merits; but the appellant's counsel assigned a ground of error herein which was not involved in that case, which is that the complaint does not state a cause of action. The substance of the complaint is as follows: "Edward W. Bingham, the plaintiff in the foregoing entitled action, complains of Sarah M. Kern and J. W. Kern, her husband, the defendants therein, and for cause of action alleges that plaintiff is seised in fee-simple of the following-described premises, to-wit: The south half of river lot numbered five, (5,) in block ten, (10,) as numbered and described in the recorded plat of Brooklyn, (Brookland,) in the county of Multnomah, and state of Oregon. Said lot is also described as a portion of Gideon Tibbet's donation land-claim. That said property is not in the actual possession of any one, but defendants are acting as the owners thereof. Wherefore plaintiff demands judgment for the possession of said premises, and for his costs and disbursements herein."

The Civil Code, § 316, provides that any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action at law, such action shall be commenced against the person in the actual possession of

¹Publication delayed pending rehearing.

the property at the time, or, if the property be not in the actual possession of any one, then against the person acting as the owner thereof; and section 318, Civil Code, provides that the plaintiff in his complaint shall set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years, and for whose life, or the duration of such term, and that he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him, to his damage, etc. The appellant's counsel contend that the complaint is defective in not containing an allegation that the respondent was entitled to the possession of the premises, while the respondent's counsel insist that it was not such a defect as the verdict of a jury would not cure, and that the findings of the circuit court were tantamount to such verdict.

The only question to be considered is whether such allegation is necessary to constitute a cause of action. The Code seems to require that the complaint shall contain the allegation, and this court held in *Richards v. Crews*, 16 Or. 58, 16 Pac. Rep. 925, that it was necessary that it should contain it. A verdict does not supply any fact omitted from a pleading, though it establishes every reasonable inference that can be drawn therefrom. *Weiner v. Lee Shing*, 12 Or. 276, 7 Pac. Rep. 111. It may be claimed that the allegation that the respondent was seised in fee-simple, of the premises entitled him to the possession thereof, but that inference does not necessarily follow. That seisin therein referred to meant, no doubt, a seisin in law, as contradistinguished from a seisin in fact; and the respondent may have had the former character of seisin, and still not have been entitled to the possession of the premises. Besides, the provision of the Code referred to is mandatory in its terms, and I do not see how it can be disregarded. The judgment appealed from will be reversed, and the case remanded to the circuit court, with directions to dismiss the respondent's complaint without prejudice to the right of the respondent to commence another action for the recovery of the possession of the premises herein referred to.

A petition for rehearing was denied in this case on March 3, 1890.

(83 Cal. 70)

RUSSELL v. McDOWELL. (No. 13,325.)

(Supreme Court of California. Feb. 1, 1890.)

ELECTIONS—CONTESTS—MALCONDUCT OF OFFICERS—QUALIFICATIONS OF VOTERS.

1. Code Civil Proc. Cal. § 1111, subd. 4. provides that an election may be contested on account of illegal votes; and section 1114 declares that nothing in that ground is to be construed to authorize an election to be set aside unless it appears that a number of illegal votes has been given to the contestee, which, if taken from him, would give him less votes than those which were legally cast for another person for the same office. *Held* that, in the absence of proof that the illegal votes cast at an election were given for the contestee, it was not error to apportion them among the several

candidates, and deduct them *pro rata* from their respective scores.

2. The reception of illegal votes cannot be contested on account of the misconduct of the election boards as provided for by Code Civil Proc. § 1111, subd. 1, where it does not appear in what particular precinct they were cast.

3. The California election law, prior to its amendment by St. Cal. 1889, p. 209, provided that spurious tickets could only be counted for what they would have been if genuine, where the fraudulent names were "pasted" on the tickets. *Held*, that under such law tickets in all respects genuine, except that on them was "printed" the name of the adverse party's candidate for sheriff, were properly counted for him in a contest for his office.

4. Code Civil Proc. Cal. § 1112, which provides that no irregularity or improper conduct of the judges shall avoid an election unless it procures the election of the contestee when he has not received the highest number of legal votes, does not prevent an election from being avoided by rejecting the votes of entire precincts for disregard by the judges of mandatory requirements of the election law, or of merely directory provisions coupled with such fraud as made the true result doubtful.

5. Pol. Code Cal. §§ 1225, 1226, which provide that, in incorporated cities and towns, a person offering to vote shall give the location and number of his residence, or such description thereof as shall definitely fix the same, and require it to be announced by the inspector or judge, and recorded on the poll-list, are directory, and not mandatory.

6. Pol. Code Cal. § 1239, subd. 8, which was valid under Const. Cal. 1863, art. 2, § 1, provides that "a person must not be held, by reason of having moved from one precinct to another in the same county, within 30 days prior to the election, to have lost his residence in the precinct so moved from, provided he was an elector therein on the thirtieth day prior to such election." *Held*, that it conflicted with the new constitution, (article 2, § 1,) which requires residence in the precinct for 30 days preceding the election. *THORNTON, J.*, dissenting.

7. The contestant proved that the number of male persons over 21 years of age who resided in certain precincts on a particular lot on the election day, and for 30 days prior thereto, was less than half the number of votes cast. *Held* that, though the proof was consistent with the supposition that a voter may have resided in different places in the precinct during that period, it was negative proof, and, there being none in rebuttal, it would be held to establish material misconduct on the part of the election boards.

In bank. Appeal from superior court, San Diego county; T. K. WILSON, Judge.

George W. Monteith and Goodwin & Goodwin, for appellant. *Hunsaker & Britt, Edwin Parker, and John M. Lucas*, for respondent.

BEATTY, C. J. This is an election contest. At the general election held November 6, 1888, Russell, the contestant, was the Republican, and McDowell, the contestee, was the Democratic, candidate for sheriff of San Diego county. According to the official canvass of the returns of the election made by the supervisors, the whole number of votes cast in the county was 8,203, of which McDowell received 4,010 votes, Russell received 3,844 votes, W. J. Gould (Prohibition) received 277 votes, and two votes were counted as scattering. McDowell having received a certificate of election, Russell, in due time, filed his petition in pursuance of section 1111 et seq. of the Code of Civil Procedure, contesting his right to the office. The grounds

of contest were the first and fourth enumerated in said section, viz.: (a) Malconduct of the election boards; and (b) Illegal votes. At the trial, the sealed packages of ballots were opened and recounted; the result being, according to the findings of the superior court, that the whole number of votes cast in the county was 8,262, distributed as follows:

McDowell (Dem.).....	4,085
Russell (Rep.).....	3,885
Gould (Pro.).....	275
Scattering.....	87

But it was found that 210 votes had been cast by persons whose names were not on the Great Register, and 21 votes by persons who were not residents of the wards in which they voted; making an aggregate of 231 illegal votes. Of these, it was proved that 2 had been cast and counted for McDowell, and 1 for Russell. As to the remaining 228 illegal votes, there was no evidence as to how they had been cast. The superior court deducted 2 from the vote of McDowell, and 1 from that of Russell, on account of the illegal votes known to have been received by them, respectively; and, as to the remaining 228 illegal votes, they were deducted from the vote of each candidate, and from the total of the scattering votes, in the same proportion that each vote, respectively, bore to the total vote, with the following result; leaving

McDowell.....	3,923 legal votes
Russell.....	3,759 legal votes
Gould.....	268 legal votes
Scattering.....	85 legal votes

Upon this finding of a plurality of 164 legal votes for McDowell, judgment passed in his favor, confirming his election, and for costs, from which Russell appeals, assigning error as follows:

First. He contends that the court erred in apportioning among the candidates the 228 illegal votes, as to which there was no evidence to show how they were cast, and deducting them *pro rata* from the respective scores. But counsel does not make it very clear what other course he thinks the court ought to have taken with respect to these votes. He argues, and very justly, that such a method of disposing of illegal votes can never change the result of an election; that the different candidates must always stand in the same relative position after the *pro rata* deduction as before it, and consequently that it is a vain and nugatory proceeding to make the deduction. He also argues, with equal force, that there is but one means of proving how the illegal voter has cast his vote, that is to say, by his own testimony, which is more likely to be false than true, and consequently that the attempt to prove how illegal votes have been cast can only result in an aggravation of the fraud. But what consequence would he have us deduce from this reasoning? He does not contend that all of the illegal votes should be deducted from the vote of the candidate standing highest in the poll, and there is neither reason nor authority

to support such a proposition. In truth, a court can do nothing better, in the absence of proof as to how illegal votes have been cast, than to make the apportionment as was done in this case, or to throw out the precincts at which they have been received on the ground of malconduct of the election board. Considering such illegal votes with reference to the ground of contest mentioned in subdivision 4 of section 1111 of the Code of Civil Procedure, the second ground of appellant's contest in this case, they can avail the contestant only so far as he is able to prove, not only that they were illegally cast, but that they were cast for the contestee. This is made clear by the provisions of section 1114 of the Code of Civil Procedure. "Sec. 1114. Nothing in the fourth ground of contest, specified in section 1111, is to be so construed as to authorize an election to be set aside on account of illegal votes unless it appear that a number of illegal votes has been given to the person whose right to the office is contested, which, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given to such other person." In the absence of any proof, therefore, that any of these 228 illegal votes were cast for McDowell, the court certainly had no right to deduct from his vote more than his just proportion.

But the reception of illegal votes, votes of persons not on the registry lists, or not residing in the precinct where they offer to vote, may amount to malconduct on the part of the board of judges, and might come under the first ground of appellant's contest, based on subdivision 1, § 1111, of the Code of Civil Procedure. We do not, however, understand appellant's counsel to contend that these particular illegal votes are to be considered with reference to his first ground of contest; and, indeed, they could not avail him upon that ground, for it nowhere appears in what particular precinct or precincts they were cast, and if the malconduct of the judges who received them was such as to warrant the court in throwing out the entire vote of the precincts where they were received, we cannot tell what precincts would be thrown out. For aught that appears, the contestant may have received more votes than the contestee in the precincts where these illegal votes were given. There was no error, certainly none injurious to the appellant, in the apportionment of the 228 illegal votes.

Second. It was discovered by the recount that eight tickets headed, "Regular Republican Ticket," and in fact regular in all respects except that they contained the name of McDowell instead of Russell as candidate for sheriff, had been voted at the election. They were counted for McDowell, and the appellant contends that the court erred in not counting them for him. Under the election law, as amended since the last general elec-

tion, (St. 1889, p. 209,) these eight ballots would be counted as appellant contends they should have been counted; but that statute has no retrospective operation, and the question is whether, under the law as it stood in November, 1888, a court or board of canvassers would have been authorized in counting these spurious tickets as if they had been what they pretended to be,—regular Republican tickets. There was no express provision of law at that date to warrant such action. The general object of the law was, of course, to give effect to the real intention of the voter,—to secure the counting of his ballot in favor of the candidates of his choice; and it contained many specific provisions to that end. But the general rule for ascertaining the intention of the voter was to read his ballot as printed or written, and be guided by that. To this rule there were no exceptions save those expressly provided for. One of these, contained in section 1204 of the Political Code, related to pasters,—a fraud of the same kind, though clumsier, and more easily detected, than spurious tickets. It is surprising that the legislature did not from the beginning deal with names fraudulently printed on tickets exactly as it dealt with names fraudulently pasted on tickets. But for some reason it did not make such provision until its last session, and therefore we cannot say that the superior court erred in counting these tickets as they were printed.

Third. In support of his first ground of contest, misconduct of the election boards, the appellant introduced a large amount of evidence in regard to the manner of conducting the election in the First and Third precincts of the Third ward, and the First precinct of the Fifth ward, of the city of San Diego. In these three precincts, respectively, in the order named, there were 831, 326, and 487 votes cast, making a total of 1,144, of which McDowell received 642, and Russell 472; remainder, scattering. McDowell's plurality of 170 in these three precincts was greater than his plurality in the whole county, and consequently, if they were thrown out, his election would be invalidated. Appellant contends that the superior court erred in failing to set aside and disregard the vote of these precincts for misconduct of the election boards. His counsel makes a number of separate assignments of error under this head, but they may all be conveniently considered together. Sections 1225 and 1226 of the Political Code are as follows: "Sec. 1225. The person offering to vote must hand his ballot to the inspector, or to one of the judges acting as inspector, and announce his name, and the number affixed to it on the register in use at the precinct where he offers his vote: provided, that in incorporated cities and towns the said person shall also give the name of the street, avenue, or location of his residence, and the number thereof, if it be numbered, or such clear and definite description of the place of such residence as shall definitely fix the same. Sec. 1226. The in-

spector, or judge acting as such, must receive the ballot, and, before depositing it in the ballot-box, must, in an audible tone of voice announce the name and register number: provided, that in incorporated towns and cities the said inspector, or judge acting as such, shall also announce the residence of the person voting, and the same shall be recorded on the poll-list by the poll-clerk." San Diego was in November, 1888, an incorporated city,—laid off into blocks and lots, with its streets numbered upon a simple and definite system. But the poll-lists of precincts 1 and 3 of the Third ward show that no record was kept of the place of residence of the voters, and presumably they gave no place of residence. The poll-list of the First precinct of the Fifth ward shows that a record was kept of the streets or blocks where voters resided, but not of their street numbers, in many instances. In other words, they were so indefinitely located that it could not be told upon which of eight or a dozen lots they claimed to reside. It is very clear that in these three precincts the election boards disregarded the requirements of sections 1225 and 1226 of the Political Code, and in so doing were guilty of misconduct.

This brings us to the serious question of the case: What is the consequence of this misconduct? Must the vote of these precincts be thrown out, thus invalidating the election of the contestee, or may the vote of these precincts be counted notwithstanding the omission to require the voters to state the street and number of their residence? The answer to these questions would be very plain and easy if nothing had been shown beyond the mere fact that the election boards neglected to require the voters to give their places of residence; for it is well settled that disregard of directory provisions of election laws, in the absence of actual fraud, is no ground for rejecting the entire vote of a precinct, and the provisions quoted cannot be regarded as other than directory. It is only those provisions of the statutes relating to the time and place of holding elections, the qualifications of voters, and such others as are expressly made essential prerequisites to the validity of an election, that are held to be mandatory. All others are directory, merely, and a failure to observe them, caused by honest ignorance or mistake, and not resulting in manifest fraud, does not afford ground for rejecting the entire vote of a precinct. But, on the other hand, it is equally well settled that neglect of directory provisions of a statute designed to prevent fraudulent voting, followed by actual fraud of that character sufficient in extent to throw doubt on the result of the election, is ground for rejecting the entire vote of a precinct, if there are no means of purging the poll. We have not time to cite and review the numerous decided cases by which this doctrine is established; but we refer to *Pine on Elections*, §§ 497-509, where a full discussion of the subject will be found. See, also, Chapter 17, *Cooley, Const. Lim.* But

it is claimed by respondent that such is not the law of this state, for the reason that the statute under which this contest is made lays down a different rule. He relies on section 1112 of the Code of Civil Procedure, which reads as follows: "Sec. 1112. No irregularity or improper conduct in the proceedings of the judges, or any of them, is such malconduct as avoids an election, unless the irregularity or improper conduct is such as to procure the person whose right to the office is contested to be declared elected, when he had not received the highest number of legal votes." According to respondent's construction of this section, no amount or character of misconduct of an election board will warrant the exclusion of the entire vote of a precinct, but the contestant of the election must assume the burden of showing how the illegal or fraudulent votes were cast, and can have no relief except the deduction from his adversary's score of such illegal votes as he may be able to prove were cast for him. This construction cannot be maintained. If it could, it would follow that an election held miles away from the appointed place would be valid, contrary to the decision in *Knowles v. Yates*, 31 Cal. 82, and it would follow that the votes of a precinct must be counted though the election was held on a different day from that appointed, contrary to all authority; for the language of this section is equally applicable to mandatory as to directory provisions of the election law, and it must receive a construction reconcilable with the doctrine, as to the effect of disregarding mandatory provisions. We conclude its meaning to be merely that the election of a county officer as sheriff will not be avoided unless enough precincts are excluded for malconduct of the election boards to destroy his majority and that the law of this state is, as it is everywhere else, and ought to be, that disregard of mandatory requirements of the election law, or of merely directory provisions, coupled with such actual fraud as makes the true result doubtful, is ground of throwing out the entire vote of a precinct, where there is no means of purging the poll.

This brings us to a consideration of the evidence offered to sustain the allegation of fraud. The evidence showed, beyond any doubt, that the officers of the three city precincts above named disregarded the provisions of sections 1225 and 1226 of the Political Code. The manifest object of these provisions is to prevent fraudulent voting. Compliance with them makes fraud difficult and improbable. Disregard of them makes fraud easy, difficult of detection and punishment, and therefore probable. Officers of election are, like all other persons, presumed to know the law and their deliberate omission to follow directions designed to prevent fraudulent voting certainly calls for explanation. It casts suspicion upon their integrity, and is sufficient *prima facie* to make out a case of fraud. No doubt such omission is susceptible of explanation, and we are very

willing to believe that the officers of these precincts erred through ignorance of the law, and were not actually guilty of fraudulent intent. But, as the case is presented, we cannot indulge that presumption. The officers were not called as witnesses, as they should have been, to prove that they acted as they did through ignorance, and not with fraudulent purpose; and, in the absence of any rebutting proof on this point, we feel constrained to hold that the contestant made out a case of malconduct on the part of the election boards.

But upon another point of more serious import the evidence of fraud was much stronger. The contestant called hundreds of witnesses, residents of all parts of the three precincts in question, by whom he undertook to prove the names of all those qualified by residence to vote in those precincts. These witnesses, testifying with reference to maps of the precincts showing all the subdivisions of blocks and lots, proved the names of all male residents over 21 years of age who had resided on any particular lot on the day of the election, and for 30 days previous. The names of all such persons were considerably less than half of the number of votes, 1,144, cast in the three precincts. From this, contestant argues that more than half of the votes so cast, about 600, were illegal and fraudulent votes. Respondent, on the other hand, argues that the proof, allowing it the utmost effect, was not sufficient to prove that any fraudulent or illegal votes were cast; for, he says, proof that a man did not reside on a particular lot on the day of the election, and for 30 days prior thereto, is not inconsistent with the supposition that he may have lived for 30 days prior to the election within the precinct,—part of the time in one house, and part of the time in another. Nor is it inconsistent with the supposition that he might have been living in the precinct 30 days before election, and removed to another precinct of the same county within the 30 days, in which case he would be a qualified voter of the precinct by virtue of subdivision 3, § 1239, Pol. Code, which reads as follows: "A person must not be held, by reason of having moved from one precinct to another in the same county, within thirty days prior to the election, to have lost his residence in the precinct so moved from, provided he was an elector therein on the thirtieth day prior to such election." It is to be observed, however, with respect to this provision of the Political Code, that it was adopted while the old constitution was in force, and, though perfectly valid at the time of its adoption,—the old constitution not requiring any length of residence in a voting precinct as a prerequisite to the right to vote (Const. 1863, art. 2, § 1.)—it has ceased to be law since the adoption of the new constitution, with which it is in direct conflict. By the new constitution, (article 2, § 1.) residence in his election precinct for 30 days preceding the election is just as essential a condition of the right to

vote as is residence in the county for 90 days, and in the state for 1 year.

As to the other point, however, it is true that proof that a particular person has not resided continuously on one lot, or in one house, for 30 days prior to an election, is entirely consistent with the supposition that he may have resided in the precinct the whole period,—part of the time in one house, and part in another. But it is equally true that proof of this character, with reference to more than half of the persons voting in a ward, is not consistent with the supposition that all, or any considerable number, of them have lived in the precinct 30 days. It is not in accordance with ordinary experience that men generally move so frequently; and so, notwithstanding the flaw in plaintiff's proof, considered with reference to any particular person, we cannot avoid the conclusion that in the aggregate, and considered with reference to the mass of persons affected by it, it did establish a strong *prima facie* case of fraudulent voting on a large scale in these three precincts. Moreover, it is to be considered that the contestant was assuming the difficult task of proving a negative, *i. e.*, the want of qualification of a large number of voters; and the doctrine is well established that slight proofs make out a *prima facie* case, where a negative is to be proved. In all such cases, rebuttal is comparatively easy, and is consequently of imperative obligation. Here no proof in rebuttal was offered, and the evidence for contestant stands absolutely uncontradicted.

Such being the case, we are forced to the conclusion that the superior court erred in finding no material malconduct of the election boards. For this error the judgment must be reversed. But we cannot accede to the proposition of contestant that we should pronounce a final judgment, either declaring the contestant elected, or avoiding the election of the contestee. There are no findings to sustain such a judgment, and we cannot supply findings. Besides, the contestee is entitled to an opportunity to show, as he may be able to do on a new trial, that despite the irregularities complained of there was in fact no fraud, actual or intended, on the part of the election boards, or those voting in the three precincts, whose vote the contestant seeks to exclude. Judgment reversed, and cause remanded.

We concur: FOX, J.; SHARPSTEIN, J.; PATERSON, J.; MCFARLAND, J.

WORKS, J., did not participate in the decision of this case.

THORNTON, J. I concur in the judgment, and in all that is said in the opinion except that which relates to the constitutionality of section 1239 of the Political Code. The section is not clearly opposed to any provision of the constitution, and in such case the deference due to the legislature requires that the

section be held constitutional. The constitution should not be so construed as to cut off the right to vote of any citizen who has resided in the state 1 year preceding the election, in the county 90 days, including a residence in the precinct on the thirtieth day preceding the election. The opportunity of committing fraud under such circumstances is reduced to a *minimum*, for many citizens must know of the residence of such a person who has resided in the county 90 days, and a portion of the 30 days' limits in that precinct of the county where he offers to vote. It must be observed that the person offering to vote must have resided in the county 90 days, and a portion of the 30 days, to give him a right to vote, and his removal is only from one precinct to another of the same county.

(82 Cal. 513)

BODE v. TRIMMER. (No. 12,262.)

(Supreme Court of California. Jan. 11, 1890.)

SCHOOL LANDS—CONTESTS—NATURALIZATION—EVIDENCE.

1. On a contest to determine which of two persons had the better right to purchase certain school lands from the state, the order of reference by the surveyor general, introduced in evidence without objection, recited that the register of the United States land-office had "certified that there was no valid claim adverse to the state" against the land. Held that, as under Pol. Code Cal. § 3409, this certificate could not be properly obtained until "after the survey of the township by the United States surveyor general," the recital was sufficient to show that the survey had been made before the certificate issued, especially as the pleadings of both parties stated that a survey had been made.

2. Since the naturalization of an adult alien is a judicial proceeding which must be entered of record, (2 Story, Laws U. S. 851,) an applicant for the purchase of state school land cannot prove his naturalization by parol.

Commissioners' decision. Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Webb & Sherwood, for appellant. Gell & Morehouse, for respondent.

FOOTE, C. This action was brought to determine a contest arising in the office of the surveyor general of the state of California with respect to which of two parties had the better right to purchase certain school lands from the state. The matter was referred by the surveyor general to the superior court of Monterey county for adjudication, under the provisions of section 3414 of the Political Code. Judgment was rendered in favor of the plaintiff as having the right to purchase the land in dispute. Pending a motion for a new trial the defendant died, and the cause was revived in the name of his administrator, and the motion was denied. From the order made in the premises, and the judgment, this appeal is prosecuted.

The appellant makes the point that the eighth finding of fact is without evidence to support it, his contention being that although it is found that previous to the filing of the application of the plaintiff to purchase the land it had been surveyed by the sur-

veyor general of the United States, and the survey and plat, duly approved, were filed by him in the United States land-office, etc.; that, nevertheless, there was no evidence of such facts in the record. Both plaintiff and defendant state in their pleading that a proper survey was made, and the copy of the order of the state surveyor general, which was introduced in evidence without objection, states that "on March 24, 1869, H. C. Rollins, register of the United States land-office for the San Francisco district, certified that there was no valid claim adverse to that of the state of California for all the above-described land." Section 3409 of the Political Code provides that "the surveyor general must, after the survey of any township by the United States surveyor general, obtain from the United States land-office a statement showing whether or not the sixteenth and thirty-sixth sections therein belong to the state." This statement cannot be properly obtained until a survey of the township is made, and the sixteenth and thirty-sixth sections cannot be truthfully stated by the United States land-office to belong to the state until they are ascertained and fixed by the survey; nor can they be demanded from the United States, or listed to the state, until such survey. It is a proper presumption that officers have performed their duty. *People v. Otto*, 77 Cal. 47, 18 Pac. Rep. 869; Code Civil Proc. § 1963, subd. 15. It would seem, therefore, that it should be presumed that the certificate is truthful, and that the proper officers have performed the duties which were required of them before such statement could be made, which includes the making of the survey, and that the land belonged to the state; especially, since in this case the pleadings of both parties state that a survey was made, etc.; and there is no evidence in the record which even hints to the contrary. And this is a proceeding, too, in which, from its very nature, the order for a reference of the contest, and all proceedings prior and subsequent thereto, assume the title of the land to be in the state, certainly so far as the plaintiff and defendant are concerned. *Lobree v. Mullan*, 70 Cal. 152, 11 Pac. Rep. 685; *Taylor v. Weston*, 77 Cal. 534, 20 Pac. Rep. 62. This view of the matter disposes of the next point made by the appellant, viz., that the decision was against law, because there was no proof, as he claims, that any survey of the lands was ever made.

It is further urged by counsel for the appellant that the court erred in striking out, upon motion of the plaintiff, the parol evidence of the defendant as to his being a citizen of the United States; and also the great register of the county, introduced to show his citizenship. The defendant had testified that he was a naturalized citizen of the United States, and therefore an alien by birth. He also stated that he had been naturalized in the state of Indiana. The great register showed that he was registered as John Madigan, and he stated that he

had voted in Monterey as John Madigan. The name by which he appeared in the action was John McBride. The evidence was objected to when offered, but was allowed to go in, subject to a motion to strike out, which, as we have seen, was made and granted. There was no other evidence offered by the defendant which proved, or tended to prove, that he was a citizen of the United States, or had declared or filed his intention of becoming one. In order to purchase the land it must appear that an applicant is a citizen of the United States, or has filed his intention to become such. Section 3495 Pol. Code. Statutes of this kind confer rights upon a particular class of persons, or by reason of their possessing some special qualification or *status*, and one who desires to obtain the benefit or advantages thereby accruing "must show himself to belong to the class designated, or to possess the qualification prescribed, or the *status* mentioned, as the basis of the right." *Lee Doon v. Tesh*, 68 Cal. 45, 6 Pac. Rep. 97, and 8 Pac. Rep. 621. It being in evidence that the defendant was an alien by birth, "his original *status* is presumed to continue until the contrary be shown. *Hauenstein v. Lynham*, 100 U. S. 483. * * * It may be considered as settled that the naturalization of an alien as a citizen of the United States is a judicial act, and it follows that, to be effective, it must be done by a court of competent jurisdiction. * * * Of naturalization, then, there must be, as in other judicial matters, that judgment which is 'the end of the law.' * * * Now, how is this judgment shown? In the nature of things, it must be a matter of record. A court speaks by its dockets, minutes, or records. Where there is no record there is no judgment. *Plant v. Gunn*, 2 Woods, 378. * * * 'Proceedings of naturalization have to be recorded, "which proceedings shall be recorded by the clerk of the court," is the language of the act of congress on the subject. 2 Story, Laws U. S. 851.' * * * Nor is it competent to supply alleged deficiencies in the record by parol evidence. The record, if not correctly made up, or if lost or destroyed, should be perfected or replaced by appropriate proceedings in the court where the judgment was pronounced. *Freem. Judgm.* § 38; *Bigelow, Estop.* 34. Naturalization cannot be proved by parol. *Slade v. Minor*, 2 Cranch, C. C. 139; *Dryden v. Swinburne*, 20 W. Va. 89; 14 U. S. Dig. (N. S.) 18." *Green v. Salas*, 31 Fed. Rep. 107, 108, 109, 111. It is clear, therefore, that neither parol testimony nor the great register, as proffered, was admissible to prove citizenship, or the filing of an intention to become such. No prejudicial error appearing, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFARLAND, J., (concurring.) I concur in the judgment. No proper evidence of defendant's naturalization was offered; but I am not clear that the rule stated in the opinion of Mr. Commissioner FOOTE, about proof of naturalization, is entirely correct.

(82 Cal. 570)

PRENTICE v. MILLER. (No. 12,264.)

(Supreme Court of California. Jan. 27, 1890.)

SCHOOL LANDS—CONTESTS—NATURALIZATION—EVIDENCE.

1. On a contest to determine which of two persons had the better right to purchase certain school lands from the state, the order of reference by the surveyor general, introduced in evidence without objection, recited that the register of the United States land-office had "certified that there was no valid claim adverse to the state" against the land. *Held* that, as under Pol. Code Cal. § 3409, this certificate could not be properly obtained until "after the survey of the township by the United States surveyor general," the recital was sufficient to show that the survey had been made before the certificate issued, especially as the pleadings of both parties stated that a survey had been made.

2. Though the certified statement of the register of the land-office is the best evidence as to when the survey was made, and though the recital is not a matter required to be placed in the order of reference, yet as it was admitted without objection, it is sufficient proof of the fact to which it relates.

3. Though in land contests each party is an actor, and must both by pleadings and proofs show compliance with the law, yet, under Code Civil Proc. Cal. § 462, allegations in plaintiff's complaint, not denied by defendant's answer, must be taken as true.

4. Since the naturalization of an adult alien is a judicial proceeding which must be entered of record, (Rev. St. U. S. §§ 2165, 2167,) an applicant for the purchase of state school land cannot prove his naturalization by parol.

Commissioner's decision. Department 1. Appeal from superior court, Monterey county; **JOHN K. ALEXANDER, Judge.**

Webb & Sherwood, for appellant. *Gell & Morehouse*, for respondent.

GIBSON, C. This was a contest referred to the superior court of Monterey county by the surveyor general and *ex officio* register of the United States land-office, to determine the respective rights of the parties to purchase certain school lands. Judgment passed for plaintiff, from which, and an order denying a new trial, defendant appeals. The pleadings are conceded to be in proper form, and sufficient. The appellant urges, in support of his appeal, that there is no evidence to sustain the fifth, sixth, and seventh findings, wherein the court, in effect, found that before plaintiff filed his application to purchase the land in dispute, it had been surveyed by the United States surveyor general for California, who had filed an approved plat of such survey in the United States land-office at San Francisco, the office for the district within which the land lies, and that the register of the United States land-office had accepted the land for, and listed and certified it over to, the state, in part satisfaction of the grant by the United States to this state of the six-

teenth and thirty-sixth sections of each township for school purposes.

An application to purchase lands of the character in question cannot be made until after the township in which the same may be situated has been surveyed by the United States. Pol. Code, § 3495; *Medley v. Robertson*, 55 Cal. 396. This made it necessary for each contestant to allege and prove that the land applied for was surveyed by the United States at the time they severally sought to purchase it. *Rogers v. Shannon*, 52 Cal. 99; *Finney v. Berger*, 50 Cal. 248. The respective allegations of the parties in their pleadings in this regard are sufficient to meet this requirement. In the certified copy of the order of reference of the surveyor general, made pursuant to sections 3414 and 3415 of the Political Code, which was introduced in evidence by plaintiff without objection, is a recital which is the only evidence tending to support the above findings. It reads as follows: "On March 24, 1869, H. G. Rollins, register of the United States land-office for the San Francisco district, certified that there was no valid claim adverse to that of the state of California for all the above-described land."

While the recital, if objected to, would doubtless have been excluded, because it was not a matter required to be placed in the order of reference, and of which the certified statement of the register of the United States land-office would have been the best evidence, still it comes within the rule that inadmissible evidence, if admitted without objection, is sufficient proof of the fact to which it relates. *Morrell v. Morgan*, 65 Cal. 575, 4 Pac. Rep. 580. It is at most but slight evidence; but, such as it is, it tends to show, and, we think, in the absence of evidence to the contrary does show, that the surveyor general had obtained the statement from the United States land-office, showing that the land in question belonged to the state, in compliance with section 3409 of the Political Code, by which it is provided: "The surveyor general must, after the survey of any township by the United States surveyor general, obtain from the United States land-office a statement showing whether or not the sixteenth and thirty-sixth sections therein belong to the state." The statement, it is apparent, could not have been obtained until after the township, containing the land applied for, had been surveyed by the United States. We are unable, then, to say that there is an entire absence of evidence of the facts found, in order to sustain this contention of appellant. But the respondent is not obliged to rely wholly upon such evidence, as the allegations of his complaint, to which the findings assailed respond, are not denied by the defendant's answer; and, as we have seen, being material allegations, they must therefore be taken as true. Code Civil Proc. § 462; *Gilson v. Robinson*, 68 Cal. 543, 10 Pac. Rep. 193. In the case last cited the general rule regarding this class of cases was well stated as follows: "In cases of this kind each party

is an actor, and must set forth in his pleadings, and show by his proofs, that he has strictly complied with the law, and by such compliance has become entitled to purchase the land. If he fails to do this, he can obtain no assistance from the courts." Citing *Woods v. Sawtelle*, 46 Cal. 392; *Cadierque v. Duran*, 49 Cal. 356; *Christman v. Brainard*, 51 Cal. 536; *Lane v. Pferdner*, 56 Cal. 122. But the rule thus stated does not change the rule applicable to pleadings declared in the Code of Civil Procedure, *supra*; for we find in that same case that one of the points presented by the appellant was that the trial court had no jurisdiction to try the case, because there was no proper and sufficient order of reference made by the surveyor general referring the contest between the parties to the court below for trial, as required by sections 3414 and 3415 of the Political Code. The plaintiff, however, alleged in his complaint that he demanded of the surveyor general a reference of the contest between himself and the defendant to the proper court for adjudication, and that thereupon that officer did refer it. A copy of the order of reference was attached to the complaint. The allegations were not denied by the answer, and it was accordingly held that a proper reference had been made so as to give the court jurisdiction of the case.

The appellant here on the trial, realizing that under section 3495 of the Political Code it was necessary for him to prove that at the time he made his application to purchase he was either a citizen of the United States, or had declared his intention to become such, offered certain evidence to prove that at that time he was a naturalized citizen of the United States. The evidence was received conditionally by the court and afterwards, upon motion of respondent, stricken out. This ruling is the only other point presented. The evidence referred to consisted of an entry as a qualified naturalized voter in the great register of the county of Monterey; and of his own testimony, as follows: "I was born in France. Came to the United States in 1850. Came to New York. Remained in New York city three months, and then went to Illinois, where I stayed two years, and then went home to France. Got my citizen's papers in New York before I went to Illinois. I got naturalized in New York. Lost my papers on my way home from France by shipwreck. * * * I came to the United States under age." This evidence was properly excluded. It was ruled in the recent case of *Miller v. Prentice*, ante, 8, (No. 12,239, filed December 18, 1889,) as follows: "The evidence as to the citizenship of plaintiff is clearly insufficient to establish that fact. He swears that he was born in France, and was naturalized in the city of New York, but has lost his naturalization papers." The naturalization of an adult alien, or one who has resided in the United States from his eighteenth year of age, is a judicial proceeding, and can only be effected in a court of record

having a seal and a clerk, and must be entered of record. Rev. St. U. S. §§ 2165, 2167. And like any other judicial record must be proved by the record itself, or a properly exemplified copy thereof, or by proof of its loss or destruction. *Green v. Salas*, 31 Fed. Rep. 107. There are, however, certain limitations to this rule, for after proper proof of the naturalization of the parents of alien children, who were under 21 years of age, and residents of the United States at the time their parents were naturalized, parol evidence may be received to prove the minority and residence of the children in order to show that they are citizens, (Rev. St. U. S. § 2172;) and proof of naturalization may also be by the parol evidence of the party, in the form of an affidavit, in proceedings concerning mining claims, by virtue of section 2321 of the Revised Statutes of the United States; but the appellant does not come within either of these limitations. See, generally, as to the two questions herein considered, the late case of *Bode v. Trimmer*, ante, 187, (No. 12,262. Filed January 11, 1890.) We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(32 Cal. 518)

In re WADLEIGH. (No. 20,589.)

(Supreme Court of California. Jan. 11, 1890.)

CRIMINAL LAW—SENTENCE—DEDUCTION FROM TIME.

1. Under Pen. Code Cal. § 1205, providing that "a judgment that defendant pay a fine may also direct that he be imprisoned until the fine be satisfied" at a certain rate per day, a sentence, on conviction of an offense punishable by fine and imprisonment, that defendant be imprisoned in the state-prison for a definite term, and pay a fine, and be imprisoned in the state-prison until the same should be satisfied, at a given rate per day, is void so far as it provides for imprisonment in the state-prison for the collection of the fine. Following *Ex parte Arras*, 78 Cal. 304, 20 Pac. Rep. 633.

2. Pen. Code Cal. § 1590, giving to prisoners certain deductions from their term of imprisonment for good conduct, is not unconstitutional, as an infringement of the right of the governor to pardon, and no order from the governor is necessary before discharging a prisoner whose term, after allowing his credits for good conduct, has expired.

In bank. On *habeas corpus*.

Carroll Cook, for petitioner. *Charles B. Darwin*, for respondent.

WORKS, J. This is an application for a writ of *habeas corpus*. The petitioner is confined in the state-prison under a conviction of felony, and sentenced to the state-prison for five years, and that he pay a fine of \$1,000, and be imprisoned in said prison until said fine is satisfied, at the rate of one day for each one dollar of said fine. It is alleged in the petition "that during his imprisonment the said Wadleigh has faithfully ful-

filled all the duties assigned to him, and has obeyed the rules and regulations of said prison, and has therefore earned the credits and deductions from his term of sentence allowed him by law; that, allowing said Wadleigh such deductions and credits so allowed him by law, the five years' imprisonment ordered by said judgment has fully expired; and that said Wadleigh is now held in said prison, as petitioner is informed and believes, solely for the collection of the fine imposed by said judgment." The return of the warden does not deny the allegation of the petition that the petitioner has earned the credits and deductions allowed him by law, and that, allowing him such credits, he has served his full term of imprisonment imposed as a punishment, but contends that the credits provided for by the statute cannot be allowed except upon some action of the governor authorizing it. So much of the judgment against the prisoner as provides for his imprisonment in the state's prison for the collection of the fine imposed is void. *Ex parte Arras*, 78 Cal. 304, 20 Pac. Rep. 683. Therefore we must treat the sentence as one of imprisonment for five years. So treating it, the statute provides, in express terms, that certain credits or deductions from the term of imprisonment imposed shall be allowed for good conduct. *Deer. Codes*, p. 490 Sup. § 20, (*Pen. Code Cal.* § 1590.) This statute does not require any action on the part of the governor, nor is any such action necessary. The statute, by its terms, entitled the petitioner to his discharge, the same as if his term of imprisonment had expired without such commutation as he is allowed by its provisions. The statute is not unconstitutional as an infringement of the power of the executive to pardon. It does not take away or interfere with such power in any way. The statute simply fixes the term of imprisonment in certain cases and upon certain conditions. This provision enters into and becomes a part of the judgment of the court below. When a defendant is sentenced to imprisonment for five years, this means five years, subject to the deductions allowed from such time by law. The respondent asks upon whose order a prisoner is to be discharged under this statute. The answer is given by the above construction of the statute. If the term for which he is imprisoned has expired, allowing him the credits provided for, he is entitled to be discharged by the warden, as in any other case where the term of imprisonment has expired, without an order from any other officer. This is subject, however, to the right of the board of prison directors to determine, before the expiration of his term, that he has, by subsequent misconduct, forfeited his right to such deductions. The petitioner is entitled to be discharged, and it is so ordered.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; Fox, J.

THORNTON, J. I concur on the ground of

the decision in *Ex parte Arras*, supra. In *Arras'* case I dissented, and still think it wrongly decided, but I feel bound now to accept it as settled law in this state.

McFARLAND, J. I concur in the judgment and in the opinion of Mr. Justice WORKS. But, as it may be thought that some things were decided in *Ex parte Arras* which were not before the court in that case, I desire to express my doubt whether a defendant can be imprisoned, even in a county jail, beyond the maximum term of imprisonment prescribed by the statute as a punishment for the offense of which he has been convicted. A fine is, no doubt, quite a severe additional punishment to one who is able, and can be forced, to pay it; but, after a sentence to the full term of imprisonment provided by law for the offense, to then impose a fine of one thousand or five thousand dollars on an impecunious defendant, known to be utterly incapable of raising one thousand cents, for the mere purpose of prolonging his imprisonment beyond the term prescribed by law, seems to me to be a species of legal jugglery not contemplated by the Code. When the Code provides that the punishment of imprisonment for a certain offense shall be for a term, for instance, "not exceeding one year," does it mean that a court may indirectly imprison him for two, or five, or twenty years? The asserted power to do this is based on section 1205 of the Penal Code by applying to it the most extreme rule of literal construction. The section is as follows: "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied," at a certain rate per day. Now, it must be remembered that the judgment, prescribed for many offenses is imprisonment, or fine, or both. There are therefore three different kinds of judgments,—one imposing imprisonment alone, another imposing a fine alone, and a third imposing both imprisonment and fine. And is it not a fair construction of the words used in section 1205, "a judgment that the defendant pay a fine," construing it as a penal statute, to hold that they constitute a distinguishing description or definition of a certain kind of judgment, viz., a judgment to "pay a fine,"—that is, a judgment which imposes a fine alone, and not one which, in addition to a definite term of imprisonment, also imposes a fine? Such a construction would bring the section in harmony with all the other sections of the Code on the subject, and with the evident purpose of the legislature. When the legislature says that imprisonment in punishment of a certain offense shall not exceed a certain term, it ought not to be held that a court can imprison one beyond that time, unless such holding be imperative. Under the construction herein intimated, a court could imprison a defendant for the maximum term prescribed by law, and could in addition, if it thought proper, impose a fine, to be collected, if possible, by execution; but it could not, under the guise of the fine, extend the

maximum term of the imprisonment almost indefinitely. Or, if a proper case for leniency should arise, when it seemed probable that the defendant could pay a fine, and that it would be better for both him and the public that he should expiate his offense in that way, a fine alone could be imposed, and enforced by imprisonment,—at least, to the extent of the maximum term. And it seems to me that the most savage court should be satisfied with this power; at least, until the legislature chooses to enlarge it. I am aware that this court formerly, on one or two occasions, expressed views different from those above stated, and I am as loth as any one to depart from a settled rule; but I think that the question here discussed can hardly be considered as definitely settled. It seems to me that in recent years the practice of imprisonment for fines has resulted, in some instances, in great oppression, and in imposing on defendants convicted of only trivial offenses extreme and cruel terms of imprisonment, against both the letter and spirit of the law. I think, therefore, that on a proper occasion the question here presented should, at least, be opened and reconsidered.

I CONCUR: PATERSON, J.

(83 Cal. 39)

NIDEVER v. AYERS. (No. 13,328.)

(Supreme Court of California. Jan. 30, 1890.)

BONA FIDE PURCHASERS—QUITCLAIM DEEDS.

1. A decree in probate for the final distribution of land, which is unrecorded at the date of a conveyance of the land by the holder of the legal title, is not constructive notice to the vendee of an outstanding equitable title.

2. Nor is the vendee chargeable with constructive notice of an outstanding equitable title by his deed, which recites that "the grantor has granted, bargained, and sold and confirmed, and by these presents does hereby grant, bargain, sell, convey, and confirm, all the right, title, and interest of the party of the first part in and to the premises described," though it be deemed to constitute a quitclaim deed.

Commissioners' decision. Department 2. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

Joseph H. Skirm, for appellant. McKeeby & Smith and Blackstock & Shepherd, for respondent.

FOOTE, C. The complaint in this case, in one aspect, might be called a complaint in an action to quiet title. Upon that theory, the evidence showing that the legal title was in the defendant, no right of recovery would accrue to the plaintiff. *Von Drachenfels v. Doolittle*, 77 Cal. 295, 19 Pac. Rep. 518. But possibly it might be construed as a complaint for a conveyance of the legal title, and, inasmuch as we have reached the conclusion that the judgment in favor of the defendant should be affirmed, we have examined the merits of the case. The complaint alleges that one George Nidever, the father of the plaintiff, was at the date of his death the owner of and seized of an equitable estate in certain lands;

that the legal title thereof was vested in John Nidever at the time of the bringing of this action, also deceased; and that the last-mentioned person held such lands as the trustee of his son George, above mentioned, the father of the plaintiff, George D. Nidever. The record shows that upon the death of George Nidever, who died intestate, his father, John Nidever, became the administrator of his estate, being duly appointed as such by the probate court of the proper county. While acting in that capacity, and, as alleged, "holding the legal title to and being in possession of said equitable estate," the administrator filed an inventory, to which, among other things, he declared the land in dispute equitably to belong to his son's estate. He also filed in that court a verified petition, asking that the estate of his decedent be distributed, in which the same declaration is made as to the title of the land involved here. An order of distribution was made, and under it the plaintiff, as the only child surviving his father, George Nidever, had set apart to him an undivided one-half of the land distributed as above specified in the inventory and petition, the other half being set apart to his mother, the widow of George Nidever, which last is not included in this action. Several years before this order or decree of distribution was recorded, John Nidever made and delivered a deed of the land to which he thus held the legal title to George S. Gilbert and W. S. Chaffee, and through that deed and mesne conveyances the defendant disclaimed his title from John Nidever. The deed which the latter executed was duly recorded long before the decree above mentioned. Both parties to the action claim from the same source of title, under a patentee from the United States government. According to the admissions of the plaintiff, by his counsel, on the trial, the defendant never had any actual knowledge of any payment made by the decedent, George Nidever, upon these lands, or any actual notice of any trust relation existing between the father, John Nidever, and his son, George. The whole contention is that the probate court proceedings, and the recitals of the deed which John Nidever executed, were constructive notice to the defendant of the outstanding equitable title in George Nidever and his successors, which equitable interest arose from the payment of the purchase price of the land by George Nidever, and his causing the legal title to be vested in his father, John Nidever. Upon this state of facts the motion of the defendant for a nonsuit was granted, and from the judgment thereupon entered this appeal is prosecuted.

Was the decree of distribution, unrecorded at the date of the conveyance by John Nidever, the holder of record of the legal title, constructive notice to the defendant of the equitable title vested in George Nidever by his paying the purchase money for the land, and having the legal title thereto vested of record in his father, John Nidever? The ap-

pellate court of this state said, in a case where a similar question arose, as to one claiming, as the defendant does here, to be a *bona fide* purchaser without notice: "The intervenors claim that, by virtue of the homestead proceedings in the Alhoff estate, they became tenants in common with their mother in the ownership of the premises; that when Chalmers acquired the title from the United States government he acquired it for them, and thence held it in trust for them; and that the possession by their father, and the setting apart by the probate court, imparted to the plaintiff sufficient notice to put it upon inquiry, and that it is not an incumbrancer in good faith, without notice. We do not think the homestead proceedings in any manner affect the mortgage. Those proceedings operated only upon whatever right the intestate had at the time of his death." *Association v. Chalmers*, 65 Cal. 95, 3 Pac. Rep. 101. We perceive no reason why the rule thus laid down should not apply as well to a decree of final distribution of land as to a decree setting apart a homestead.

Should the recitals in the deed made by John Nidever, through which the defendant claims, be held sufficient to put him upon inquiry as to the existence of the outstanding equity? An examination of the deed upon record, if made, would have shown that John Nidever was invested with the legal title to the land. The language of the granting clause in the recital in the deed from John Nidever, through which defendant claims, relied on to defeat the defendant's claim as a *bona fide* purchaser without notice, is "that the grantor has granted, bargained, and sold and confirmed, and by these presents does hereby grant, bargain, sell, convey, and confirm, all the right, title, and interest of the party of the first part in and to the premises described." Conceding that this constituted the instrument a quitclaim deed, does it necessarily follow, from this circumstance alone, that the defendant must be held to have been put upon inquiry as to the secret equity? The appellate court of this state, in *Graff v. Middleton*, 43 Cal. 341, held that "in this state, from the earliest times, quitclaim deeds have been in every-day use for the purpose of transferring title to land, and have been considered as effectual for that purpose as deeds of bargain and sale. It is true they transfer only such interest as the seller then has, and do not purport to convey the property in fee-simple absolute, so as to pass an after-acquired title, but to the extent the seller has an interest they divest him of it, and vest it in the purchaser. We consider, therefore, that a quitclaim deed received in good faith and for a valuable consideration, which is first recorded, will prevail over a deed of older execution, which is subsequently recorded." In the present case there is nothing, unless the mere recitals of the deed can be so treated, to show any want of good faith, and it is not denied that a valuable consideration was paid for the land, and the deed recorded before the

recording of the decree of the probate court. With reference to a like question the supreme court of Mississippi, speaking through Mr. Justice CAMPBELL, said: "We conclude that there is no authority for the proposition that a quitclaim deed in the chain of title deprives him who claims under it of the character of a *bona fide* purchaser. There are *dicta* and suggestions and inferences to that effect. But we deny and repudiate the proposition as unsound and insupportable on authority, principle, or policy. We fully approve and adopt the language of Rawle, *Cov.* (4th Ed.) 36: 'In the absence of local usage, it would seem that no presumption of notice can properly arise, either from the absence or presence of unlimited covenants.' Such a doctrine, as that a quitclaim conveyance in the chain of title affects the party who claims under it with notice of infirmities in the title, would be as impolitic as it is unsupported by reason or authority." *Chapman v. Sims*, 53 Miss. 168, 169. It follows, therefore, that the contention of the appellant that the defendant was a purchaser with notice of the equitable title of George Nidever and his successors is without force, and we advise that the judgment of nonsuit be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment of nonsuit is affirmed.

(82 Cal. 621)

DREYFUS v. HIRT. (No. 13,129.)

(Supreme Court of California. Jan. 27, 1890.)

LEASES—BONA FIDE PURCHASERS.

1. Defendant in ejectment held two leases from plaintiff's grantor, each of which embraced, with other land, a part of the land granted to plaintiff. Only the first lease was of record at the time plaintiff recorded his deed. The evidence clearly showed that defendant entered into and was exclusively occupying the whole tract at the time of plaintiff's purchase. It also appeared by the evidence of a surveyor that defendant's house was on the tract covered by the second lease. *Held*, that this, being consistent with the first lease, put plaintiff on inquiry, and he, not having pursued it, was charged with notice.

2. Civil Code Cal. § 1111, provides that grants of rents, reversions, or remainders are good without attornment of the tenants, "but no tenant who, before notice of the grant, shall have paid rent to the grantor, must suffer any damage thereby." Defendant paid rent to his lessor on both leases in advance of the time it became due, and plaintiff received his conveyance before the rent so paid would have become due, but defendant had no notice of plaintiff's purchase until after the time specified in the leases for the payment of such rent. Moreover, plaintiff and his grantor had made no apportionment of the rent. *Held*, that defendant was not in default to plaintiff for the rent so paid to his lessor.

Commissioners' decision. Department 2. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Ejectment by Isidore Dreyfus against Anton Hirt. Judgment for defendant, and plaintiff appeals. Exhibit 3 was an agreement between defendant and his brother, as lessees, and Hope, their lessor, and Cowles

and Redding, as purchasers of part of the demised premises, for the surrender of the leases referred to in the opinion, so that Hope might give a clear title to Cowles and Redding. Exhibit 4 is a surrender of the leases, but expressly excepts from the release the land claimed by plaintiff.

Jarrett T. Richards, for appellant. *B. F. Thomas*, for respondent.

GIBSON, C. Ejectment. Judgment for defendant. Plaintiff appeals on the judgment roll, which contains a bill of exceptions. Defendant admitted by his answer that the plaintiff was the owner of the premises in dispute, and that he (defendant) had possessed and occupied them, and averred that his possession and occupation thereof were pursuant to two leases, granted to him by the grantor of plaintiff. From the findings it appears that while one Hope was the owner in fee of 290 acres of the Rancho Las Positas in the county of Santa Barbara, he made two leases to the defendant. The first was executed on the 3d of October, 1885, and recorded on the 14th day of the same month, and demised certain land, including about one-half of the land in dispute, for the term of five years, from the 1st day of November, 1885, at the annual rental of \$375, \$250 of which was to be paid in advance. The second lease was executed on December 1, 1885, for the same term, commencing at the same time, and included all the land claimed by plaintiff, together with certain other land; and was not recorded until the 12th day of October, 1887, six months after plaintiff received his conveyance from Hope. On the 1st of November, 1885, or soon thereafter, the defendant entered upon the land described in both leases, and on that part of the land not included in the lease of October 3, 1885, placed a dwelling-house, barn, stable, and corn-crib thereon, and since said entry has exclusively occupied and cultivated the land described in plaintiff's complaint. The respondent, on March 5, 1887, paid to Hope the rent in advance for all the land demised to him, down to and inclusive of the 1st day of November, 1888, and the evidence shows that this rent was paid by respondent in good faith, at the solicitation of Hope. Shortly after, on April 19, 1887, Hope sold and conveyed to plaintiff the land sought to be recovered by him, and his only title thereto was derived from Hope. Plaintiff, at the time he received his conveyance, had notice of the lease, dated December 1, 1885. There are other findings to the effect that defendant did not oust plaintiff at any time, nor wrongfully withhold the possession of the land, nor damage the plaintiff by withholding the land, and that the value of the annual rents and profits of the land in dispute amounted to \$200.

Appellant contends that as the respondent's apparent possession of the premises was not inconsistent with the terms of the first lease, which was of record when Hope conveyed to him, that he was not bound to make any in-

quiry respecting such possession beyond what the record disclosed; and that as the lease of December 1, 1885, was not of record when he purchased in good faith from Hope, without actual notice of the lease, and placed his deed of record before the lease was recorded, that he could not be charged with notice of the lease, which, as against his subsequent conveyance, was void, under section 1214 of the Civil Code, which provides: "Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded." In support of his contention, appellant claims that the evidence shows that the respondent only entered into and held the possession of the premises first demised to him, and which only embraced one-half of the land subsequently purchased by appellant; and that, therefore, the fourth finding, wherein the court found that the respondent entered into and held the exclusive possession of the premises embraced within both leases, and placed structures upon that portion of the premises included in the second lease, but not included in the first, is contrary to the evidence; and that the seventh finding, wherein the court found that the appellant at the time he purchased of Hope had notice of the second lease, is also contrary to the evidence.

As respondent relied upon his unrecorded lease, it was at the trial incumbent upon him, in order to avoid the effect of section 1214 of the Civil Code, *supra*, to show that at the time appellant purchased he (respondent) was in the open, notorious, and exclusive possession of the premises in controversy; as such possession would, if proven, establish the fact that appellant had actual notice of respondent's leasehold interest in the premises, unless the appellant pursued with proper diligence, and without obtaining knowledge of such interest, the inquiry such a possession would impose upon him. *Fair v. Stevenot*, 29 Cal. 486; *Smith v. Yule*, 31 Cal. 180; *Thompson v. Pioche*, 44 Cal. 500; *Palmtag v. Doutrick*, 59 Cal. 154. The evidence clearly shows that respondent entered into and exclusively occupied the whole tract, embracing the portion subsequently acquired by appellant, for a period of three years, covering the time appellant made his purchase. There does not seem to be any evidence to the contrary. As to the location of his buildings, the evidence is only a little less clear. The respondent says in one place that the house was upon the land described in the first lease, and again he says it was upon the slope of the hill on the land embraced within the second lease, which was not included in the first, and upon that portion, as we understand it, which appellant subsequently bought. He is corroborated regarding his last statement by witness Cooper, a surveyor, familiar with all the land, and who was called for appellant, and testified that the first lease

included only the valley land and one-half of the land in dispute, and that the second lease included both valley and hill land; that there were two houses upon the land embraced in the last lease, one of which was on the Dreyfus tract, the premises in dispute. Witness Hirt, a brother of defendant, testified that his brother's house was on "the land between the hill and valley," and that his brother lived there three years. Witness Williams testified: "I know where the defendant has been living for the last three years. I don't know the boundary of the land in controversy. Defendant's house is built on the slope of the hill; the hill sloped to the bottom,—just at the foot of the hill." There was therefore ample evidence to justify the findings assailed. The respondent, then, at the time of appellant's purchase, having had the exclusive, open, and notorious possession of the hill land embracing one-half of the Dreyfus place, with a house upon it, which made it a visible possession, and which was inconsistent with the first lease which was of record, was sufficient to put the appellant upon inquiry, and, not having pursued it, he was properly charged with notice. Civil Code, § 19. And the unrecorded lease was valid as to him by reason of such notice. *Id.* § 1217.

The appellant further contends that the respondent had, prior to the commencement of the action, forfeited his first lease by non-payment of rent; and proceeds, as to the second lease, upon the theory that as to him it was a nullity. "Grants of rents or of reversions or of remainders are good and effectual without attornments of the tenants; but no tenant who, before notice of the grant, shall have paid rent to the grantor, must suffer any damage thereby." *Id.* § 1111. This is a protection to the tenant who pays rent to his landlord before notice of the grant of the reversion. As we have seen from the findings, the respondent paid rent on both leases in advance of the time it became due and prior to appellant's purchase, until and including the 1st day of November, 1888. On the first lease, according to its terms, the first annual rent, payable in advance, that became due after the purchase by appellant, was on November 1, 1887, for the ensuing year; and on the second lease, on the same date, for the year ending on that date. Now, as the appellant failed to give notice of his purchase to the respondent, the respondent, even if he was not, as claimed by appellant, justified in paying it in advance, as he did, he would have been justified in paying on the first lease on November 1, 1887, a year's rent in advance, which would carry it up to the time he did pay for; also upon the second lease, on the same date, for the year ending on that date. The first time appellant brought the fact of his interest in the land claimed to the notice of the respondent was when he served a written demand upon him for the possession of the portion purchased by him one year, less a few days, after his

purchase; during all of which time the respondent was in the exclusive and visible possession of the land.

There is a reference to the purchase of appellant, Dreyfus, in a release executed by respondent and his brother on the 17th of December, 1887, (Exhibit 4.) But Dreyfus was not a party thereto, and the date is subsequent to the time when the rent above referred to became due, and therefore is insufficient alone to show knowledge of Dreyfus' purchase, so as to charge respondent with the rents that accrued November 1, 1887. Besides, as each of the leases covered other land in addition to one-half of the land in dispute, it follows that the appellant only received a portion of the reversion affected by each lease, and consequently was not entitled to the whole rent reserved in each lease. He and his grantor having failed to make, so far as the record shows, any apportionment of the rent, his grantor, as the lessor of respondent, would, it seems, be entitled to collect the whole of it, even after notice of a grant of a portion of the reversion, and could sue for the whole of it, and leave it to the jury to determine the apportionment between himself as lessor and his grantor of a portion of the reversion. 1 Tayl. Landl. & Ten. § 385; *Worthington v. Cooke*, 56 Md. 51; *Walter v. Maunde*, 1 Jac. & W. 181. It is therefore evident that as all the rent which had accrued before the action was brought had been paid to Hope without notice of the sale of a portion of the reversion, and without any apportionment of the rent and notice thereof, the respondent was not in default.

Appellant further urges that the agreement between respondent and his brother, as lessees, and Hope, their lessor, and Cowles and Redding, as purchasers of a portion of the demised premises, for a surrender of the leases, (Exhibit 3,) and a release of a portion of the premises pursuant to said agreement, expressly, however, excepting the portion sold to Dreyfus, (Exhibit 4,) canceled all the leases, and that the exception in Exhibit 4 was of no effect, as it was not provided for in Exhibit 3. But we fail to see how the appellant could derive any benefit from the transactions. They were designed to give a clear title to Cowles and Redding to that portion of the demised premises which they had purchased, and the appellant was not a party thereto, nor interested therein. We therefore advise that the judgment be affirmed.

We concur: VAN CLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(82 Cal. 659)

WATERMAN v. BOLTINGHOUSE. (No. 13,377.)

(*Supreme Court of California.* Jan. 23, 1890.)

REAL-ESTATE AGENTS—COMMISSIONS.

A real-estate broker who has a contract giving him the exclusive right to sell land within a

certain time cannot recover his commissions of his employer, who sells, himself, within the time, without the agency of the broker, unless he has produced a purchaser ready and willing to buy according to the terms of the contract.

Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Meun & Edwards, for appellant. *E. C. Winchell* and *Wharton & Short*, for respondent.

THORNTON, J. This is an action by plaintiff to recover commissions for an alleged sale of land. He never produced a purchaser ready and willing to buy on the terms of his employer, the defendant. He cannot, therefore, recover. *Dolan v. Scanlan*, 57 Cal. 261; *Moses v. Bierling*, 31 N. Y. 462; *Sibbald v. Iron Co.*, 83 N. Y. 378. Here the plaintiff had the exclusive right to sell for a term ending January 1, 1889; and the defendant, during this period, himself effected a sale. Though the plaintiff had the right to sell, to the exclusion of his employer, still he cannot recover his commissions unless he has produced a purchaser ready and willing to buy, as above stated. This is expressly held, and correctly held, in *Moses v. Bierling*, supra, which is a case similar to this. The plaintiff argues this case as if it was a suit to recover damages for defendant's breach of contract. The complaint does not set forth any such action, but one to recover the compensation agreed to be paid on a sale. There is no error. Judgment affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

(83 Cal. 10)

IESPERIA LAND & WATER CO. v. ROGERS.
(No. 13,150.)

(Supreme Court of California. Jan. 30, 1890.)

IRRIGATION—ADVERSE USER—EVIDENCE.

1. The adverse user of an irrigating ditch, through the lands of another, only during the cropping season, the ditch not being needed at other times, constitutes a continuous adverse user, as the omission to use when not needed does not break the continuity of the user.

2. In an action to quiet title to land in which defendant claims an easement, the assessment book is not admissible to show an assessment for taxes of plaintiff's land in which the easement is claimed, when defendant's easement has never been assessed for taxes.

Department 2. Appeal from superior court, San Bernardino county; HENRY M. WILLIS, Judge.

R. M. Widney and *H. C. Rolfe*, for appellant. *Rowell & Rowell*, for respondent.

THORNTON, J. Action to quiet title to a parcel of land situate in the county of San Bernardino. Defendant had judgment. Plaintiff moved for a new trial. His motion was denied, and he appeals from the judgment and order denying his motion. The controversy turned on the adverse user of defendant for more than five years of an irrigating ditch constructed by him over plain-

tiff's land. The adverse user is made out by defendant, unless the contention of plaintiff that it was not continuous is maintainable; and it is urged that the user by defendant was not continuous, for the reason that defendant only ran the water in the ditch every year during the cropping season, and when he needed it. The correct rule as to continuity of user to give a presumptive right to an easement, and what shall constitute such continuity, can be stated only with reference to the nature and character of the right claimed. The right is not abandoned to the use of a ditch to convey water for purposes of irrigation because water does not flow in it every day in the year. The party claimant does not need the ditch every day in the year, and the law does not require him to constitute continuity of use to use the water when he does not need it. If he has used the ditch at such times as he needed it, it is regarded by the law as a continuous use. If a right of way over another's land has been used for more than five years, it is not necessary to make good such use that the claimant has used it every day. He uses it every day, or once in every week, or twice a month, as his needs require. He is not required to go over it when he does not need it, to make his use of the way continuous. The claimant is required to make such reasonable use of the way as his needs require. So it is of the ditch. If, whenever the claimant needs it, from time to time, he makes use of it, this is a continuous use. An omission to use when not needed does not disprove a continuity of use, shown by using it when needed. *Bodfish v. Bodfish*, 105 Mass. 319. Neither such intermission nor omission breaks the continuity.

It does not appear that the defendant's easement in the use of the ditch has ever been assessed for taxes, and the court did not err in excluding the assessment book showing an assessment of plaintiff's land for taxes over which the ditch ran. There is no error. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

(83 Cal. 96)

GIDDINGS et al. v. 76 LAND & WATER CO.
et al. (No. 13,199.)

(Supreme Court of California. Feb. 1, 1890.)

FORCIBLE DETAINER—EVIDENCE—DAMAGES.

1. Code Civil Proc. Cal. § 1160, subd. 2, provides that every person shall be guilty of forcible detainer who unlawfully enters on real property during the absence of an occupant who, within five days preceding such unlawful entry, was in peaceable and undisturbed possession of the land. Held, that plaintiffs need not prove their actual, personal presence on the land for five days continuously preceding the unlawful entry.

2. It need not be shown (subdivision 2) that defendants held possession by force or threats.

3. Evidence that plaintiffs have been in the exclusive possession of the land in dispute for three years, no one interfering with them except one time, when defendants came and got some hay, and that defendants entered and took possession during the temporary absence of plaintiffs, without their consent, and against their will,

and have ever since retained possession, is sufficient to support a finding that plaintiffs were in the peaceable, actual, and undisturbed possession, and that defendants unlawfully entered.

4. Where the land is used in the same manner that owners of land of like character in the neighborhood commonly use theirs, the fact that it is not inclosed is immaterial.

5. Where the court finds that plaintiffs are in possession of all the lands, and this finding is not assailed, an objection that plaintiffs are not entitled to recover damages for the whole tract because they show themselves in possession of no definite part will not be sustained.

Department 1. Appeal from superior court, Tulare county; W. W. Cross, Judge.

Action by E. Giddings and others against The 76 Land & Water Company and others to recover possession of land. Defendants appeal. Code Civil Proc. Cal. § 1160, provides that every person is guilty of a forcible detainer who by force, or by menaces and threats of violence, unlawfully holds possession of any real property, or who unlawfully enters on real property during the absence of an occupant who within five days preceding such unlawful entry was in peaceable and undisturbed possession of the lands.

Wigginton & Hawes and Jarboe, Harrison & Goodfellow, for appellants. *Thompson & Thompson and O. L. Abbott*, for respondents.

PATERSON, J. This is a proceeding under the provisions of section 1160, Code Civil Proc., relating to forcible detainer, to recover possession of a tract of land in the county of Tulare. The court gave judgment for plaintiff for the restitution of the land, \$900 damages, and costs of suit. Defendant appealed from the judgment, and from an order denying its motion for a new trial. The second and fifth findings of the court are assailed by appellant on the ground that they are not supported by the evidence. The second finding is as follows: "The plaintiffs herein, for and throughout the period of more than two years last past, before the time of the entry by the defendants hereinafter mentioned, were, and continuously had been, and at the time of said entry were, in the open, peaceable, actual, and undisturbed possession and occupancy of all the land described in the complaint." Sibley, one of the plaintiffs, testified: "I have been in possession of the land in controversy for the past three or four years, putting it in crops, harvesting, etc. * * * Giddings and I have had, as partners, the entire, exclusive possession of the land for the past three years, using all of it in the customary manner for raising wheat. * * * No one ever disturbed our possession till the defendants took it as complained of by us herein. We never consented to defendants' taking possession; but, on the contrary, they took possession against our will, and without our consent. * * * We hauled hay from this land all through October and into November. * * * About the 13th of last November the defendants entered upon these premises." Giddings, plaintiff, testified: "Myself and partner have

farmed this land since 1884. * * * My partner, Sibley, and I were in full, peaceable possession up to the time the defendants took it from us. * * * On November 13th they [defendants] hauled lumber upon the premises in controversy, and built a house. Anterior to that time no one had interfered with us." Farl, a witness for defendant, testified: "They refused to deliver the hay. This was on October 2d. We then took teams, and went there, and got the hay. This conversation took place near Mr. Giddings' house." Shipe, one of the defendants, testified: "I first went upon this land on November 13th. I hauled wood there. I had a conversation with Mr. Giddings; told him I had the land rented; he told me I might unload the wood, but if I moved in I would be moved out; that they did not mean to fight or break the peace, but were in possession of the land, and meant to keep it by all lawful means. I afterwards went and took possession in their presence." This testimony, which is consistent with all the evidence offered by the plaintiffs, is sufficient, we think, to support the second finding. Plaintiffs alleged, and the court found, and the finding is not attacked, that "on or about the 13th day of November, 1888, during the temporary absence of the plaintiffs from said land, the defendants, without the consent, and against the will, of plaintiffs, entered upon said real property, the land so described in the complaint, and took possession and occupancy thereof, and have ever since intruded thereon, retained and had, and they still retain and have, the possession and occupancy of all of said land."

The fact that the land was not inclosed is immaterial. The land was occupied and used by the plaintiffs in the same manner that owners of land of like character in that neighborhood commonly occupied and used their land.

Nor was it necessary for plaintiffs to prove their actual, personal presence on the land for five days continuously preceding the unlawful entry. *Goodrich v. Van Landigham*, 46 Cal. 601; *Leroux v. Murdock*, 51 Cal. 541; *Minturn v. Burr*, 16 Cal. 107; *Shelby v. Houston*, 38 Cal. 410; *Wilson v. Shackelford*, 41 Cal. 630.

The fifth finding is as follows: "That by reason of the said taking and withholding of said lands by the defendants the said plaintiffs have sustained damage in the sum of \$300." We think this finding is supported by the evidence. It is said by appellants that "plaintiffs showed no possession, or right to take the possession, of the premises in controversy; therefore, they showed no right to damages." This point we have answered in considering the second finding.

It is claimed also that "the plaintiffs showed themselves in possession of no definite part of said premises. If the plaintiffs were only ousted from a part of the premises, clearly they were not entitled to damages for the whole." But the court found in its third

finding that the plaintiffs had retained, and still retain, the possession and occupancy of all of said land, and this finding is not assailed. No objection was made to the evidence offered by the plaintiffs on the question of damages. This evidence showed that the amount of crop which could be raised if planted after the middle of January would be only about half the amount that could be raised if the lands were "put in" in November or December. If the unlawful act of the defendants resulted in depriving the plaintiffs of half of the crop that could otherwise have been obtained, they were properly held liable. No objection was made to the evidence. If defendants deemed it speculative, or not within the issues, objection ought to have been made, so that the plaintiffs might have had the benefit of the ruling of the court upon the question, and, if adverse, overcome the effect of the objection by adopting some other mode of proof or measure of damages, and, if necessary, by amending their complaint.

It was not necessary for plaintiffs to show that defendants held possession of the premises by force, or threats of force. Code Civil Proc. § 1160, subd. 2; *Leroux v. Murdock*, supra. The cases cited by appellants on this proposition are some of them based on statutes in force prior to the adoption of the Code, and others are cases of forcible entry. In such cases the force is a necessary element. *Hodgkins v. Jordan*, 29 Cal. 577; Code Civil Proc. § 1159.

We find no error in the rulings of the court in the exclusion or admission of evidence. Under our statute, evidence of title in actions of forcible detainer is inadmissible. "The inquiry in such cases is confined to the actual, peaceable possession of the plaintiff, and the unlawful or forcible ouster or detention by the defendants, the object of the law being to prevent the disturbance of the public peace by the forcible assertion of a private right. Questions of title or right of possession cannot arise. A forcible entry upon the actual possession of plaintiff being proven, he would be entitled to restitution though the fee-simple title and present right of possession are shown to be in the defendant." *McCauley v. Weller*, 12 Cal. 524. "Under the Code, all entries on the actual possession of another are unlawful; and the question of good or bad faith on the part of the defendants no longer affects the right of the recovery in this form of action." *Voll v. Hollis*, 60 Cal. 575. Judgment and order affirmed.

We concur: BEATTY, C. J.; FOX, J.

(82 Cal. 577)

SHAIN v. FORBES et al. (No. 12,145.)

(Supreme Court of California. Jan. 27, 1890.)

ATTORNEY AND CLIENT—COMPENSATION—NON-SUIT—MISJOINDER OF PARTIES OR CAUSE—WITNESS—TRANSACTION WITH DECEDENT.

1. In an action for professional services rendered by an attorney, where defendants' answer admits that the attorney acted for one of them in

two actions, and for the other in a third action, it is error to grant a nonsuit on the ground that there was no evidence that the attorney was ever employed by defendants; the presumption being that an attorney is employed by the persons whom he represents.

2. Though the action is brought jointly against two defendants, one of whom has since died, and though under Code Civil Proc. Cal. § 1880, relating to testimony of transactions with a person since deceased, testimony by the attorney as to the value of his services is incompetent as against the executors of the deceased defendant, it should be admitted as against the other defendant. A several judgment may be entered against the surviving defendant, under Code Civil Proc. Cal. § 578, which provides that judgment may be given for or against one or more of several plaintiffs or defendants, and that the court may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

3. A misjoinder of defendants or of causes of action, not specified by defendants as a ground of a motion for a nonsuit, will not justify an order granting the motion, as it is the settled law of the state that the grounds for a nonsuit must be precisely stated by the party moving therefor, and none other can be considered by the court in granting or refusing the motion, or by the appellate court in reviewing the order.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge. *Gordon & Young*, for appellant. *Henry E. Highton*, for respondents.

BELCHER, C. C. This is an appeal from a judgment of non-suit. The action was originally brought by the plaintiff, as assignee of one Vincent Neale, an attorney at law, to recover from the defendants Alexander Forbes and William McPherson the sum of \$2,021, alleged to be due for professional services performed, and money expended for them, at their special instance and request, by plaintiff's assignor. The defendants jointly answered the complaint. The answer averred in substance that the only professional services ever rendered by Neale to the defendants, or either of them, were in the matter of the collection of a promissory note for \$5,000, made by E. J. Weston and S. Boushey, and payable to the defendant Forbes and L. L. Robinson; that the note was secured by a mortgage upon real property, and on the day of its date was indorsed and delivered by the payees thereof to the firm of Forbes Bros., then composed of the defendant Forbes and one Charles Forbes; that the indorsers waived demand and notice of non-payment of the note; that after the maturity of the note, and on or about the 6th of October, 1880, Forbes Bros. retained and employed the said Vincent Neale, as attorney at law to collect the amount due for principal and interest on said note, and to foreclose the said mortgage, which provided for an attorney's fee in the event of foreclosure of 10 per cent. upon the amount that might be found to be due; that Neale was employed to collect the full amount due—*First*, through a sale of the mortgaged property; and, *second*, by a personal judgment for any deficiency against the makers and indorsers of the note; that Neale was so employed under a specific agree-

ment—that the compensation for his services should consist of \$100, afterwards increased to \$135, and any sum that might be collected over and above the principal and interest of the note and the costs and expenses, other than counsel fees; that this agreement ever since has been, and now is, in full force and effect; that in pursuance of the said agreement Neale commenced two actions in the name of the defendant Alexander Forbes, as plaintiff therein, to collect the note and foreclose the mortgage, which, for reasons stated, were dismissed, and that Forbes Brothers paid him \$200, instead of \$135, as agreed; that, after these actions had been dismissed, Forbes Brothers, under the advice and direction of Neale, “sold, indorsed, assigned, and delivered the said promissory note to the defendant William McPherson, and thereafter the said Vincent Neale continued his services under the agreement aforesaid, but as the attorney for the defendant, Wm. McPherson, who ratified and confirmed the said agreement;” that McPherson, by Neale, as his attorney, commenced an action to collect the note and foreclose the mortgage against Weston and Boushey, the makers and mortgagors, and against Forbes and Robinson, the payees and indorsers, and that such proceedings were subsequently had in the action that judgment was rendered therein as prayed for against all of the defendants, except Robinson; that judgment was rendered in favor of Robinson, and from that judgment and an order denying a new trial the plaintiff, by Neale, as his attorney, duly appealed to the supreme court, where the appeal was still pending; and that the foregoing constituted all the professional services rendered by the plaintiff in this action and alleged in his complaint. The answer then further averred that before the commencement of this action the claim and demand set forth in the complaint had been and was fully paid and satisfied, and that there was a misjoinder of parties defendant in this, that each of the said defendants is improperly joined and united with his co-defendant. After the answer was filed Forbes died, leaving a will, which was duly admitted to probate. The executrix and executor of the will were then substituted as defendants in his place. The plaintiff presented to them his claim for allowance, but the same was rejected; and thereupon he filed a supplemental complaint, to which defendants filed a joint answer. The case was tried before the court sitting without a jury. To support his side of the case the plaintiff called as a witness Lewis Shearer, who testified that he was an attorney at law, and knew Vincent Neale and of the action entitled “William McPherson vs. E. J. Weston et al.,” that Neale was attorney for the plaintiff in that action, and witness was attorney for defendant Robinson; that the court gave judgment in favor of the plaintiff against all the defendants except Robinson, and fixed the fee of Neale at \$1,500; that Robinson had judgment for his costs, from which the

plaintiff appealed; that Neale acted as McPherson's attorney in the appeal proceedings. He prepared a statement on motion for a new trial, argued the motion, and, when it was denied, served notice of appeal, prepared transcript on appeal, prepared appellant's first brief, and argued the case before the supreme court. The witness estimated that Neale's services on the appeal were worth \$750. The plaintiff then called as a witness Vincent Neale, when the following occurred: “Counsel for Defendants. I object to his testifying—*First*, with respect to all of the defendants; *second*, specially as respects the defendants Mary Agnes Forbes and Charles Forbes, executrix and executor of the last will and testament of the deceased Alexander Forbes. The Court. The witness is incompetent to testify to any fact anterior to the death of Mr. Forbes. Counsel for Plaintiff. I offer to prove by Vincent Neale the true services in this case as against Mr. McPherson, and the question that I asked him was to go against Mr. McPherson, and he has never been paid for them. All that I ask to do is to put Mr. Neale on to prove the question as against Mr. McPherson, and I think he is competent. The Court. I don't see very well how the court can pass on the testimony. If the case were on trial before a jury, and the question should arise which has arisen here, it seems to me it would be very difficult, indeed, for the court to treat Mr. Neale as competent and incompetent at the same time. As to Mr. McPherson, he is a competent witness; as against the estate he is incompetent to prove the facts which you offer to prove by him. Now, you have averred the services rendered for two parties. It amounts to this, that his testimony, whatever it is, is in his own favor, and tends to make out a case which the jury could take into consideration as well against the estate as against McPherson. It would be quite impossible for the court to remove the matter by way of a charge to the jury. This testimony of Mr. Neale is against the estate of Alexander Forbes. If he were the only witness, then it would be very easy for the court to control the case by directing a verdict either of nonsuit or in behalf of Mr. Neale. But suppose there were other witnesses. I will sustain the objection. Counsel for Plaintiff. We except.” The defendant McPherson was then called by plaintiff as a witness, and on cross-examination, against the objection and exception of plaintiff, was allowed to testify that he never employed Mr. Neale in the action of McPherson v. Weston. At the conclusion of the plaintiff's testimony counsel for defendants moved for a nonsuit—“*First*, on behalf of all the defendants; *second*, on behalf of the executor and executrix of the estate of Alexander Forbes; *third*, on behalf of the defendant McPherson.” And as ground for the motion it was specified that there was “no evidence of any employment, either expressed or implied, to render the specific services which are alleged in the

complaint;" "that, so far as the defendants Mary Agnes Forbes and Charles Forbes, executrix and executor, are concerned, there is no testimony tending to establish any employment of Vincent Neale, and, so far as the defendant Wm. McPherson is concerned, the testimony shows specifically and positively that there was no such employment." The court granted the motion, and the plaintiff reserved an exception to the ruling.

1. It is settled law in this state that when a party moves for a nonsuit, the grounds of the motion must be precisely stated, and no other grounds than those stated can be considered by the court in granting or refusing the motion, or by the appellate court in reviewing the order. *Coffey v. Greenfield*, 62 Cal. 602; *Gardiner v. Schmaelzle*, 47 Cal. 588; *Raimond v. Eldridge*, 43 Cal. 506; *Hayne, New Trials & App.* § 116. In this case the only ground stated for the motion was that there was no evidence tending to show that Neale was ever employed by the defendants to render the services for which compensation was asked. But it is clearly admitted in the answer that Neale acted as the attorney for the plaintiff Forbes in the two actions which were commenced and dismissed, and also that he acted as attorney for the plaintiff McPherson in the third action, which was tried, and, as against Robinson, was appealed to the supreme court. This being so, he was presumptively employed by the parties whom he represented, and was entitled to receive a reasonable compensation for his services. The answer, however, attempts to meet this by stating that there was a special contract as to the compensation which he was to receive, and that this contract remained in full force, and was binding in the last as well as the first two cases, and that the agreed compensation had been fully paid. But, the services being admitted, a *prima facie* case was made against the defendants, and the burden was upon them to meet it. The misjoinder of parties defendant, or of causes of action, was not specified as a ground of the motion, and, if admitted, it could not be held to justify the ruling. As the motion was made, we think the court erred in granting it, and that the judgment should therefore be reversed.

2. Counsel have very fully argued the question as to the right of the plaintiff to call and examine Vincent Neale, his assignor, as a witness, and, as this question will again arise on a new trial, we think it should be considered. It is clear that Neale was not a competent witness as against the representatives of the estate of Forbes, (Code Civil Proc. § 1880,) and equally clear that he was competent as against McPherson. It is argued, however, for respondents that the action was joint, and no several judgment could be rendered against McPherson therein; that the testimony, if given, must operate against the estate as well as McPherson, and therefore that it was incompetent for any purpose. It is true that the rule contended for existed at

common law, but from the earliest time it has been changed by statute in this state. The Code provides: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves." *Id.* § 578. And this was but a reenactment of section 145 of the old practice act. Under this provision it has been held that where two persons are sued jointly upon a joint contract, judgment may be rendered in favor of the plaintiff against one of the defendants, and in favor of one of the defendants against the plaintiff. *Rowe v. Chandler*, 1 Cal. 168; *Lewis v. Clarkin*, 18 Cal. 399; *People v. Frisbie*, *Id.* 402. In opposition to the rule declared in these cases counsel for respondents cite *Stearns v. Aguirre*, 6 Cal. 176; *McCord v. Seale*, 56 Cal. 262; and *Weinreich v. Johnston*, 78 Cal. 254, 20 Pac. Rep. 556. But *Stearns v. Aguirre* was overruled in *Lewis v. Clarkin*, *supra*, and the other two cases cited are not in point. In *McCord v. Seale* the names of the plaintiffs appeared in the title of the complaint as individuals, and in the body of the complaint it was averred that they were partners. On the trial a partnership contract was proved, and it was objected that the plaintiffs had not filed or published the certificate required by section 2466 of the Civil Code. It was held that proof of a partnership contract could not sustain allegations of an individual contract. So, in *Weinreich v. Johnston*, the action was brought by the plaintiffs, as partners, upon a promissory note, which was proved and found to have been made to the plaintiff *Weinreich* alone, and it was held that upon the pleadings no judgment could be rendered on the note. In our opinion a several judgment might have been rendered against *McPherson*, and the testimony of *Neale*, as against him, was admissible. We advise that the judgment be reversed and the cause remanded for a new trial.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed and the cause remanded for a new trial.

(88 Cal. 36)

BOOTH *et al.* v. PENDOLA *et al.* (No. 13,267.)

(Supreme Court of California. Jan. 31, 1890.)

MECHANICS' LIENS—ENFORCEMENT—WITNESS—TRANSACTIONS WITH DECEDENTS.

1. Under Code Civil Proc. Cal. § 1195, which permits several mechanics' liens to be united in one complaint, the different causes of action are stated sufficiently separate, where there are distinct statements of the facts concerning each lien, though they are not numbered or otherwise formally designated.

2. The failure of the mechanics' liens, filed against two houses on the same lot, to specify how much of the material and labor was furnished for each, merely gives precedence to other liens, under Code Civil Proc. Cal. § 1188, and cannot be com-

plained of by the owner, who is not thereby affected.

3. An action to enforce a mechanic's lien, being in the nature of a proceeding *in rem*, in which no personal judgment can be recovered against a decedent's estate, payable in course of administration, is not a "claim," within the meaning of Code Civil Proc. Cal. § 1880, which declares that a party cannot be a witness in an action against an executor or administrator "upon a claim or demand against the estate of a deceased person."

4. There is a sufficient finding of the value of materials and labor furnished by lien claimants where the court has found that they were employed by the contractor at a certain price, as under the Code the contractor is the agent of the owner.

Department 2. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Cope & Boyce, for appellants. *A. E. Putnam*, *W. P. Bulcher*, and *B. F. Thomas*, for respondents.

McFARLAND, J. This is an action brought by plaintiffs, having several liens of mechanics and material-men, against property owned by Giovanni Pendola (now deceased) in his life-time. He died during the pendency of the action, and his executors were made defendants. Other persons were also made defendants, who set up other mechanics' liens on the property. The judgment went for plaintiffs, and for the defendants asserting liens. The defendants, executors of said Pendola, deceased, appeal from the judgment, and from an order denying a new trial.

The only safe course for one desiring to have a house built by contract, when the price exceeds \$1,000, is to have the contract written and recorded, as provided by section 1183 of the Code of Civil Procedure, and to follow the contract in his payments of money. This is, no doubt, a hardship to owners of land who desire to improve it, and limits, to them, the general control which men usually have over their own property. But it is quite evident that the legislature has industriously endeavored, by extreme means, not only to protect and favor mechanics and laborers who actually work on buildings, (which seems to have been the original notion of a "mechanic's lien,") but also certain merchants, who are brought in under the category of "material-men." And, as long as the provisions of the present lien law are held to be constitutional, (and they seem to have been so held by this court,) owners of buildings must protect themselves by the written contract provided by the Code, unless they can induce the legislature to change the law. In the case at bar the owner did not have any recorded contract; and that neglect has given rise to most of the questions in the case, as similar neglects have brought many similar cases to this court. We have examined all the points made and argued in this case, and we find no error which should work a reversal of the judgment. We shall briefly notice a few of those points.

Several different liens were united in the complaint,—which may be done under section 1195 of the Code of Civil Procedure,—

and appellant contends that the different causes of action were not separately stated. It is doubtful if this point can be raised on the record; but, at all events, we think that there is a sufficient separate statement. There was a distinct statement of the facts as to each lien, and there was no necessity that they should be numbered or otherwise formally designated.

There were two houses built on the same lot,—the Western Hotel and the Pendola cottage,—and appellant objects that in some of the liens it does not appear how much material and labor was furnished for one, and how much for the other. But that circumstance, under section 1188 of the Code of Civil Procedure, would only have the effect of giving precedence to other liens. It would be no concern of the owner of the lot. See *Dickenson v. Bolyer*, 55 Cal. 285.

The demurrer to defendant McCann's supplemental cross-complaint was properly overruled. It contained a sufficient averment of presentation of the claim to Pendola's executors, if such presentation was necessary.

Appellants contend that it was error to allow plaintiffs to testify, because, the defendant Giovanni Pendola having died before trial, they were incompetent as witnesses under subdivision 3 of section 1880 of the Code of Civil Procedure. It is to be observed that at one time a party was prohibited from testifying in any case where the adverse party was "the representative of a deceased person," as to facts which occurred before the death of the deceased. Civil Prac. Act, § 393; Hitt. Gen. Laws, 769. The law was changed to the present provision, which is that a party cannot be a witness in an action against an executor or administrator "upon a claim or demand against the estate of a deceased person." In *Fallon v. Butler*, 21 Cal. 24, it was held that a "claim" referred only to such demands against the decedent as might have been enforced against him in his life-time by a personal action, and did not include a mortgage lien, where no money judgment was sought against the estate. This ruling has been approved in *Estate of McCausland*, 52 Cal. 576; *Estate of Swain*, 67 Cal. 641, 8 Pac. Rep. 497; and *Stuttmeyer v. Superior Court*, 72 Cal. 489, 14 Pac. Rep. 35,—although in those cases the application of the rule was not made to the precise question raised here. But in *Myers v. Reinsteint*, 67 Cal. 89, 7 Pac. Rep. 192, the competency of a party as a witness against an administrator, under section 1880, was directly involved, and it was there held that, in an action to enforce a resulting trust against the personal representative of the deceased trustee, the plaintiff was a competent witness. The principle there adopted was essentially the same as the one here invoked by respondent. An action to enforce a mechanic's lien is of the nature of a proceeding *in rem*. No personal judgment can be recovered in it against the estate, payable in due course of administration, and therefore, in our opinion, it is not a "claim," within the meaning

of subdivision 3 of section 1880. We think, therefore, that the court did not err in overruling the objections to the competency of the witnesses.

Appellant contends that there is no sufficient finding of the value of the materials and labor furnished by two of the lien claimants. But the court finds that they were employed by Hamilton, the contractor, at a certain price; and as, under the Code, Hamilton was the agent of the owner, we think that this was sufficient.

There are other assignments of error which we do not deem it necessary to notice in detail. We have noticed those which we deem the most important. It must be remembered that the mechanics' lien law of this state has been changed at nearly every session of the legislature since the first statute on the subject was passed, and that many former decisions of this court in relation to it rested upon provisions not now in existence. From a careful examination of the whole of the record in this case, we see no prejudicial error.

Judgment and order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

(82 Cal. 471)

DOWNING v. LE DU. (No. 13,448.)

(Supreme Court of California. Jan. 7, 1890.)

MORTGAGES—FORECLOSURE—JURY TRIAL.

1. In an action to foreclose a mortgage, defendant is not entitled to a jury trial as a matter of course, though judgment is asked for any deficiency, and the execution of the note is denied.

2. As against the mortgagors, a foreclosure of a mortgage will be granted without proof that the mortgage was recorded.

Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

John I. Caldwell, and Geo. D. Buckley, for appellant. Caldwell & Little, for respondent.

WORKS, J. This was an action by the respondent against the appellant and her husband to recover on a promissory note executed by them jointly, and to foreclose a mortgage on certain real estate given by them to secure payment of the same. The husband allowed judgment to be taken against him by default. The wife answered, denying the execution of both the note and mortgage, and setting up a homestead in the property. There was judgment against her, and she appeals. The bill of exceptions shows that she demanded a jury trial, which was denied her, and she excepted. This is assigned as error. The respondent contends that she waived a jury trial, and it is so recited in the findings. But there is nothing in the record showing such waiver, and the recital in the findings that there was a waiver cannot prevail against the showing in the bill of exceptions that she demanded a jury, and it was denied. The respondent further contends that the case was a purely equitable one, and that, therefore, she was not entitled, as a

matter of right, to a trial by jury. But was this a purely equitable case?

The defendant denied the execution of the note, and denied that she was indebted to the plaintiff upon it for any sum. These were not equitable issues. Standing alone, they would have been triable in a court of law. Could the fact that the issues were joined with others of an equitable character deprive her of the right to a trial by jury upon those which were not equitable? The case of *Société Française v. Selheimer*, 57 Cal. 623, does not reach the point. That case was one to foreclose a mortgage, but the party appealing was not a party to the note or mortgage, but was a subsequent purchaser of the mortgaged property, and as to her the issues were purely equitable. It was said in that case: "Appellant demanded a submission of the issues raised by her answer to a jury, which was refused. Nothing is better settled in this state than that it is entirely within the discretion of the court to grant or refuse such a demand in an action in equity; and this proceeding, so far as it affects the appellant, is purely one in equity. She was made a defendant in order that her equity of redemption might be foreclosed, and for no other purpose." The other cases cited by the respondent are not in point, except that they support the well-settled rule that in purely equitable cases a party cannot demand a jury as a matter of right. But this precise question was before the court of appeals of New York in a late case, in which the defendants pleaded part payment of the amount due. It was held in that case that the party was not entitled to a jury, the court saying: "This is an action for the foreclosure of two mortgages on real estate, and was triable by the court. The defendant was not entitled, as matter of right, to a trial by jury. Although a sale of the mortgaged premises might result in a deficiency for which a money judgment could be docketed against the defendant liable for such deficiency, such a judgment was not the sole object of the action, but was an incident of the equitable relief sought. It might not even become necessary, as the mortgaged premises might bring a sufficient sum to pay the mortgaged debt, and the circumstance that in the contingency of the premises proving insufficient a judgment for the deficiency might result, did not entitle the defendant to a jury trial." *Carroll v. Deimel*, 95 N. Y. 254. We are of the same opinion, and hold that a jury trial was properly denied.

It is contended by the appellant that the findings of the court were not sustained by the evidence, but we think otherwise. One contention is that no lien was established, because there was no proof that the mortgage was recorded; but, the action being against the mortgagor, this was not necessary. The execution of the mortgage created the lien. The recording of a mortgage is not necessary, as between the parties to it. It is only necessary to give notice to third parties.

It is further contended that the mortgage was not properly acknowledged by the appellant. But the certificate of the officer shows the acknowledgment to have been in due form, and if it were conceded, as contended by the appellant, that the certificate was not conclusive, but only *prima facie* evidence of a proper acknowledgment, we think it is corroborated by the parol testimony; but, if it were not, it was sufficient to uphold the finding. It is claimed, also, that it was not shown that there was any consideration moving to the appellant for the note and mortgage. This was not necessary. The note imported a consideration, and no such proof was necessary. Judgment and order affirmed.

We concur: PATERSON, J.; FOX, J.

(3 Cal. Unrep. 227)

PEOPLE v. TOAL. (No. 20,610.)

(Supreme Court of California. Feb. 1, 1890.)

CONSTITUTIONAL LAW—POLICE COURT OF LOS ANGELES—ESTABLISHMENT.

1. Const. Cal. art. 6, § 1, provides that "the judicial power of the state shall be vested in the senate sitting as a court of impeachment, in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may establish in any incorporated city or town, or city and county." Section 13 provides that the legislature shall fix by law the jurisdiction of any inferior courts which may be established in pursuance of section 1, and shall fix by law the powers, duties, and responsibilities of the judges thereof. *Held*, that an inferior court can be established only by the passage of an act of the legislature, and its approval by the governor, or its passage over his veto, in the same manner as any other law is enacted under Const. art. 4, §§ 15, 16.

2. Laws Cal. 1887, pp. 88-90, (Const. 16th Amend., amending art. 11, § 8,) provides that any city of more than 10,000, and not more than 100,000 inhabitants may frame a charter for its own government "consistent with and subject to the constitution and laws of the state," and, if ratified by a majority of the qualified voters of the city, it shall be submitted to the legislature for its approval or rejection as a whole, and, if approved by a majority vote of the members elected to each house, it shall become the charter of such city, and the organic law thereof, and "shall supersede any existing charter, and any amendment thereof, and all special laws inconsistent with such charter." *Held*, that this does not dispense with the requirements of Const. art. 6, § 13, and that the provisions of a charter establishing a police or inferior court in such city which depend alone for their validity on a joint resolution of approval of the charter by a majority of the members of the legislature, but in no way submitted to or passed on by the governor, are unconstitutional, and the acts of such court are void.

FOX, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; J. W. MCKINLEY, Judge.

Wm. T. Williams and Horace Bell, for appellant. Atty. Gen. Geo. A. Johnson, for the People.

FOOTE, C. The defendant was convicted of an assault with intent to commit murder. From the judgment of conviction, an order overruling his motion in arrest of judgment, and an order denying his motion for a new

trial, he appeals. The order overruling the motion in arrest of judgment is not itself appealable by the defendant, but may be reviewed on his appeal from the judgment. *People v. Majors*, 65 Cal. 100, 8 Pac. Rep. 401.

The main point relied on by the defendant seems to be that the police court of the city of Los Angeles, before the judge of which his preliminary examination was had, and by whose order he was committed for trial before the superior court of Los Angeles county, was not a legal court; that the judge thereof was not authorized by the constitution of the state to perform any function whatever as a committing or other magistrate. The defendant made a motion in due time that the information be set aside upon the ground that before the filing thereof he had not legally been committed by a magistrate, under section 995 of the Penal Code. If in fact he was not legally committed by a magistrate, the point made is well taken. *People v. Ah Fook*, 64 Cal. 382, 1 Pac. Rep. 347; *Kalloch v. Superior Court*, 56 Cal. 229.

In support of his contention, the defendant declares that the provisions of the charter of the city of Los Angeles, under and by virtue of which L. Stanton, the police judge, who sat as committing magistrate in his case, was elected and claims to exercise the functions of a magistrate, are in violation of article 6, § 1, of the state constitution; that the joint resolution under which that charter was adopted by the legislature as a whole, to be found in Acts 1889, p. 512, was without force and effect so far as it concerned the establishment of a police court in said city. That resolution, omitting the preamble and charter which precede it, reads as follows: "Resolved, by the senate of the state of California, the assembly thereof concurring, (a majority of all the members elected to each house voting for and concurring herein,) that said charter be, and the same is hereby, approved as a whole for and as the charter of said city of Los Angeles." Was this a proper legislative method of enacting a law which would establish a legal inferior court, such as article 6, § 1, of the state constitution, warrants? That section of the above-named article reads thus: "The judicial power of the state shall be vested in the senate sitting as a court of impeachment, in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may establish in an incorporated city or town, or city and county." It is conceded by the appellant that the supreme court of California, in *Brooks v. Fischer*, 21 Pac. Rep. 652, has held that the charter above referred to was legally adopted, and valid in most of its provisions, but that as to the particular provisions which bring into existence a police court, and invest it with the functions of a committing magistrate, that there has been no adjudication of their validity. Section 13 of article 6 of the state constitution is: "The legislature shall fix by law the

jurisdiction of any inferior courts which may be established in pursuance of section 1 of this article, and shall fix by law the powers, duties, and responsibilities of the judges thereof." It seems clear from the language used in these constitutional provisions that it was the intention of those who framed that instrument, in establishing inferior courts, such as the one under consideration, to declare that it must be done by the passage of an act of the legislature, and its approval by the governor, or, upon his veto thereof, must be passed again by two-thirds of the members of each house voting therefor, and must become a law in the same manner as any other law is to be enacted under sections 15 and 16 art. 4 of the constitution; and this method of procedure must prevail in all cases, unless a different rule is established, pertaining to the bringing into existence of inferior courts, under provisions of charters, such as that of Los Angeles. This difference can only exist, if it be authorized at all, by the sixteenth amendment to the state constitution, amending the eighth section of article 11 of the constitution, to be found in Laws 1887, pp. 88-90. The portion of it applicable here is as follows: "Any city containing a population of more than ten thousand, and not more than one hundred thousand inhabitants, may frame a charter for its own government, consistent with and subject to the constitution and laws of this state, by causing a board of fifteen freeholders, who shall have been for at least five years qualified electors thereof, to be elected by the qualified voters of said city, at any general or special election, whose duty it shall be, within ninety days after such election, to prepare and propose a charter for such city, which shall be signed in duplicate by the members of such board, or a majority of them, and returned, one copy thereof to the mayor or other chief executive of said city, and the other to the recorder of the county. Such proposed charter shall then be published in two daily papers of general circulation in such city for at least twenty days; and the first publication shall be made within twenty days after the completion of the charter; and within not less than thirty days after such publication it shall be submitted to the qualified electors of said city, at a general or special election, and if a majority of such qualified electors voting thereat shall ratify the same, it shall thereafter be submitted to the legislature for its approval or rejection as a whole, without power of alteration or amendment; and if approved by a majority vote of the members elected to each house it shall become the charter of such city, and the organic law thereof, and shall supersede any existing charter, and any amendments thereof, and all special laws inconsistent with such charter."

Does this amendment to the constitution of 1879, as to such courts as the one in hand, which the Los Angeles charter seeks to establish, supersede the provisions of the constitution, which were existent at the time of

its ratification, and which we have heretofore cited? If not, then the establishment of the police court, the judge of which acted as an examining magistrate in this case, was without due form of law, and the court thus attempted to be established does not exist, its acts are void, and the defendant was not legally committed by a magistrate. We do not think, in so important a matter as this, viz., the changing of the form by which inferior courts shall be established by law in cities of the class to which Los Angeles belongs, that the sixteenth amendment, supra, should be held to have so far-reaching an effect, and that in this way the important provisions of the constitution, which before its passage existed, should be held to be struck dead. Again, the amendment declares that if such a charter is "approved by a majority vote of the members elected to each house it shall become the charter of such city, and the organic law thereof, and shall supersede any existing charter, and any amendments thereof, and all special laws inconsistent with such charter." Thus the idea kept constantly in view is that the charter must be consistent with and subject to the existing constitution, and all general laws, but that any preceding charter or amendment, or special laws inconsistent with the charter are to be superseded by the approval of the legislature alone. In other words, the force and effect of the sixteenth amendment, supra, as applied to charters of cities containing over 10 and under one hundred thousand inhabitants is this: That such charters may be framed in the manner prescribed by the amendment, and, if ratified by the majority of the qualified voters of the city to which it is to apply, shall be submitted to the legislature for its approval or rejection as a whole, without power of alteration or amendment, and if approved by a majority vote of the members elected to each house it shall become the charter of such city, and the organic law thereof, and shall supersede any existing charter, and any amendment thereof, and all special laws inconsistent with such charter, but that such charter must be consistent with and subject to all constitutional provisions then in force, and all general laws. Is it permissible to declare that the provisions of a charter establishing a police or inferior court in a city of over ten and under one hundred thousand inhabitants, which depend alone for their validity upon a joint resolution of approval of the charter by a majority of the members of the legislature, but not in any way approved by, submitted to, or passed on by the governor, are consistent with or subject to the constitutional provisions and general laws in existence at the time of the ratification of the sixteenth amendment, supra, which constitutional provisions prescribe a different method for the establishment of such a court, as the charter provisions bring into existence. And can a constitutional amendment which contains such limitations as those existing in the sixteenth amendment,

supra, be said to supersede the necessity of establishing an inferior court in the manner which the prior sections of the constitution point out as proper? We do not think that the sixteenth amendment is susceptible of the construction claimed for it; and we are of opinion that it plainly declares to the contrary, viz., that all existing constitutional provisions, and general laws in force at the time of its adoption are continued in full force and effect, and control any such charter. And this view is strengthened when we come to consider section 6, art. 11, in reference to corporations, which concludes in these words: "And all charters thereof framed or adopted by authority of this constitution shall be subject to and controlled by general laws." If the whole charter had been duly passed by the legislature, and approved by the governor, or passed over his veto, and in all respects taken the ordinary form of legislative enactment under the constitution, (sections 15 and 16, art. 4,) we are not prepared to say, if no general law upon the same subject had remained in force, but that a police or other inferior court thus established would be within the terms of the constitutional provisions above adverted to.

There is another feature connected with the matter in hand, which, although not urged, is yet, under the circumstances, of such importance as to deserve at least passing mention. It is a well-known fact, as we think, not only, as it appears from the preamble of the resolution adopting the charter of Los Angeles, that it is a city of more than ten and under one hundred thousand inhabitants, but that it is a city of more than thirty and under one hundred thousand inhabitants. If this is so, then the portion of the charter objected to on the ground heretofore stated is also unconstitutional in another point of view, in this, that it is obnoxious to the so-called "Whitney Act," which is adverted to by the appellate court in the lately-decided bank case, *In re Ah You*, 22 Pac. Rep. 929, (No. 20,586.) It was there decided that the freeholders' charter of the city of Oakland, a city of the same class with Los Angeles, was subject to the provisions of the act above mentioned, the same being held a "general law," and to be found in the statutes of 1885, p. 213, and that the police court, established by that charter had no existence, and no jurisdiction to try misdemeanors, or any other offense known to the law. It follows, therefore, as it seems to us, that the police judge of Los Angeles had no jurisdiction or authority as an examining and committing magistrate, and that there was no authority of law for filing the information against the defendant; and therefore his motion to set aside the information should have been granted. We therefore advise that the judgment and order be reversed.

I concur: GIBSON, C.

PER CURIAM. For the reasons given in

the foregoing opinion the judgment and order are reversed.

PATERSON, J., (*concurring.*) It will be conceded, I presume, that the city of Los Angeles is a municipal corporation, having 30,000, and under 100,000 inhabitants. The judicial power of the city, therefore, is vested in a police court, "to be held therein by the city justices, or one of them, to be designated by the mayor." Whether such power is conferred by the act of March 18, 1885, known as the "Whitney Act," (St. 1885, p. 213,) or by the act in relation to municipal corporations of the second class (St. 1883, p. 200,) it is unnecessary to inquire, because under both acts it is made the duty of the mayor to designate a justice of the peace to hold said police court. The city is not in consequence of this decision left without a court for the punishment of misdemeanors, and examination into the commission of felonies within the city limits. Being a city having 30,000 and under 100,000 inhabitants, we have to presume, in the absence of anything in the record to the contrary, that the mayor has performed the duty required of him by the act of March 18, 1885, and designated a justice to hold the police court; and we have to presume, further, that such justice is in the actual discharge of his duty as *ex officio* judge of the police court.

It is said by respondent herein that Stanton's title to his office cannot be tried in this collateral proceeding; that he is at least a *de facto* officer, performing the duties of his office, and claiming to have been elected thereto in accordance with law. This point raises the most serious question in the case, and, if it were not for the statement in the record, that "the defendant had been examined and held to answer by L. STANTON, Esq., judge of the police court of Los Angeles city, the said police court having been authorized by the legislature of said state, to-wit, senate resolution No. 2, approving the charter of the said city of Los Angeles, adopted January 31, 1889, and the said L. STANTON having been elected judge of said court under and by virtue of said charter, and was so acting by virtue of his said election," I should consider the contention sound. This statement, however, shows that the defendant was held to answer in a judicial tribunal that has no lawful existence, namely, a police court organized under the charter of the city of Los Angeles, sanctioned by the legislature under senate resolution No. 2, and presided over by one who was elected judge of said court under and by virtue of said charter, and was so acting by virtue of his said election. While it is true that the acts of a *de facto* officer, acting in a *de jure* tribunal, cannot be questioned, we have here a case in which there is neither a court nor an officer authorized by law; and, as stated before, we must presume that the court authorized by the statute is in existence, and presided over by a justice duly appointed by the mayor. In *Re Ah*

You it was admitted that if the police court established by the freeholders' charter of the city of Oakland had no legal existence its judgment was void, and that the petitioner should be discharged. Perhaps, if such admission had not been made in that case, this court would have been bound to consider Laidlaw a *de facto* judge, and his acts valid and binding, there being nothing outside of said admission to show that he was acting solely under the authority of the charter, and by virtue of his election as a police judge. That case decided that the new charter of Oakland, is subject to and controlled by the act of 1885, so far as the police court is concerned, and that decision, under the facts admitted in this case, is conclusive upon the question as to the right of the defendant to his discharge.

FOX, J. I dissent. Conceding all that is said in the opinion of the commissioners as to the unconstitutionality of that portion of the charter of Los Angeles which provides for the establishment of a police court, and the jurisdiction thereof, I cannot admit that that city is left without a court for the punishment of misdemeanors, and for examination and inquiry into the commission of felonies within its borders. It is conceded in said opinion that the "Whitney Act," so called, is a general law applicable to the city of Los Angeles. Even if that be not true, the city is still not left without law, and without a police court with jurisdiction ample for inquiry into and commitment for offenses such as are charged against this defendant. In the absence of a constitutional provision in the charter, and of the "Whitney Act," there is still a general law for the establishment and government of municipal corporations, which establishes a police court in cities of this class, and defines their powers and jurisdiction, the same, so far as relates to this case, as the jurisdiction exercised in the examination and commitment of this defendant. See St. 1883, p. 200. The magistrate who presided at this examination, and made this commitment, even if not lawfully entitled to hold the place, was presiding in a *de jure* court, of competent jurisdiction, and was himself the *de facto* judge thereof. His acts and judgments as such are as valid and binding, as to third persons, as though he held the office by strict law. *Westbrook v. Rosborough*, 14 Cal. 180.

(83 Cal. 66)

MANN v. HIGGINS. (No. 13,400.)

(Supreme Court of California. Jan. 31, 1890.)

SPECIFIC PERFORMANCE—PLEADING—MISJOINDER—HARMLESS ERRORS.

1. A complaint which alleges that defendant agreed to pay plaintiff a sum of money, part of it to be paid by the conveyance of real estate, and asks for specific performance of the contract to convey and for judgment for the balance in money, is not a misjoinder of several causes of action, as the contract sued on is an entirety.

2. A complaint which alleges that plaintiff rendered defendant certain services by which de-

fendant was enabled to take such preliminary steps as would enable him to acquire title to certain lands, and that defendant promised to pay for such services, states facts sufficient to constitute a cause of action.

3. A memorandum of a contract to convey land, which describes the land as "1 acre in S., described as follows, to-wit, in the S. W. corner of section 5, township 16, range 22, all sold to W. M., for value received," which was signed by defendant, is sufficient to be enforced by specific performance.

4. It is not a reversible error for the court in instructing the jury to use the word "testimony" instead of "evidence," as it is entirely improbable that the jury was misled by the inadvertence.

Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Action by Washington Mann against Charles Higgins, to recover for services performed, and for specific performance of a contract to convey real estate. Under the contract for the services, the real estate was to be conveyed in part payment for the services, the balance to be paid in money. Defendant appeals.

Mann & Edwards, for appellant. *E. W. Risley* and *T. P. Ryan*, for respondent.

MCFARLAND, J. The complaint avers that for a certain consideration named defendant agreed to pay plaintiff to sum of \$6,400; and that \$2,200 of said amount was to be satisfied by the conveyance to plaintiff by defendant of certain described land, which defendant agreed to so convey, leaving \$4,200 due plaintiff after such conveyance. (There was also an averment of an agreement by defendant, made in the same contract, to purchase certain personal property from plaintiff for \$475; but, as that item was abandoned by plaintiff at the trial, it need not be further considered.) Certain special issues were submitted to a jury, who found them favorably to plaintiff. The court adopted them, and made other findings, and judgment was given to plaintiff for the \$4,200, and decreeing a conveyance from defendant to plaintiff of the said lands. Defendant appeals from the judgment and from an order denying a new trial.

Appellant demurred to the complaint on the grounds that several causes of action were improperly joined, and that the complaint was ambiguous, unintelligible, and uncertain. He contends that the court erred in not sustaining these grounds of demurrer, but the rulings of the court on these subjects are not specified as errors in the statement on motion for a new trial. Assuming that they can be considered here, although not contained in the assignment of errors, we think that the points were not well taken. As the alleged contract was an entirety, and defendant's promises were all founded upon the same consideration, we think that not only could plaintiff have judgment in the same action for the money and for the specific performance of the agreement to convey, but that it was his duty to unite them both in the same action if he wished to enforce both. Neither do we think that the com-

plaint was fatally defective on account of ambiguity, uncertainty, etc.

And we think, also, that the point that the complaint does not state facts sufficient to constitute a cause of action cannot be maintained. The facts alleged as constituting the consideration of defendant's promises are these: That "plaintiff and defendant entered into a certain agreement whereby it was agreed between them that plaintiff should use his knowledge and influence in behalf and render certain services to defendant, to enable defendant to take the preliminary steps to acquire from the United States for himself, or those whom he might name, the title to" certain named legal subdivisions of government land, containing 320 acres; and that he did use such knowledge and render such services, etc., by which defendant was enabled to and did take such preliminary steps as will enable him to acquire such lands. We think this was a sufficient statement of a cause of action.

Appellant contends that there was no sufficient "note or memorandum in writing" of defendant's agreement to convey to plaintiff the property described in the complaint. The written memorandum was as follows: "6,865. 4,675. Lots 5, 6, 7, and 8, in fractional block E of Cooper's addition to Selma; 1 acre in Selma, described as follows, to-wit: In the S. W. corner of section 5, township 16, range 22,—all sold to W. Mann, for value received. CHARLES HIGGINS." There was also another memorandum made at the same time, which, after mentioning certain horses and other personal property, ended with the words, "Due W. Mann. \$4,675. CHARLES HIGGINS," and immediately below defendant's name were the words, "one acre in Selma, 1,000; 4 lots, 1,200." We think that the memoranda were sufficient. The figures "6,875" were shown to be the \$6,400 which defendant was to pay plaintiff, with the additional \$474, at that time contemplated to be paid for the personal property; and the "4,675," found in both memoranda, the amount remaining after deducting the \$2,200 for the land at Selma. The facts here are materially different from those in *Breckinridge v. Crocker*, 21 Pac. Rep. 179. We have examined the assignments of error alleged to have been committed in rulings on the admissibility of evidence, and we think that none of them are tenable. They are mostly founded on the theory that there could be no explanation of the written memoranda.

The court, when instructing the jury on the subject of the preponderance of evidence, used the word "testimony," instead of "evidence;" and appellant contends that this was a reversible error. Of course, "evidence" is the more comprehensive word, and includes "testimony," which latter, strictly speaking, means only that evidence which comes from living witnesses who testify orally. But in common language, (and, sometimes, even, among lawyers) the two words are frequently used synonymously, and

it is entirely improbable that the jury was misled in the premises. The fact is that the real struggle of this case centered around the truth and weight of the evidence. But the evidence was certainly conflicting, and the responsibility of determining the questions of fact was with the jury and the trial court; and we see no good reason to disturb the view to which the judge of the court below took of the alleged newly-discovered evidence. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

(36 Cal. 93)

GOLDTREE et al. v. McALISTER. (No. 13,436.)

(Supreme Court of California. Jan. 31, 1890.)
WILLS—FOREIGN PROBATE—COLLATERAL ATTACK
—MORTGAGE FORECLOSURE.

1. Code Civil Proc. Cal. §§ 1822-1824, provide that when a copy of a will, duly proved and allowed in a foreign country or state, and the probate thereof, duly authenticated, shall be produced, the same shall be filed, and the court must appoint a time for the hearing, and if, on the hearing, it appears that the will has been proved, allowed, and admitted to probate in any foreign country, it must be admitted to probate in this state. *Held*, that the question whether a will has been duly proved and allowed in a foreign country is a fact which the court must find from the evidence, and, where the court finds that a will has been properly probated in a foreign country, and admits it to probate in this state, its action cannot be attacked collaterally, but only by direct appeal.

2. Code Civil Proc. Cal. § 892, requires actions for the foreclosure of mortgages to be tried in the county in which the subject of the action, or some part thereof, is situated, and where real property is situated partly in one county, and partly in another, the plaintiff may select either county, and the one selected is the proper county for the trial of the action. *Held*, that where land is sold by the sheriff of the county of S. under foreclosure proceedings instituted in that county, and part of the land is shown to be in the county of K., but it does not appear where the remainder is situated, it will be presumed that the mortgaged premises consists of one body of land situate partly in the county of S. and partly in the county of K.

Commissioners' decision. Department 2. Appeal from superior court, Kern county; J. B. CAMPBELL, Judge.

William Shipsey and Graves, Turner & Graves, for appellant. *W. H. Spencer and J. M. Wilcoxson*, for respondents.

VAN CLIEF, C. This is an appeal from a judgment for plaintiffs in an action of ejectment. The plaintiffs sued in the character of trustees of the estate of Jonathan Thompson, deceased, under his last will; and the first question to be considered arises from a contest upon the trial as to whether or not the plaintiffs were entitled to sue in that character. The defendant having denied the will, the plaintiffs, to prove it, offered in evidence a certified copy of the proceedings of the probate court of the county of San Luis Obispo in the matter of the estate of Jonathan Thompson, deceased, commenced by the petition of John Thompson and John A. Patchett, filed December 2, 1875, alleging, in

substance, that the testator died in the county of Monterey, Cal., leaving estate in the county of San Luis Obispo; that his will had been duly proved and allowed in the queen's probate court of England, at London, on the 28th day of October, 1875, which court had competent jurisdiction for that purpose; that the will was executed in conformity with the laws of this state; the character and value of the property in this state; who were the heirs and devisees residing in this state and in England; that petitioners and Thomas Grierson, of England, were named in the will as executors thereof; and that they consented to act as such; and praying that the authenticated copy of the will be admitted to probate, allowed, and recorded. With this petition was exhibited and filed what purported to be a copy of the will as probated in the English court, headed as follows: "Extracted from the principal registry of the probate division of her majesty's high court of justice. On her majesty's court of probate." Added and subscribed to this copy of the will was the following: "Affidavit filed that testator was a British subject, and that he made his will in England. Proved at London 28th October, 1875, by the oath of Thomas Grierson, one of the executors, to whom administration was granted. Power was reserved of making the like grant to John Andrew Patchett and John Thompson, otherwise John Brown Thompson, the other executors. I certify that this copy has been examined with the original will deposited in the registry, and that it is a true copy thereof. Examined, J. W. S. DAVID HENRY OWEN, (14 fos., W. J. O.,) Registrar. [The seal of her majesty's high court of justice, principal registry, probate division.]" It is admitted that due notice of the time and place appointed for hearing the petition and for probate of the will in the California court, as prayed for in said petition, was made and published according to law. On the day appointed, the probate court in which said petition was filed made the following order: "The petition of John Thompson and John A. Patchett, heretofore filed in the above-entitled matter, praying for admission to probate of a document purporting to be a duly-authenticated copy of the last will and testament of said deceased, and to be appointed executors of the said estate, and that letters testamentary thereon be granted to said petitioners, coming on regularly to be heard on this 27th day of December, 1875, on reading and filing of the publication and services of notices of the present hearing, as required by order of this court, and it appearing to the court that due notice has been given according to law, and that the aforesaid document is a duly-authenticated copy of the last will and testament of said deceased, together with a copy of the probate thereof, said will having been executed in the kingdom of Great Britain and Ireland, in conformity with the laws of this state, and thereafter, to-wit, on the 28th day of October, 1875, having been proved, al-

lowed, and admitted to probate in the queen's probate court, in the city of London, England, and it having heretofore, to-wit, upon the appointment of the special administrator of said estate, appeared that the said deceased died on the 5th day of September, 1875, being at the time a resident of the county of San Luis Obispo, having estate real and personal therein, and the said John Thompson and John A. Patchett being of lawful age, and competent to serve as executors, it is ordered that the paper heretofore filed, purporting to be a copy of the last will and testament of the said deceased, be admitted to probate as the last will and testament of said deceased; that the said John Thompson and John A. Patchett be, and they are hereby, appointed executors of said estate and that letters testamentary issue to the said petitioners upon their taking the oath as required by law. Dated December 27, 1875. Mc. D. R. VENABLE, Probate Judge." Letters testamentary were accordingly issued to John Thompson and J. A. Patchett, and they duly qualified. The will also appointed Thompson, Patchett, and Grierson trustees of the estate, and devised the property to them for the uses and purposes expressed in the will, so that upon the settlement of the estate in the probate court the residue of the property, including the testator's right and title to the demanded premises, was on March 10, 1877, distributed to them. On November 9, 1884, by order of the superior court duly made, Patchett was removed, and the plaintiff Goldtree was appointed in his place.

To the introduction in evidence of the record of the California probate proceedings the defendant objected on the ground that the probate court of San Luis Obispo county never acquired jurisdiction of the subject-matter of the probate of the will, because the copies of the will, and of the foreign probate thereof, were not certified nor authenticated as required by sections 1323, 1324, and 1906 of the Code of Civil Procedure. Sections 1322-1324 provide a mode of proving a defined class of wills in this state, viz., all wills which have been duly proved and allowed in any other of the United States, or in any foreign country or state. The mode of proof and the evidence required in this class of cases differ from the mode and evidence required in other cases, yet all are cases of probate of wills. Section 1324 provides that upon the proofs and conditions therein mentioned wills of this class "must be admitted to probate, and have the same force and effect as a will first admitted to probate in this state." Conceding, for the sake of argument only, that the fact that the will had been "duly proved and allowed" in a foreign country or state, as expressed in section 1322, is a jurisdictional fact in addition to the jurisdictional facts of cases in which wills are first probated in this state, yet it belongs to that class of jurisdictional facts which the court must find from the evidence; and if the court found this fact upon insufficient evidence, or without competent

evidence, and thereupon proceeded to exercise jurisdiction, the action of the court in this respect was not void, but merely erroneous, and subject only to direct attack by appeal, and was not open to the collateral attack here made. *Irwin v. Scriber*, 18 Cal. 500; *Hal-leck v. Moss*, 22 Cal. 276; *Rogers v. King*, Id. 73; *Lucas v. Todd*, 28 Cal. 182; *State v. McGlynn*, 20 Cal. 233; *Luco v. Bank*, 70 Cal. 339, 11 Pac. Rep. 650; *Freem. Judgm.* §§ 118, 60. An error of the court in deciding that certain documentary evidence, not properly authenticated, proved a valid foreign probate of a will, is not different in character or principle from an error in deciding, as in the case of *Irwin v. Scriber*, supra, that certain evidence proved that the deceased had her last place of residence in Sacramento county. The error in the former case may have proceeded from a misconception of what constituted a valid foreign probate of a will, or from an error as to what was competent or sufficient evidence to prove it. In the latter case, the error may have arisen from a mistaken view of what constituted a residence, or from an error as to what was sufficient or competent evidence to prove it. Such errors may be corrected by appeal, but do not render the judgment void; and it makes no difference that the Code (sections 1323, 1324) provides that the fact of the foreign probate shall appear or be proved by duly authenticated record evidence, as these provisions only regulate the procedure by which the court shall ascertain that fact. It may be that the court considered the "copy of the will, and the probate thereof, duly authenticated" by the documents produced and filed with the petition as above stated; or, for aught that appears, it may be that the court permitted this documentary evidence to be supplemented by proof, in accordance with section 1907 of the Code of Civil Procedure. In either case the error, if it was error,—and this may be conceded for the present purpose,—was such only as to the competency or sufficiency of the evidence upon which the court found the fact which is claimed to be jurisdictional, viz., that the will had been "duly proved and allowed * * * in a foreign country or state," as required by section 1322, Id. I therefore think the trial court did not err in admitting in evidence the records of the probate court of the county of San Luis Obispo.

Counsel for appellant further contends that the court erred in sustaining a general demurrer to defendant's cross-complaint. The cross-complaint shows that the demanded premises, S. W. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 19, township 28 south, range 19 east, are a part of what are known as the "University Lands" of California, sold by the state through the agency of the board of directors of the university. In March, 1871, Carolan Mathers applied to purchase the S. W. $\frac{1}{4}$ of section 19. His application was accepted, and he paid 20 per cent. of the purchase money, and interest on the remainder in advance, as required by law, amounting to \$64.50 and

\$8 fees, and received a certificate of purchase. In March, 1874, David C. Norcross, in the same manner, and upon the like conditions, applied for the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of said section 19, and received a certificate of purchase therefor. In September, 1871, Mathers conveyed his interest in the land, and assigned his certificate of purchase, to David C. Norcross; and in September, 1875, David C. Norcross conveyed and assigned one undivided half of both parcels of land, and of the certificates of purchase, to John C. Norcross. In October, 1875, David C. Norcross and John C. Norcross executed to the plaintiff John Thompson as administrator of Jonathan Thompson, deceased, a mortgage on 2,441 acres of land, including the demanded premises, to secure \$12,000 and interest. In January, 1877, at suit of the executors of Jonathan Thompson in the then district court San Luis Obispo county, against David C. and John C. Norcross, a decree of foreclosure of this mortgage was entered. November, 1877, in execution of said decree of foreclosure, the sheriff of San Luis Obispo county sold the mortgaged premises, including the demanded premises, to the plaintiffs as trustees of the estate of Jonathan Thompson, deceased, and issued to them a certificate of sale. This sale was made in front of the court-house in San Luis Obispo county. The demanded premises are wholly in Kern county; but it does not appear from the cross-complaint, nor from the record, in what county the remainder of the mortgaged premises, 2,441 acres, are situated. June 8, 1878, the sheriff executed to plaintiffs a deed for the whole of the mortgaged premises. On July 2, 1879, the plaintiffs presented the sheriff's deed to the proper officers of the university, representing that they were the assignees of Mathers and Norcross, to whom the certificates of purchase had been issued, paid the balance of the purchase money, and thereby procured state patents for the land. On October 8, 1885, over six years after the date of the patents, David C. and John C. Norcross conveyed to defendant, McAlister, all their right, title, and interest in and to the demanded premises, and said certificates of purchase. Upon this state of facts, the defendant claims that he is the equitable owner of the land; that plaintiffs hold the legal title in trust for him; and that upon payment by him of "all money they have necessarily and properly expended in procuring said patents with interest," (which he offers to pay,) they should be ordered to convey to him the legal title; and to this effect is the prayer of the cross-complaint.

The sole ground upon which defendant bases his right to this relief is that the sheriff of San Luis Obispo county had no authority to sell the demanded premises, situated, as they were, wholly in Kern county, and that the sale was therefore void. It is not denied, however, that the district court had jurisdiction to foreclose the mortgage, nor that the foreclosure procedure was entirely regular.

and, since it does not appear but that the mortgaged premises consisted of one body of land, situated partly in San Luis Obispo county and partly in Kern county, these facts must be presumed in support of the jurisdiction and regularity of proceedings of the district court. The constitution, art. 6, § 5, provides "that all actions for * * * the enforcement of liens upon real estate shall be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated." Section 392 of the Code of Civil Procedure requires "actions * * * for the foreclosure of * * * mortgages" to be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial. And further provides that "where the real property is situated partly in one county and partly in another the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action." The foreclosure of a mortgage embraces the sale of the property and the execution of the sheriff's deed, as well as the decree of the court ordering the sale. A mortgage cannot be said to be foreclosed, even in the sense of our Code, until the mortgagor's right of redemption is cut off. Anderson's Law Dictionary defines "foreclosure" as follows: "(1) Specifically, the extinguishment of a mortgagor's equity of redemption beyond possibility of recall. A mortgage is foreclosed in the sense that no one has the right to redeem it, or to call the mortgagee to account under it. In no sense can the term be applied to a mortgage until sale of the property has been effected." Referring to 2 Bl. Comm. 159. Puffer v. Clark, 7 Allen, 85; and Duncan v. Cobb, 32 Minn. 464, 21 N. W. Rep. 714.

In providing that an action for the foreclosure of a mortgage may be commenced and tried in any county in which any part of the mortgaged property is situated, it must have been the intention of the legislature that the mortgage should be foreclosed in such county; that is to say, that every judicial, ministerial, and executive official act necessary to effect a foreclosure might be performed in any county in which any part of the property was situated. A piece of mortgaged land may be partly situated in several different counties, as where three or four counties corner upon it, and also where it is traversed by a meandering stream which marks the boundary line between two counties. In such case it would be very inconvenient, and unnecessarily expensive, to require each part of the land to be separately sold and conveyed by the sheriff of the county in which it is situated. Besides, it would generally turn out that the sum of the value of all the parts thus sold would not equal the value of the undivided whole. These considerations strengthen the construction permitting the mortgage to be completely foreclosed in any one of the counties in which any part of the mortgaged property is situated. It must therefore be pre-

sumed, upon the facts stated in defendant's cross-complaint, that the sheriff of San Luis Obispo county was authorized to sell and convey the demanded premises. This being so, it follows that the cross-complaint does not state facts sufficient to entitle the defendant to any relief, and that the demurrer to it was properly sustained. I think the judgment should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(82 Cal. 654)

WHITE v. SOTO et al. (No. 12,341.)

(Supreme Court of California. Jan. 31, 1890.)

PLEADING CONTRACTS—MECHANICS' LIENS.

1. A complaint which alleges that there was a written contract between the parties, which was afterwards modified by an oral agreement, and then states the contract according to its legal effect as modified, sufficiently pleads the contract.

2. A written contract which has been modified, but not entirely superseded, by a subsequent parol agreement, is admissible in evidence in a suit on the contract as modified.

3. Where a written contract for building a house provides that the person for whom it is to be built may at any time during the progress of the work request any changes in the contract, and the same shall in no way avoid it, parol evidence is admissible, on the question as to whether a mechanic's lien was filed in time, to prove an oral agreement made during the progress of the work by which the building was enlarged, and the time for completing it extended.

4. An amended complaint, based on the same cause of action set up in the original complaint, relates back to the date of the filing of the original complaint.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

R. M. F. Soto, for appellants. Gell & Morehouse, for respondent.

GIBSON, O. This is an appeal by defendants from an order denying them a new trial in an action prosecuted by plaintiff to foreclose a mechanic's lien. It appears from the findings that on August 23, 1882, J. M. Soto, the husband of Maria P. de Soto, entered into a contract in writing with White, by which the latter agreed to erect a dwelling-house of a certain kind and dimensions upon land owned by Maria P. de Soto, and furnish all the material and labor therefor, and complete and finish it on or before November 21, 1882; for which J. M. Soto agreed to pay him the sum of \$2,850, in four several installments. After White had commenced the erection of the building under the contract, he and J. M. Soto made a modification of the said contract, by verbal agreement, by which White agreed to enlarge the building in certain respects, and furnish the necessary additional material and labor, and J. M. Soto to pay, in addition to the original contract price, whatever such additional material and labor should be reasonably worth, and that White should have such additional time as he might

require to complete the building. White, pursuant to the written contract, as modified by the subsequent oral agreement, completed the dwelling-house on January 31, 1883, and on the same day he delivered the entire possession of it to Soto and his wife, who both, on the same date, moved into it, and thereafter continued to occupy it as their place of residence. During the whole progress of building the defendant Mrs. Soto was in and about the building, and supervised plaintiff's work, and made directions as to certain changes therein, and never in any way objected to the erection of the building. The reasonable worth of the additional work upon and material furnished for the building was \$383, which, in addition to the original contract price, made all the work done and material furnished of the reasonable value of \$3,234. Of this sum, and before suit was brought, J. M. Soto paid \$2,880, leaving an unpaid remainder of \$353. White filed his claim of lien, and commenced suit thereon within the statutory time. During the trial it was admitted that after the action was commenced J. M. Soto paid to White the sum of \$253 of the amount sued for, and it was at the same time stipulated that the sum so paid should be deducted from whatever amount the court should find due, if any should be found due, and judgment for the remainder rendered and entered. Interest from the commencement of the suit was allowed on the \$100 found due, after all deductions; also an attorney's fee of \$100, and \$10 for expenses incurred in securing the lien. The objections upon which appellants seem to mainly rely are that the written contract, as subsequently modified by parol agreement, was not properly pleaded; and that the court erred in admitting the written contract, and parol evidence of its modification, in evidence.

1. It is alleged in the amended complaint that the written contract in question was made between the plaintiff and J. M. Soto; that subsequently, by their oral agreement, it was modified, and that as modified it is as follows, (then follows a statement of the contract according to its legal effect, followed by appropriate allegations to the effect that plaintiff upon his part had executed it, and that Maria P. de Soto, upon whose land the house was erected, had by her conduct accepted and ratified the contract, but had failed to execute it in full upon her part.) It has been decided in several cases that a contract may be declared upon *in hæc verba* or in substance and according to its legal effect. *Stoddard v. Treadwell*, 26 Cal. 294; *Love v. Mining Co.*, 32 Cal. 639. Although the plaintiff did not set forth in his complaint the written contract, and then show, by appropriate allegations, wherein it had been modified by their subsequent executed verbal agreement, pointed out as the proper method in *O'Connor v. Dingley*, 26 Cal. 11, and

adopted in *Barilari v. Ferrea*, 59 Cal. 1, still, as the complaint shows clearly and with certainty what the contract as modified was, it was not subject to defendant's demurrer, on the ground of ambiguity, uncertainty, and unintelligibility.

2. As the original contract was not entirely superseded by the subsequent modification of it made by parol, it, together with such modification, constituted the basis of the suit; and it is therefore clear that the written contract was indispensable to enable the court to determine how far it had been performed, and to ascertain the stipulated time and mode of payment, in order to give it effect as far it might be applicable in connection with the parol modification of it. *O'Connor v. Dingley*, supra; *Dermott v. Jones*, 2 Wall. 9; *Ladue v. Seymour*, 24 Wend. 60. The written contract contained the following stipulation: "*Sixth*. Should the said Soto, at any time during the progress of the work on said building, request any alterations, deviations, additions, or omissions from this contract, or the said drawings or specifications, he shall be at liberty to do so, and the same shall in no way affect or make void this contract, but a rebate from or an addition to the amount of the contract price shall be made on account thereof, by a fair and reasonable valuation." Thus it appears the original contract provided for just such a subsequent deviation from it as was made. This deviation did not vary the terms of the written contract, but merely expanded them so as to embrace the enlargement of the building provided for in the written contract, and such additional time as might be required for the completion of the building as enlarged, and was properly provable by parol evidence. *O'Connor v. Dingley*, supra; 2 Whart. Ev. § 1026.

3. The further objection, made by appellants, that plaintiff failed to file his lien and to commence an action thereon in time, cannot be sustained because the record shows that the dwelling-house was completed on January 31, 1883, and that the claim of lien was filed March 30, 1883, within 60 days. This was within the statutory time, as the plaintiff was an original contractor. Code Civil Proc. § 1187. Suit was brought to enforce the lien on June 28, 1883, within 90 days after the claim of lien was filed, and was therefore in time. *Id.* § 1190. The amended complaint was filed on July 22, 1885, but, as it was based upon the same cause of action, it related back to the date upon which the original complaint was filed. *Jones v. Frost*, 28 Cal. 246; *Easton v. O'Reilly*, 63 Cal. 305. We therefore advise that the order appealed from be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(82 Cal. 645)

WIESE v. SAN FRANCISCO MUSICAL SOC.
(No. 12,740.)

(Supreme Court of California. Jan. 30, 1890.)

RES ADJUDICATA.

1. A judgment, unappealed from, that a mutual benefit insurance association had no power to limit by by-law the amount of "sick benefits" to be paid to a member, is conclusive on the parties in an action for subsequently accrued installments.

2. The conclusiveness of the judgment is not affected by the fact that it was rendered in an action commenced in a justice's court, where it appears that the court had jurisdiction.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

W. H. L. Barnes, for appellant. O'Brien & Morrison, for respondent.

HAYNE, C. This was an action to recover certain "sick benefits." The general features of the case are like those in *Stohr v. Society*, 22 Pac. Rep. 1125, (filed January 22, 1890,) which is against the same defendant. After the passage of the by-law limiting the amount of benefits, and the payments in accordance therewith, the defendant refused to pay anything further; and within a few months thereafter the plaintiff commenced an action in the justice's court to recover the installments then claimed to be due. Judgment was given in his favor, and the society appealed to the superior court, where, after a trial on the merits, a similar judgment was rendered. The court below held this judgment to estop the defendant from maintaining the defense presented here, and we think that this ruling was correct. It affirmatively appears that the matters which are presented here were litigated and decided in the former action. There, as here, the main defense was that the by-law of 1883 limited the amount of benefits to be paid to the plaintiff. The court decided that the defendant had no power to impose such a limitation. The only difference between the two cases is that, by mere lapse of time and the continuance of the plaintiff's sickness, new installments have become due. It is quite true, as stated by Chief Justice DE GREY in the *Duchess of Kingston's Case*, that a judgment is not conclusive "of any matter to be inferred by argument from the judgment." But here the invalidity of the by-law was the ultimate point involved, and it was actually litigated, which circumstance distinguishes the case from *Cromwell v. County of Sac*, 94 U. S. 351, cited for the appellant. The preponderance of authority is in favor of the respondent's position that in such a case the judgment is conclusive in an action for subsequent installments. *Robinson v. Howard*, 5 Cal. 428; *Love v. Waltz*, 7 Cal. 250; *Outram v. Morewood*, 3 East, 346; *Aurora City v. West*, 7 Wall. 96; *Bissell v. Spring Valley Tp.*, 124 U. S. 225, 8 Sup. Ct. Rep. 495; *Smith v. Ontario*, 18 Blatchf. 454, 4 Fed. Rep. 386; *Laird v. De Soto*, 32 Fed. Rep. 652; *Oregonian*

Ry. Co. v. Oregon, Ry., etc., Co., 27 Fed. Rep. 278; *Kennedy v. McCarthy*, 73 Ga. 346; *Cleveland v. Creviston*, 93 Ind. 81; *Furneaux v. Bank*, 39 Kan. 144, 17 Pac. Rep. 854; *Gardner v. Buckbee*, 3 Cow. 120; *Doty v. Brown*, 4 N. Y. 71; *Bouchaud v. Dias*, 3 Denio, 238.

The fact that the former case was commenced in the justice's court makes no difference. That court had jurisdiction; and, when a court which has jurisdiction renders a valid judgment, such judgment is as binding as any other. But, however this may be, the case was retried on its merits in the superior court, and the judgment relied upon was entered there, and is a judgment of that court. We therefore advise that the judgment and order appealed from be affirmed.

We concur: VAN CLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(83 Cal. 23)

BOREHAM et al. v. BYRNE et al. (No. 13,222.)

(Supreme Court of California. Jan. 30, 1890.)

HOMESTEAD—DECLARATION—TRIAL—COMMENTING ON INSTRUCTIONS—CUSTODY OF JURY.

1. St. Cal. April 28, 1880, p. 311, § 1, provides, *inter alia*, that a declaration of homestead shall state that declarants or either of them, are married, or, if not married, that he or she is the head of a family, and that at the time of making the declaration they, or either of them, are residing on the premises with their family, or the person under their care. *Held*, that a declaration is insufficient which states that the declarant was a married man, and had been in possession of the premises for a specified time, but fails to state the nature of the possession, or that either he or his wife, with the family, were residing on the premises at the time.

2. Evidence is inadmissible, in connection with such defective declaration, to prove that when it was made, and thereafter, declarant was in fact residing on the premises with his family, and that the purchaser from him took the premises with knowledge of all the equities, as actual residence, without a sufficient declaration, is ineffectual to constitute a homestead.

3. As the object of the act is to disable either spouse from voluntarily alienating the premises, but only when there has been a sufficient declaration, in the absence of such, a deed of the premises, executed by both husband and wife, is admissible in evidence as the deed of the husband alone; the wife's signature being superfluous.

4. Evidence that the wife's signature was a forgery is immaterial in such case.

5. It is discretionary with the trial court to permit counsel to read to the jury, and comment on, the instructions previously settled by the court.

6. It is not essential that a special oath should be administered to the person in charge of the jury; and a statement that he was an officer implies that he had taken his oath of office, which is a sufficient qualification for that purpose.

Department 2. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

M. T. Moses and Charles A. Sumner, for appellants. Byron Waters and Elmer E. Rowell, for respondents.

THORNTON, J. Ejectment. Trial by a jury. Verdict and judgment for defendants. Plaintiffs appeal from the judgment and order denying their motion for a new trial. On October 14, 1862, one Mee, who at that time held the title to the land in suit, conveyed it to George Boreham, husband of plaintiff, Louise Boreham. It was admitted that, from the day the foregoing deed bears date, up to the time George Boreham left San Bernardino, (about July 1, 1865), he and his family resided on the land sued for. Defendants claim title under a deed purporting to be executed by George Boreham and plaintiff Louise Boreham, his wife, to J. H. Stewart, dated May 31, 1865. "It was offered by defendants as the deed of George Boreham only." Whatever title Stewart took by this deed passed to, and vested in, the defendants.

On the trial, plaintiffs offered in evidence a certified copy of a paper executed by George Boreham on November 4, 1862, which was duly acknowledged and recorded on the day just above named. The following is a copy of it: "Know all men by these presents, that I, George Boreham, of the county of San Bernardino, state of California, do hereby make and declare my intention to use and claim the following-described premises as a homestead, to-wit, [here follows a description of said property], which said premises was conveyed to me, by Sydney Mee, by deed bearing date the fourteenth of October, A. D. 1862, together with all the appurtenances thereunto belonging; and I do further declare that I am a married man now, and have been since the date of said deed, in possession of said premises, and that said premises are worth less than \$5,000. In witness whereof, I have hereunto set my hand and seal this 4th day of November, A. D. 1862, at the city of San Bernardino. [Signed] GEORGE BOREHAM. [Seal.] Duly acknowledged and recorded November 4, 1862." Defendants objected to the introduction of the foregoing paper on the grounds that it was not a declaration of homestead; that it was immaterial, irrelevant, and incompetent, void on its face; that it did not state that the declarant was residing on the premises at the time it purported to have been made, nor that he was residing thereon with his family; and that it does not state the cash value of the property. The court sustained these objections, and excluded the declaration, to which plaintiffs reserved an exception. The plaintiffs again offered this paper in evidence, and offered to prove, in connection with it, that at the time the same was made and recorded the declarant was in fact residing upon the premises described therein with his family, claiming and using the same as a homestead, and that he so continued to reside there, with his family, up to about the 1st day of July, 1865, and also that the parties defendant acquired whatever right, title, or claim they had to said property under a deed from J. H. Stewart, and with knowledge of the nature and condition of said Stewart's title and equities

in the premises, and also that J. H. Stewart, the party dealing with George Boreham, understood and believed at the time that it was a valid homestead, and dealt with him as if it were such, and required that in the purported deed of said land from Boreham to Stewart the wife of Boreham should join, and procure some one to personate her, and sign her name to such deed; all of which was excluded under the same objections. To this ruling the plaintiffs also objected.

The paper thus excluded from evidence was offered as a declaration of homestead made by George Boreham under the act of April 28, 1860. St. 1860, p. 311, as amended by the act of May 12, 1862, p. 519. The act of 1860 was an amendment of the act of April 21, 1851, which latter was the first act passed in this state in relation to a homestead. St. 1851, p. 296. Under this act it was held that a homestead claim could not be created by the residence of the husband alone, in the absence of the wife and family. *Gambette v. Brock*, 41 Cal. 83, and cases there cited. A material modification of this act was made by the act of 1860. St. 1860, p. 311. This latter act authorized the creation of a homestead by either husband or wife, or other head of a family. Either could select or dedicate a homestead by a declaration in writing executed and recorded as provided in the act. In all cases, residence on the land was requisite to consummate the claim of homestead. *Gregg v. Bostwick*, 33 Cal. 220; *Mann v. Rogers*, 35 Cal. 316; *Gambette v. Brock*, 41 Cal. 83. This act was an enabling act, and intended so to be. The provisions of the act as to the declaration had to be complied with in order to make such a selection and dedication. The ability to protect the property claimed as a homestead from sale by forced or voluntary alienation did not arise unless the declaration contained the requisites provided for in the act of 1860. This act (first section) provides what the declaration shall contain. "Said declarations," the act provides, "shall state that they, or either of them, are married, or, if not married, that he or she is the head of a family; that they, or either of them, as the case may be, are at the time of making such declaration residing with their family, or with the person under their care and maintenance, on the premises, particularly describing said premises, and that it is their intention to use and claim the same as a homestead." The paper offered in this case as a declaration of homestead is made by the husband. There is in it no statement that either he or his wife was at the time residing with their family on the premises. The statement that he was, then a married man, and had been since the 14th of October, 1862, in possession of the premises, is not equivalent to the required statement of residence. The declarant might have been in possession by his tenant, or might have been in actual possession of the land while his family were residing elsewhere. The paper was manifestly insufficient as a decla-

ration of homestead, and the court did not err in excluding it.

Nor did it err in ruling out the other matters offered in connection with a further offer of the so-called "declaration of homestead." Nothing could make the premises a valid protected homestead without such a declaration as the statute required. Actual residence on the land would not so make it, in the absence of a sufficient declaration. A declaration sufficient in form without residence, and residence without a sufficient declaration, are alike ineffectual to constitute the homestead. The court did not err in any of the rulings above stated.

It is argued by counsel for plaintiffs that the declaration is required only to protect the land claimed as a homestead from forced sale. The act cannot be so construed, nor has it ever been so construed. It is manifest, from the perusal of the act, that it was to disable either spouse from making a voluntary alienation of the land, but only when a sufficient declaration was made. If there was no sufficient declaration, the power of the husband to alienate the land, of his own will, remained unimpaired.

The court did not err in allowing the defendants to offer the deed of George Boreham to Stewart as the deed of George alone. If it was signed by the wife of Boreham, it was not error. As we have seen, Boreham, (the husband,) there being no homestead, was competent to convey the land. The signature of his wife was a mere superfluity, and imported no efficacy whatever to the deed. Her signature conveyed no title. This contention comes with a bad grace from plaintiffs, who claimed on the trial, and offered to show, that Louise Boreham's signature to the deed was a forgery. Granted that such signature was a forgery, the deed had still the genuine signature of the husband, and was all that was required to pass the title to the land conveyed by it. It follows from the above that the court did not err in excluding testimony to show that the signature of Louise to the deed was forged. It would have been a waste of time to listen to such testimony, which would have been entirely irrelevant to any issue in the case.

There was no error in the refusal of the court to give the instruction No. 6 requested by the plaintiffs, nor did the court err in giving instructions 2, 3, 4, 5.

In the course of his argument, Byron Waters, Esq., of counsel for defendants, read to the jury, and commented on, the instructions previously settled by the court. To this conduct of counsel plaintiffs objected, and, on its permission by the court, excepted. This course was entirely within the discretion of the court, and, as there was no abuse of discretion in permitting it, this court finds no error in it.

After the charge to the jury had been given, it (the jury) was given in charge of an officer, and retired for deliberation. It appears in the statement that this officer was not sworn,

and that the plaintiffs excepted to this conduct of the court. The officer must have taken his oath of office. To this extent he was a sworn officer, and bound by his oath. The mere statement that the person who took charge of the jury was an officer implied that he had taken his oath of office; for without having taken such oath he would not have been an officer. It is consistent with what appears in the statement that the jury were put in charge of the sheriff. Though it is usual to put the jury, retiring to deliberate, in charge of an officer, to whom a special oath is administered in regard to the discharge of his duties while so in charge, we know of no law, and we have been referred to none, which requires it. The Code of Civil Procedure, in the chapter in regard to the trial by jury, contains no such requirement. Its provisions seem to have been framed under the idea that the official oath was sufficient. We so regard it, leaving it to the superior courts to administer a special oath or not, as they may think proper under the circumstances. The record is free from error. Judgment and order affirmed.

We concur: MCFARLAND, J.; SHARFSTEIN, J.

(83 Cal. 30)

JOHNSTON v. McDUFFEE *et al.* (No. 13,399.)

(Supreme Court of California. Jan. 30, 1890.)

MORTGAGES—FORECLOSURE—PARTIES—DEPOSITION OF PARTY.

1. Under a joint mortgage executed to secure two several notes, one of the joint mortgagees, who purchases the mortgaged land, acquires the legal title subject to the lien of the mortgage, and is a proper party defendant in an action of foreclosure by the other mortgagee's assignee.

2. Plaintiff's deposition is admissible in evidence where he is absent from the county, and one of his counsel testifies that he knows of no other witness in the county by whom certain facts can be proven.

3. Under Code Civil Proc. §§ 2021, 2034, relating to depositions, a plaintiff's deposition is admissible in evidence though he is present at the trial, and though other witnesses are present by whom he could have proved the same facts, as the exception in the statute excluding the deposition when the witness' presence can be procured relates to another kind of witness.

Department 2. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

Charles R. Gray, for appellant. Harris & Gregg, for respondent.

THORNTON, J. Action to foreclose a mortgage executed by one Winters to Jameson and defendant McDuffee to secure two notes, one to Jameson and the other to McDuffee. The mortgage is joint, and the notes are several, as stated above. Jameson assigned his note and the mortgage to secure it to the plaintiff, Johnston. McDuffee, after the execution of the notes and mortgages, and before this action was brought, purchased of

the mortgagor, Winters, the mortgaged premises, a conveyance of which was executed to him by Winters. By his purchase of the equity of redemption of Winters, McDuffee became the holder of the legal title. He stood in Winter's place in regard to the land mortgaged. McDuffee was made defendant, and properly made a defendant, as the purchaser of the mortgaged property from Winters. As such purchaser, he came in by title subsequent, and subject to the lien of the mortgage. There was judgment of foreclosure against all the defendants. McDuffee only appeals.

It is argued that McDuffee is improperly such a defendant. We do not agree to this, for the reason above given. For the same reason, the complaint states a cause of action against him. The property is described in the complaint by reference to the mortgage, which is appended to the complaint as an exhibit, and made a part of it. *Emeric v. Tams*, 6 Cal. 156. The mortgage sufficiently describes the mortgaged premises. When the plaintiff offered the mortgage in evidence, no objection was made to it. It is not specified in any way that the findings are not sustained by the evidence.

The plaintiff offered in evidence his own deposition taken in the case. It does not appear to have been taken otherwise than in accordance with law. The defendant McDuffee objected to the offer of this deposition on the ground that it did not appear that plaintiff was absent from the county of San Bernardino, where the case was tried, and unable to be present at the trial, and on the further ground that it did not appear but that the facts sought to be proven by the deposition could be proved by other witnesses. The court overruled these objections, and the defendant excepted. It was proven to the court that the witness was absent from the county, and there was the testimony of one of plaintiff's counsel that he knew of no other witness in the county by whom the facts might be established, or could be proven. In fact, neither ground of objection is maintainable. The plaintiff had the right, under the statute, to read the deposition, though he had been present at the trial, and though other witnesses had been present by whom he could have proved the same facts. Such is the legal meaning of the statute. Code Civil Proc. § 2021. The only case in which the presence of the witness whose deposition has been taken is required is under the sixth subdivision of section 2021, *supra*, which does not concern us here, as it relates to a different sort of witness. The presence of a party whose deposition has been taken is never required, and the deposition may be read on the trial by either party, though he is in court when it is read. *Id.* §§ 2034, 2021. The judgment is supported by the findings. Though McDuffee's rights as mortgagee might have been protected by taking the proper steps to bring them before the court, the record before us is not in a shape that pre-

sents them. There is no error in the record. Judgment and order affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

(83 Cal. 18)

VAUGHN *et al.* v. CALIFORNIA CENT. RY. CO. (No. 13,183.)

(*Supreme Court of California*. Jan. 30, 1890.)

NEGLIGENCE OF MASTER.

In an action against a railroad company for the alleged negligent killing of one of defendant's employes, it appeared that deceased was sent out, with others, on a construction train, to find wash-outs and repair the track; that he knew the purpose for which the train started; and that he was killed by the wrecking and ditching of the train at one of the washouts. The complaint was drawn on the theory that defendant's servants in charge of the train were incompetent, and that defendant was negligent in selecting them. *Held*, that special findings by the jury that the company exercised ordinary care and prudence in selecting the servants, and that the accident was not proximately caused by the negligence of any of them, are in conflict with a general verdict in plaintiffs' favor, which cannot be allowed to stand.

Department 2. Appeal from superior court, San Bernardino county; HENRY M. WILLIS, Judge.

A. Brunson, Chas. R. Redick, and Broussseau & Hatch, for appellant. *Stephenson & Harris and Byron Waters*, for respondents.

MCFARLAND, J. Pierce B. Vaughn, a young man about 27 years old, was killed by an accident on the railroad of the corporation defendant; and this action was brought by his father and mother (as heirs) to recover damages for his death, under section 377, Code Civil Proc. The verdict and judgment went for plaintiffs. Defendant appeals from the judgment, and from an order denying a new trial. The jury, in addition to a general verdict, returned answers to a large number of special issues submitted to them; and appellant contends (among numerous other points) that the general verdict is in conflict with the findings on the special issues, and therefore cannot stand. We think appellant right in this contention. Paragraph 4 of the complaint is as follows: "That on January 4, 1888, said Pierce B. Vaughn, while so engaged in such service of the defendant, was being carried upon a work-train of defendant upon such railway, in this county, when, owing to the negligent and defective manner in which the track and road-bed of such railway had been originally constructed and subsequently maintained by said defendant, and at a point about one mile west of North Cucamonga station, the said road-bed was and had been for many hours before, for a distance of thirty feet along the track, washed out, and by the negligence of the defendant the same was so allowed to remain, in an unsafe condition, till the accident complained of occurred." Paragraph 5 is as follows: "That, notwithstanding said unsafe condition of said track, the defendant, without exercising any care in the running of said

train, and without exercising any care to discover the unsafe condition of its track, and by its negligence in the running of said train at a reckless and fast rate of speed along and over said defective track, caused said train to be wrecked and ditched at such washout, thereby, without any fault on the part of said Vaughn, causing said Vaughn to be instantly killed."

An amendment to the complaint contains the following averments: "(8) That at the time of said wreck, and of the killing of said Vaughn, and continuously for more than ten days prior thereto, James McKenna was the section foreman of the defendant; and in that capacity had charge of the defendant's railroad track and road-bed where said washout and wreck occurred, and for several miles along the track on each side thereof, but that he was neither properly qualified nor competent, nor was sufficiently skillful, to perform his duties as such section foreman, and the defendant neglected to use ordinary care in selecting him as such section foreman. (9) That Edson Long was the conductor of said train at the time it was wrecked; but he was neither properly qualified or competent, nor of sufficient skill, to perform his duties as such conductor, and the defendant neglected to use ordinary care in selecting him as such conductor. (10) That at the times aforesaid A. Jones was the engineer of the said work-train, but he was neither properly qualified or competent, nor of sufficient skill, to perform his duties as such engineer, and the defendant neglected to use ordinary care in selecting him as such engineer."

It is apparent that the gist of the alleged cause of action lies in the averments contained in said paragraph 5 of the complaint, and in the matters averred in the amendment, and that the theory of the pleader was that appellant was liable in damages on account of the carelessness with which the train was run, the incompetency and misconduct of the employees, and the want of care of appellant in employing them; and the reason of this is quite apparent, when we look at the history of the accident. The train on which deceased was killed was not a passenger train; neither was it a work or construction train, traveling on ordinary business. The facts were that during a rainy and stormy time news came to the office of the defendant at San Bernardino of breaks and washouts along the line of the road, and this particular construction train was sent out for the express purpose of finding washouts, and repairing the road at points where such washouts should be found. The deceased was a co-employee of defendant with the other persons on the train, and he knew all the facts, and the purpose for which the train started. He therefore took the extra-hazardous risks. It would therefore have been difficult (we do not say impossible) to have rested a cause of action for damages for personal injury upon the mere fact alone that the managers of the train found what they were seeking, viz., a washout, and went into

it without any carelessness on the part of anybody. The fact that the road had not been constructed as thoroughly as it should have been at the place where the washout occurred, cuts but little figure, because it was evident from the start that the breaks would be most likely to be found at the weakest points. At all events, the complaint goes upon the theory that the injury was caused by the reckless speed with which the train was allowed to approach the washout, and the negligence and misconduct of the company's employees at the time of the accident, and, to avoid the rule that damages cannot be recovered for injuries caused by the negligence of a co-employee, the complaint avers the incompetency of the employees, and defendant's want of care in employing them. But the jury, by its findings on the special issues, expressly negatives all negligence on the part of any person at the time of the accident, and exonerates defendant from any want of care in selecting its employees. To the following questions the following answers were given by the jury: "Were the engine-man and conductor in charge of defendant's train exercising ordinary care in the running of the train at the time of the accident? *Answer.* Yes. Did the defendant exercise ordinary care and prudence in the selection of its employees having charge of its trains? *A.* Yes. Did defendant exercise ordinary care and prudence in the selection of its conductor, and persons having charge and supervision of its road-bed and track? *A.* Yes. Was the proximate cause of the accident the negligence of any such servant. If so, which one? *A.* No." With these issues thus found, there was nothing left of the complaint and the evidence to warrant the general verdict for plaintiff, which was for the very large sum, under the circumstances, of \$10,000.

It is to be observed, also, that part of these special findings seem to be in conflict with the averments and admissions of the pleadings. The complaint avers that the section foreman was not qualified or competent to discharge his duties, and the answer admits this, and affirmatively alleges that his negligence, etc., caused the accident; and yet the jury found against the negligence of any servant. The judgment and order are reversed, and the cause remanded for a new trial.

I concur: SHARPSTEIN, J.

THORNTON, J. I concur in the judgment. I think the pleader in the complaint counts on the negligent and defective manner in which the track was originally constructed, and subsequently maintained, as well as on other acts of negligence by the defendant. For negligence in constructing and maintaining its track, an employee can recover against a railway company. *Trask v. Railroad Co.*, 63 Cal. 96. But in this case the deceased, Vaughn, went out on a train sent for the purpose of repairing the track, which had been damaged by washouts caused by a severe

storm, which had a short time previously occurred. He knew the train was sent out for this purpose, and on an errand of danger. By going on this train, he accepted the risks incident to its passage over the track. Under these circumstances, I cannot see how the plaintiffs can recover.

(82 Cal. 533)

SMITH v. TAYLOR. (No. 13,421.)

(Supreme Court of California. Jan. 13, 1890.)

VENDOR AND VENDEE—THE CONTRACT—TITLE—SPECIFIC PERFORMANCE—PLEADING—EVIDENCE—FINDINGS.

1. Where a written contract for the sale of land contains a stipulation that the money paid thereunder shall be refunded if the abstract of title to be furnished by the vendor does not show good title in him, evidence of the groundlessness of the claims of persons whom the abstract shows to be asserting title adverse to the vendor is inadmissible in an action to recover the installments paid.

2. Evidence that, on the vendee's refusal to receive a "certificate" of title, it was agreed that the vendor should furnish an abstract instead, which was to be referred to a lawyer for examination, does not show a change of the terms of the written contract.

3. Where the written contract is that the vendee should take the land subject to a specified mortgage, evidence that, when the contract was executed, he knew of the existence of other incumbrances, and that there was a parol agreement as to how, when, and by whom they were to be paid off, is inadmissible, as Civil Code Cal. § 1625, provides that when the parties to a contract reduce it to writing the writing supersedes all other agreements between them on that subject.

4. Where a written contract for the sale of land has ceased and determined by its own terms, and the acts of the parties under it, a subsequent oral agreement that a sale should be concluded on the vendor's quieting title against all adverse claimants is void under the statute of frauds. Civil Code Cal. § 1624.

5. Even if regarded as a modification of the written contract, the oral agreement, being unexecuted, is void, under section 1693.

6. While ordinarily, when it is alleged that two parties entered into an agreement for the sale of land, it will be assumed, if nothing else appears, that the agreement is in writing, yet that assumption will not be made in favor of a cross-complaint for specific performance of a land contract containing stipulations that, by his answer in the same cause, defendant declares to have rested in parol.

7. Where a cross-complaint by a vendor for specific performance of a contract for the sale of land fails to show that he has tendered a deed conveying the title he has agreed to convey, or that he is in a condition to convey such a title, and also fails to allege how or when conveyance of title is to be made, or how deferred payments are to be secured, it is not prejudicial error to allow the withdrawal of a demurrer for want of facts, and for ambiguity and uncertainty, and the filing of a second demurrer on the same grounds, but adding further specifications of ambiguity and uncertainty.

8. Where a party makes no request for leave to amend a defective pleading, it is not error for the court, on making an order sustaining a demurrer thereto, to omit to say anything about leave to amend.

9. Where the ultimate facts found by the court are sufficient to sustain the judgment entered, it is not prejudicial error for the court, before entry of judgment, to file a second set of findings, practically a copy of the first, but containing additional probative facts not necessary to be found.

Department 1. Appeal from superior court, Los Angeles county; W. P. WADE, Judge.

Action by W. M. Smith against J. M. Taylor to recover \$500, the first installment of the purchase price of land agreed to be conveyed to plaintiff by defendant. Defendant answered, and also filed a cross-complaint for specific performance. Judgment for plaintiff, from which, and an order denying a new trial, defendant appeals.

Lee & Scott, for appellant. *Owens & Woodward*, for respondent.

FOX, J. Judgment for plaintiff; motion for new trial denied; and defendant appeals from both judgment and order. The complaint is in three counts. The first is for the recovery of \$500, money paid on account of the purchase of an interest in certain lands under an agreement that if, upon examination of abstract, it was found that title was not good, the money was to be refunded, and alleging that upon such examination it was found that the title was not good; the second, upon the common count for money had and received; and the third, for the recovery of the same money upon an alleged parol agreement to repay the same, and rescind the contract mentioned in the first count. Upon the trial the claim under the third count was abandoned, and no findings are presented on the issues presented by said third count, and the answer thereto.

The answer admits of making of the contract set out in the complaint, and the receipt of the \$500 on account of the same, but contains numerous denials going to the legal effect and meaning of the contract, and then proceeds to deny that the title, as shown by the abstract furnished by defendant, was defective, and alleges that such title was good and valid, and follows with a statement of the facts shown by the abstract, upon which defendant says plaintiff bases the claim that said title was not good, and to claim therefrom that the objections made by plaintiff were groundless; also, sets out that as to certain incumbrances found to exist upon the property, other than the one provided for in the written contract, they were known to the plaintiff at the time of the contract, and that in regard to them certain oral agreements were made that are not set out in the written agreement. Defendant further alleges that after the making of the written agreement, and the delivery and examination of the abstract, a certain parol agreement was made between the parties, under which the defendant was to quiet his title against certain adverse claimants, or parties who seemed to be such, and that upon this being done the sale should be completed as contemplated in the original and written agreement, and that he (defendant) had duly performed the conditions of this subsequent parol agreement on his part. His answer to the second and third counts of the complaint consists of denials putting in issue the allegations of the complaint in that behalf. Defendant also filed a cross-complaint, setting out that on the 31st day of December, 1887,

which was the date of the written agreement set out in plaintiff's complaint, plaintiff and defendant made and entered into an agreement for the sale by defendant to plaintiff of a certain interest in certain lands which defendant alleges are the same as those mentioned in the agreement sued upon, although they are differently and more specifically described, the terms of which agreement he sets out in said cross-complaint. These terms are a combination of those given in the written agreement, and of the other matters which in his answer he alleges were understood, and rested in parol, at the time of making the written agreement. He then further sets out the furnishing of an abstract of title, the discovery of the alleged defects of title, and avers that within 15 days after furnishing the abstract plaintiff notified him of the defects discovered, but that he still elected to purchase the property, but required the defendant to quiet the title, and then follows with allegations as to the subsequent agreement to quiet title, performance on his part, etc., as already set out in his answer, and prays, practically, for specific performance of this agreement.

It is not pretended in this cross-complaint that any part of the agreement upon which it was based was in writing; but, on the contrary, it is expressly stated that the part of it which is claimed to have been made after the examination of the abstract was verbal. While, ordinarily, it may be true that when it is alleged that two parties entered into an agreement for the sale of lands, if nothing else appears, it will be assumed that the agreement was in writing, it can hardly be so in this case, where the defendant in his pleading refers to another agreement made between the same parties at the same time, which was confessedly in writing, and then proceeds to set out a different agreement, which he declares was made in reference to the same property, and containing stipulations, as a part thereof, which by his answer in the same cause he declares did rest in parol.

This cross-complaint was demurred to for want of facts, and also for ambiguity and uncertainty, and afterwards, and before the demurrer came on for hearing, the plaintiff, by leave of the court, filed a second demurrer, which was in effect, though not so entitled, an amended demurrer, made on the same grounds as the original one, but adding other specifications of ambiguity and uncertainty. In due time these demurrers were argued and sustained, when the defendant excepted to the ruling of the court permitting the said second demurrer to be filed, and also to the ruling of the court sustaining said demurrers. This part of the case is brought up on a separate bill of exceptions, and these rulings are relied upon as errors on this appeal. Without passing upon the question of whether a demurrer is a pleading which the party has a right to amend of course, or by leave of court, or not, it is sufficient to say that in this case,

if error was committed, it was not prejudicial; for, in our opinion, either demurrer was sufficient in form and substance, and an order sustaining either of those demurrers to the cross-complaint was not erroneous. The cross-complaint did not state facts sufficient to entitle the defendant to the affirmative relief sought, even assuming that the agreement for the sale of lands mentioned in it was in writing, and not, therefore, void under the statute of frauds. Under the facts stated, the defendant could not, even if so commanded by the court, specifically perform the terms of that agreement on his part. He was not, therefore, entitled to a decree for specific performance against the plaintiff. The cross-complaint failed to show that the defendant had tendered the deed conveying the title which he had agreed to convey, or that he was in a condition where he could convey such a title. It showed affirmatively that the abstract did not show good title, and did not show that he had made, or could make, it good. It was also indefinite, ambiguous, and uncertain, in that it did not allege as to how or when conveyance of title was to be made; also, as to how the deferred payments were to be evidenced or secured; also, as to the assumption of mortgages. It is a well-settled rule that if the contract is vague and uncertain the court will not decree a specific performance, but will leave the party to his remedy at law. See *Agard v. Valencia*, 39 Cal. 301, and the cases there cited; also, *Sturgis v. Galindo*, 59 Cal. 28; *Magee v. McManus*, 70 Cal. 553, 12 Pac. Rep. 451.

It was not error, in making the order sustaining said demurrer, to omit to say anything about leave to amend, as the defendant did not ask for such leave, or for any order on that subject.

On the issues framed by the complaint and answer, the case was tried before the court without a jury, and the court found, among other things, that on the 31st day of December, 1887, the defendant entered into a contract in writing with the plaintiff, which is in the following words and figures, to-wit: "RECEIPT AND CONTRACT ON SALE OF LAND.

"Los Angeles, Cal., Dec. 31, 1887. Received, this date, from William D. Smith, the sum of five hundred dollars, (\$500,) lawful money of the United States of America, being a deposit and part payment on account of a bargain and sale made to him this day of a certain lot, tract, or parcel of land, lying, situate, and being in the county of Los Angeles, state of California, bounded and described as follows: Being an undivided one-sixth interest in the 509.84 acres of the Rincon de los Bueyes ranch, situate in Los Angeles county, Cal., conveyed by José de Arnaiz, February 3, 1887, to Joseph Moffat and H. Clay Graham. Said tract of land, above described, having been sold to said William D. Smith this day for the sum of eighty-four hundred and ninety-seven dollars, (\$8,497,) the balance to be paid as follows: Twenty-

five [hundred?] (\$2,500) to be paid within ten days, \$1,461 on or before twelve months from date, and \$1,461 on or before twenty-four months from date, with interest at 8 per cent. per annum, interest payable semi-annually, and assume and pay one-sixth of a certain mortgage for \$15,450, now on said ranch. The title to said above lands to prove good, or no sale; five days being allowed to examine abstract or certificate, and pass upon title, after abstract or certificate is delivered. If the remaining payments be not made according to this agreement and contract, the above-mentioned deposit to be forfeited without recourse. If title prove defective, said deposit to be returned. J. M. TAYLOR, Agent. I hereby extend the time of this agreement five days longer from the date hereof. J. M. TAYLOR."

The further findings necessary to be noted here were in substance as follows: (2) That, at the time, plaintiff paid to defendant the sum of \$500, "Which is acknowledged by said contract as a deposit to secure the sale of one-sixth interest," etc. (3) That said payment was upon express condition that the title should prove good upon examination of abstract or certificate; otherwise there should be no sale, and the said \$500 should be repaid. (5) That the defendant delivered to plaintiff an abstract which, within 10 days was examined by plaintiff's attorney, and the title found to be not good, but defective. (6) That thereupon plaintiff returned the abstract with objections to the title, to the effect that the same was not good, but defective, and that plaintiff then informed defendant that he elected not to consummate the sale. (7) That afterwards, and on or about the 29th of May, 1888, the plaintiff made written demand upon the defendant for the repayment of said deposit of \$500; but (8) that defendant refused, and still refuses to repay the same, or any part thereof. (9) That no other contract or agreement relative to the sale of said lands was made between the parties. (10) That at the time of making said contract, and depositing said money, and of the examination of the abstract, and ever since, the defendant had not, and has not, a good and perfect title of record, but the same was and is defective; that the same was incumbered by mortgage liens of record, and was subject to litigation between parties other than the parties in this action. (11) That at the time of making the contract, and up to the examination of the abstract, plaintiff had no knowledge of said defects of title, or of any incumbrance except \$15,450. (12) That at the time of making the contract, and of the examination, there was a mortgage on the whole of the tract to secure an indebtedness of \$20,450, also a mortgage on the undivided two-thirds, embracing said undivided one-sixth of \$3,333.34. (13) That all the allegations and averments of the first and second causes of action of the plaintiff's complaint are true. And the court finds as conclusion of law that plaintiff is entitled to re-

cover the \$500 with interest, amounting to \$533.45, with his costs of suit, and judgment is entered accordingly. Two sets of findings were filed, one on the 13th and one on the 14th of May, 1888; and judgment is entered May 17, 1888.

One of the errors of law assigned and relied upon is that the court erred in filing the second set of findings. They are, confessedly, exactly like the first, except that in the second, in No. 11, the court states that the plaintiff knew of the existence of an incumbrance amounting to \$15,450, a statement omitted from the findings as first filed, and in No. 12 the mortgage liens are set forth, which was not done in the first. With the exception of the two corrections which we have noted, the paper indorsed "Findings," filed on the 14th, was practically a copy of the one so indorsed and filed on the 13th; and, if the filing of the second was error, it was not a prejudicial one, for all that there was new in it was finding of certain probative facts, not necessary to be found, the ultimate facts already found being sufficient. Both sets of findings were filed before judgment. Both are brought up to this court. Either is sufficient to support the judgment, and there is nothing in either that conflicts with the other in any matter material to the issues in the cause, or the judgment entered. While it is true that a court cannot change its findings after the entry of judgment without granting a new trial, and doing it upon new trial, it does not follow that it may not make such modification or correction of its findings before judgment as shall make them conform to the truth, and cover the issues in the cause. We have carefully examined all the testimony in the record, and are satisfied that the evidence supports the findings. It only remains to consider whether there was any such errors of law, not already disposed of, as will require a reversal of the judgment or order appealed from.

Appellant contended at the trial, and contends here, that he had the right to prove by evidence *alimule* that the claims of persons who appeared by the abstract of title to be asserting title to land adverse to the title which he offered, and who had suits pending regarding the same, were groundless. Many of his exceptions are to rulings of the court in rejecting evidence offered for that purpose. We are not called upon at this time to determine what would have been his rights in this regard, if his contract had been simply one to make good title. But that was not the force or effect of his bond. The only fair interpretation of this contract is that he was to furnish an abstract of title,—a paper prepared by a skilled searcher of records, which should show an abstract of whatever appeared on the public records of the county affecting the title,—and that this abstract must show good title, or there was no sale; and in that event he was to return the money. He did furnish such abstract, and the plaintiff found, and the court, upon sufficient

proof,—in fact, upon the admissions of the defendant himself, as well as upon presentation of the abstract,—sustains the finding, that the abstract did not show good record title. Under that contract, the plaintiff was not bound to make any investigation outside the abstract, or to take the chances of any litigation which the abstract showed to be either pending or probable. The court therefore did not err in rejecting any of the evidence offered for this purpose.

Appellant claims that at the time of the making of the contract the plaintiff had knowledge of the existence of incumbrances upon the land other than the \$15,450, of which he was to pay the one-sixth, and that there was then a parol understanding or agreement between them as to how, when, and by whom the incumbrances in excess of said \$15,450 were to be paid off; and several of his exceptions and assignments of error are directed to the rulings of the court in rejecting certain evidence offered in support of that claim. It was not error to reject this evidence, for when the parties reduced their agreement to writing the writing superseded all other understandings or agreements between them on that subject. Civil Code, § 1625. Some evidence, however, on that subject did get in from both sides; and the court found that the plaintiff at the time had no such knowledge, and that there was no other agreement between the parties than the written one.

It was also claimed on the part of the appellant that long after this examination and rejection of the title the parties made an oral agreement whereby defendant undertook to quiet his title against all adverse claimants shown by the abstract, and that upon his doing so the sale was to be concluded, and many exceptions were saved to rulings of the court rejecting evidence offered in support of his claim; and these rulings are now assigned as error. These rulings were not erroneous. The agreement in writing had already ceased and determined by its own terms, and the action of the parties under it. According to its express provisions, there was "no sale." Defendant was already bound to repay the \$500, and it had already been demanded of him. This subsequent agreement, then, if there was one, must stand or fall by itself. If there was such an agreement, it was one for, or in relation to, the sale of an interest in lands, and was not in writing. It was therefore void under section 1624, Civil Code. But even if it was, as defendant contends, an alteration or modification of the former written agreement, it was void under section 1698, *Id.*, being an unexecuted oral agreement. So that in either event the defendant was not entitled to introduce evidence in support of it. But in this case, as in the other, the parties were finally permitted to tell what did occur, and to call other witnesses to the same point; and from the evidence so admitted it appears that some effort was made to make such an agreement, but

that the minds of the parties never met, and no such agreement was ever concluded, orally or otherwise, and the court so finds.

In the course of the trial it was shown that the defendant, in the first instance, presented to the agent of plaintiff a certificate of title, as distinguished from an abstract of title. This certificate exposed the fact of the existence of some adverse claims, and the agent of plaintiff declined to accept it, when it was agreed between the agent and defendant that defendant should furnish an abstract instead, when it should be referred to Judge Minor for examination, and plaintiff would accept Minor's opinion as to whether it showed good title or not. Defendant moved to strike out this evidence on the ground that it was incompetent to change the terms of the written contract. This motion was denied, and defendant excepted, and now assigns this ruling as error. There was no error in denying the motion on the ground upon which it was made. The evidence was perhaps irrelevant and immaterial, but it worked no injury to defendant, and certainly did not tend to show a change of the terms of the written contract.

The foregoing covers a review of all the 32 exceptions taken by defendant, and now assigned as errors of law. It follows from the conclusions reached that the judgment and order appealed from must be affirmed. So ordered.

PATERSON, J.: I concur.

WORKS, J.: I concur in the judgment.
Hearing in bank denied.

GOOD v. TAYLOR. (No. 13,419.)

(*Supreme Court of California.* Jan. 13, 1890.)

FOX, J. This case is in all material respects like the Case of Smith, against the same defendant, ante, 217, No. 13,421, (decided this day.) It was tried at the same time, and submitted on the same evidence. On the authority of the decision in said case, No. 13,421, the judgment and order appealed from in this case are affirmed.

WE CONCUR: PATERSON, J.; WORKS, J.

CARSCADDON v. TAYLOR. (No. 13,420.)

(*Supreme Court of California.* Jan. 13, 1890.)

FOX, J. This case is in all material points like the Case of Smith, against the same defendant, ante, 217, No. 13,421, (decided this day.) It was tried at the same time, and submitted on the same evidence. On the authority of the decision in said case, No. 13,421, the judgment and order appealed from in this case are affirmed.

WE CONCUR: PATERSON, J.; WORKS, J.

(83 Cal. 1)

GEER v. SIBLEY. (No. 13,221.)

(*Supreme Court of California.* Jan. 29, 1890.,

SWAMP LANDS—KNOWLEDGE OF PURCHASER.

Pol. Code Cal. § 3443, provides that a person desiring to purchase swamp and overflowed land shall state in his affidavit "that he knows the land applied for, and the exterior bounds thereof,

and knows of his own knowledge that there are no settlers thereon." In an action to try defendant's right to purchase such land, it appeared that, before making his affidavit, he went to the north-east corner of the section with a surveyor, by whom the corner post was pointed out to him; that the surveyor set up his instrument at this corner, and with it showed defendant the prolongations of the east and north boundaries, telling him that the south-east and the north-west corners were at the distance of a mile along the respective lines; that they went to the north-west corner of the north-east quarter section, and to the south-east section corner, where they found the stakes in the water, and from which points the surveyor showed him the projections of the north and south boundaries, and gave him corresponding information; that they traversed the east boundary; that all the land, except a few acres at the north-east section corner, was covered with the waters of a lake; that one had an unobstructed view for two or three miles in each direction. *Held*, that defendant's knowledge was sufficient, within the statute.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; W. W. Cross, Judge.

Chas. E. Wilson and T. M. McNamara, for appellant. *Chas. G. Lamberson*, for respondent.

FOOTE, C. This was a contest in the superior court of Tulare county as to the respective rights of the plaintiff and defendant to purchase a section of swamp land of the state. Judgment passed for the plaintiff, from which the defendant appeals. The point made for the reversal of the judgment is that the findings of fact do not support it. The only ground relied upon in the complaint to defeat the defendant's right to purchase the land is that his affidavit filed with the surveyor general was false, in that it asserted that at the time of making it the defendant knew "the land applied for, and the exterior bounds thereof," when he did not so know. The court found, among other facts necessary to enable the defendant to recover, in finding 4, that, "at the time of making and filing said affidavit and application, defendant did not know of any valid claim to said land other than his own; he knew of his own knowledge that there were no settlers thereon, and he did not, and does not now, own swamp and overflowed land, which, together with that sought to be purchased by him as aforesaid, exceeded six hundred and forty acres." But found in the fifth finding "that, immediately prior to the making and filing of his affidavit and application, the defendant went to the section of land in controversy in company with John Gilcrest, a practical surveyor, whom the defendant employed to survey and point out to him the said section. They found the north-east corner of the section, which was marked by the government stake standing at that point. The surveyor set up his instrument at this point, and, turning south, projected the east line of said section, and at his request the defendant looked through the instrument along said line, the surveyor at the same time informing him that he was looking along the east line of said section, which line extended one mile from that point. The surveyor

then turned his instrument west, projecting the north line of the section. The defendant looked through the instrument along this line, being at the same time informed by the surveyor that said north line extended one mile on that course. They then followed along said line to the quarter section corner of said section, in said line, at which point they found the government stake floating in the water, but confined by tules. The surveyor set his instrument at this point, sighting west on said north line, and the defendant looked through the instrument, being at the same time informed by the surveyor that the north-west corner of said section was located one-half mile west of said quarter section corner in said line. They then went back, and around to the south-east of section 1 in said township, and from there ran west to the south-east corner of the section, which they found marked by the government stake standing in the water. The surveyor set his instrument at this corner, looking west, and projecting the south line of the section. The defendant looked through the instrument along this line, being at the same time informed by the surveyor that he was looking along the south line of said section, and that the south-west corner thereof was located at a point in said line one mile west of said south-east corner, in the direction pointed by the instrument. At this time the section of land in controversy, except about ten or fifteen acres at the north-east corner thereof, was covered with the water of Tulare lake. The defendant could see the entire surface of the water covering said section, and for two or three miles in either direction. From the foregoing facts the court finds that the defendant did not, at the time of making and filing his affidavit and application, know the land he applied to purchase, and in controversy herein, nor the exterior bounds thereof." From this the court, as a conclusion of law, decided that the defendant was not entitled to purchase the land, and that the plaintiff was so entitled, and rendered judgment accordingly.

The appellate court held in *People v. Reed*, 22 Pac. Rep. 474: "But, conceding that the finding is one of fact, or, as counsel terms it, a 'conclusion of fact,' it is apparent that the court below did not intend to cut off the right of the appellants to test the sufficiency of the specific facts found to show such dedication, in the manner indicated. This finding is based upon the other facts found. It recites in terms that, 'by the acts, facts, and matters above found, said premises were by said parties dedicated,' etc. It may be that if this finding had stood alone, and had not been put in this argumentative form, it might have been upheld as a sufficient finding of an ultimate fact. But this cannot be so where the facts are fully found, and the general finding of a dedication is expressly drawn as a conclusion from such facts. Counsel say it does not appear that the court found all the facts proved. But it does appear from the

finding itself that it was based entirely upon the facts found, and not, in whole or in part, on facts proved, but not found. Therefore, if the specific facts found do not support this one, which is a summing up of the others, the judgment should be reversed." The supreme court in *Price v. Beaver*, 73 Cal. 625, 15 Pac. Rep. 356, said: "It is claimed for the appellant that the finding 'that at said time she knew the land applied for, and the exterior bounds thereof, and knew of her own knowledge that there were no settlers thereon,' was not justified by the evidence; and this is the principal point made for a reversal of the judgment. We do not think the judgment should be reversed, for the reason urged. * * * It is true the Code requires any person desiring to purchase swamp and overflowed land to state in his affidavit 'that he knows the land applied for, and the exterior bounds thereof, and knows of his own knowledge that there are no settlers thereon.' Pol. Code, § 3443. And it is also true that in cases of this kind each party is an actor, and must allege and prove that he has strictly complied with the law. But it is not required that the purchaser of swamp land shall know 'of his own knowledge' the land applied for, and the exterior bounds thereof. Ordinarily he does not, and, unless he is a skilled surveyor, must gain this information from others. Having gained it, however, he can and must then state, if such be the fact, that he knows of his own knowledge that there are no settlers on the land. The defendant was shown by her brother-in-law what he supposed to be the corners and boundary lines of the land in controversy. She relied and acted upon the information thus received, and there was no attempt to show that it was not correct. It is not pretended that she did not go upon the land which she desired to purchase, nor that she was incorrectly informed as to its bounds or limits, nor that there were any settlers on the land. The claim is only that J. W. Beaver did not at the time know the true lines and corners, and so, however correct her information may have been, her application must fail. If this be the correct view, then it must follow that if defendant had employed a surveyor to show her the land, and he had made mistakes as to the corners and lines, and had incorrectly located its bounds, her application could be successfully assailed by any subsequent applicant. We do not think that such a result was intended by the law-makers, or should receive sanction from the courts."

In the present case the point seems to be that the defendant did not know the exterior boundaries of the land applied for, because neither his own information, nor that derived from the surveyor he had employed, was sufficient to enable him to have such knowledge in the sense intended by the statute. But the findings of special facts show that the land was covered with water, except in one corner of the section, and that on this dry

land the defendant did find and have located by his surveyor the government stake; and that he and the surveyor also found another quarter section stake on the north line of the section, and one upon the south-east corner of the section; and that from each of the stakes thus found the surveyor showed the defendant a prolongation of some one of the boundaries of the section, and the distance along them at which the other section corners were; and that they traversed at least one of the boundaries, and went to the south-east and north-east corner stakes, and to the quarter section stake on the north line; so that the defendant had pointed out and shown to him by a surveyor three of the boundary lines of the section, viz., the north, south, and east lines, and the west line could easily be determined, as it was the prolonged line between the north-west and south-west corners. Such knowledge, so obtained, under all the circumstances surrounding the matter, in the light of the construction given to the statute in the case just adverted to, and in the sense in which we believe it should be construed, must be held to satisfy the terms and spirit of the statute involved here. It must therefore be apparent that the ultimate fact in finding 5 is manifestly inconsistent with the specific facts previously set out in the same finding, and the judgment is therefore without proper support. We advise that it be reversed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed.

(83 Cal. 56)

CULLEN *et al.* v. SPRIGG *et al.* (No. 13,131.)

(Supreme Court of California. Feb. 1, 1890.)

DEEDS—DESCRIPTION—CONDITIONS.

1. The city of San Diego, by its president and trustees, conveyed to defendants' grantor "that lot of land containing 60 acres, lying in block No. 1111, according to the official map of said city made by * * * A. D. 1856." The deed referred to a resolution of the trustees, under which the lands were sold, which provided that all surveys should be made by the purchaser. At the time of the conveyance there had been no survey or subdivision of the block. *Held*, that the deed should be construed to convey an undivided 60 acres of the block.

2. The resolution of the trustees provided that lands should be granted only on these terms: One-half of the purchase money should be paid at the time of securing certificate; the lands should be occupied and improved within six months from date of certificate; and, if within a year therefrom improvements of a certain amount were not made, then the purchaser should forfeit his deposit, and the lands should revert to the city. The deed to defendants' grantor recited a sale made to him that day on the conditions of the resolution, and an agreement on his part to make the improvements, but these recitals preceded the granting clause, which, together with the *habendum*, in consideration of the full receipt of the purchase money by the city, purported to vest in the grantee the full title of the city in fee-simple absolute, without condition. *Held*, that the grant was absolute, and not on condition.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; E. PARKER, Judge.

Levi Chase, for Lillian Cullen. *C. F. Holland*, for George Cullen. *J. E. Deakin*, for Walter L. Pease. *M. A. Luce*, for San Diego Building & Loan Association. *Parrish, Mossholder & Lewis*, for College Hill Land Association. *Hunsaker, Britt & Lamme*, for C. A. Lumsden. *Sprigg & Carter*, for J. C. Sprigg, Jr.

VAN CLIEF, C. This is an action for partition of pueblo lot No. 1111 of the lands known as the "Pueblo Lands of the City of San Diego." The appeal is from an interlocutory judgment determining the rights of the parties as to their respective interests in said lot, and from an order denying a new trial. The rights of the appellants rest upon their deraignment of title from the city of San Diego under a deed from the city executed October 25, 1869, to James W. Cullen, purporting to convey a tract in the southeastern portion of said lot, specifically described by metes and bounds, and forming a rectangular piece of land 40 chains in length and 20 chains in width. The rights of the respondents depend upon their deraignment of title from the city under two deeds from the trustees of the city, dated March 1, 1869, to William Evans, one for "that lot of land containing sixty acres, lying in block No. 1111, according to the official map of said city made by Charles H. Poole, A. D. 1856," and the other for "that lot of land containing forty acres, lying in block 1111," according to the same map. The deed for the 60 acres recites, in substance, that the president and trustees, in compliance with a vote of the qualified electors of the city at an election held May 25, 1868, in pursuance of the "Act to repeal the charter of the city of San Diego, and to create a board of trustees," approved January 30, 1852, by which they are directed, authorized, and empowered to sell pueblo or city lands, the property of said city, sold the land and premises in said deed described "for the sum of \$15, in gold coin of the United States of America, being at the price of 25 cents per acre, upon the conditions provided for and prescribed in a certain resolution or order of said board of trustees, made and entered on the 8th day of June, 1868, and said party of the second part has agreed to complete all improvements upon said land by said resolution or order requiring to be done, and has fully paid said sum of \$15 into the treasury of said city." But these recitals precede the granting clause, to which no condition is appended, and which is in the following words: "Now, therefore, the president and trustees of the said city of San Diego, parties of the first part, for and on behalf of said city, by virtue of the power and authority in them vested by the law, and for and in consideration of the said sum of \$15 gold coin of the United States, to them in hand paid by the said party of the second

part, at or before the ensailing of these presents, receipt whereof is hereby acknowledged, have given, granted, bargained, and sold, released and quitclaimed, and by these presents do grant, give, bargain, and sell, release and quitclaim, unto the said party of the second part, his heirs and assigns, forever, all the right, title, interest, and claim whatsoever of the said city of San Diego of, in, and to the following described piece or parcel of land situate in the said city, and within the limits of the pueblo lands of said city, and more particularly described as follows: Being that lot of land containing sixty acres, lying in block 1111, according to the official map of said city made by Charles H. Poole, A. D. 1856, and on file in the office of the secretary of said board, together with all and singular the tenements and appurtenances thereunto in any wise pertaining. To have and to hold all and singular the above-described premises unto the said party of the second part, his heirs and assigns, forever, as fully and absolutely as we, the said president and trustees, may or can by virtue of the power in us vested convey the same."

The deed for 40 acres contained, in substance, the same recitals and provisions, the consideration being \$1.25 per acre, amounting to \$50. The whole controversy relates to the admissibility and effect of these two deeds. Each was objected to by appellant upon the ground that it is void for uncertainty in the description of the lot attempted to be conveyed thereby. It is further insisted by the appellant that these deeds, being of no effect, do not sustain the findings of the trial court, as the findings are based upon an erroneous construction of the deeds, to the effect that they respectively conveyed an undivided 60 acres, and an undivided 40 acres, of block 1111; thereby making the grantee tenant in common with the grantor in the whole block, which contains 107.67 acres. By stipulation of the parties it is agreed that on March 1, 1869, the city of San Diego had title to the whole of pueblo lot 1111, and that the rights of the parties depended upon the validity and effect of the respective deeds from the city authorities to William Evans and James W. Cullen. It appears that on June 8, 1868, at a special meeting of the board of trustees of the city, it was resolved "that the only way pueblo lands will be granted is as follows: One-half of the purchase money to be paid at the time of securing certificate; to occupy and improve the lands within six months from date of certificate, said certificate to be called for within one month after approval of petition. The value of improvements to the amount of land granted, viz., on a fraction of an acre up to forty acres, \$250, and on eighty acres, \$400; and, if within one year from date of certificates the said improvements are not made, then the petitioner to forfeit the money deposited, and the land to revert to the city: provided, also, that whenever the stipulated amount of improvements shall have been made on the land granted, then the peti-

tioner may apply for a deed for the same on his paying the residue of the purchase money. All surveys whatever to be paid for by the petitioner."

It is contended by appellants' counsel that, under these resolutions which were referred to in the recitals of the deeds to Evans, these deeds were given upon conditions precedent; and that, there having been no occupancy or improvement of the lands within six months, it was treated by the city as having been forfeited by non-compliance with the conditions, as evidenced by the fact that it (the city) afterwards conveyed the property to James W. Cullen, under whom appellants claim title, and that this conveyance operated as a declaration of forfeiture. The record does not show whether or not any part of the land in controversy was ever improved either by Evans or by Cullen, or by any person claiming under either of them. The only testimony relating to the subject is that of the county surveyor, who testified that "the block has never been subdivided into lots, except that recently some specific pieces of it have been sold by persons claiming under the Evans deeds, and these have been surveyed and located in blocks and lots." No equitable considerations arising from improvements appear in favor of either of the parties, and the questions presented are pure questions of law as to their respective rights, as successors in interest to the city.

I think the trial court ruled correctly both as to the admissibility and the effect of the deeds to Evans. Those deeds did not purport to describe any specific part of block 1111 by metes or bounds, but, by reference to the Poole map, described the block as a whole. This description is as definite and specific as if the metes and bounds of the block as indicated upon that map had been inserted in the deed. It is the settled law of this state that a conveyance of a definite number of acres, or of any other definite quantity of land within, and as parcel of a larger tract of land well described, but without locating the land thus conveyed, is to be construed as conveying an undivided interest in the larger tract, provided the deed does not purport specifically to describe the smaller tract so conveyed, and fail to do so with reasonable certainty. *Schenk v. Evoy*, 24 Cal. 110; *Grogan v. Vache*, 45 Cal. 610; *Lawrence v. Ballou*, 37 Cal. 518; *Lick v. O'Donnell*, 3 Cal. 60; *Wallace v. Miller*, 52 Cal. 655. In *Pipkin v. Allen*, 29 Mo. 229, a grant of 750 arpens of land was described as the "balance and remainder of a tract" of 1,220 arpens of land, which originally belonged to the grantor, "500 arpens of which have been selected by the recorder of land titles as being ratified by the laws of congress," and previously sold to another grantee; but it appeared that the 500 arpens so previously sold had not been selected as described. The court held, in view of the maxim, *ut res magis valeat quam pereat*, that the portion of the description which referred to the 500 arpens as having been se-

lected should be disregarded, and the deed construed as if 500 arpens had been previously sold, without any other description, and as creating a tenancy in common of the two grantees in the whole tract in proportion to their respective interests. Section 1643 of the Civil Code provides that "a contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." The reference to the land granted as "being a lot," without any description of metes and bounds, does not alter the nature of the grant as essentially one of quantity undivided at the time of the grant, it being the manifest intent of the parties that the lot should be definitely fixed by a future location and survey, at the expense of the grantee.

The circumstance that the grant was by a municipal corporation does not affect its nature, or exempt it from the rule of interpretation which requires the grant to be made effective, if possible. It is only in cases of uncertainty, "not removed by the preceding rules of interpretation," that section 1654 of the Civil Code requires a contract between a public officer or body and a private party to be interpreted most strongly against the private party, as being the one who presumably caused the uncertainty. It is, indeed, a settled rule of construction that public grants to private persons are to be construed most strongly in favor of the grantor, (Civil Code, § 1069;) but this rule presupposes the existence of an effective grant, and relates only to the extent of its operation. In all cases it must be presumed that a grantor intended to make a valid grant of some property unless the contrary appears. In view of the cardinal principle of interpretation expressed by the maxim above quoted, I think the grant to Evans should not be held void for uncertainty. "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates," (Id. § 1647;) and, in view of the known circumstances that these deeds were executed on the day of the sale, without any previous survey or subdivision of block 1111, and that the resolutions of the trustees provided for a survey at the expense of the grantee, the deed should be construed as if the description had been: "Being a lot of land" to be located and surveyed at the expense of the party of the second part, "containing sixty acres, in block No. 1111," etc. Had these words of the resolution been inserted in the deed, there could be no question that, until a partition should be made by some mode, the grantee would take an undivided interest in the block. *Lawrence v. Ballou*, 37 Cal. 518; *Jackson v. Livingston*, 7 Wend. 136.

The grant to Cullen, October 25, 1869, could not operate as a declaration of forfeiture of the lands granted to Evans, March 1, 1869, in any view of the case. The resolutions of the trustees, adopted June 8, 1866,

provided for a forfeiture only upon failure to make the required improvements within one year, and, if the resolution had been made an express condition of the grants to Evans, the conveyance by the city to Cullen in less than one year from the date of the sales to Evans could not operate as a declaration of forfeiture before Evans was in default. But under the terms of the deeds to Evans there could be no forfeiture of the lands. Contracts and laws declaring a forfeiture must be strictly construed, and a forfeiture can never take place by implication, but must be effected by express, unambiguous language. The terms of the resolution of June 8, 1868, only related to the forfeiture of contracts or certificates of purchase, and did not contemplate the execution of a deed until the required improvements should be completed. It is true that, in the deeds to Evans which were made on the day of the sale, there is a recital of a sale upon the conditions prescribed in the resolution, and also of an agreement by Evans to complete all improvements required by them; but the granting part and *habendum* of the deed, in consideration of the full receipt of the purchase money by the city, purports to vest in the grantee the full title of the city, in fee-simple absolute, without condition precedent or subsequent. To create a condition in a grant, apt and appropriate words must be appended to the grant, which *ex vi termini* import that the vesting or continuance of the estate is to depend upon the condition. *Craig v. Wells*, 11 N. Y. 320; *Jackson v. McClallen*, 8 Cow. 296. An estate upon condition cannot be created by deed, except when the terms of the grant will admit of no other reasonable interpretation. Reciting in a deed that it is in consideration of a certain sum, and that the grantee is to do certain things, is not an estate upon condition, not being in terms upon conditions, nor containing a clause of re-entry or forfeiture. 2 Washb. Real Prop. 4, 8. A clause in a deed, stating that it is made "on the express stipulation that a dwelling-house of not less than a certain value shall be put upon the land within a certain time," has been held not to constitute a condition, (*Stone v. Houghton*, 139 Mass. 175;) and a recital in a deed that it is made for and in consideration of a prior agreement between the parties, accompanied by a provision following the granting clause that it is upon certain further express terms, conditions, and reservations, contained in such agreement, has been held not to create an estate upon condition subsequent, there being no provision for a re-entry for breach of such terms, appended to the grant, nor that the absolute title granted should cease upon such breach, (*City of Portland v. Terwilliger*, 16 Or. 465, 19 Pac. Rep. 90.) It is further to be considered that no forfeiture appears in this case, for the reason that the record does not show affirmatively whether Evans or his successors in interest have or have not made the improvements required by the resolution. The

grant being *in presenti*, if the recitals preceding it, as to the conditions of the contract of sale, and the agreement of Evans to perform those conditions, could be construed as conditions appended to the grant, they could only be regarded as conditions subsequent, (*Hihn v. Peck*, 30 Cal. 289,) and the burden would devolve upon the city or its successors to prove a failure to perform such conditions, in order to defeat the vested title. Moreover, the mere breach of conditions subsequent does not, *ipso facto*, effect a reverter of the title until the proper steps are taken to consummate the forfeiture. *Ruch v. Rock Island*, 97 U. S. 693; *Ferris v. Coover*, 10 Cal. 589-619. No such steps appearing to have been taken in this case after the time limited within which a forfeiture might accrue, if at all, the title of the grantee remains in him and his successors. I think the judgment and order should be affirmed.

We concur: FOOTE, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(33 Cal. 159)

JUE FOOK SAM v. LORD. (No. 13,462.)

(*Supreme Court of California*. Feb. 22, 1890.)

RECORD ON APPEAL.

An appellant who used no statement on his motion for a new trial, and who presented no bill of exceptions to the court for settlement at the time the decision was made, (*Code Civil Proc.* § 649,) nor served a copy of the proposed bill on the adverse party within 10 days after the decision was made, (*section 650*,) is not entitled to the use of any statement or bill of exceptions on his appeal from the judgment; *section 950* providing that a bill of exceptions "settled as provided in *section 649 or 650*," or a statement or bill of exceptions "used on motion for a new trial," may be used on appeal from a final judgment.

Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Vincent Neale, for appellant. *Cross & Simmonds*, for respondent.

PATERSON, J. Judgment was entered in the court below in favor of the plaintiff, on February 20, 1889, for the sum of \$774.74 and costs; and the defendant appealed therefrom to this court on April 8, 1889. The complaint states facts sufficient to constitute a cause of action, the verdict of the jury covers all the issues, and the judgment follows the verdict. There is therefore no merit in the appeal from the judgment. The notice of intention to move for a new trial was not filed or served until March 9, 1889, more than 10 days after entry of the verdict and judgment: and the proposed statement on motion for a new trial was not served on the attorney of defendant until April 25, 1889. The judge of the court below declined to settle the

statement on the ground that neither the notice of intention nor proposed statement was served in time. Defendant thereupon appealed from the order refusing to settle the statement.

There is no doubt that the steps taken by defendant in his proceedings for a new trial were not within the time required by law, and that the statement, if settled, could not have been used in support of his motion. This his counsel concedes. It is claimed, however, that on his appeal from the judgment he was entitled to a statement, and, there being no time fixed by law within which such statement is to be served, and having the right, under the statute, to appeal from the judgment at any time within a year after its entry, his statement was prepared and served within a reasonable time, and should therefore have been settled by the judge as a statement on appeal. The Code provides that "any statement used on motion for a new trial, * * * or any bill of exceptions settled as provided in section 649 or 650, or used on motion for a new trial, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing the new trial." Section 950, Code Civil Proc. Unless the statement was used on motion for a new trial, it cannot be used on appeal from the judgment. The letter and spirit of the Code provisions unite in showing that it was the aim of the legislature to require a party desiring to review a decision of the trial court on matters of fact, or its rulings at the trial, to take some steps to correct the error while the history of the trial is fresh in the memory of the judge and the parties. If the aggrieved party desires the court which tried the case to review its own decisions of law or of fact, and grant a new trial, "he must, within ten days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, * * * file with the clerk, and serve upon the adverse party, a notice of his intention, designating the grounds," etc., and thereafter he must prepare and serve his bill or statement within the time fixed. Section 659, Id. Any such bill or statement used on motion for a new trial may be used on appeal from a final judgment, although there has been no appeal from the order, if it appear, from the certificate of the judge or otherwise, that it was used on the hearing of the motion. If the proper steps have not been taken in time, and for that reason the judge has refused to settle the bill or statement, it is not one which has been used on motion for a new trial, and cannot, therefore, be used on appeal from the judgment. If the party aggrieved does not desire to ask the court below to review its own rulings, but prefers to appeal directly to this court from the judgment, he may do so, and may have the rulings of the trial court reviewed by complying with the provisions of sections 649 and 650, supra. Those sections provide: "A bill containing the exception to

any decision may be presented to the court or judge for settlement at the time the decision is made, and, after having been settled, shall be signed by the judge, and filed with the clerk." Section 649, Id. "When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, within ten days after the entry of judgment, if the action were tried with a jury, or after receiving notice of the entry of judgment, if the action were tried without a jury, or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare the draft of a bill, and serve the same, or a copy thereof, upon the adverse party." Section 650, Id.

It does not follow that, because the party aggrieved has been given a year within which to appeal from the judgment, that he may wait a year, or nearly a year, before serving the statement or bill upon which he relies to show error in the rulings of the court. The provisions of the Code which we have cited show that where the party aggrieved intends to rely upon the insufficiency of the evidence, or upon errors of the court not appearing upon the face of the judgment roll, he must present a bill containing the exception at the time the decision is made, (section 649, supra;) or must, within 10 days after the decision, serve his proposed bill, (section 650, supra;) and, in order that a fair and reliable record of the evidence and proceedings may be preserved, the legislature has provided that when the motion is to be made on the minutes of the court, in which case the statement need not be settled until after the motion is heard and determined, the notice of intention must specify the particulars in which the evidence is claimed to be insufficient, and the particular errors upon which the moving party relies, (section 659, subd. 4.) The old practice act provided for statements on appeal, and statements on motion for a new trial; and the latter could not be used in place of the former, in the absence of a stipulation. The Code originally did not provide for statements at all, but amendments were made in 1874, restoring statements on motion for new trial, and providing that they might be used on appeal from the judgment, if used on the motion. As appellant never used any statement on his motion for a new trial, and did not present any bill of exceptions under the provisions of sections 649 and 650, supra, he lost his right to a statement or bill of exceptions on appeal from the judgment; and the judge properly refused to settle the statement presented to him. This subject is very carefully and thoroughly considered by Mr. Hayne in his "New Trials and Appeals," c. 45.

We have discussed this matter of practice upon the assumption that an appeal lies from an order refusing to settle a statement. Counsel for respondent contend that there is no appeal from such an order. It is unnecessary, in view of what we have said, to decide whether the order is appealable. There is no

merit in either appeal. The judgment and order are therefore affirmed.

We concur: FOX, J.; WORKS, J.

(81 Cal. 588)

WARD v. CLAY. (No. 12,892.)
(Supreme Court of California. Feb. 10, 1890.)

TRIAL—FINDINGS.

Though a finding, in an action on a note for \$2,546.48 with interest, that there is a balance of \$790.75 due is merely a conclusion of law, and not a sufficient answer to the issue of non-payment, such issue is covered where the court specifically finds that plaintiff sold a \$2,000 note, which defendant had assigned to him as collateral security, "for the amount of the principal and interest then due," and credited the proceeds on the note in suit, and that no part of the latter has been paid, except the amount of the principal and interest due on the \$2,000 collateral note, January 25, 1886.

In bank. On rehearing. For former opinion, see ante, 50.

Action by John T. Ward against Sadie I. Clay on a promissory note for \$2,546.48, with interest. From a judgment for plaintiff for \$790.75 and costs, and an order denying a motion for a new trial, defendant appealed, and, on affirmance, now moves for a rehearing.

R. Percy Wright, for appellant. J. W. Ward, Jr., and J. A. Cooper, for respondent.

BEATTY, C. J. The appellant bases her petition for a rehearing altogether upon the contention that the ninth finding of the superior court, "that there is now due and owing from defendant, Sadie I. Clay, to plaintiff, on the promissory note sued on in this case, a balance of \$790.75," is merely a conclusion of law, and not a finding of fact covering the issue of non-payment. I think the contention is well founded, and that we ought not to approve the ninth finding as a sufficient answer to the issue of non-payment. But there are specific findings covering this issue. It is found that the defendant, as collateral security for the note in suit, assigned a note payable to her, dated December 7, 1883, for \$2,000, bearing interest at 6 per cent. It is further found that this note so held as collateral security was sold by the plaintiff, January 25, 1886, "for the amount of the principal and interest then due" thereon, and the proceeds credited on the note in suit. It is further found that no part of the note in suit has been paid "except the amount of the principal and interest due on the \$2,000 collateral note, dated January 25, 1886." The word "dated," in the last part of this finding, is an evident clerical mistake, and should be omitted. With or without it, the meaning of the finding is perfectly clear, viz., that no part of the note in suit has been paid except \$2,000, the principal of said collateral note, and the interest due thereon, January 25, 1886. It is true this leaves the amount paid to be computed, but that is certain which can be made certain; and allowing in favor of the defendant that all the interest that had ever accrued on the \$2,000 note was due and

unpaid when it was sold, and deducting this maximum sum from the amount of the note in suit at the date of judgment, there remains the full sum found to be due, and for which judgment was rendered. Rehearing denied.

(82 Cal. 502)

LAREW v. NEWMAN, County Auditor. (No. 12,251.)

(Supreme Court of California. Dec. 4, 1889.)

COUNTY OFFICERS—INCREASE OF COMPENSATION.

Under Const Cal. art. 11, § 9, providing that the compensation of a county officer shall not be increased during his term of office, one who is appointed to fill a vacancy in the office of county superintendent of schools, the salary of which was increased after the election of his predecessor, but before the happening of the vacancy, is not entitled to the increase; as Pol. Code Cal. § 1004, provides that any person appointed to fill a vacancy is subject to "all the liabilities, duties, and obligations of the officer whose vacancy he fills."

Department 2. Appeal from superior court, Mariposa county; J. M. CORCORAN, Judge. J. H. Campbell, for appellant. Newman & Jones, for respondent.

McFARLAND, J. This is a proceeding in *mandamus* to compel defendant, auditor of Mariposa county, to draw his warrant in favor of plaintiff for \$837.50. In the court below judgment went for defendant, and plaintiff appeals from the judgment, upon the judgment roll alone. The facts necessary to be here stated are these: W. D. Egenhoff, having in 1882 been elected superintendent of schools of said county, qualified and entered upon the duties of said office on the 8th day of January, 1883, and held the office until March 19, 1884, when he resigned. On said March 19th the plaintiff, by an order of the board of supervisors, was appointed "to serve the unexpired term of W. D. Egenhoff, resigned." Under such appointment plaintiff held the office until the first Monday in January, 1887. He was paid his salary at the rate of \$350 per annum; but he contends that he should have been paid at the rate of \$650 per annum, and brings this proceeding for the difference. When Egenhoff took the office, the salary fixed by statute was \$350 per annum. Afterwards, and before he had resigned, the general county government act (approved March 14, 1883) went into effect, by which the salary of said office was fixed at \$650 per annum. This act enacted that its provisions for salaries "shall not affect the present incumbents;" and also that a vacancy in an office should be filled by appointment by the supervisors, "the appointee to hold office for the unexpired term." Section 9, art. 11, of the state constitution, provides that "the compensation of any county * * * officer shall not be increased after his election, or during his term of office." Section 1004 of the Political Code provides that "any person elected or appointed to fill a vacancy, after filing his official oath and bond, possesses all the rights and powers, and is subject to all the liabilities, duties, and obligations, of the officer whose vacancy he fills."

We think that under these constitutional and statutory provisions, plaintiff merely stood in the shoes of Egenhoff, and gained no additional rights. The increased salary did not commence until after the expiration of the term for which Egenhoff had been elected, and that result could not be evaded either by Egenhoff resigning and procuring himself to be appointed, or by his resigning and allowing some other person to be appointed. The judgment is affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

(83 Cal. 130)

PEOPLE v. LUM YIT. (No. 20,579.)

(Supreme Court of California. Feb. 10, 1890.)

ROBBERY—NEW TRIAL.

1. An order granting a new trial, without disclosing any grounds for its basis, will not be disturbed, on appeal, if it can be sustained on any of the grounds specified in the motion, unless an abuse of legal discretion is manifest.

2. The only direct evidence of an alleged robbery was the testimony of the prosecuting witness, to the effect that he was called out in front of a store, and there engaged in conversation by one A., who was ostensibly seeking employment, when defendant and others approached and robbed him. A policeman who arrived a few minutes thereafter found prosecuting witness much excited, but, deeming pursuit of the alleged robbers useless, communicated with two detectives, who, a few hours later, arrested defendant and A. The place of the alleged robbery was lighted, and people passed to and fro, several being in the store at the time. Defendant's evidence tended strongly to show that on meeting prosecuting witness, and demanding payment for what he owed defendant's brother, an altercation ensued, terminating by defendant and his companions walking away. Prosecuting witness, while denying personal liability, admitted the indebtedness to defendant's brother. A. was subsequently released, and employed by prosecuting witness. *Held*, that an order granting a new trial on the ground that a conviction was not warranted by the evidence would not be disturbed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; D. J. MURPHY, Judge.

J. D. Page, Dist. Atty., for the People. Thomas D. Riordan, (Lyman I. Mowry, of counsel,) for respondent.

GIBSON, C. The respondent in this case was charged with, and convicted of, the crime of robbery. He moved for and obtained a new trial. From the order granting his motion the people appeal. The fourth and sixth of the several grounds upon which the motion was based were, respectively, that the verdict was contrary to the evidence, and that material evidence had been newly discovered, which the defendant, with reasonable diligence, could not have found and produced at the trial. In support of the motion upon the last ground, the respondent introduced the affidavits of six different persons. The court, in granting the motion, did not specify any particular ground in its order. The argument of the appellant is that, as the instructions given to the jury do not appear in the record, and as no exception was taken to the admission of evidence, nor to any ruling

of the court, the motion must necessarily have been granted upon the ground of newly-discovered evidence, and, as the several affidavits consisted merely of the opinions of the respective affiants as to the innocence of the respondent, they were consequently incompetent and insufficient to warrant a new trial.

We agree with the appellant as to the character and insufficiency of the affidavits; but we must presume, in the absence of anything in the record to negative it, that the court acted regularly and tested the affidavits by the proper rules of evidence, and, having found them insufficient, granted the motion upon some other ground, if any other ground to sustain it can be found in the record. So it is with regard to the charge to the jury. In view of the statement, in the bill of exceptions, that the court duly charged the jury upon the law of the case, we must presume that the charge was correct.

This brings us to the leading question, can the ruling be sustained upon any of the grounds of the motion? We are of the opinion that it can be, upon the ground that the verdict was contrary to the evidence. It seems to be well settled that, when it appears by the record that a motion for a new trial, based upon several grounds, was granted by an order which does not disclose any ground for its basis, the ruling will not be disturbed, if it can be sustained upon any of the specified grounds of the motion, unless an abuse of legal discretion is manifest. In *People v. Baker*, 39 Cal. 686, a case in which the record was in many respects similar to the one here, the appeal was from an order granting the defendant's motion for a new trial. Among several specified grounds of the motion was one that the verdict was contrary to the evidence. The bill of exceptions contained all, or some portion, of the evidence, but none of the minutes of the trial, or the rulings of the court during the trial. The order did not show upon what ground the motion had been granted. In this state of the record, the only ground upon which it appeared that the court could have made the order was that the verdict was contrary to the evidence; and, although the evidence apparently strongly preponderated in favor of the verdict, still, as it did not appear that the trial judge has abused his legal discretion in determining otherwise, the order was affirmed. See *People v. McAuslan*, 43 Cal. 55; *Weddle v. Stark*, 10 Cal. 302; *Oullahan v. Starbuck*, 21 Cal. 414; *Hayne*, New Trials & App. § 284, p. 842.

The only direct evidence of the robbery in the present case was the testimony of Chung Wey, the prosecuting witness. About 7 o'clock of the evening of January 19, 1889, he, being at the time engaged as a contractor in employing men for an Alaskan fish cannery, was called out of a store on Sacramento street by one Ah Fook, who was in search of employment. While conversing with Fook in or near a hallway opening into the street,

and but four or five steps away from the store which he had left, the defendant, with three other Chinese, came up and robbed him. The defendant drew a knife, and the three others held the prosecuting witness down, while defendant took from his pocket a handkerchief in which was tied \$240. A policeman, who was attracted by the blowing of a whistle, arrived at the place a few minutes after the robbery, and found the prosecuting witness much excited, and learned from him that he had been robbed by several Chinese, who had run down the street. Thinking it useless to pursue them then, the officer went over to Washington street, and left word for two officers detailed for detective work in the Chinese quarter. These last two officers, about 11 o'clock of the same night, came to see the first officer about the affair, and the three together interrogated Chung Wey; and later, the same night, one of the detective officers arrested the defendant and Ah Fook. The hallway, at the time of the robbery, was lighted. There were people passing to and fro upon the street, and a number of other Chinese were in the store referred to as being but four or five steps from the hallway. The testimony of two other witnesses tend to corroborate Chung Wey as to the amount of money he might have had upon his person at the time. Ah Fook, who was arrested, according to Chung Wey, because he was the man who had called the latter out of the store when he was robbed, was subsequently released, and employed by, and received advance money from, Chung Wey, to go to Alaska. On the other hand, the testimony given on behalf of the defendant tends strongly to show that at the time of the alleged robbery Chung Wey was indebted to the brother of the defendant for services rendered in some fish cannery; and that, Chung Wey having theretofore refused to pay the sum claimed, the defendant, with several other Chinese, at the time and place of the alleged robbery, met Chung Wey, when the defendant demanded the amount due unto his brother, which was refused. An altercation then ensued and was continued a few minutes, and then terminated by the defendant and his companions walking away. Chung Wey, on being recalled for the defendant, did not deny but what somebody owed the defendant's brother for services rendered, but claimed he was not responsible for the debt, because at the time he was simply a foreman, upon a salary, in the cannery where the services were rendered, and not a contractor. Altogether, the testimony given on behalf of defendant tends forcibly to support the theory that the motive of the prosecuting witness was to have an importunate creditor removed or silenced, rather than to punish a veritable robber. It is apparent that the only question that such a state of the evidence presents is one as to its weight, and we cannot say that the trial judge abused his discretion in determining that the jury had mistaken its weight. He

had the witnesses before him, and an equal opportunity with the jury to observe the manner of the witnesses, the character of their testimony, and to judge of their credibility, and discover their motives. He, too, had to be satisfied that the evidence, as a whole, was sufficient to sustain the verdict. If he was not, it was not only the proper exercise of a legal discretion, but his duty, to grant a new trial. *People v. Baker*, supra; *People v. Ashnauer*, 47 Cal. 98; *People v. Hotz*, 73 Cal. 241, 14 Pac. Rep. 856. The order should therefore be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

(83 Cal. 138)

PEOPLE v. MULLINGS. (No. 20,598.)

(Supreme Court of California. Feb. 12, 1890.)

WITNESS—PRIVILEGED COMMUNICATIONS—HUSBAND AND WIFE.

1. Under Code Civil Proc. Cal. § 1881, which provides that a husband or wife cannot be examined for or against each other as to "any communication made by the one to the other during marriage," a defendant in a criminal case, who has offered himself as a witness in his own behalf, and who has not testified in chief to any communications between himself and his wife, cannot, without his consent, be examined by the state as to any such communications.

2. Where the state asks defendant a long list of questions as to communications made by him to his wife, an objection to several of them that the communications were privileged and the questions incompetent is sufficient, without repeating the objection to every question.

3. Where the state asks defendant a long list of incompetent questions which assume defendant's guilt, with the evident intention of impressing the probability of his guilt on the minds of the jurors, it cannot be said that the questions were not prejudicial to defendant, though he answers them in the negative.

Department 2. Appeal from superior court, Butte county; P. O. HUNDLEY, Judge.

W. J. Herrin and *M. C. Barnay*, for appellant. *Geo. N. Johnson*, Atty. Gen., for the People.

MCFARLAND, J. Defendant was charged with the murder of one John S. Moore. He was convicted and sentenced to the state-prison. He appeals from the judgment and from an order denying him a new trial. Defendant went upon the stand as a witness in his own behalf. After a denial that he had made one or two statements testified to by one or two of the witnesses for the prosecution, his testimony consisted simply of the following question and answer: "*Question*. Did you or did you not kill John Moore? *Answer*. No." Upon cross-examination the prosecution asked him a great variety of questions, against the objections of his attorney that they were not proper cross-examination of a defendant under section 1823 of the Penal Code; that is, that they were not as to "matters about which he was examined in chief." The cross-examination in this respect certainly went, at least, to the very verge of error,—a place where prosecuting

officers seem frequently to want to go on all doubtful questions. But, considering the general nature of defendant's statement, this court (at least a majority of it) is not prepared to say that error was committed on the sole ground that the questions asked were not proper cross-examination.

In the course of the cross-examination, however, the prosecution asked the defendant a long list of questions about conversations between him and his wife, to which his counsel objected on the additional ground that they were privileged communications, about which he could not be examined. The objection was overruled, and defendant excepted. This was error of a most material character. At the time of the conversations asked about, the person with whom they were had was defendant's wife, although afterward she was divorced from him. The provisions of our Codes on the subject of privileged communications between husband and wife are little more than a declaration of the common-law rule upon the subject, except in this respect: The privilege at common law did not extend to communications which were not in their nature confidential; and, although such communications were generally held to be confidential, yet some very difficult questions did occasionally arise as to the character of the communications; but our Code sweeps away that embarrassing distinction by extending the privilege to "any communication made by one to the other during the marriage." Code Civil Proc. § 1881. The general rule is stated in section 398 of Wharton's Criminal Evidence, as follows: "Aside from the question of interest, confidential communications between husband and wife are so far privileged that the law refuses to permit either to be interrogated as to what occurred in their confidential intercourse during their marital relations." The main provision of our Codes upon the subject is as follows: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: (1) A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage, or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage." The rule is founded on public policy, and its purpose, as stated in the clause of the Code just quoted, is to "encourage confidence, and preserve it inviolate;" and no disclosure can be forced from either spouse without the consent of the one against whom it is sought to be used. In *Murphy v. Com.*, 23 Grt. 960, the rule was applied to a mere witness for the prosecution. In that case Alexander Murphy was on trial for an alleged assault with intent to kill on one John Murphy. John Murphy was a witness for the prosecution, and on cross-examination he was asked by counsel

for defendant if he had not stated to his wife that defendant acted only in his own defense. The prosecution objected to the question as privileged, and the objection was sustained, and the supreme court of appeals of Virginia held the ruling correct, because the question "required him to state a communication supposed to have been made by him to his wife, which, if made, was what the law considers a confidential communication, and which he was not bound to disclose." And, of course, the rule applies much more strongly to a defendant himself on trial upon a serious charge.

It has been repeatedly held that a party offering himself as a witness in his own behalf cannot be cross-examined as to any communication made to his attorney. In *Duttenhofer v. State*, 34 Ohio St. 91, the defendant was indicted for and convicted of forgery. He was a witness for himself; and, on cross-examination, the state succeeded in examining him, over his objection of privilege, about certain communications made by him to his attorney concerning the matter in controversy. But the supreme court of Ohio reversed the judgment for this error, and in its opinion said, among other things, as follows: "The privilege applies to the communication; and it is immaterial whether the client is or is not a party to the action in which the question arises, or whether the disclosure is sought from the client or his legal adviser." And the court further says: "Nor do we see the propriety of not allowing the attorney to make the disclosures without the consent of his client, and yet compelling the client himself to make them." In *Bigler v. Reyher*, 43 Ind. 112, it was held (we quote for brevity from the syllabus) that "communications made in consultation by a client to his attorney are privileged and protected from inquiry, when the client is a witness, as well as when the attorney is a witness." In *Hemenway v. Smith*, 28 Vt. 701, one Orcutt, who was a defendant, was a witness on his own behalf, and was cross-examined, against his objection, about consultations with his attorney. For this error the judgment was reversed, the supreme court of Vermont saying that "the rule should be the same as it would have been if the counsel had been called to prove the consultation." In *Bobo v. Bryson*, 21 Ark. 387, it is held that "a witness is protected from testifying as to any communication he may have made to his attorney in confidence." In *State v. White*, 19 Kan. 445, the defendant, who was being tried for bigamy, was a witness for himself, and he was cross-examined by the prosecution, against his objection, about consultations with his attorney. For this error the judgment was reversed, and the court, after reciting that the statute prevents an attorney from testifying about communications made to him by his client, proceeds as follows: "This statute would be of no utility or benefit, if the client could be compelled, against his consent, to make such disclosures. It

would be absurd to protect by legislative enactment professional communications, and to leave them unprotected at the examination of the client. In such an event, in all civil actions, the confidential statements of client and counsel would be exposed, and likewise the same would occur in all criminal actions where the defendant should testify. The authorities are otherwise." The reasoning and philosophy of these cases (and there are many others to the same effect) apply with increased force to the relation of husband and wife,—a relation more confidential than that of attorney and client; indeed, the most confidential relation known to human beings. And we have cited the above cases because they are closely analogous in principle to the one at bar; and because we have been unable to find any reported case where it has been attempted to compel a defendant in a criminal case to testify to communications between his wife and himself. Slightly changing the language above, quoted from *State v. White*, but applying its principle to this case, we can say that "this statute would be of no utility or benefit, if the husband could be compelled, against his consent, to make such disclosures. It would be absurd to protect communications between husband and wife, and to leave them unprotected on the examination of the husband." All along the line of the cases about communications between client and attorney it was steadily argued on the one side that the statute only prevented the attorney from testifying, and that when the client was on the witness stand he could be forced to disclose; and the constant answer of the other side, sustained by the courts, was "the privilege applies to the communication," and it cannot be forced from either party to the confidential relation. It is clear to us, therefore, that a defendant in a criminal case who has offered himself as a witness in his own behalf, and who has not testified in chief to any communications between his wife and himself, cannot, without his consent, be examined by the state as to any such communications.

The attorney general makes the point that the defendant's attorney did not sufficiently object, on the ground of privilege, to the questions asked defendant about communications with his wife; but the point is not tenable. We do not understand that, when an attorney has clearly and pointedly objected several times to a certain line or class of testimony, he is called upon to repeat his objection to every question. Such repetition would be unbecoming, and needlessly annoying to the court. The first question in the case at bar to which the question applied was this: "What did you say to your wife when you went home that night?" The objection of defendant's counsel was this: "We object to any conversation between him and his wife as not in cross-examination, and as improper; being a privileged communication." The court overruled the objection, and defendant excepted. Further on, to the question, "Did you not

tell your wife that you had killed a man?" the objection was, "We object on the ground that, even if so, it was a privileged communication." Objection overruled, and defendant excepted. Other objections were made to similar questions which did not expressly state the ground of "privilege," but which did state, among other things, that the question was "not in cross-examination, and incompetent." The word "incompetent," under the circumstances, was sufficiently broad to include the ground of objection under review. Such questions were "incompetent;" that is, apart from the consideration of relevancy and materiality, they were incompetent because prohibited by law. Again, toward the close of the cross-examination, when a question was asked about something which the wife was assumed to have said to the defendant, his attorney said: "All this testimony, pretended conversations between this man and his wife, I move to have stricken out, for the reason that they are not such communications as can be repeated in any form, because the wife would not be allowed to come in and testify to them, and because irrelevant and incompetent for any purpose whatever. They are not such conversations as can be rebutted in any way, but are, if anything, privileged communications, not allowed to be brought out in court. I shall ask for a ruling on the motion as soon as the testimony of the witness is finished." And at the close of the examination of defendant his attorney said as follows: "Now we move to strike out all the evidence with reference to conversations had between this defendant and his wife concerning the killing of John Moore, as not such evidence as can be brought out by the prosecution because privileged." The motion was overruled, the court announcing the broad proposition that "any declaration that he might have made to his wife he might be interrogated about on cross-examination." The defendant excepted. It appears, therefore, that defendant's objection to the evidence was clear, fair, and full; that it was thoroughly understood by the court; and that it was pointedly overruled.

Counsel for respondent contends that the questions asking defendant about conversations with his wife did not injure him, because his answers to them were mostly in the negative. But what answers were expected? After defendant testified that he did not kill John Moore, can any sane man think that the district attorney supposed for a moment that defendant would answer affirmatively a long list of questions framed upon the presumption that he did kill him? Why, then, did he ask them? And if the questions and answers did not help to strengthen the case against defendant, why did not the prosecution consent to have them stricken out? It is quite evident that the questions and not the answers were what the prosecution thought important. The purpose of the questions clearly was to keep persistently before the jury the assumption of damaging

facts which could not be proven, and thus impress upon their minds the probability of the existence of the assumed facts upon which the questions were based. To say that such a course would not be prejudicial to defendant is to ignore human experience and the dictates of common sense. The questions themselves were incompetent, and, after one or two of them had been asked showing the purpose of the prosecution, counsel should not have been allowed to ask others of like character. A similar point to the one under discussion—that is, that the defendant was not injured by the questions on account of the character of the answers—was made in *Gale v. People*, 26 Mich. 161; but in that case Judge COOLEY, delivering the opinion of the court, says: "A review of the evidence in this case suggests very forcibly that, however full may be the explanation, a list of questions which assume the existence of damaging facts may be put in such a manner, and with such persistency and show of proof, as to impress a jury that there must be something wrong, even though the prisoner fully denies it, and there is no other evidence. Holding that these questions were erroneous, and that they might, and probably did, prejudice the prisoner, the conviction must be set aside, and a new trial ordered." Of course, occasionally one or two questions may be erroneously allowed, and the answers may be such that, under the circumstances of the case, it can be readily seen that no injury was done. For instance, counsel for respondent cites *People v. Brown*, 76 Cal. 574, 18 Pac. Rep. 678. In that case the court was dealing with one single question of doubtful propriety, and held that at all events the defendant could not have been injured by it, because, as the court said: "He would not have been in any more favorable position if the question had neither been asked nor answered." The distinction between that case and the one at bar is too apparent to need pointing out.

We see no other matters in the record necessary to be noticed in detail. The examination of defendant's divorced wife was properly stopped as soon as she was asked about communications between defendant and herself during the marriage. The instruction as to preponderance of evidence is mostly of a negative character, and can hardly be said to be erroneous; but it would be safer for prosecuting attorneys and courts to limit themselves on that subject to the language of the Code. Great exuberance in the way of instructions is a prolific source of difficulty. Of course, when a defendant asks for doubtful instructions, the court is compelled to pass on them; but district attorneys and courts should not themselves voluntarily load up records with a mass of instructions which are both doubtful and unnecessary. Judgment and order reversed, and cause remanded for new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

TERRITORY v. EVANS.

(*Supreme Court of Idaho*. Feb. 24, 1890.)

CRIMINAL LAW—JURY—MORMONS—DEPOSITION.

1. A juror must have all the qualifications now prescribed for an elector, and a member of the so-called "Mormon Church" cannot be a juror.

2. No exception is by statute allowed to an order overruling a challenge to a juror for general cause, hence such order is not error.

3. Depositions taken in the presence of the accused may be used on trial, when, on account of death or other good cause, the presence of the witness cannot be had. Our statutes do not forbid such use, nor is it in violation of the sixth amendment to the constitution of the United States.

(*Syllabus by the Court.*)

Appeal from district court, Bear Lake county; BERRY, Judge.

Smith & Smith, for appellant. *R. Z. Johnson*, Atty. Gen., and *Hawley & Reeves*, for respondent.

BEATTY, C. J. The appellant was charged with the offense of resisting an officer. From the judgment rendered upon his conviction thereof he has appealed to this court, and now contends that the trial court erred (1) in admitting as a trial juror a person "who was a member of an organization that taught * * * its adherents * * * to commit the crime of bigamy or polygamy;" and (2) in admitting as evidence before the trial jury the depositions of witnesses taken before the committing magistrate.

Must a juror have all the qualifications of an elector? Whether a juror must have the same qualifications now required of an elector is the question involved in the first assignment of error. Sections 3941, 3942, Rev. St., together provide that jurors must be citizens of the United States, and electors of the county. Sections 500, 501, require that electors, besides having certain qualifications, must not be members of any "organization which teaches its adherents to commit the crime of bigamy or polygamy." While these statutes seem clearly to exclude as jurors all persons who belong to such "organization," it is contended such a construction will do violence to the legislative will and intention, for which the reasons following are assigned: (1) That when the law first provided a juror should be an elector (Laws 8th Sess. p. 704) the only qualifications of an elector were citizenship and residence, and, in changing the qualification of electors (13 Sess. p. 106) by requiring they must not belong to said organization, it was not designed to apply this restriction to jurors, also; (2) that, if jurors must have all the qualifications of electors, they must also be registered, which, under the operation of the registration law, would often result in the temporary exclusion of good citizens as jurors, who are otherwise qualified electors; and (3) that in some counties in this territory so many of the people are members of such organization that the courts would thus be practically without jurors.

1. The authorities holding that statutes will not be repealed by implication are not

applicable to general laws which are in conflict with, and repugnant to, each other. When a general law is in apparent conflict with some prior private or special act, passed for the benefit of some particular interest or municipality, the presumption is indulged that it was not designed by the general to repeal the special law; but no such presumption is entertained in the case of conflicting general statutes. They cannot stand together. There can be no question that the two statutes prescribe different qualifications for electors, and the older must yield to the later. It may be added that the act of the thirteenth session was an election law, and by its last section it not only expressly repealed the former law on the same subject, but also "all acts or parts of acts in conflict with this act," which must be held to exclude any presumption that the legislature did not intend the repeal of all conflicting statutes. However, the fact that on the 11th day of January, 1887, the legislature by one act swept out of existence all former legislation and laws of Idaho, and enacted a complete revision thereof, now embodied in our Revised Statutes, including sections 3941, 3942, as they now are, is sufficient answer to all suggestions that the legislature did not intend the statutes as they now read. One of the prime objects of a revision is the elimination of doubt. What is included therein must be construed together as the law, and all that formerly existed, and not included, is clearly repealed. Section 19, Rev. St.

2. It is not conceded an elector must be registered to act as a juror. Section 500 says he must be registered to vote. It does not follow that, if he has all the qualifications of an elector, he must be registered, to sit in the jury-box. Registration does not go to his qualification, but is only a precaution to prevent fraud in the election. But, even if the law should be construed that a juror must be registered, it would generally result in only a few being temporarily debarred the privilege of jurors.

3. It is, unfortunately, true that in some counties such a large proportion of the people belong to said "organization" that juries cannot be selected from the mass of the people, and courts may at times find it even inconvenient to procure them. So, also, communities might be found where the qualification of citizenship, or any other general qualification, might result in the same inconvenience. On the contrary, we think the legislature meant to exclude from jury service those belonging to the so-called "Mormon Church." By section 501 they are distinctly enjoined from "holding any position or office of honor, trust, or profit." Laws are construed in the light of the facts and circumstances under which enacted. We are justified in supposing the law-maker took notice of the generally admitted fact that the members of that church are more obedient to its teachings, which are antagonistic to the laws of the land, than to the latter.

View this question in any light, we are forced to the conclusion that under our laws a juror must have all the qualifications now required of an elector, and that the court should have excluded the juror objected to by appellant. That this conclusion will lead to inconvenience in some localities may be true, but we cannot change what seems to be a positive and clear statute. If there is any need of a change, we respectfully refer it to the legislative department.

Exception to Order Overruling Challenge for General Cause. Respondent insists, however, that, even if the juror was not qualified, the statute does not allow appellant an exception to the order of the court overruling his challenge to such juror. Inconsistent as it may appear, it seems such is the statute. Section 7831 divides causes of challenge to jurors into (1) general, including "a want of any of the qualifications prescribed by law to render a person a competent juror," (7832,) and (2) particular, which includes implied and actual bias (7833.) The cause of challenge in this case was a general cause; and the statute in no place provides for or allows an exception to an order overruling such a cause of challenge. Our section 7940 (Pen. Code Cal. § 1170) allows exceptions only in matters of challenge based on implied or actual bias. Here, then, we have a statute which declares a juror disqualified, but provides no remedy to the aggrieved party when the court admits him. On the principle that there is a remedy for all wrongs, we would be inclined to hold that such action of the court is reviewable. But our statute on this subject is an exact copy of that of California, and in adopting their laws we adopt also their construction of them. Partially in point is the case of *People v. Riley*, 65 Cal. 107, 3 Pac. Rep. 413, and cases cited, which hold that a defendant is not allowed an exception to the ruling of the court disallowing a "challenge for actual or implied bias," because the statute makes no provision for such exception, but only allows it to the decision of the court "in admitting or rejecting testimony, or in charging the triers in the trial of a challenge to a juror for actual bias." The direct question is decided in *People v. Fong Ah Sing*, 70 Cal. 8-11, 11 Pac. Rep. 323, being a cause in which defendant was found guilty of murder. A juror who was not a resident of the county, as required by law, was admitted against defendant's challenge. On appeal it was held this was a general cause of challenge, to rulings in which no exception is allowed. The case seems approved in *People v. Ward*, 77 Cal. 113, 19 Pac. Rep. 373. We therefore hold the appellant's exception to the order of the court overruling his challenge to the juror is not well taken.

Depositions may be Used on the Trial. Was it error to admit in evidence the depositions referred to in the cause? Appellant claims it was, because not permitted by the

statute, and contrary to the constitution of the United States. Under the common law, the depositions of witnesses, taken in the presence of the defendant, could be used at the trial of the cause in case of the death or absence of the witness, but it seems they could not be used before the grand jury. Does our statute abrogate the common-law rule, or prohibit the use of depositions? Sections 7576 and 7634 provide for the taking of the depositions, and their use before the grand jury. It seems probable these provisions were designed to procure the testimony of witnesses while it is fresh in their minds, and also in the interest of economy and convenience. The question of testimony before the trial jury was not under consideration. The two questions are not sufficiently relevant that the consideration of one necessarily involves the other. It is evident this legislation referred only to the use of such evidence before the grand jury; for it provides for its use even when the presence of the witness can be procured, which is never permitted in the use of such testimony before the trial jury. The subjects not being relevant, failure to provide for its use before the trial jury does not operate to exclude it. Our statutes expressly establish and recognize the principle of the use of depositions on the trial in certain cases, of the absence or death of the witness. Sections 7588 and 8161. Then why not in all cases, if not expressly forbidden? Section 8161 provides expressly for the taking of depositions of defendant's witnesses for use on the trial, and the fact that no provision is made therein for taking the deposition of the people's witnesses strongly suggests that it was designed they should not be used. But it does not appear we have abolished the common-law rule on this subject, nor have we directly enjoined the use of such testimony; and it does appear that all the depositions above referred to are taken in the same way, in the presence of the accused, thus justifying the presumption of a like use of all so taken; and section 7864 provides that "the rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code." There is no doubt this is a question relating to "the rules of evidence," nor is there that depositions may be used in civil actions. We think our statute permits their use before the trial jury when duly taken in the defendant's presence, and the witnesses cannot, for good cause, be brought before the court.

The Use of Depositions not Forbidden by United States Constitution. It remains to consider whether article 6 of the amendments to the constitution of the United States, providing that the accused must be "confronted with the witnesses against him," absolutely requires the presence of the witnesses at the trial. This question has been discussed time after time in the courts of the states having the same or similar constitutional provisions; and, while the

decisions have not been uniform in their conclusions, the weight of authority is that depositions taken in the presence of the defendant, with the right of cross-examination, is being "confronted by the witnesses," and meets the demands of the constitution. Such depositions have been admitted when it appeared the witness was dead. If constitutional in such case, the same justification can be urged for their use in case of absence of the witness. Of the many authorities sustaining this view are *State v. McO'Brien*, 24 Mo. 412, a murder case, in which depositions were allowed notwithstanding a constitutional provision that "in all criminal prosecutions the accused has the right to meet the witnesses against him face to face." *Summons v. State*, 5 Ohio St. 340, was a murder case. The constitutional provision was: "In any trial, in any court, the party accused shall be allowed * * * to meet the witnesses face to face." The testimony of a witness given in a former trial was permitted to be testified to by those who heard it; the witness having in the mean time died. To same effect are *Gilbreath v. State*, 26 Tex. App. 318, 9 S. W. Rep. 618; *Sneed v. State*, (Ark.) 1 S. W. Rep. 70; and numerous authorities. Had the depositions been improperly admitted, the appellant has failed to furnish the court such a record as will authorize it to correct the error. Section 8236 is: "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." The appellant has entirely failed to show us he was prejudiced in the least by the alleged error of permitting the use of the depositions. That the court may judge whether they were detrimental to appellant, he should have brought them here, which he has failed to do. It is not enough for appellant to show error. He must, under our statute, show damaging error. Under the plain provision last noted, we do not need the guide of other courts to lead us to this conclusion; but in harmony with it are *People v. Brotherton*, 47 Cal. 388; *People v. Leong Sing*, 77 Cal. 117, 19 Pac. Rep. 254, and cases cited; and *People v. Olsen*, (Cal.) 22 Pac. Rep. 126. The judgment in this cause should be and is affirmed.

(5 N. M. 408)

BENT v. THOMPSON *et al.*

(*Supreme Court of New Mexico*. Jan. 23, 1890.)
PROBATE OF WILLS—ADOPTION OF COMMON LAW.

1. Under Comp. Laws N. M. 1884, § 1823, which adopts the common law as the basis of jurisprudence, the statute law is not repealed, but only so much of the common law is adopted as is not in conflict with the statute law. *Browning v. Browning*, 9 Pac. Rep. 677, followed.

2. Under Comp. Laws N. M. 1865, § 1865, which continues in force the Laws of Velarde in relation to the probate of wills, and under Laws of Velarde, c. 15, which provides that a will may be presented for probate by any person interested, and that the

witnesses must be summoned and examined, but makes no provision for notice to the heirs, an order admitting to probate a will presented by the widow of the testator, and duly proved by the witnesses, is valid, though no notice was given to testator's children.

3. Under Comp. Laws N. M. 1884, §§ 1869, 1881, which provide that an infant whose rights would be otherwise barred by lapse of time shall be allowed three years in which to assert his rights in regard to land, but only one year in which to assert all other rights, a proceeding to re-probate a will, four years after reaching majority, is barred.

Error to district court, Taos county; REEVES, Judge.

Wells, McNeal & Taylor, for plaintiff in error. *Frank Springer*, for defendants in error.

MCFIE, J. This is an action originating in the probate court of Taos county, wherein William Bent seeks a re-probate of a will probated in the year 1867 as the will of Alfred Bent, his father. In his petition, which was filed in said court on the 12th day of August, A. D. 1887, William Bent alleges, in substance, that his father, Alfred Bent, died December 9, 1865, leaving as his sole heirs at law his widow, Guadalupe Bent, now the wife of one George W. Thompson, Charles Bent, William Bent, also known as Julian Bent, and Alberto Silas Bent, all of said children being infants; that letters of administration were granted to said Guadalupe Bent upon said estate, April 12, 1866; that on the 6th day of March, 1867, his mother, Guadalupe Bent, presented to the probate judge of said county, and had probated, a will, alleging it to be the will of Alfred Bent, and that neither he nor his brothers were notified, or were present, when said will was probated. The petitioner further alleges, on information and belief, that the will probated was not the will of his father, but says that, if it was, the testator was of unsound mind when it was executed; that the witnesses named were not present at the making of the will, nor were they examined when said will was probated. He alleges that the Maxwell Land Grant Company and the Maxwell Land Grant & Railway Company have or claim some right or interest in the premises, and prays that citation may issue requiring said Guadalupe Bent, now Thompson, to appear and make solemn proof of said will, and that Charles Bent, Alberto Silas Bent, and the above-named companies be cited to be present and hear said proofs. A copy of the will is attached, and is as follows: "In the name of God, Amen. I, Alfred Bent, being of sound mind and memory, and knowing the uncertainty of life and the certainty of death, do hereby devise and decree as my last will and testament, in presence of the subscribing witnesses, as follows, to-wit: *First*. I give and bequeath unto my wife, Guadalupe Long Bent, for the maintenance of her and my three children, Charles, William, and Silas Bent, all of my real and personal property, money, goods, and effects, after my just debts have been paid, which are as follows, to-wit:

To North & Scott, of St. Louis, the sum of five hundred and sixty-nine dollars, with interest; to Mrs. S. Beuthner and L. B. Maxwell, sixty dollars; to David Webster, the sum of four dollars,—which debts I desire shall be paid. I desire that my said wife shall be my executor, and may join with her, if necessary, any person who may desire for her benefit, and that of my children, heirs as aforesaid. In testimony whereof I have this 6th day of December, A. D. 1865, subscribed my name, in the presence of subscribing witnesses. *Codicil*. The debt due North & Scott, of the city of St. Louis, is jointly due by myself and Horatio Long, of Colorado territory. ALFRED BENT. Witnesses: FERNANDO MAXWELL, W. A. KITTRIDGE, JAS. S. HURST, CHARLES HART." Citation issued August 12, 1887, returnable September 5, 1887.

On the opening of court on the 5th day of September, 1887, T. B. Catron, attorney of defendant companies, appeared in behalf of said companies, and filed a written protest and motion to dismiss the cause for numerous reasons, in substance, that the will had been probated more than 20 years in the same court, and could not be re-probated; that the court had no jurisdiction; that the proceeding was barred by limitation; that there was no law authorizing the re-probate of the will; and that the proceeding was barred by reason of laches and unreasonable delay. The court overruled the motion, and, after hearing testimony, entered judgment declaring the former probate of the will illegal, and annulling the record of same, on September 7, 1887. From said judgment an appeal was taken by defendant companies to the district court for Taos county, where, at the November, 1887, term thereof, the following motion was made and allowed, dismissing the cause, and declaring said proceedings of the probate court at the September term, 1887, in regard to the probate of the will of Alfred Bent, null and of no effect. The motion was as follows: "Now comes the Maxwell Land Grant Company, and the Maxwell Land Grant and Railway Company, and move the court to declare null and of no effect all of the proceedings contained in the record had by the judge of the probate court of the county of Taos at the September term of said court, with reference to the re-probate of the will of Alfred Bent, and especially the part of said record declaring said will not to be the last will of Alfred Bent: (1) Because the same were not had in conformity with the provisions of an act of the legislative assembly of the territory of New Mexico approved January 26, 1861, entitled 'An act amendatory of the law of testaments,' and being sections 1446, 1447, 1448, and 1449 of the Compiled Laws of 1884. (2) Because said probate judge and court rejected and in effect declared said will of Alfred Bent null and contrary to law. (3) Said probate court and probate judge declared said will of Alfred Bent null and void, under the pretext of want of solemnities prescribed by law for

making wills. (4) Because said probate judge did not return said will to the person who may have applied for the approval thereof, either said William Bent or Guadalupe Thompson or any other person, nor did he note at the foot of said document the positive reasons on which he founded any opinion why he refused to approve said will. (5) Said will has not been presented to the district court by any person to whom the same has been returned, nor has the same been returned to any one whoever. (6) Because neither the probate court nor the probate judge had jurisdiction to entertain the said petition, or grant the prayers thereof. (7) Because neither said probate court nor said probate judge could inquire into the validity of the acts of the probate court or the probate judge, done at a regular term of the probate court, more than twenty years prior to the filing of said petition of William Bent. (8) Because neither said probate court nor said probate judge had any authority or right to review the action of his predecessor, or of the probate court, done in regular term, over twenty years before the application. (9) Because said will was made and executed and approved before the common law came in force in this territory, and there was no law in force at the time of making, executing, and probating of said will allowing a re-probate thereof. (10) Because the laws in force at the time of the making and execution of said will and the death of the testator did not provide for or permit any re-probate. (11) Because said petitioner has been guilty of laches, and has not made his application in due and lawful time. (12) Because said proceedings are illegal and void, and unauthorized by law. (13) Because the proceedings declaring said will not to be the will of Alfred Bent, deceased, are illegal and contrary to law, and not in the jurisdiction of the probate judge or probate court, and these respondents especially pray the court to declare the same null and void. (14) The record shows that neither the probate court nor the probate judge made any investigation as to the validity of said will, although it appears the witnesses, or some of them, had been before him at the same term in the matter of said petition. (15) Because said record is in other respects vague, uncertain, and insufficient, and not in accordance with law. CATRON, KNAEBEL & CLANCY, Attorneys for said Companies." To reverse this judgment the cause is brought to this court.

It is insisted by defendants in error that there is an error on the first page of the printed record, in that the date when William Bent arrived at his majority is stated to have been "May 31, A. D. 1887." They insist that it should have been "May 31, A. D. 1883." The plaintiff in error assumes the correctness of the record by basing an argument upon its correctness, and it becomes important for the court to know which is the correct date. An inspection of this record discloses the fact, to our satisfaction, that

the date "1887" is an error, and should be "1883." It will be observed that on page 10 of the record, where the petition is again set out in full, the date is given as "1883," and the ages agree with the order in which the names are given in the will. These considerations, it is true, may not be conclusive; but when added to these is the admission in the petition that plaintiff in error's father died December 9, 1865, all doubt is removed, as petitioner makes the further admission that he was living when his father died, thereby showing that "1887" cannot be the correct date. From this it will be seen that the petitioner had arrived at his majority more than four years prior to the commencement of this suit in the probate court. The certified record shows the conclusion above to be correct.

Plaintiff in error cites numerous authorities to the effect that under the English common law two forms of probating a will were recognized, namely, the common and solemn forms. The common form required no notice to the heirs or interested parties, while the solemn form required such parties to be cited to appear; and, where a will had been probated in common form, any interested party could appear, and have the will re-probated in solemn form, at any time within 30 years. Such was the practice in the ecclesiastical courts, which were in fact the probate courts of England. Plaintiff in error also refers to several of the state courts' maintaining the double form of probating a will, but an examination of these authorities shows that the courts of those states were either governed by the common law, or by special statute regulating the practice. Plaintiff in error assumes that the rules of the common law govern this case, as it will be observed that the petition demands a re-probate of the will in solemn form, and authorities cited are all in support of that view; while the defendants in error contend that the probate of a will in this territory is a purely statutory proceeding, and that the laws of this territory do not recognize the double form of probating wills prescribed by the common law, nor require notice to heirs or legatees. Let us therefore examine this subject with a view to determine what law governs this case.

The civil law was undoubtedly in force prior to conquest and the treaty of peace between the republic of Mexico and the United States, and in many respects remained in force for many years afterwards. The Laws of Pedro Murillo Velarde, in relation to the execution and proving (or probating) of wills, and administration of estates of decedents, dating back to 1790, were also in force, and were continued in force by specific provision of the Kearney Code in 1846. Comp. Laws N. M. 1865. Under the civil law, the only provisions made for proving a will (which is equivalent to probating) are as follows: "In order that an open testament, made before witnesses without a notary, can have effect, it must be declared valid by the judge. For the purpose of obtaining his

sanction, any one having an interest in its disposition may apply to the judge, who must summon the witnesses present at the execution of the testament; and, upon his finding that it has been truly made, he shall declare it a valid testament, and order it to be inscribed in the registers of some notary." Schmidt, Laws Spain and Mexico, pp. 214, 215, art. 1015. In regard to a close or sealed will, the provision is as follows: "When the testator is dead, the person believing himself heir or legatee must apply to the judge to have it opened. Thereupon the judge must order the person who has possession of the testament to bring it before him, and, having summoned the witnesses, exhibit it to them for the acknowledgment of their signatures. When such acknowledgment has been made by all the witnesses, or at least four of them, if the others cannot be had, he shall proceed to open the testament." Partidas, lib. 3, tit. 2, p. 6; Schmidt, Laws Spain and Mexico, art. 1019. These laws, it will be observed, do not provide for notice, by publication or otherwise, to heirs or interested parties to be present at the probating of the will; only the witnesses to the will are to be summoned. Any interested party or person having possession of the will might present the same for probate; and there is but one form of probate recognized, so far as we have been able to discover. The Laws of Pedro Murillo Velarde are almost identical, and provide: "Chapter 15. Of the Sealed Testament, and the Proving of the Nuncupative Testament not Made before a Notary. The testator who has executed a sealed testament being dead, the heir named, the legatee, and the executor may ask that it be opened, with the intention that such disposition be declared valid, or the child omitted, or unjustly disinherited, and the heirs *ab intestato*, with the intention that it be declared void; wherefore, any one who may be interested may ask it, swearing that he does not do so in bad faith, but under the presumption that he has, that he is interested. This petition should be made to the regular secular judge, and in it be expressed that the testator died under this disposition, and the judge shall direct that it be brought immediately, in order that it be opened; and, it being in another place, he will set a time for him who may have it, in order that he may present it; and if he be contumacious, he shall pay to him who shall demand it the legacy which may be left to him in the testament, and the damage that his contumacy may cause him. Before proceeding to the opening, the judge shall require that the instrumental witnesses identify in his presence their signatures, that of the testator, and the sealed envelope which may inclose the testament, and that they depose as to the decease of the testator, because they may have heard of it or seen it; and, not knowing it, the notary shall certify to it, because he has seen it, giving certificate of identity, or because he was told of it in his house or neighborhood; because, before the

death be proved, the opening cannot be proceeded with. If the witnesses are dead, or are absent without their whereabouts being known, information shall be given of it, that at the time of the execution they lived and were at the place, and that they were persons who could testify; and the same as to the legality of the notary before whom it was executed, if he should be dead; and, if there should be any one who may know their signatures, he shall identify them, or they shall be proved. But if the witnesses are alive, and cannot all be had, it will be sufficient that the majority of them appear; and if this cannot be done, and the judge should understand that to omit the opening there might result damage to the parties in interest, he may call responsible men, and before them open the testament, have it copied and read, and, the responsible men signing it, have it closed and preserved, in order that, when the instrumental witnesses present themselves, they may recognize it in the prescribed form. If it should not be opened before the notary who witnessed its execution, he should acknowledge his signature and signet. The identification being made by the witnesses, and the envelope not being torn or erased, nor being suspicious by reason of any other cause, the judge shall have it opened in the presence of the notary and witnesses, and reading it first to himself in case the testator should direct that any part should not be read or published until a certain time, in which he should accede to his wishes, he will have it read and published in the presence of all; directing that it be made a public document, to which end it shall be filed in the records of the notary before whom it is opened, and to the rest (a copy) of the clause which relates to them, with the beginning and end of the testament. If the testamentary disposition should be written on common paper, but before the competent number of witnesses, the heir or executor shall apply to the judge presenting it to him, stating (the name of) the person who wrote it, that which passed at that time, the reason why it was made so, and without the presence of a notary, and that the testator died under it; and asking that, after taking the declaration of the witnesses and the acknowledgment of their signatures, that that disposition be declared a nuncupative testament, that there be given the proper copies to the parties in interest, and that it be filed in the record of the notary. The judge shall direct that the information be received, and, it being done, he shall proceed accordingly. If the testator manifested his will by word alone before the legal number of witnesses, the same proceedings shall be had, omitting, of course, the presentation of the common paper, which does not exist, and asking that the depositions of the witnesses may be declared to be the testament of the deceased."

Under these laws, any person interested could have a will probated without notice to the heirs, or other interested parties. Only

witnesses were required to be summoned, only one form of probate was prescribed, and yet the will would be declared valid. By the Kearney Code, the Velarde Laws in relation to wills and estates were continued in force. "The laws heretofore in force concerning descents, distributions, wills, and testaments, as contained in the treatises on these subjects written by Pedro Murillo de Lorde, (Velarde,) shall remain in force so far as they are in conformity with the constitution of the United States, and the state laws in force for the time being." Section 1365, Comp. Laws N. M. The probate courts were given exclusive jurisdiction over the probate of wills, and the contesting thereof. Appeals were allowed from the probate to the district courts in the same manner as from the district to the supreme courts. Appeals from the district to the supreme court were allowed, if taken during the same term at which judgment or decision was rendered, if during the same term appellant or his agent should file an affidavit of merit, and bond. By section 17 of the act of January 12, 1852, (Comp. Laws N. M. § 1393,) it was provided that "probate judges in their respective counties are authorized to qualify wills, by receiving the evidence of the witnesses who were present at the time of making the same, and all other acts in relation to the investigation of the validity thereof." The word "quality" is equivalent to the word "probate" in the above section, and is intended to convey the same meaning. By the act of January 26, 1861, (Comp. Laws, §§ 1446-1449,) it was provided: "No judge of probate shall have the power to declare any will, codicil, or any other testamentary disposition to be null and void, under the pretext of the want of the solemnities prescribed by the laws of this territory by the testator making such disposition." Then follow three sections of the same act, which provide, in substance, that when a will is presented for probate, if the probate judge has any doubt as to whether he should approve the will or not, or "if, in the judgment of such judge, the will offered for probate does not merit his approval," he shall return the will immediately to the person who presented it for probate, noting on the foot of the will his reasons for refusing approval. The third section of the act then provides that it shall be the duty of the person to whom the will is returned to present the same at the next regular term of the district court of the county, and it is made the duty of the district court to examine into the matter, declare by its decision whether it is valid or null and void, and then return the will to the party. There is a proviso in the last section of this act which reads as follows: "That any proceedings had by said judges of probate, not in conformity with the provisions of this act, shall be declared null and of no effect by the district court, and all at the cost of the said probate judges."

This was the state of the law of this territory at the time the will in this case was ex-

ecuted and probated, and at the time of the death of the testator, Alfred Bent. This court has decided that the common law was not introduced into this territory by the organic act, except in a very limited degree. *Browning v. Browning*, 9 Pac. Rep. 677. And even in 1876, when the common law was formally adopted as the basis of our jurisprudence, it was the common law "as recognized in the United States" that was adopted. For the reason that the common law of one state is not necessarily common law in another, as each state adopts such parts as are suitable and desirable, this court, in the case of *Browning v. Browning*, 9 Pac. Rep. 677, took occasion to declare the scope of the common law as adopted in 1876, as follows: "We are therefore of opinion that the legislature intended by the language used in that section to adopt the common law, or *lex non scripta*, and such British statutes of a general nature not local to that kingdom, nor in conflict with the constitution or laws of the United States, nor of this territory, which are applicable to our condition and circumstances, and which were in force at the time of our separation from the mother country." By the adoption of the common law in 1876, it was not intended thereby to repeal our own statute laws; only such portions were adopted as did not conflict with our laws. Our statute laws governing probate courts, and defining the manner in which wills shall be probated in this territory, remained in force, until modified by the act of 1889, and were the basis of the jurisdiction and authority of our probate courts. The probate of a will in the manner prescribed by the statute is conclusive, and must be recognized and admitted in all courts as valid so long as such probate stands. The courts of California have so held in numerous cases. A leading case from that state on the subject is that of *State v. McGlynn*, 20 Cal. 233.

The will in this case, as shown by the record, was probated as required by law by petitioner's mother, who was an interested party, more than 20 years prior to the filing of the petition in the probate court in this case; and the record also shows that the petitioner delayed more than 4 years after attaining his majority before he filed his petition. The record of the proceedings of the probate court on March 6, 1867, in reference to the probating of the will, is as follows: "Don Fernando de Taos, N. M. Wednesday, the 6th day of March, 1867, at ten o'clock in the forenoon, the court met. Present: The Hon. Pedro Sanches, judge of probate; Leandro Martinez, clerk; and Pablo Martinez, deputy-sheriff. The order of business is as follows: The administrators of the estate of Alfred Bent, deceased, presented the will of said deceased for approval. The court examined said will, and the witnesses in it mentioned, and, finding it correct according to law, approved it, and ordered that it be recorded in this office." The will, being probated and recorded, became the foundation of title to

both real and personal property, and became admissible in evidence in all courts in support of such title. *Castro v. Richardson*, 18 Cal. 478. The probate courts of this territory are courts of record, so far as the probating of wills is concerned, and their jurisdiction is original and exclusive in the first instance. Here, then, we have a case in which the record discloses a valid judgment of a court of record, standing without appeal and unreversed, for the period of more than 20 years. The petitioner now seeks to have this judgment set aside and declared void, for such would be the effect of sustaining this proceeding. To avoid the effect of his failure to proceed through his next friend to have this judgment set aside, he sets up his minority as a justification. This is a substantial plea, but it does not last always. Courts of law are, and should be, anxious to settle titles, rather than disturb and unsettle them; and a failure to fix a time when an infant, after arriving at his majority, shall be held to have waived his rights, if he fails to assert them, would result in destroying confidence in the titles to our property, and injuriously affecting substantial rights. Therefore a majority of the states and territories in this country have by statute fixed a time within which an infant must assert his rights, or be deemed to have waived them. In almost every instance the infant is allowed one year after the removal of his disabilities, and such is the period fixed by our statute, except as to real estate, in which case the period is extended to three years. *Comp. Laws 1884, §§ 1869, 1881.*

The petitioner proceeds upon the theory that he has 30 years under the common law to have this will re-probated in solemn form; such seems to be the contention of plaintiff in error in his brief. We are unable to agree with him in this respect, but, on the contrary, hold that this case is governed by the statute law of the territory. In this case, therefore, the petitioner did not commence his action within the time allowed by law, even if it is admitted that the action related to the title to real estate. More than four years were allowed to elapse, and, in view of the statute, any legal right that he might have asserted within the proper time must be held to have been waived, and it follows that petitioner had no standing in court at the time he brought this proceeding. The probate court entertained the petition, overruled the motion to dismiss, and recorded a judgment annulling its former judgment. This record of the probate court was brought by appeal before the court below. The motion to dismiss and annul the proceedings of the probate court was based on jurisdictional grounds, which the record discloses. It was, in substance, that, by reason of laches and unreasonable delay disclosed by the record, and in the absence of statutory authority, the court had no power or jurisdiction to act. Laches did not exist within the time fixed by the statute, but after that time there were both

laches and unreasonable delay, in law, such as would render it improper for the court to attempt to set aside its former judgment, or grant the petitioner any relief whatever. We are of the opinion that, at the time this proceeding was brought in the probate court, the former judgment of that court had become conclusive, so far as this petitioner was concerned, and could not be reopened or annulled by that court. This court has held, in the case of *Browning v. Browning*, above cited, that the act of 1880 relating to the limitation of actions, in force at the time of the commencement of this proceeding, is applicable to the probate courts of this territory, and it is applicable, therefore, to this case. *Comp. Laws N. M. §§ 1869, 1881.* The only errors assigned are that the court erred in dismissing the proceeding, and entering judgment as shown by the record; but we are of the opinion that the court had the power to do so, and exercised it properly in the action taken. Therefore the judgment will be affirmed, with costs.

LONG, C. J., and WHITEMAN and LEE, JJ., concur.

(5 N. M. 400)

SANCHEZ v. CANDELARIA.

(*Supreme Court of New Mexico. Jan. 23, 1890.*)

JUSTICE OF THE PEACE—JURISDICTION—APPEAL—AMENDMENT.

1. Under *Comp. Laws N. M. 1884, § 2425*, which provides that, "if there be no justice of the peace in the precinct where the premises are situated, able or qualified by law to act, suit may be brought before some justice of the peace in any adjoining precinct," when an action for forcible entry is brought in an adjoining precinct the complaint must allege that there is no justice able or qualified to act in the precincts in which the premises are situated.

2. Under *Comp. Laws N. M. 1884, § 1848*, which provides that "all appeals from inferior tribunals to the district courts shall be tried anew in said courts, on their merits, as if no trial had been had below," the district court has the power to allow amendments to the pleadings in a case appealed from a justice of the peace.

3. In such a case, where the justice had jurisdiction, but the complaint failed to allege the jurisdictional facts, it is error for the district court to refuse to allow an amendment adding the necessary averments.

Appeal from district court, Valencia county; BRINKER, Judge.

N. B. Field, for appellant.

WHITEMAN, J. This was an action for forcible entry and detainer, commenced by the appellant, Vicente Sanchez y Contreras, against the appellee, Jesus Candelaria, before PABLO CHAVES, justice of the peace of precinct No. 13, in the county of Valencia. The plaintiff, in his complaint, charges, in substance, that on the 3d day of January, A. D. 1888, in the county of Valencia, he was legally possessed of a certain piece of land or tenancy known and described as follows: "Said land is composed of one hundred and sixty acres of land, deeded in favor of this plaintiff, and situated in a place called 'La Cienega,' in said Valencia county,"—and be-

ing thus possessed, was legally entitled to the possession of said land, and that on the 20th day of September, 1887, the defendant, Jesus Candelaria, illegally and by force entered upon said tract of land, and dispossessed the plaintiff, and detained, and still detains, the possession of said land, etc. The defendant, Jesus Candelaria, appeared and defended the action; and upon the trial thereof, had on the 13th day of February, 1888, a judgment was rendered in favor of the plaintiff, whereupon the defendant sued out a writ of *certiorari*, and thereby carried the case by appeal to the district court of Valencia county. In the district court the defendant, on the 12th day of April, A. D. 1888, filed a motion to dismiss the cause upon the ground that the justice of the peace before whom the same was tried was without jurisdiction of the subject-matter, or of the parties. The plaintiff, on the 18th day of April, A. D. 1888, moved the court for permission to file an amended complaint. The amended complaint tendered by the plaintiff set out a proper description of the land in dispute, and averred that the land was situated in precinct No. 16, in the county of Valencia, and that, while the plaintiff was possessed of the land, the defendant, Jesus Candelaria, by force, intimidation, and fraud, entered upon the land, and detains and withholds the possession thereof from the plaintiff. It also contained an averment that at the time of the forcible entry complained of there was not, and had not been since, a justice of the peace in the precinct where the lands were situated able or qualified by law to act in the premises, and that for that reason the action was instituted in precinct No. 13 of said county of Valencia, and that said precinct No. 13 adjoins the precinct wherein the lands are situated. The court denied and overruled the motion to permit the plaintiff to file the amended complaint, and the cause was then heard upon the defendant's motion to dismiss the cause, which motion was sustained; and the cause was accordingly dismissed. The record also discloses the fact that the court refused to permit the plaintiff to file the amended complaint offered, solely upon the ground that the court had no power or jurisdiction to permit the said amendment. The appellee, Jesus Candelaria, has not appeared in this court, and no brief has been filed by him.

But one question is presented for our consideration in this cause, viz., whether the district court had power and jurisdiction to permit an amendment of a complaint made in an action of forcible entry and detainer before a justice of the peace, where the original complaint failed to show affirmatively that the justice of the peace had jurisdiction of the subject-matter of the suit, and if, having such power, and having refused to exercise it, this court will review the action of the district court in respect thereto. We understand the rule to be that applications for leave to amend are addressed to the sound discretion of the court, and the refusal of a

court to permit amendments is ordinarily not open to review upon appeal; but where a court has a discretion to allow an amendment of a pleading, and refuses to exercise such discretion upon the ground of a want of power, such refusal is error, and good ground for an appeal. *Russell v. Conn*, 20 N. Y. 81. The defect in the original complaint consisted in this, that the lands which were the subject of the controversy were situated in precinct No. 16, and the action was commenced before the justice of the peace of precinct No. 13, in Valencia county. That the original complaint was defective will not be questioned, but it was within the power of the plaintiff to have recited facts in the complaint which would, if true, have conferred jurisdiction upon the justice to hear the cause. "If there be no justice of the peace, in the precinct where the premises are situated, able or qualified by law to act, suit may be brought before some justice of the peace in any adjoining precinct." *Comp. Laws N. M. 1884, § 2425.*

Under the provisions of the sections of the statutes just quoted, all that was necessary to have given the justice of the peace of precinct No. 13 jurisdiction to act was to recite in the complaint that there was no justice of the peace in precinct No. 16 able or qualified by law to act. The complaint made before the justice of the peace did not recite this jurisdictional fact. But after the case had been appealed by the defendant to the district court, and before the district court had considered and determined the defendant's motion to dismiss the cause, the plaintiff asked the court for permission to amend the complaint by reciting facts which would have given the court jurisdiction, which application to amend was refused. We think that, if the application to amend had been made while the case was pending before the justice of the peace, it would have been the duty of such justice to have permitted the amendment to be made, and that the plaintiff's right to amend was not lost by the case having been appealed to the district court. "The district court, on the trial of an appeal, shall proceed *de novo*." *Id.* § 2434. "All appeals from inferior tribunals to the district courts shall be tried anew in said courts on their merits, as if no trial had been had below." *Id.* § 1848. By this we understand that the cause shall be tried upon its merits, as if it was a new action in the court. The court is to be in no wise trammelled in its mode of proceeding by the irregular, untechnical acts of the justice of the peace. It would indeed be a very hard rule to deny the court its power and discretion, in allowing amendments, to place a cause appealed from the justice in such a manner before the court as to be triable, when the whole trial is to be *de novo*. To forbid the courts this power to amend in this class of cases, when the power is so general and broad in all other civil suits, would, in this country, amount to almost a denial of justice through the means of appeals. The

justices of the peace are, for the most part, unskilled, if not uninstructed, in legal forms and technical proceedings. The records in appealed causes in the courts manifest how defective and inartificial the business in the precinct tribunals is transacted. The dockets are rare that can exhibit strict regularity. If, where a litigant presents himself before the district court with his appeal in hand, the court is powerless in granting to the parties the privilege to correct and perfect what unskillfulness or ignorance has defectively done, the result must be that suitors will be turned from the court with heavy bills of costs, and confidence in legal justice be destroyed. *Sanchez v. Luna*, 1 N. M. 238. The statute requires that a cause appealed to the district court shall be tried anew in said court, upon its merits, as if no trial had been had below. The appeal vests the district court with power to try the cause, and the proceedings upon the trial in that court are to be controlled by the enlarged rules of practice and decisions that pertain to the district courts; and if the justice of the peace was vested by law with jurisdiction to try such a cause, and the steps taken to invoke the jurisdiction were defective, such defect may be cured by an amendment made in the district court. But if the subject-matter involved in the cause was such that a justice of the peace would, under no circumstances, have jurisdiction to hear and determine, then the appeal would not vest in the district court the power to hear and determine the cause. The action originated before the justice of the peace, and the character or form of the action could not be changed upon appeal to the district court. Neither could the action be enlarged upon appeal so as to have given the plaintiff greater or more extended relief than the justice of the peace might lawfully have given on the case made below. But, to the extent that jurisdiction existed in the justice of the peace, to the same extent was the district court vested with jurisdiction by the appeal, not for the purpose of reviewing or correcting such errors in law as may have appeared by the transcript to have been committed by the justice of the peace, because the district court did not sit as a court exercising appellate powers to correct errors in law, but to try the case *de novo*, upon its merits. A reference to the several sections of the Compiled Laws of this territory upon the subject of amendments generally clearly shows a liberal legislative intention with respect thereto, viz.: "No want of form shall be sufficient cause for abating any matter pleaded, providing the court can see in it sufficient matter upon which to base a decree or judgment; and when legal exceptions are sustained the opposite party shall have leave to amend." Comp. Laws N. M. 1884, § 1910. "Each party, by leave of the court, shall have leave to amend, upon such terms as the court may think proper, at any time before verdict, judgment, or decree." Id. § 1911. Section 2443, Id., which relates particularly to the

practice in trials of actions of forcible entry and detainer, reads: "All causes removed into the district court in pursuance of the foregoing sections shall be tried *de novo*, and the court shall allow all amendments which may be necessary, in furtherance of justice, in all cases appealed by petition or *certiorari*, or in the ordinary mode." Here we have an express legislative declaration upon the subject of amendments of this particular class of actions. The purpose of the statute is to promote the attainment of substantial justice between the parties. Technical objections are to be disregarded, and the case tried upon its merits. We are not disposed to establish a rule which would have the effect to dwarf or limit the wise and liberal spirit and intent manifested in these legislative enactments. To do so would be to subvert the legislative power and authority, and would be an unwise and unjust usurpation by the court of powers that belong exclusively to the legislative authority.

We are of the opinion that the justice of the peace possessed jurisdiction to try this case; that the steps originally taken by the plaintiff to invoke such jurisdiction were defective; but that the district court had the power to permit the appellant to correct such defect by an amendment of the complaint, and it was error for the court to refuse him permission so to do. The judgment of the lower court will be reversed, and this cause remanded to that court, with directions to permit the amendment asked by plaintiff; and it is so ordered.

LONG, C. J., and LEE and McFIE, JJ., concur.

(5 N. M. 427)

EXCHANGE BANK OF DALLAS v. TUTTLE.

(Supreme Court of New Mexico. Jan. 24, 1890.)

PROMISSORY NOTES—STIPULATION FOR ATTORNEY'S FEES.

1. In action on a promissory note, when the note contains an agreement to pay "ten per cent. for attorney's fees in case this note is placed in the hands of an attorney for collection or is collected by suit," and defendant by pleading the general issue has denied the entire indebtedness, the 10 per cent. for attorney's fees can be recovered, together with the face value of the note.

2. In such a case, it is not necessary to prove the value of the attorney's services.

3. The note alone is sufficient evidence to support a judgment for the 10 per cent. for attorney's fees.

Appeal from district court, Socorro county; BRINKER, Judge.

Action by the Exchange Bank of Dallas against L. B. Collins, C. E. Odem, and W. W. Tuttle. Judgment was rendered against W. W. Tuttle, and he appealed.

Neill B. Field, for appellant. Isaac S. Tiffany, for appellee.

McFIE, J. This suit was brought in the district court for Socorro county upon the following promissory note: "\$3,500. Dallas, Texas, Oct. 23d, 1885. On December 1,

'85, after date, without grace, we or either of us promise to pay to the order of Exchange Bank, Dallas, thirty-five hundred dollars, for value received, at the Exchange Bank of Dallas, with interest from maturity at the rate of twelve per cent. per annum, with ten per cent. for attorney's fees in case this note is placed in hands of an attorney for collection, or collected by suit. L. B. COLLINS. C. E. ODEM. W. W. TUTTLE." The declaration, in addition to the usual demand for debt, interest, and costs, asked judgment for attorney's fees, as provided by the terms of the note. Collins and Odem were not served with process, but W. W. Tuttle entered his appearance, and filed one plea, that of *non assumpsit*. The defendant, Tuttle, waived a jury, also written finding of facts, and consented to trial by the court, which was had, and the following judgment was rendered by the court at the November term, A. D. 1888: "At this day, this cause having been heretofore submitted to the court, and the court being now sufficiently advised, doth find the issues for the plaintiff, and assess its damages against defendant, Tuttle, at the sum of four thousand seven hundred thirty and 00-100 dollars, and also the sum of three hundred and fifty dollars as attorney's fees; wherefore it is ordered and adjudged that plaintiff recover of defendant W. W. Tuttle the sum of four thousand seven hundred thirty and 00-100 dollars damages, with 12 per cent. interest from this day until paid, and also the sum of three hundred and fifty dollars as attorney's fees, together with its costs in this behalf laid out and expended, to be taxed herein, and that execution issue therefor." To reverse this judgment, the case is brought to this court by appeal.

Appellant seeks a reversal solely upon the ground that the court gave judgment for attorney's fees, and assigns the following errors: (1) That the district court erred in its finding that the appellant was liable for attorney's fees on the contract sued on; (2) that the district court erred in giving judgment against the appellant for three hundred and fifty dollars attorney's fees, when there was no evidence of the value of the attorney's fees before the court; (3) that the judgment of the district court against this appellant is wholly without evidence to support it.

The note was the only evidence offered by the plaintiff, and, although the entire cause of action was put in issue by defendant's plea, no evidence was offered in support of the plea. The introduction of the note in evidence was sufficient to warrant a judgment for plaintiff for the amount of the note, interest, and costs. We are now called upon to say whether or not the court erred in allowing attorney's fees as specified in the note.

Let us consider the first assignment of error: "That the district court erred in its finding that the appellant was liable for attorney's fees on the contract sued on." This question of the allowance or disallowance of attorney's fees provided for in promissory

notes and written contracts has been before the courts for many years in this country, and many learned opinions of able judges and courts have been rendered on both sides of the question. An examination of the authorities will show, however, that the fruitful cause of this contrariety of opinion is due mainly to the varied forms in which the question is presented to the courts. One instrument sued on differs in its provision, upon that subject, from that of another. Therefore the phraseology of a decision, apparently applicable, may be, and often is, found to be inapplicable when examined in the light of the facts before the court. Take the case of *Oelrichs v. Spain*, 15 Wall. 231, cited by appellant. The case is sometimes cited as showing that the supreme court of the United States is opposed to the allowance of attorney's fees in any case, whether provided for in the instrument or not; but an examination of that case shows that it was a suit on an injunction bond, with no provision in the instrument for attorney's fees, and the question in that case was whether attorney's fees should be allowed as part of plaintiff's damages, which is a very different proposition. The case of *Bullock v. Taylor*, 39 Mich. 137, cited by appellant, is not in point in this case. The notes in that case provided that "the undersigned agree to pay \$15 attorney's fee, over and above all taxable costs," each, on six small notes, two of them for \$41.50 each. The surety did not sign the notes, but signed a bond as surety for the makers. The court says, among other things: "The surety insists that such notes are not within the terms of his undertaking. * * * (2) Because they provide for the payment of an attorney's fee, to which he has never consented." Again the court says: "In this state, the attorney's fees which the successful party is permitted to recover in courts of record are prescribed by statute or by rule of court. In justices' courts, none are given except in a few special cases. The policy of our law is to limit such recovery to a very moderate sum in every case where it is permitted at all; * * * and it is a question of very grave importance whether the policy which thus limits attorney's fees, and also limits the rates of interest, can be set aside by provisions like that under review." It is very apparent that this case was decided mainly upon the ground that such fees as were contracted were prohibited by the statute law or rules of court of Michigan; the contract, therefore, was in violation of law, and the court would not enforce it. In this territory we have no statute upon the subject. In *Stoneman v. Pyle*, 35 Ind. 104, the note provided for attorney's fees in case suit was brought, and it was sustained, the court saying: "On the maturity of the note, the maker knew precisely what he was bound to pay, and the holder what he was entitled to demand. * * * The stipulation for the payment of attorney's fees could have no force, except upon a violation of his contract by the de-

defendant," etc. In *Churchman v. Martin*, 54 Ind. 388, the court held void a note providing for "10 per cent. attorney's fees, if suit be instituted." It might be said, without examination, that these two decisions are contradictory; but they are not so, for the reason that between the two decisions a statute had been passed in that state, as follows: "That any and all agreements to pay attorney's fees, depending upon any condition therein set forth, and made part of any bill of exchange, acceptance, draft, promissory note, or other written evidence of indebtedness, are hereby declared illegal and void." Act March 10, 1875. The provision was held to be void under the statute, because upon "condition," and not because it was against public policy.

It may be admitted, however, that some of our ablest courts hold opposite views on some of the points arising out of this question. Our own federal courts are somewhat divided in opinion; Judges DEADY, PARDEE, and SPEER sustaining the validity of contracts for attorney's fees, while Judges CALDWELL and MCCRARY take the opposite view. The early cases upon this subject were disposed to hold against the validity and also negotiability of such contracts, a leading case being that of *Woods v. North*, 84 Pa. St. 407, placing it upon the ground of uncertainty; but in later decisions a different view is taken, and there is now a large preponderance of decisions that where the amount provided for in a promissory note, at maturity, is fixed and certain, it is negotiable. Applying that test to the note sued on in this case, we are of the opinion that it is negotiable. The weight of authority is to the effect, also, that where a promissory note provides for a fixed and reasonable amount for attorney's fees, if the note is collected by suit, it is valid, and will be sustained by the courts. Illinois, Iowa, Louisiana, Kansas, Kentucky, Indiana, Arkansas, Texas, Colorado, California, and the federal courts in Oregon, Kansas, and Georgia, sustain the validity of such notes. Pennsylvania, Minnesota, Wisconsin, Missouri, and the federal court in Arkansas are not disposed to enforce such provisions.

This case is brought within very limited bounds by the record. We are not called upon to construe the clause of the note sued on; which provides for "10 per cent. attorney's fees in case this note is placed in hands of an attorney for collection," because it is not properly raised. The provision just quoted is certainly a questionable one. It is susceptible of being used in a very oppressive and collusive manner. Therefore, if this record showed that the defendant, Tuttle, paid, or tendered payment, of the debt and interest at maturity, or before suit was brought, and the payment tendered refused for the reason that the note was placed in the hands of an attorney, who demanded 10 per cent. more for attorney's fees, a very different case would be presented; but in this case

there was neither payment nor tender of any part of the note, so far as the record discloses. On the contrary, suit was actually brought for the collection of the note, and the defendant, by pleading *non assumpsit*, denied the entire indebtedness, in law, and put the plaintiff upon proof of the entire amount; and while the judgment, except as to the amount of attorney's fees, is in fact admitted, still the entire amount is suspended, and the plaintiff is deprived of the benefit of judgment for the debt and interest. If to declare the clause as to attorney's fees invalid would void the entire note, there would be some justification for the practice; but it will not be contended that such would be the effect, and hence this court cannot, by reversing the judgment of the court below, approve a practice which practically deprives the plaintiff of his legal rights, when, by payment or tender of amount due and admitted, such results would be avoided without depriving the defendant of any legal right. To reverse this case, the court must declare that a provision in a promissory note for attorney's fees of a fixed and definite amount, in case the note is "collected by suit," is contrary to public policy, and therefore void. This we cannot do, as we are satisfied that the weight of authority sustains the validity of such a provision in a promissory note by contract of the parties. We are aware of the force of the argument "that to sustain such contracts, because they are the contracts of the parties, would admit of oppression of the debtor by the grasping creditor," but we cannot presume that such will be the result; and besides it does not follow, and this court does not hold, that the courts will not interfere to prevent oppression and collusion, where the facts are brought before the court in the proper manner. The courts have held void many of the provisions for attorney's fees in notes and contracts, where they are uncertain, excessive, or oppressive. Even where a fixed sum has been agreed upon by the parties, the courts have interfered to afford relief, where the amount was clearly exorbitant or oppressive, and the facts were shown to the court. In this case, services of the attorney were rendered. It is not shown that the amount contracted for was excessive, nor that the contract was not a voluntary one, with a full knowledge of all the facts. The note was sufficient evidence to warrant the court in giving judgment for attorney's fees, and in doing so there was no error.

The second assignment of error is, in substance, that the court allowed attorney's fees without requiring proof of their value. If the note sued on provided for a "reasonable attorney fee," the amount not being fixed, such proof should be required; but in this case the amount has been fixed by the contract, and we must presume that the amount fixed was the reasonable value of the services rendered, until the contrary appears. The amount being fixed, and value reasonable,

the court below committed no error in giving judgment for the amount provided for in the note.

The third assignment of error is not well taken. There was sufficient evidence to warrant the court below in giving judgment for attorney's fees upon the note; in fact, the note was the best evidence of the fact, and proved itself. Finding no error in the record, the judgment of the court below is affirmed, with costs.

LONG, C. J., and LEE and WHITEMAN, JJ., concur.

(9 Mont. 251)

BICKLE v. IRVINE et al.

(Supreme Court of Montana. Feb. 4, 1890.)

FRAUD—PLEADING AND PROOF—AMENDMENT.

1. Under a general denial of title, in an action to recover personal property from a sheriff, it cannot be shown that, after a sale thereof to plaintiff by the debtor, there was no change of possession, for the purpose of proving fraud.

2. Refusal to allow an amendment cannot be held error where the transcript does not show that any amendment was prepared or submitted, or that good cause was shown therefor.

Appeal from district court, Custer county. *Andrew F. Burleigh and C. R. Middleton*, for appellants. *Strevell & Garlock*, for respondent.

BLAKE, C. J. This action was commenced in the probate court of Custer county, against the sheriff and his deputy, to recover the possession of certain horses, or the value thereof, and also damages for their wrongful use. The complaint alleged that "the plaintiff was the owner of, and entitled to the possession of," the property. The answer denied this, and the other allegations of the plaintiff, and, as new matter, pleads a justification for the officers under a certain writ of attachment. The case was appealed to the district court, and, upon the trial by a jury, the defendants offered to show, by the cross-examination of George Bickle, that, after the sale of the horses by him to his brother, the plaintiff, and before the levy of the attachment, the witness "remained in continuous and open possession and control" of the property, "in order to show that the said sale from this witness to David Bickle was constructively fraudulent under * * * the statutes relating to fraudulent conveyances." The court sustained the objection to this cross-examination and rejected the offer. A judgment was entered against the defendant, who moved for a new trial, and this appeal has been taken from the order refusing the motion.

The appellants contend that the foregoing cross-examination was legitimate, under the denial in the answer of the title of the respondent to the property. The transcript is imperfect, and fails to show the direct testimony of the witness; and we are not informed concerning this important subject. But counsel concur in the statement that the court below ruled that evidence of this char-

acter could not be introduced without an allegation in the answer to this effect, and that the general denial was insufficient. The authorities support the proposition. In *Smith v. Auerbach*, 2 Mont. 349, this court, by Mr. Justice KNOWLES, said: "Where fraud is a necessary part of a plaintiff's or defendant's case, the facts constituting the fraud should be set forth so that the opposite party may know what he has to meet." In *Botcher v. Berry*, 6 Mont. 448, 13 Pac. Rep. 45, this court, in a case similar to the one at bar, held that allegations in the answer that a certain assignment was fraudulent, and that the possession of the property involved never passed from the assignor to the plaintiff, presented material issues, and that it was error to strike them out of the pleading. In *Feeney v. Howard*, 79 Cal. 529, 21 Pac. Rep. 984, the court says: "The facts constituting fraud must be averred in cases of constructive as well as of actual fraud." See, also, *Golson v. Dunlap*, 73 Cal. 164, 14 Pac. Rep. 576; *Burt v. Wilson*, 28 Cal. 638.

The appellants maintain that the court erred in refusing their application for leave to amend their answer in these respects so that the testimony of George Bickle could be introduced. We repeat our criticism of the unsatisfactory condition of the transcript, and are compelled to say that it does not appear that any amendments were ever prepared or submitted to the court below, or that good cause was shown therefor. We find no error in the record, and the judgment is affirmed, with costs.

HARWOOD and DEWITT, JJ., concur.

(18 Or. 456)

HELMICK v. DAVIDSON et al.

(Supreme Court of Oregon. Feb. 11, 1890.)

EQUITY—JURISDICTION—MONEY DEMANDS—CONFLICTING EVIDENCE.

Where a plaintiff in a suit to foreclose a junior mortgage upon real property entered into an agreement with the defendant therein, whereby he agreed, for a valuable consideration, to dismiss the suit at his own costs, and after realizing the benefits of the agreement and receiving the surplus funds arising from a sale of the mortgaged property, under a decree of foreclosure of the senior mortgage, procured in violation of the agreement, a default and decree to be entered by the court in his favor for affirmative relief, which was afterwards set aside by an original suit brought by the defendant, but the court retained jurisdiction of the plaintiff's suit, and allowed the defendant to file an answer therein, and it appearing that there was nothing between the parties to litigate, except mutual money demands, which were strongly controverted, and the proof of them depended upon conflicting oral testimony, held, that the case was a proper one to be submitted to a jury, and, that in view of the facts and circumstances, the complaint should be dismissed without prejudice, and the parties remanded to their legal rights in a court of law. Held, further, that the rule that a court of equity, having acquired jurisdiction of a suit for one purpose, may retain it for all purposes necessary to do complete justice between the parties in the cause, was adopted for the same object for which other equitable principles were established,—to prevent a failure of justice.

(Syllabus by the Court.)

Appeal from circuit court, Polk county; R. P. Boise, Judge.

The respondent on the 28th day of April, 1883, commenced a suit in said circuit court to foreclose a mortgage upon certain real property in said county, executed by the appellant Davidson and his wife to secure the payment of a promissory note bearing date January 21, 1880, made by the appellant Davidson as principal, and by the appellant Stump as surety, by the terms of which said appellants promised to pay to the order of said respondent, 12 months after date, \$1,260, with interest at the rate of 1 per cent. per month until paid. There was a prior mortgage upon the property to Messrs. Ladd & Bush, which was outstanding at the time of the execution of the note and mortgage. Soon after the respondent commenced his said suit, he and the appellant Davidson entered into an agreement to the effect that Davidson should execute to the respondent a chattel mortgage upon the former's growing crop of wheat, and that the latter should dismiss the suit, and pay the accrued costs and disbursements. Davidson did accordingly execute the chattel mortgage, but the respondent failed to dismiss the suit. The respondent realized from the crop of wheat under the mortgage \$814.75, which he received on the 3d day of January, 1883; and on the 28th day of January, 1883, he received the further sum of \$896.38 from the proceeds of the sale of the real property, made upon a foreclosure of the mortgage to said Ladd & Bush, which mortgage was foreclosed after the commencement of the suit herein, and prior to the last-mentioned date. The said respondent, after making said agreement to dismiss the suit, applied to the said court for an order defaulting the said appellants, and for a decree foreclosing said mortgage, which were granted, and the decree was entered. Subsequently the appellants commenced a suit against the respondent in said court to impeach and set aside said decree on the ground that it was entered in violation of the said agreement. Said court, after hearing the case, ordered that the decree be set aside, but retained jurisdiction of the suit, and permitted said appellants to file an answer therein, which was accordingly filed on the 3d day of January, 1888. The appellants averred in said answer that on or about the — day of April, 1881, the appellant Davidson paid respondent the sum of \$335, and on or about the — day of November, 1881, the further sum of \$350, as payments on said promissory note, in addition to the amount received under the chattel mortgage and from the proceeds of the sale of the real property upon the foreclosure of the mortgage to Ladd & Bush. The \$350 item was on account of a sale of a span of horses sold by Davidson to respondent at that price. There was no contention between the parties in regard to the purchase by the respondent of the span of horses from Davidson at said price. They, however, very decidedly disagreed as to the

time at which the sale and purchase were made; Davidson contending that the sale was made after the note in suit was executed, and that the price of the horses was to apply as a part payment thereon. The respondent, with equal positiveness, asserts that he purchased them prior to the execution of the note, which was given to take up a former note, and that their price was allowed on the former indebtedness, and accounted for when the note in suit was given.

W. R. Bilyeu, for appellants. *Daly & Butler*, for respondent.

PER CURIAM. The circuit court should not have retained jurisdiction of the suit herein, after ascertaining that the respondent had agreed to dismiss it if the appellant Davidson would execute the chattel mortgage, and that the latter had complied with such agreement. The foreclosure of the Ladd & Bush mortgage, and sale of the real property mortgaged, cut off the respondent's claim to equitable relief, and there was nothing left in the case to be determined except a money demand. The right on the part of the respondent to apply the proceeds of the sale of the wheat upon the debt was given by the chattel mortgage, and the application of the surplus arising upon the sale of the real property, under the Ladd & Bush mortgage, was decreed in the suit to foreclose that mortgage. Hence, at the time the answer to the complaint in the suit herein was filed by the appellants, the only question which remained to be determined between the parties was, what amount, if any, was due to the respondent on the note of January 21, 1880. The determination of that question depends mainly upon the fact as to whether the appellant Davidson paid upon said note the \$335 and \$350, as alleged in the answer. This is a matter *in pais*, and a very proper one to be submitted to a jury. A court of equity has an undoubted right, where it acquires jurisdiction for one purpose, to retain the suit for all purposes, and do complete justice between the parties in the cause. Such has long been its established policy. Its adoption, however, like that of other principles of equity, was to prevent a failure of justice. In this case the respondent agreed with Davidson, in consideration of an important advantage secured thereby, to dismiss the suit; but failed to keep faith with him, and procured the decree to be entered in his favor, which the circuit court set aside. In the mean time events occurred so affecting the subject-matter of the suit that the respondent was unable to claim any relief therein, aside from that which he could obtain in a court of law. Under such circumstances, jurisdiction in equity should not have been retained for the convenience of the respondent, especially where a trial by jury was much better adapted to a determination of the matter in dispute. The \$350 item, the price of the team, depends for its allowance or disallowance as payment on the note almost entirely upon the fact whether the sale

of the team was made subsequent or prior to the date of the note. The appellants have produced a large number of witnesses, persons of good standing in the community, who have testified that the team of horses remained in the possession and ostensible ownership of Davidson long after the time the note bears date; while the respondent has produced at least as great a number of persons, of equally as good standing, who testified that he had possession and ostensible ownership of the horses long prior to that time. This testimony was taken by deposition, and is brought here for this court to determine which party is in the right; but it is so conflicting and equally balanced that an attempt to decide the merits of the question therefrom would be liable to do injustice to the party against whom the decision was made. The court, therefore, in view of all the circumstances of the case, has concluded that it will be more just to the parties to dismiss the complaint without prejudice; which will enable them to adjust their differences in a court of law, if they should desire to do so. The decree appealed from will therefore be reversed, and the case remanded to the circuit court, with directions to dismiss the complaint without prejudice; neither party to recover costs.

(18 Or. 274)

PARKER v. NEWITT.

(Supreme Court of Oregon. Jan. 6, 1890.)

RESULTING TRUSTS—ADVANCEMENTS—EVIDENCE—BURDEN OF PROOF.

1. The principle is well settled in equity that when one purchases an estate and pays for it, and takes the title in the name of another, or when one purchases an estate with the money of another, and takes the title to himself, there arises, by operation of law, a resulting trust in favor of the owner of the money.

2. This is founded upon the presumption that the party paying for the estate intended it for his own benefit, but this presumption does not arise in some excepted cases, where, by reason of the relation of the parties, the payment of the consideration may be supposed to be a gift to the nominal purchaser.

3. Whether a purchase in the name of a wife or child is an advancement is a question of intention, though presumed in the first instance to be a provision or settlement.

4. A resulting trust may be established by parol evidence, but the law for the safety of titles requires that the proof shall be of the most reliable and satisfactory kind. The onus of establishing a resulting trust rests upon him who seeks its enforcement, and, before a court of equity will be warranted in making a decree therefor, the evidence must be clear, definite, and free from doubt.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.

R. & E. B. Williams, for appellant. Johnson & Idluman, for respondent.

LORD, J. This is a suit in equity brought by the plaintiff to establish a resulting trust in his favor to certain lots of land in the city of East Portland, alleged to have been purchased by his wife, Mary J. Parker, now deceased, with money belonging exclusively to

him, and that the deeds to the same were taken in her name, without his knowledge or consent or authorization. The defendant Mary A. Newitt, is the daughter and heir of the said Mary J. Parker by a former husband, and the defendant J. W. Newitt is the husband of the said Mary A. Newitt. The complaint shows, in respect to the property in dispute, that there were three different transactions, and that in each of them the deeds were made and taken in the name of the wife, the said Mary J. Parker. In substance the defense is (1) that the property in controversy was bought with money owned by and belonging to the said Mary J. Parker; and (2) that the deeds to the same were executed and delivered to her with the full knowledge, consent, and direction of the plaintiff. After issue was joined, the cause was referred to T. Hume, Esq., to take the testimony, and report the same back to the court, with his findings of fact and conclusions of law. It is enough to say, upon the coming in of the report, the findings both of law and fact were for the plaintiff, and upon motion to confirm the same, after argument by counsel, the court confirmed said report, and decreed that the defendant execute to the plaintiff deeds for any interest they might claim in said property, etc. From this decree the defendant appeals to this court.

The question to be determined is whether from the nature of the different transactions, at the times the several deeds were executed and delivered in the name of the wife of the plaintiff, there arose a resulting trust in his favor in such lands, or whether such deeds, when so executed and delivered, were intended by the plaintiff as a settlement or advancement to his wife; or, more briefly, whether, upon the facts, the wife held the property in trust for him, or in her own right, as the intended beneficiary of it. The principle is well settled in equity that where one purchases an estate, and pays for it, and takes the title in the name of another, or where one purchases land with the money of another, and takes the title to himself, there arises, by operation of law, a resulting trust in favor of him whose money paid for it. 1 Perry, Trusts, § 126; Hill, Trusts, 146; Foote v. Colvin, 3 Johns. 216; Sunderland v. Sunderland, 19 Iowa, 327. This is founded upon the presumption that the party paying for the estate intended it for his own benefit. But this presumption does not arise in some excepted cases, where, by reason of the relation of the parties, the payment of the consideration may be presumed to be a gift to the nominal purchaser named in the deed. 1 Perry, Trusts, § 143 et seq. Where he who pays the consideration takes the title in the name of one for whom he is bound legally and morally to provide, the presumption is that it was intended as an advancement, and not a resulting trust; or, as it is sometimes said, that this circumstance rebuts the presumption of a resulting trust, and creates a presumption that it was done as an advance-

ment. Where land has been purchased by a husband, and the title taken by him in the name of his wife, the presumption is that it was intended as an advancement or settlement for the wife, and not as a trust in favor of the husband. 2 Story, Eq. Jur. § 1201 et seq. Or, if a husband permits his wife to use his money to make the purchase in her own name, no trust results to the husband; but the presumption is that it was intended as an advancement, and operates the same as if he had made the purchase, and caused the title to be made to her. *Sunderland v. Sunderland*, supra; *Douglass v. Brice*, 4 Rich. Eq. 322. But this presumption may be overcome by evidence. "Whether a purchase in the name of wife or child is an advancement or not is a question of pure intention, though presumed in the first instance to be a provision and settlement." 1 Perry, Trusts, § 147; *Hill, Trustees*, 97. Although a resulting trust may be established by parol evidence, yet to have that effect it must be clear and positive. "To make such an effort successful, the law, for the safety of titles, requires that the proof shall be of the most convincing and satisfactory kind. Nothing short of certain, definite, reliable, and convincing proof will justify the court in divesting one man of title to lands, evidenced by a regular deed, and putting it in another." *Midmer v. Midmer*, 26 N. J. Eq. 304; *Boyd v. McLean*, 1 Johns. Ch. 590; *Lench v. Lench*, 10 Ves. 517. Moreover, the *onus* of establishing a resulting trust rests upon him who seeks its enforcement, and, before a court of equity will be warranted in making a decree therefor, the evidence must be clear, definite, and free from doubt. Hence, to entitle the plaintiff to conveyances of the premises in controversy to himself, he must fairly establish, if he paid for the property and took title in the name of his wife, that at that time it was mutually understood and was the intention that she should hold the title to the premises, not in her own right, but in trust for him; or if it was money in her possession, belonging to him, with which she bought the property and paid for it, and took the title to herself, that it was done without his knowledge or consent or direction. As advancements are ordinarily, if not always, voluntary, in order to ascertain whether the transaction was a trust, or intended as an advancement, when the title is in the name of the wife, the intention at that time is the point of inquiry, and to which we must look.

With these principles in view, we must examine the evidence to enable us to rightly apply it in determining the true nature of the transactions under consideration. It appears by the evidence that the plaintiff was married to Mary J., his wife, now deceased, in 1871; that she was a widow, several years his senior, and that her occupation at that time was that of a stewardess on one of the Sound steamers; that she was an active, industrious woman, but of more than ordinary force of character; of a temper at times un-

governable; and of a will unyielding, when opposed, and which dominated her husband. There are times, it is true, in the course of their married lives, when he makes a show of resistance, and attempts to oppose her will, but it always ended in his subjugation to her wishes; for there could be no domestic peace, or, as the evidence runs, "no living with her without it." For the plaintiff, it may be said that he was industrious, a skilled mechanic, and in receipt of good wages, after working extra hours, for which he received extra pay, in order to add to his savings. As his wife preferred it, and to please her, he allowed her to take care of his wages, so that when his wages fell due, and he was paid, it was his habit to bring them to her to take care of until needed for some purpose. There is nothing in the evidence to show at the time of the marriage, or at any other time, that she had any money or property of her own, except as it thus came to her.

As the plaintiff was present at only one of the transactions, and absent from the two others, when the deeds were executed and delivered in her name, we will examine, first, the circumstances under which this was done. This relates to lot 2, in block 239. Mr. Lyons, of whom this lot was bought, testified that "Mrs. Parker came to me and said that she had heard that I had a lot sell on Eleventh street. I told her I had, and asked \$500 for it. She said she would give me \$450, and I told her she could have it. Then she said she could not pay the money down; that she had \$200 of her husband's money then, to pay for the lot, and that she would give his note for the other,—for the balance,—in sixty days; and he gave me his note for the balance of \$250. Then, when the deed was made out, he wanted to make it in his name. She said: 'Well, you know the property is all yours; but you might get up and leave me.' 'The property is all yours, and your money is paying for it;' and Mr. Parker says: 'Why not make it in my name?' and she says: 'Well, you might get up and leave me some day, if it is made in your name;' and he kind of hummed and hawed, and consented at last, and said: 'Well, let it go.'" Now, on cross-examination of this witness, he was asked: "*Question.* He [Parker] consented in your presence, while you were there, that the deed should be made to her? *Answer.* Well, he didn't consent; he said, 'Let it go;' that is what he said. *Q.* Was there anything said by him just at that time, or between them, to the effect that she should hold this property for him? *A.* Yes; she said: 'The property is yours; your money is paying for it,—it is all yours.' *Q.* And she took the deed in her name? *A.* Yes; as a deed of trust." This shows quite plainly how this witness, who sold the property, understood the transaction, and it substantially corresponds with the testimony of the plaintiff in these particulars. In his examination he states how the property came to be bought; the amount of money belonging to him she had with which

to make a payment; of his giving the note for the balance; and the controversy about the suggestion of putting it in her name; and testifies: "She said she wanted the property in her name, and we had some dispute. I did not want her to have it so. She told me the property was all mine, anyhow." And after explaining that she was quick of temper, and inclined to be of a jealous disposition, and his disbelief that she ever intended to defraud him out of this property, he was asked: "Question. So you consented it should remain in her name? Answer. I didn't consent at all. I don't call that consent. Q. Why did you do so? A. I couldn't help it; I couldn't live with her unless I let her have her own way in these matters. There is the long and short of it." And he also says: "The object seemed to be on her part, that she was afraid that I would go away and leave her some time, and wanted to hold it in her name for these reasons,—stated it, time and time again."

It is not possible, without incumbering the record, to cite more of the testimony; but when looked at as a whole, in regard to this transaction, nothing is plainer than that it was not understood nor intended that his wife should take the title to this property absolutely or otherwise than his property. The idea of an advancement arising from the presumption that the deed was in her name is wholly rebutted when the true nature of the transaction is disclosed, and how that circumstance happened. His wife, inclined to be jealous and distrustful, which was perhaps quickened by her sense of seniority, seems to have thought that with the deed to the property in her name she would have a stronger hold upon him, or security against a loss of his affection, and perhaps, also, that the property itself in such case would be more safe against financial accidents; and he, to avoid irritating her, and coming in conflict with a temper somewhat ungovernable and robust when opposed, in the interests of domestic peace and happiness, under the circumstances consented that the deed might be put in her name. But, in view of the facts, it is clear that neither party—husband or wife—understood that the deed was intended as a settlement or provision for her. The transaction itself shows conclusively that it was a trust. In respects to lots 1, 2, 3, 4, 5, and 6, in block 103, the plaintiff testifies that he and his wife "talked over the matter of buying these lots, but that he had not made up his mind fully to buy them, when one night, after he came home, she told him that she had bargained with Allen for the lots, and had paid \$100 upon them; that the price was \$600, and that she had taken a bond for a deed in her own name; that he objected to it, and did not consent that it should be so; that after the bargain was made he permitted her to go and make the payments, and that, without his knowledge or consent, she had the deed put in her name. Mr. Allen substantially corroborates

his testimony, and testifies that she remarked to him, when she paid him a portion of the money, that Mr. Parker was getting \$5 a day at work, and that the money is his. It is not my money; it is his money that is paying for the property." There is no pretense on her part to disguise the true nature of the transaction. To her neighbors she says the same thing. To Mrs. Pilger she said: "He takes it all; it all goes back to Mr. Parker again." This referred to all the property, and shows how she understood these transactions; and this is in accord with the nature of such transactions as they occurred, and the intention to be derived therefrom. As to lots 5 and 6, in block 118, he had a bond for a deed. This he had bought before the marriage, but had not made all of the payments. And as he was busy at his work during the day he told her to make the payments as they fell due, and when she made the last one she had the deed put in her name, without his knowledge or consent; that he did not know she had a deed until after it was made out in her name. Advancements are usually voluntary, and are grounded upon the consent of the donor. When a deed is taken in the name of a wife, and the money of the husband pays the consideration, the law presumes, in the absence of rebutting circumstances, that was intended by the husband as an advancement; that he so made it, or authorized it, because he so intended or consented. But when the owner of the fund denies the consent or authorization, and the transactions themselves disclose that it was done without his knowledge or consent, no presumption of advancement or provision for the wife can be indulged.

Here the case of *Peer v. Peer*, 11 N. J. Eq. 435, is in point, in which the chancellor says: "It is evident that this defense has its foundation in the fact that the deed was made to Tunis Peer at the request, or, at least, with the consent, of his mother; for, if he procured the deed to be made to himself without the complainant's consent, there can be no pretense that it can be made to assume the shape of an advancement from the mother to her son. To assert that a title made to the son was an advancement by a parent to his child, when the deed was made without the knowledge or consent of his parent, is an absurdity." See, also, *Darrier v. Darrier*, 58 Mo. 227; 1 Perry, Trusts, § 148; and so in the case before us. After the property was thus in her name, as his money had paid for it, the plaintiff testifies that he frequently requested and urged that the property be properly transferred to him; and while the evidence discloses that she acknowledged his right, and refused to do it, and when pressed would become angry, and a quarrel would ensue, always ending in his submission; the reason of her refusal was a fear that seemed to haunt her that his fidelity depended upon holding the property in her name; and also that there was less liability to lose it in

such case. But there can be no doubt that she did not understand that the property belonged to her in her own right, but recognized that it belonged to him, and expected "it would all go back to Mr. Parker;" while the transactions themselves, in which the purchase and conveyances originated, utterly preclude the idea of an advancement, and render such a conclusion impossible and absurd. Nor does this result work any injustice. This property represents the accumulated earnings of the plaintiff's best manhood, and he should not be stripped of it, and it passed into alien hands, unless he has done so by his own voluntary act. Nor is it irrelevant to say that the record discloses that he has always borne a generous part towards the defendant and her children, which has been extended beyond any claim that either she or her children had upon his kindness or bounty. The evidence shows that, after his marriage to the mother of the defendant, the defendant herself was a widow, residing in the city of New York, in reduced circumstances, with three little children, of ages varying from three to eight years of age; that the plaintiff sent \$490 to her to pay the expenses of herself and children to Oregon; and that shortly after her arrival here she took employment as cook, and that the wife of the plaintiff took these little children to his home, and kept them there about five years, during all of which time they were fed and clothed, doctor's bills paid, and sent to school, at his expense. We think the decree must be affirmed, and it is so ordered.

A petition for rehearing was denied in this case on March 4, 1890.

(18 Or. 387)

SMALLMAN v. POWELL.

(Supreme Court of Oregon. Jan. 20, 1890.)

DESCENT—NEXT OF KIN—GRANDFATHER—UNCLE.

1. The grandfather is one degree nearer of kin than the uncle, as computed by the civil law.
2. Where an intestate has no issue, nor wife, nor father, mother, brother, nor sister, *held*, that his grandfather took the estate in preference to his uncle, as next of kin.

(Syllabus by the Court.)

Appeal from circuit court, Linn county; R. P. BOISE, Judge.

It is hereby stipulated and agreed by and between the parties herein to submit this cause to the court for trial upon the following statements of the facts herein, to-wit:

First. That Sampson Smallman and Margaret Smallman, now both deceased, were, at and prior to their death, seised in fee-simple of the following-described real estate, to-wit: The donation land claim of Sampson Smallman and Margaret Smallman, his wife; the same being notification No. 1118, and claim No. 6, being part of section 35, in township 9 S., range 2 W., and claim No. 53, being

parts of sections 1, 2, 3, and 11 in township 10 S., range 2 W., in Linn county, Or. *Second.* That said Sampson Smallman and Margaret Smallman died intestate, leaving John Smallman, the plaintiff herein, and Elizabeth Smallman, their only children, surviving them, and their only heirs. *Third.* That afterwards said Elizabeth Smallman was lawfully married to Wiley Powell, a son of Peter Powell, the defendant herein. *Fourth.* That afterwards said donation land claim was duly partitioned and divided between the plaintiff and said Elizabeth Powell, and the east half of said donation land claim was allotted and set apart to the said Elizabeth Powell, in her own right, in fee-simple, as for her share of said land claim, and the west half of said land claim was allotted and set apart to the plaintiff as and for his share of said land claim, in his own right, in fee-simple. *Fifth.* That afterwards said Elizabeth Powell and said Wiley Powell, her husband, died intestate, leaving one child, Sampson T. Powell, their only heir, surviving them. *Sixth.* That afterwards said Sampson T. Powell died, and at the time of his decease he left neither wife, nor father, mother, brother, nor sister, nor the representatives of either, living. *Seventh.* That said Sampson T. Powell, at the time of his death, was seised in fee-simple of the east half of said land claim, as the sole heir at law of said Elizabeth Powell, his mother. *Eighth.* That Peter Powell, the defendant herein, is the paternal grandfather, and only surviving grandparent, of the said Sampson T. Powell. *Ninth.* That John Smallman, the plaintiff herein, is the uncle of the said Sampson T. Powell, on the part of his mother, and the only surviving child of the maternal grandparents, now deceased, of said Sampson T. Powell, on his mother's side.

If the court shall be of the opinion, upon the above statements of the facts in this case, that the plaintiff is entitled to the east half of said donation land claim, as the sole heir and next of kin of the said Sampson T. Powell, then the plaintiff is to have judgment herein for the possession of the said east half of said land claim; but if the court shall be of opinion that the defendant, in his own right, as next of kin, on the part of the father of said Sampson T. Powell, is entitled to said east half of said land claim, then the court is to find and render judgment herein in favor of the defendant, as shall be deemed advisable and just on the above statement of facts in this cause.

After argument by counsel, the court, having fully considered the allegations of the parties, and the facts as agreed upon by the parties in their stipulation to file herein, finds the facts as stipulated, and adopts the statement of facts so stipulated as the findings of fact by the court, and as conclusions of law; and the court finds, first, that Peter Powell is the nearest of kin surviving the said Sampson T. Powell, and is the heir at law of said Sampson T. Powell, and takes by descent the

east half of the land claim described in said stipulations as the sole heir at law of said Sampson T. Powell, and is the lawful owner, and entitled to the possession, thereof.

The court found a decree in accordance therewith, and from which this appeal is taken.

J. K. Weatherford, for appellant. *J. C. Powell*, for respondent.

LORD, J., (*after stating the facts as above.*) This case presents the single question whether the real property already described passes to the defendant as next of kin, or to the plaintiff; the former being the grandfather, and the latter the uncle, of the intestate. The whole matter depends upon the meaning to be given to subdivision 5, § 3098, Code Or. "If the intestate shall leave no lineal descendants, neither wife, nor father, mother, brother, nor sister, such real property shall descend to his next of kin in equal degree," etc. And section 3103 provides that "the degree of kindred shall be computed according to the rules of the civil law." It is somewhat difficult to catch the point in the contention for the plaintiff. While the rule for computing kindred as declared by the statute is admitted, the argument indicates that if so computed, and the grandfather be found to be one degree nearer than the uncle, he would not be entitled to the inheritance, because he is not of the blood of the ancestor from whom the estate originally descended. The argument proceeds upon the theory that there is an exception when the estate comes by descent, which, by the law of some of the states, when the intestate leaves no children, reverts to the heir or kindred of the person through whom it is acquired. The policy of the common law was to keep the real property in the line of the ancestor by whom it was brought into the family; and the statutes of descent in some of the states, in certain cases, have provisions to that effect. But, generally, in the United States, the English common law of descents, in its essential features, has been rejected, and each state has established a law for itself. 4 Kent, Comm. 374. In fact, by enactment, the common-law rule prevails, that the right of succession is entirely statutory. The reason is obvious. At common law the canons of descent grew out of the feudal system of tenures, and the policy of the state to establish and maintain a wealthy landed aristocracy, which co-operated to prevent the distribution of real property, and to promote its accumulation in the hands of the few. An important factor in working out this result was the common-law mode of computing kindred, which, being alien in spirit to our political institutions, has been generally rejected, and in this state abrogated, and the rules of the civil law adopted. In the mode of computing degrees of kindred, the civil law did not begin as at common law, and reckon from the common ancestor downward to each of the persons related, or to the

most remote of them, but from the person *a quo* upward to the common stock, and then downward to the other party related. "The difference is manifest; the canon and common law starting from the common ancestor, and the civil law starting from the intestate himself, as the terminus *a quo* the several degrees are numbered. Thus, by the civil law, from the intestate to his father, in lineal ascent, is one degree, and thence to the grandfather is another, or the second, degree. Again, from the intestate to his mother is, lineally, one degree; thence to her father or mother is the second degree; and thence downward to the aunt is the third degree. The paternal grandfather being in the second, and the maternal aunt in the third, degree, by this mode of computation, he is therefore the nearest of kin. The spiritual courts have adopted the rule of the civilians in reckoning propinquity of degree, and in so doing have necessarily placed grandfathers a degree nearer the intestate than uncles and aunts." *Sweezy v. Willis*, 1 Bradf. Sur. 498; 2 Bl. Comm. 224; 2 Kent, Comm. 407. Under the civil law, then, the grandparents are one degree nearer than uncles and aunts, and so speak all the authorities, without a dissentient voice. *Cables v. Prescott*, 67 Me. 582; *Kelsey v. Hardy*, 20 N. H. 479; *Ryan v. Andrews*, 21 Mich. 229; *Phillips v. Peteet*, 35 Ala. 696; *Barger v. Hobbs*, 67 Ill. 592; *Estate of Kirkendall*, 48 Wis. 167; *Bassil v. Loffer*, 38 Iowa, 451; *Cole v. Batley*, 2 Curt. 562; 2 Dom. Civil Law, §§ 2832, 2834. Peter Powell, therefore, as the grandfather of the intestate, Sampson T. Powell, is one degree nearer than John Smallman, his uncle, the plaintiff, and is next of kin upon the facts, to which the estate ascends, unless there is some exception which affects that result.

A glance at the statute will satisfy any one that, in the absence of those specified, the estate goes to the next of kin as computed by the civil law. The course is prescribed by the statute without reference to the course from which the property was acquired. While it may be admitted that whenever a statute does not prescribe, in a given case, to whom an estate shall descend, the common-law rule prevails for ascertaining who is the person or heir entitled to take, no such inquiry can arise here; for the statute provides, in direct terms, that "if the intestate shall leave no lineal descendants, neither wife, nor father, mother, brother, nor sister, such real property shall descend to his next of kin in equal degree." Code, § 3098, subd. 5. And as Sampson T. Powell, the intestate, had no issue, nor wife, nor father, mother, brother, nor sister, his grandfather, the defendant, would take the estate in preference to the plaintiff, his uncle. The statute makes no distinction founded upon the source from which the property has been derived, but assigns it to the next of kin, who is the defendant and grandfather, upon the facts, as reckoned by the civil law, and to

whom it must ascend. It follows there was no error, and that the judgment of the court below must be affirmed.

(18 Or. 360)

STATE v. JARVIS.

(*Supreme Court of Oregon. Jan. 20, 1890.*)

CRIMINAL LAW—TRIAL—OBJECTIONS TO INDICTMENT—ACCOMPLICES—DESCRIPTION OF OFFENSE.

1. A wrong name given to the crime in the preliminary part of an indictment is an irregularity only, and not fatal. The charging part of the indictment must be looked to, to determine the character of the offense.

2. An indictment which charges more than one crime under our Code is bad, and, if the objection be taken by demurrer at the proper time, it must prevail, but if the objection be not thus taken it is waived.

3. In a trial for the crime of incest, the party to the crime not on trial is an accomplice, and the other party cannot be convicted on her evidence, unless she be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime, or the circumstances of the commission.

4. The declarations contained in an impeaching question, when contradicted, only tend to impeach the character of the witness attacked for truth and veracity, and are not evidence of the facts recited in such declarations.

5. Correct practice in preparing a case for this court suggested.

(*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.

The defendant was convicted of the crime of incest, under an indictment the charging part of which is as follows: "The said Frank Jarvis, on the 1st day of April, A. D. 1889, in the county of Multnomah and state of Oregon, was the father of one Josephine Ross; and so being and knowing himself to be the father of the said Josephine Ross as aforesaid, and for that reason, and on account of that relationship, prohibited by law to intermarry with her, the said Josephine Ross, he, the said Frank Jarvis, did, then and there, unlawfully, feloniously, forcibly, incestuously, and violently, in and upon her, the said Josephine Ross, his said daughter as aforesaid, make an assault, then and there unlawfully, feloniously, forcibly, incestuously, and violently, against the will of her, the said Josephine Ross, did ravish and carnally know her, the said Josephine Ross; the said Josephine Ross then and there was a woman of the age of twenty years." Having been sentenced to the penitentiary for the term of three years under this conviction, the defendant has appealed to this court.

Alfred F. Sears, Jr., for appellant. *Henry E. McGinn*, Dist. Atty., for respondent.

STRAHAN, J., (*after stating the facts as above.*) The name given to the crime with which the pleader sought to charge the defendant in the indictment is "rape," but it seems a mistake in this particular is an irregularity, and is not fatal. The charging part of the indictment must be looked to, to determine the character of the offense. *People v. Cuddihy*, 54 Cal. 53.

2. This indictment seems to embrace the main elements mentioned in three sections of the Criminal Code. Section 1733 defines the crime of "rape" as follows: "If any person shall carnally know any female child under the age of fourteen years, or shall forcibly ravish any woman of the age of fourteen years or upwards, such person shall be deemed guilty of rape, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than three, nor more than twenty, years." Section 1734 punishes the offense with imprisonment not less than 20 years in the penitentiary, or during life, if the outraged female was the sister of the whole or half blood, or the daughter of the defendant, or of his wife. Section 1873 defines and punishes incest as follows: "If any persons, being within the degree of consanguinity within which marriages are prohibited by law, shall intermarry with each other, or shall commit adultery or fornication with each other, such persons, or either of them, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one year, nor more than three years, or by imprisonment in the county jail not less than three months, nor more than one year, or by a fine not less than two hundred, nor more than one thousand, dollars." The facts alleged in this indictment evidently constitute two separate and distinct offenses, namely, rape and incest, and this is contrary to section 1273, Hill's Code, which says that the indictment must charge but one crime, and in but one form only. This objection is ground of demurrer, (*Id.* § 1322,) and it is an objection that, if not so taken, is waived, (*Id.* § 1330.) No objection was taken in the court below to the indictment on this ground, and none can be raised here. The rulings of the court on the defendant's request to give one instruction presents the only matter necessary for us to consider.

3. At the conclusion of the evidence, counsel for the defendant requested the court to charge the jury, in effect, that there was not sufficient evidence before them to authorize a conviction of the defendant, and that he must be acquitted, both on the charge of rape and incest, and that the evidence was not sufficient to sustain a conviction for either crime; but the court refused to give this charge, to which ruling the defendant excepted. Hill's Code, § 1371, provides: "A conviction cannot be had on the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime, or the circumstances of the commission." This section of the Code and the request present two questions—*First*, was Josephine Ross an accomplice in the commission of the crime of which the defendant stands convicted? and, *second*, was she corroborated?

And, first, was Josephine Ross an accom-

pllice? If the rule announced by this court in *State v. Roberts*, 15 Or. 187, 13 Pac. Rep. 896, is applied to this case, the question must be answered in the affirmative. The definitions there given apply generally to every crime, and it is not perceived on what ground the one under consideration could be excepted. The case of *State v. Dana*, 10 Atl. Rep. 727, was a prosecution for incest committed by parties within the prohibited degrees, in which the court advised the jury very fully that they ought not to convict upon the uncorroborated evidence of an accomplice, unless the testimony of the accomplice obtain full credit with the jury, and they were fully convinced of its truth; in which event they should give the same effect to his testimony as should be allowed to an unimpeached witness, who is in no way implicated in the offense. In passing upon an exception to this charge, the court said: "There is no rule of common law, nor of the statute law of this state, that a person shall not be convicted on the testimony of an accomplice, unless corroborated by other evidence. In some states, such rule may exist either from a code or statute law." Because there was no such law in that state, the court refused to sustain the exception. But in this state such rule does prevail, and the court has no discretion in its application in every case where the testimony of an accomplice is relied upon. In California, where a similar statute is in force, speaking of the anomalous fact that the common law did not require that an accomplice be corroborated to authorize a conviction, and yet the court always advised the jury to acquit if he was not corroborated, and said: "The apparent anomaly is done away with by section 1111 of our Penal Code. Under it, although the jurors are the sole determinators of the facts proved by the evidence, yet if there is no evidence, other than the testimony of the accomplice, tending to connect the defendant with the commission of the offense, the judge may direct an acquittal. This, however, simply because the statute prohibits a verdict based upon testimony of an accomplice alone, even although the jury may believe such testimony to be entirely true, and that it establishes the defendant's guilt beyond a reasonable doubt; not because the jurors are prohibited from believing the testimony of the accomplice, in the absence of the corroboration mentioned in the statute. The legislature might have declared an accomplice incompetent to be a witness; but he may be a witness, and the legislature have not said that he shall not be believed if uncorroborated, but that a conviction shall not be had upon his testimony, unless there is other evidence tending to prove the defendant's complicity in the offense charged." *People v. Clough*, 15 Pac. Rep. 5; *People v. Thompson*, 50 Cal. 480; *People v. Moore*, 45 Cal. 19. And such is the ruling of this court. *State v. Odell*, 8 Or. 31-34; *State v. Light*, 17 Or. 358, 21 Pac. Rep. 132; *Blakely v. State*, 24 Tex. App. 616, 7 S. W. Rep. 233; *Zollicoffer v.*

State, 16 Tex. App. 312; *Robison v. State*, 16 Lea, 146; *People v. Courtney*, 28 Hun, 589; *Marler v. State*, 67 Ala. 55; *Merritt v. State*, 12 Tex. App. 203; *Craft v. Com.*, 80 Ky. 349; *Freeman v. State*, 11 Tex. App. 92. In this latter case the charge was incest. The court held her to be an accomplice, and reversed a conviction had on her uncorroborated testimony. At common law, and in the absence of any statute governing the subject, it was the practice of judges to tell juries that they might legally convict on the evidence of an accomplice alone, if they thought they could safely rely on his testimony; but, at the same time, to advise them never to act on the evidence of an accomplice unless he be confirmed as to the particular person who was charged with the offense. 1 Whart. Crim. Law, § 785. And Baron PARKE said that it had always been his practice to tell the jury not to convict the prisoner, unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the person of the prisoner. *Id.* § 787, and authorities there cited. Many authorities on this subject are collated in note 2 to section 381, 1 Greenl. Ev. Speaking of the evidence of an accomplice, it is there said: "But the source of this evidence is so corrupt that it is always looked upon with suspicion and jealousy, and is deemed unsafe to rely upon without confirmation. Hence the court will even consider it their duty to advise a jury to acquit where there is no evidence other than the uncorroborated testimony of an accomplice." And this principle is sustained by numerous common-law citations. In such case the common law practically required an acquittal if the accomplice was not corroborated; our statute has made it imperative. The guilty may sometimes escape punishment under the operation of such a statute, and the innocent might be convicted under the operation of the common-law rule, if juries saw proper to disregard the charge of the court. But the statute has made corroboration of an accomplice necessary, so that the court has no control over the subject except to apply the statute. The court has no discretion, but is bound to apply the statute indiscriminately to all cases wherever an accomplice appears as a witness, and the state's case depends solely upon his uncorroborated testimony. If we were now engaged in making the law, no doubt we would declare a different rule; but the principle is already established and fixed by the authorities, and we would only add to the uncertainty of the law by disregarding them,—a thing which we have no right to do. This point plainly marks the distinction between legislative and judicial power. The binding force of the authorities on this subject is fully recognized by the able editor of the Albany Law Journal, who says: "It might be well to provide for the case of incest as *sui generis*, but we think accomplices in general should be corroborated as provided for in this section."

And now as to the second question above

suggested. The state introduced only two witnesses in chief, Josephine Ross and her husband. The details of Josephine's evidence are of too revolting a character to be recapitulated here; but, briefly, it was to the effect that she and the defendant had, during the last five years, whenever occasion permitted, indulged in sexual intercourse with each other; but she was not corroborated in any manner. All her husband knew on the subject was what she told him. Under the authorities cited, this would not be sufficient to authorize a conviction. Something was said upon the argument as to the effect to be given to the evidence of Bessie Smith. She was called to impeach Hattie Felder. Hattie Felder claims to be the wife of the defendant, and testified very fully in his behalf, contradicting the testimony given by Josephine Ross. On her cross-examination, the district attorney asked her this impeaching question: "Did you not say to Mrs. Bessie Smith, at their house, at Rooster Rock, in the latter part of August or September of last year, Mrs. Smith and yourself being present, words to the following effect: 'I am sick at heart. I have been living and putting up with Mr. Jarvis' abuse as long as I propose to. I have been abused by him. His relations with Josephine are scandalous. He takes her and throws her on the bed, and he treats her in such a way. I tell you, Mrs. Smith, I know enough to send Jarvis to the penitentiary. Don't ever say anything about this to anybody. I am going to live with him until I get my share of what is honestly mine, and then I propose to leave him, and you may make this public;' or words to that effect?" Mrs. Bessie Smith, being called as an impeaching witness, had this language repeated to her by the district attorney, and she was asked if it was uttered by the witness in her presence, on the occasion referred to, and she said: "Yes; words to that effect." It was thought upon the argument that this statement of Hattie Felder, sworn to by Mrs. Smith, might in some way aid the state. But this cannot be. Such evidence only tends to impeach the character of the witness for truth and veracity, but is not evidence of the fact stated in such declarations. *State v. Fitzhugh*, 2 Or. 227.

Before concluding this opinion, it is proper to add that the bill of exceptions is in a most unsatisfactory form. It is, in effect, a transcript of the reporter's notes taken upon the trial. It embraces all of the evidence, and the charge of the court; but the exceptions to the general charge are too uncertain to be noticed. Counsel must not expect to prepare a bill of exceptions in this way, and then ask this court to sift out the alleged errors by separating the part of the charge excepted to from that part to which no exception is taken. Counsel for the appellant must do that. Where, for any cause, counsel deem it proper that all the evidence should come before this court, I think the better practice would be to annex the same as an exhibit to the bill of exceptions, carefully

marking it, so it could be readily identified, and then let the bill of exceptions contain only such exceptions as were taken upon the trial, and upon which the party relies in this court. This would enable the appellant to present in the clearest manner the rulings which he claims were erroneous. If instructions were asked which he contends should have been given, they should appear in the bill of exceptions, and, if parts of the charge actually given are claimed to be erroneous, those parts only should be separated from the general charge, leaving such general charge, as a whole, to be annexed to the bill of exceptions, if in writing. But for the error of the court in refusing to give the charge asked by the appellant, and which does clearly appear from the record, the judgment of the court below must be reversed, and a new trial awarded.

(18 Or. 377)

POPPLETON v. YAMHILL COUNTY.

(Supreme Court of Oregon. Jan. 27, 1890.)

TAXABLE PROPERTY—DEBTS DUE FROM CITIZENS OF ANOTHER STATE—EQUALIZATION—PROCEDURE.

1. The notice given by the board of equalization, or county court sitting as such board, to a tax-payer, of a proposed increase of his assessment, need not specify the property to be added thereto.

2. It is not necessary, where a tax-payer appears before a board of equalization in pursuance of a notice to show cause why corrections should not be made in his assessment, and files an answer in response to such notice, that a reply to such answer be filed.

3. In proceedings before a board of equalization to make corrections of the assessment of the property of a tax-payer, the rules of practice in civil actions or suits do not apply.

4. The appellant, a resident of the county of Yamhill, Or., sent a sum of money to Washington Territory, to be loaned out through agents there, which said agents loaned accordingly, and took notes upon such loans, secured by mortgages on real property in the territory, retaining the notes and mortgages there, and which had never been in this state. *Held*, that the board of equalization of said county had no authority, under the statutes of this state, to include the said money, notes, or mortgages in the assessment of appellant's property for the purpose of taxation.

(Syllabus by the Court.)

Appeal from circuit court, Yamhill county; R. P. BOISE, Judge.

Appeal from a judgment of the circuit court for the county of Yamhill, rendered upon a writ of review, issued out of that court, directed to the county court of said county, to review certain proceedings of assessment and taxation. The assessor of the county of Yamhill applied to Edgar Poppleton, the appellant herein, for a list of his taxable property for the year 1888. That thereupon the appellant furnished him a list purporting to be all of such property. Subsequently the board of equalization of the county caused a notice to be served upon appellant, requiring him to appear, and show cause why his assessment should not be increased. In accordance with the said notice, the appellant appeared, and filed a motion to dismiss the proceedings for the reason that no proper notice had been filed and served; but said board refused to act in the matter, and adjourned without day. The business

was then taken to the county court, sitting as a board of equalization, and another notice to the same effect was by the said court caused to be served upon the appellant. In pursuance of said last notice the appellant appeared by counsel in said court, and filed another motion to dismiss the proceeding on the ground that the court had no jurisdiction in the premises, for the same reason assigned in the former motion. The county court overruled the motion, and the appellant then filed an answer setting forth what he claimed to be all his taxable property. No reply was filed to the answer, and thereupon the appellant filed a motion for judgment in the proceedings, that they be dismissed, which motion the county court denied. The matter was then heard on testimony and proofs, and said court found the following facts: "*First*. That previous to his assessment for the year 1888 said tax-payer had sent to Washington Territory money, to the amount of \$4,500, to be loaned out in said territory by his agents there, and which said money was so loaned, before said assessment, on mortgage securities on land, and that the notes therefor were held in said territory, and never had been in this state. *Second*. That said notes are taxable in this state and county where said tax-payer resides." Whereupon said court decided as follows: "It is therefore ordered and adjudged that the assessment of said tax-payer be, and the same is hereby, raised and increased the sum of \$4,500." The said writ of review was issued out of the said circuit court to review the said decision. The said last-mentioned court, after hearing the case, decided that the grounds of error assigned in the petition for said writ were not well taken, and adjudged that the writ be dismissed at the cost of appellant, and that the said decision of the county court be affirmed, from which judgment the appeal herein was taken.

H. Hurley, for appellant. *J. E. Magers* and *H. H. Hewitt*, for respondent.

THAYER, C. J., (*after stating the facts as above*.) The notices to the appellant given by the board of equalization and county court, regarding the proposed increase of his assessment, were ample and sufficient; nor was any reply to the answer filed by appellant in response to the notice necessary. Proceedings for the equalizations of taxes are not governed by the rules of practice in civil cases, but are necessarily summary. The tax-payer is entitled to be notified of the proposed increase; and, however informal the notice may be, it will answer the purpose intended, as he will be very likely to get there, and usually will not stand upon the order of his going. Besides, the board will not be apt to get at the bottom of his affairs by the most diligent search and inquiry to which it may subject him.

The only matter that need be considered in the case is the right of the said county court to include in the appellant's list of taxable property the money, notes, and mortgages he owned and held in the then territory, now

state, of Washington. The question as to a right of government to tax choses in action due to its subjects from those of another jurisdiction has been a great source of embarrassment to the courts. The difficulty, to a great extent, has been occasioned by attempting to apply the maxim that movables follow the person of the owner. The maxim, at best, is only a legal fiction which may be resorted to or brushed aside as the justice of the case requires. If the right, in the outset, had been considered from an equitable standpoint, the law upon the subject would have been relieved of much uncertainty. I can discover no justice whatever in a government exacting from an owner of property which is within the territorial jurisdiction of another government the payment of a property tax thereon, when it is subject to a like burden under the laws of the latter government, whether it be tangible or intangible, as courts have been pleased to distinguish certain kinds of property. In the present case, what grounds can there be, in sense and reason, entitling the county of Yamhill to claim that the appellant should pay, in support of the county and state government, a tax upon the \$4,500 loaned out in the state of Washington, when neither said county, nor the state of Oregon, can afford him any protection whatever to the property? He loaned the money under the laws of the then territory; and if it is not paid, and he is compelled to resort to compulsory means to enforce its payment, it is to the laws of that government he must look for his remedy. And the case would be the same if his agents were to embezzle the funds. Not a judge, justice of the peace, sheriff, or constable within the state of Oregon could, by virtue of his office, render him the slightest assistance. How can the state, then, demand from the appellant a contribution on account of his ownership of this property except as an arbitrary exaction, which is but another name for robbery. The money, notes, and mortgages were undoubtedly subject to taxation in Washington Territory. The right to tax them there is sustained by a line of decisions of the courts upon the subject, since the one made in *Catlin v. Hull*, 21 Vt. 152, down to the present time, including *Crawford v. Linn Co.*, 11 Or. 482, 5 Pac. Rep. 738; and they are undoubtedly correct in principle. Property, in all cases, unless exempt by law, should contribute to the expense of the government which protects the owner in his enjoyment of it. But upon what principle a government can claim that property which is outside of its jurisdiction, and subject to the jurisdiction of another government, shall contribute to its expenses, I cannot imagine, unless it be upon the ground that it has the sovereign power to enforce it.

The counsel for the respondent claims that the *situs* of property of the character of that in question must necessarily, from the nature of it, be with the person of the owner, and would have this court infer from that, I suppose, that the \$4,500, or the notes and mortgages, were at the time of the assessment

with the person of the appellant. The county court, however, found that the money was sent to Washington Territory, and loaned out by appellant's agents there, before the assessment, upon notes and mortgages which had never been in this state. The counsel's logic may be on the principle of that of the lawyer who assured his client that the authorities would not put him in jail, while the latter was listening to him from within the bars of a cell, conscious of the fact that he was already in jail; though they probably intended to claim that the legal fiction of the property being with the appellant is paramount to the actual fact. But it seems to me, under the circumstances and situation of the property, it had a *situs* in Washington Territory for the purposes of taxation under its laws, and that therefore it could not be regarded, by force of a mere fiction, as being with the person of the appellant.

If the appellant had been a resident of Washington Territory, and had sent the money to this state, to be loaned out by his agents here, and they had accordingly loaned it, and taken notes and mortgages in security therefor, and the securities had been left in the hands of such agents, the property would have been taxable under the laws of this state, beyond a peradventure; and the statute of Washington Territory in force at the several times when the money was loaned, and the assessment made, to which our attention has been called, is sufficiently broad in its terms to have authorized the taxation of the property in that territory. The authorities of this state, therefore, had no moral right to tax the property in question. Nor had they any legal right to do so, unless it is conceded that the statutes of this state require the taxation of property so situated, whether taxable under the laws of another government or not, and that such a requirement is lawful,—a proposition to which I should be exceedingly loath to assent. But even then the assessment in question cannot be upheld, as our statutes, by any fair construction, do not go to that extent. Section 2731, Hill's Ann. Code, provides that "the terms 'personal estate' and 'personal property' shall be construed to include all household furniture, goods, chattels, moneys, and gold dust on hand or on deposit either within or without this state; all boats and vessels, whether at home or abroad, and all capital invested therein; all debts due or to become due from solvent debtors, whether on account, contract, note, mortgage, or otherwise,"—which is the only provision from which it could possibly be inferred that the property in question might be taxable in this state. The section was adopted in 1854, and undertook to define the words "personal estate" and "personal property" as used in the revenue act of which it was a part. Said words were to be construed as meaning certain articles on hand or deposit, within or without the state; also, boats and vessels, whether at home or abroad, and all capital invested in them; and also all debts, whether

on account, contract, etc. The clause relating to debts due or to become due, etc., was evidently intended to include domestic debts only, as it does not declare, like the other two clauses, that it includes debts due from parties "either within or without this state," or "at home or abroad," or contain terms of equivalent import. Leaving out of the latter clause the qualifying words referred to, after having inserted them in the two former ones, would indicate on the part of the legislature an intent not to include debts due from parties living out of the state as "personal property" or "personal estate," and authorize the construction indicated. The first clause of the section would include property like that in question, if it had not limited the construction to articles "on hand or on deposit." The property in question was neither on hand or on deposit, but was in the hands of the appellant's agents in Washington Territory,—invested by them, and under their control. The case is very similar in its features to that of *People v. Smith*, 88 N. Y. 576; and I think we can safely follow the decision therein made. The judgment of the circuit court will be reversed, and the case remanded to that court, with directions to entertain the said writ of review, and determine the same in accordance with the principles announced herein.

(13. Or. 372)

STATE v. DUPUIS.

(Supreme Court of Oregon. Jan. 27, 1890.)

INTOXICATING LIQUORS—SALES TO MINORS—REPEAL OF STATUTE.

1. The act prohibiting the giving or selling of intoxicating liquors to minors, of October 17, 1876, is repealed by the act of February 17, 1887, (Hill's Code, § 1913,) on the same subject.

2. Section 1913, Hill's Code, is not repealed by the act of February 18, 1889, (Sess. Laws, 9-11,) regulating the sale of spirituous, vinous, and malt liquors in this state. There is no such repugnancy between the two acts as that they both cannot stand together and be operative.

3. This act, by its own terms, is not operative in any of the incorporated cities or towns in this state.

(Syllabus by the Court.)

Appeal from circuit court, Marion county; R. P. BOISE, Judge.

The defendant was indicted by the grand jury of Marion county for the crime of selling and giving intoxicating liquors to a minor. The charging part of the indictment is as follows: "The said Elzear Dupuis, on the 27th day of August, A. D. 1889, in the county of Marion and state of Oregon, then and there being, did then and there unlawfully sell and give to Charles H. Baker one drink of intoxicating liquor, to-wit, lager-beer, of the value of five cents, he, the said Charles H. Baker, then and there being a minor, under the age of twenty-one years, and he the said Elzear Dupuis not then having the consent in writing of said minor's parents or guardian for that purpose, contrary," etc. Both parties waived trial by a jury, and the cause being submitted to the court, the court made the following findings: "(1) That the defendant, Elzear Dupuis, is engaged in

the business of retailing spirituous, vinous, and malt liquors in the town of Gervais, Marion county, Or. (2) That said town of Gervais prior to, and on, and ever since the 27th day of August, 1889, was and is a municipal corporation, duly incorporated by the legislative assembly of the state of Oregon. (3) That on the 27th day of August, 1889, the said defendant, Elzear Dupuis, sold to one Charles H. Baker one drink of lager-beer, of the value of five cents, said lager-beer being intoxicating liquor. (4) That said Charles H. Baker on the 27th day of August, 1889, was a minor under the age of twenty-one years. (5) That the said Elzear Dupuis did not, at the time he sold said lager-beer to said Charles H. Baker, have the consent in writing of the said minor's parents or guardian for that purpose." And, as conclusions of law from the foregoing facts, the court finds that said Elzear Dupuis is guilty as charged in the indictment. The defendant was thereupon sentenced to pay a fine of \$50, from which judgment this appeal was taken.

W. M. Kaiser and Tilmon Ford, for appellant. H. H. Hewitt, Dist. Atty., for the State.

STRAHAN, J., (after stating the facts as above.) The appellant's main contention is that the act of 1887 (Hill's Code, § 1913) is repealed by the act of 1889, (Sess. Laws, 9-11.) Section 1913, Hill's Code, being section 1, Acts 1887, p. 71, provides: "If any person shall sell, give, or cause to be sold or given, any intoxicating liquor, to any minor in this state, or if any keeper of any saloon, bar-room, or other vendor of spirituous or intoxicating liquors within this state shall harbor, permit, or suffer any minor to loiter or remain in such saloon, bar-room, or other place where such spirituous or intoxicating liquors are sold or kept for sale, or to engage in any game of cards, dice throwing, or other game of chance, billiards, *bagatelle*, or other game, in such saloon, bar-room, or place aforesaid, either for amusement or otherwise, such person shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by fine not less than fifty nor more than three hundred dollars, or by imprisonment in the county jail not exceeding one year, or by both, at the discretion of the court, and shall also forfeit any license such person may have," etc. At the argument some doubt was expressed as to the validity of this act, on account of the error in the title. Its title is as follows: "An act to amend an act to amend section 14 of title 1 of chapter 28, General Laws of Oregon, being section 686, chapter 8, Criminal Code, published in 1874 by authority of the legislative assembly of the state of Oregon, as amended October 17, 1876." This title, it must be conceded, is unnecessarily cumbersome and prolix, and the learned annotator of the last edition of the statute of this state, in a note at page 964, vol. 1, has pointed out the error in such title. He says: "It will be observed, moreover, while the title declares the object of

this act to be to amend an act of October 17, 1876, which was itself amendatory of the section as printed in the edition of General Laws of 1874, the body of this act purports to amend the original section, not the amendatory one. Still I have assumed that designation of section 686 of the Criminal Code, which is upon the same subject-matter as this act, is the controlling element in the descriptive part of both title and body of this act, and that the title, therefore, sufficiently expresses the subject of the act." Turning, now, to section 686 of the Revision of 1874, and it is found to punish the selling or giving of intoxicating liquors to minors. Rejecting all that part of the title which is superfluous and erroneous, and I think the act may be upheld as an amendment to section 686 of the Criminal Code. The subject of the act is expressed in the title, and the amendatory act is germane to the subject embraced in section 686, *supra*. As a result of this conclusion, the act of 1876 is repealed by implication by the act of 1887. The act of 1887 makes no provision for a written license by the parent or guardian. Therefore the allegations in the indictment on that subject, and the findings based thereon, are simply surplusage. They may be rejected without any injury to the defendant whatever, and the conviction sustained, unless this act is repealed by the act of 1889, and to that matter our attention will now be directed.

The act in question is very comprehensive in its terms. Its object is to regulate the sale of spirituous, malt, and vinous liquors throughout the state, except in incorporated towns and cities. The third section of this act requires every person applying for a license to sell spirituous, malt, or vinous liquors, before securing the same, to execute to such county a bond in the penal sum of \$1,000, with two or more sufficient sureties, to be approved by such court, conditioned that he will keep an orderly house, and that he will not permit any unlawful gaming or riotous conduct in or about his house; and that he will not give, sell, or supply any spirituous, malt, or vinous liquors to minors or habitual drunkards, nor to any person at the time in a drunken or intoxicated condition; and, in case of a violation of the foregoing conditions by any person giving such bond, he shall be liable to pay a fine of not less than fifty nor more than two hundred dollars for any such violation, and the bond so given as aforesaid by any such person shall be liable to be prosecuted as thereafter prescribed; and section 7 of the act makes it the duty of the county clerk to prosecute the bond given by such applicant. Is there such a repugnancy between this act and the act of 1887, in relation to selling or giving liquors to minors, that the two cannot stand together? If there is, according to well-settled rules of construction, the last act repeals the former by implication. It may be proper to remark, in this connection, that repeals by implication are never favored. By that, I understand, it is the duty of the court to so con-

strue said act, if possible, that both shall be operative. One difficulty in the way of the appellant's construction is that the act of 1889 applies only to licensed sellers. A person who had no license, and who should give or sell liquors to a minor, and had given no bond under that act, could not be punished under it, while the act of 1887 applies to every person alike. This of itself, I think, is a conclusive answer to the appellant's contention. But there are other considerations which seem equally as direct and satisfactory. The history of legislation in this state on this subject shows that the legislature recognized the fact that there was a threatened and impending danger to the youth of the state that they intended to avert, if possible. And this last act was an effort "to make assurance doubly sure, and take a bond of fate." It is not directly made indictable under this last-named act to sell or give liquors to minors, but it is the fact that the party, after solemnly covenanting with the state that he would not do so, then violates the conditions of his bond, which is made punishable. This is altogether a different offense from that made punishable by the act of 1887. I think the result would have been the same if the party applying for a license had been required to give a bond not to violate any of the penal statutes of the state in relation to the sale of intoxicating liquors, and a penalty had been inflicted for violating the conditions of such bond. Looking at these entire statutes, and assuming for the present that they both operate over the same territory, I think they can both stand and be operative, and therefore the latter statute has not repealed the former by implication. But, if I am mistaken in this view of the subject, there still remains a conclusive answer to this objection. The finding of the court is that this act of selling took place in the town of Gervais, an incorporated town of this state. By section 11 of the act of 1889, incorporated cities and towns are expressly excepted out of its operation. It is not in force in the incorporated cities and towns, and there could be no repugnancy or conflict between the two acts, within such incorporated cities or towns, for that reason. Legislation designed to prevent the young men of the state from becoming drunkards is of paramount importance. Who does not know that as soon as a young man contracts the habit of an habitual drinker his life is blasted, and every hope of usefulness destroyed? Any law the tendency of which is to avert such calamities is remedial in its character, and ought to be liberally construed by the courts in furtherance of its objects. There is no error in this record, and the judgment appealed from must be affirmed.

(18 Or. 431)

DAWSON v. CROISAN *et al.*

(Supreme Court of Oregon. Feb. 11, 1890.)

TAXATION—NON-RESIDENTS OF COUNTY—ASSIGNEE—INJUNCTION.

1. Section 2835, Ann. Code, being section 2 of the act to facilitate the collection of taxes, approved Feb. 11, 1890.

proved October 24, 1886, which provides to the effect that when any personal property or personal estate shall be assessed to any person "who is not a permanent resident of the county," or "who is about to depart, or to remove his property, therefrom," the assessor shall demand immediate payment of the tax thereon at the same rate per cent. as the preceding year's taxes, and, in default of such payment, he shall immediately collect the same by delivering to the sheriff a list thereof, and the sheriff shall immediately collect it by a sale of personal property, does not apply, in terms or by intendment, to a non-resident of the county engaged in business therein, but was intended to apply to a class of transient persons living in a county without any purpose of residing there permanently, and also to persons who are residing in the county, but who have arranged their affairs with a view of departing therefrom, or of removing their property to some other locality, and who might evade the payment of their taxes if summary means were not adopted to enforce payment of them. Whether said act is reconcilable with the clause of the constitution of the state which declares that all taxes shall be equal and uniform, *quære*.

2. In case of an illegal tax assessed against personal property, where there is no fraud, an injunction will not be granted unless it is shown that the recovery of damages on account of its enforcement would not be an adequate redress.

3. Where a merchant who resided in a certain county, and carried on his business there, became insolvent, and made an assignment of his property and effects, consisting mainly of personal property, to the appellant, for the benefit of his creditors, and the latter, who was a resident of another county in the state, qualified, and entered upon the discharge of his trust, and the assessor of the county in which the business was situated assessed the appellant for the property so assigned, and, because the appellant was such non-resident of the county, proceeded, in accordance with said section 2835 of the Code, to collect the tax, and the sheriff, in pursuance thereof, seized, and threatened to sell, a part of the personal property so assigned, *held*, that the proceeding was illegal.

4. *Held, further*, that as the property was in the hands of the appellant as trustee, and he was charged with its inventory price, and would be compelled to account for it, and that such threatened disposition of it would necessarily embarrass the settlement of the business pertaining to the trust, and in view of other circumstances connected with the affair, the appellant's remedy by injunction was proper.

(Syllabus by the Court.)

Appeal from circuit court, Marion county; R. P. BOISE, Judge.

Appeal from a decree of the circuit court for the county of Marion dismissing the appellant's complaint in a suit to enjoin the sheriff from selling property for the non-payment of taxes. It was alleged in the complaint that the respondents were, respectively, the sheriff and assessor of Marion county, Or.; that on the 26th day of May, 1888, Elias Eberhard, a resident of said county and state, made a general assignment for the benefit of his creditors, under the statute, to the appellant; that prior to making said assignment said Eberhard had been carrying on a general merchandise store at the town of Champoeg, in said county and state, keeping goods for sale; that appellant was the duly appointed, qualified, and acting assignee of said Eberhard, and had been such since the assignment. That as such assignee he came into possession of said stock of goods, also certain book-accounts and other property situated at said Champoeg, and being the property formerly owned by said Eberhard, and was selling and

disposing of the goods, and collecting said accounts, for the purposes of complying with his duty as such assignee; that said assignment was still pending in said circuit court; that appellant was during all the times therein mentioned a resident of the county of Multnomah, state of Oregon; that on the _____ day of _____, 1888, and before the commencement of the suit, the said assessor demanded of appellant, county, state, and school taxes for said Marion county, for the year 1888, on said property, amounting to \$53.76, which he refused to pay; that the statement of assessment of appellant under which the assessor demanded the taxes was attached to the complaint; that thereafter the said sheriff demanded of appellant the said taxes, which the latter refused to pay, and thereupon the sheriff levied upon certain goods described in the complaint, and belonging to appellant, being part of said stock mentioned, of the value of \$225, and took and carried away the same, and was threatening and advertising to sell them at public auction on the 22d day of August, 1888, to satisfy said taxes; that said sheriff had no warrant or writ for the collection of said taxes, other than the said statement of assessment delivered to him by said assessor, together with an indorsement thereon, appearing in the exhibit of said statement attached to the complaint; that before the commencement of the suit appellant delivered to said assessor a statement of his property subject to taxation in Marion county, together with a statement of indebtedness against said property, a copy of which was also attached to the complaint; that such indebtedness amounted to \$7,048; that it was indebtedness due from said Eberhard to the parties therein named before the making of said assignment; that said assessor refused to deduct from the assessment of appellant the said indebtedness; that there had been no warrant issued in said county for the collection of taxes, and no meeting of the board of equalization thereof, nor would there be before said property would be sold by said sheriff, unless restrained by the court; that the appellant had no plain, speedy, or adequate remedy at law, and, unless said sheriff was restrained from selling said property, the appellant would suffer irreparable loss and injury; and prayed a decree that the said goods be returned to him, and the respondent Croisan be enjoined from selling the property, and for general relief. Said statement, referred to in the complaint, is as follows:

Name of Tax-Payer.	Sec. 4	Town-ship.	No. of Acres.	Am't of Taxable Property.
I. R. Dawson	4	2 W.	10	\$1,000 00
Name of Town.	Block.	Value of Improvements.		
Champoeg	Dock	\$0.00		
Names.	P. O. Address.	Nature of Indebtedness.	Amount.	
Mrs. E. Eberhard	Hubbard	Mortgage	\$1,000 00	
Total indebtedness			\$1,000 00	
Value of merchandise			\$1,000 00	
Moneys, notes, accounts, and shares of stock			\$1,800 00	
Gross			\$4,000 00	
Road 38, total			\$3,000 00	

The indorsement on said instrument referred to in the complaint is as follows:

List of taxable property of I. R. Dawson, assignee Eberhard. Filed 188
County Assessor.
53 76
Costs 10
63 76

"To E. N. Croisan, Sheriff of Marion County, Oregon: The within-described personal property, valued at \$2,800.00, and consisting of merchandise kept for sale at Champoeg, in said Marion county, and notes and accounts employed as capital in a general merchandise business at said Champoeg, having been duly assessed to I. R. Dawson, assignee, who is not a permanent resident of said Marion county, but who is the owner of, and in charge of, and possession of, said personal property, I have demanded from him immediate payment of the tax thereon, at 19 2-10 mills on the dollar, that being the same rate per centum as last year's taxes in said Marion county, amounting on said personal property to the sum of fifty-three and seventy-six one-hundredth dollars; but the said I. R. Dawson has failed, neglected, and refused to pay the same, or any part thereof. I therefore place the same in your hands for collection in the manner provided by law. Dated at Salem, Or., the 2d day of August, 1888. [Signed] T. B. PATTON, Assessor for Marion County, Or."

The respondent filed an answer to the complaint, denying that the appellant had no remedy at law, as alleged therein, or that he would suffer any loss or injury unless the said sheriff were restrained from selling said property, and, for a further defense, justified the taking of the \$225 worth of goods under the proceedings referred to in the complaint. To which further answer the appellant demurred upon the ground that the same did not contain facts sufficient to constitute a defense. The case thereafter came on for hearing before the said circuit court upon the said complaint, answer, and demurrer, whereupon said court ordered and decreed that the demurrer be overruled, and, the appellant having failed to reply to said answer, ordered that the complaint be dismissed; that the injunction theretofore issued be dissolved; and that the respondents recover their costs and disbursements,—which is the decree appealed from herein.

Milton W. Smith, for appellant. Geo. H. Burnett, for respondents.

THAYER, C. J., (after stating the facts as above.) The attempt to enforce payment of the tax in question by the summary mode adopted by the assessor is sought to be justified under section 2835, Hill's Ann. Code, which reads as follows: "The assessor shall require every person to pay his poll-taxes of every kind at the time of assessing the same, and in default of such payment the assessor shall immediately give to the sheriff a list of such poll-taxes, and the sheriff shall immediately collect the same by sale of personal property, or in the mode directed in the pre-

ceding section; and when any personal property, or any other personal estate shall be assessed to any person who is not a permanent resident of the county, or who is about to depart, or to remove his property, therefrom, the assessor shall demand immediate payment of the tax thereon, at the same rate per centum as the preceding year's taxes, and in default of such payment he shall immediately collect the same in the manner aforesaid, and the assessor shall note on the assessment roll all the poll and other taxes so given to the sheriff for collection, and the sheriff shall pay over and account for the same as the other taxes." This section constitutes section 2 of an act entitled "An act to facilitate the collection of taxes in certain cases," approved October 24, 1866. Said act was intended, no doubt, to apply to a class of transient persons residing temporarily in the county, and to a class who were residing in the county, but about to depart or remove their property therefrom. Its object, evidently, was to prevent those classes of persons from avoiding the payment of taxes upon personal property assessed to them. The first-mentioned class includes persons who go into a county without any fixed purpose of residing there permanently, and remain unsettled until such time as they may determine where they will establish a permanent residence. It also includes persons who come into a county, to remain during a part of the year, for health, convenience, and business. The second class includes persons who are residing in the county, but have arranged their affairs with a view of departing therefrom, or removing their property to some other locality. The act does not in terms include non-residents of the county engaged in carrying on business therein, which seems to have been the *status* of the appellant in this case. Eberhard was engaged in the mercantile business at Champoeg, Marion county,—had a store and other property there,—but became insolvent, and made an assignment. His liabilities, in the main, were probably in favor of Portland merchants; and I suppose they insisted upon his appointing the appellant, a resident of Portland, his assignee. At all events, he did so appoint him, and he qualified and entered upon the discharge of his trust.

The appointment was made on the 26th day of May, 1888, and thereafter, and on the 20th of July, 1888, while the appellant was engaged in settling up the business, the assessor of the county proceeded to assess the assigned property. The assessment was properly made, and if the assessor had allowed it to take the usual course of other assessments upon property in the county for state, county, and school purposes it would have obviated the contention under consideration. Why the assessor should have insisted on the immediate payment of the tax at the same rate per cent. as the preceding year's taxes is very remarkable. The assignee merely stepped into the shoes of the insolvent, and the collection of the legal tax upon the prop-

erty would have been as secure if the ordinary mode of assessment, levy, and collection of taxes had been pursued in regard to it as that of any other property tax in the county. The administration of the estate of the insolvent was under the control of the circuit court, and it could, and doubtless would, have directed its payment, if necessary. The affair indicates that there has been unnecessary haste regarding it, and that if the assessor had considered the matter more thoroughly he would have pursued the course suggested, and thereby have better subserved the interests of the county.

The counsel for the appellant insists that said section of the act approved October 24, 1866, above set out, is unconstitutional and void; and, for myself, I can hardly perceive how it can be reconciled with the clause of the constitution which requires that "all taxes shall be equal and uniform." The preceding year's taxes may have been at a greater per cent. than that of the year when the assessment was made. It possibly may have been at the same rate per cent. That, however, would have been the merest coincidence. So far as this court can know, it may have been double the rate per cent.

But, if the appellant did not belong to the class of persons provided for in said section of the act referred to, then it is unnecessary to determine whether or not said section is unconstitutional. I am satisfied, after a thorough examination of the section, that it does not, either in terms or by intendment, apply to a person occupying the *status* which the appellant did in the premises. I do not think it included him, any more than it would any business man of the county who should establish his residence in an adjoining county, and continue his business in the former one. Said section of the act was not adopted for the purpose of oppressing tax-payers, and the authority therein conferred upon the assessor and sheriff will not be extended beyond its specific terms.

The respondents' counsel contends that the appellant was not entitled to an injunction to restrain the sheriff from enforcing payment of the tax by the summary proceeding, whether it was regular or not. That an injunction to restrain the collection of an illegal tax will not be granted unless the case is brought under some acknowledged head of equity jurisdiction is a well-settled principle of law. Where the tax is assessed against personal property, and there is no fraud in the proceeding, an injunction is not the proper remedy, unless it is shown that the recovery of damages would be an inadequate redress. I was very much inclined, in the outset, to the belief that the appellant's complaint, filed herein, was not sufficient to entitle him to an injunction. It looked to me as though his only remedy was to pay the tax under protest, and then bring an action at law to recover it back, or to sue the sheriff for the value of the property seized, as in other cases of trespass. But since considering the matter I am disposed to change the view I at first enter-

tained. The appellant was an assignee of the property seized, for the benefit of creditors; and it was doubtless included in his inventory of the property of the insolvent's estate, which stood charged against him at its appraised value. He was therefore under obligations to account for the property; and, if taken and carried away, it would necessarily embarrass him very much in the settlement of his affairs as trustee. I do not think that it would be overstraining the rule to hold that a trustee in possession of property charged with a trust should be protected by injunction from a threatened wrongful caption and asportation of a part of the property by a party acting under color of office. If the sheriff had been acting under process issued out of a court, the appellant could have applied to the court for an order to compel him to desist from interfering with the property. Every court has authority to control its own process, and a resort to it in the latter case by motion would be a proper course to pursue. But in the present case the appellant is unable to invoke any such remedy, and the recovery of damages would hardly be an adequate redress. Mr. Cooley, in his work on Taxation, at page 541, after having stated on the previous page that a tax would not be restrained on the ground merely that it was irregular or erroneous, says: "But it is not a mere irregularity when one is denied his legal right to work out a road-tax, and the amount is demanded in money; nor when a tax once paid is demanded a second time; nor when property is unlawfully exempted from taxation, thereby increasing the burden upon complainant; nor when property which is exempt from taxation by law is assessed; nor when one's assessment has been increased without giving him the notice to which by law he is entitled. In all these cases the party taxed is denied a substantial right, or his tax is unlawfully increased beyond his due proportion, and his right to an adequate remedy is unquestionable." According to this view, the assessment of the property of an owner, and demand of the immediate payment of the tax thereon, at the same rate per cent. as the preceding year's taxes, without allowing the party an opportunity to have his indebtedness deducted, or to go before the board of equalization to have his assessment corrected, would certainly, if not authorized by law, be the denial of a substantial right. The main ground upon which courts of equity refuse to issue the writ of injunction in cases of illegal taxation is not in consequence of their lack of jurisdiction in such cases, but through consideration of public policy. This conclusion is clearly sustained by the same author. He says, on page 536 of the work referred to, as follows: "The available remedy in equity, when any is admissible, is commonly that by injunction. It is probable that this remedy has many times been awarded in equity with too little regard to any other consequences than those which concerned the individual applying for it, but the personal consequences are not the only ones which

must be kept in view in these cases. When the illegalities complained of affect only the person complaining, an injunction which restrains the collection as to him may cause no considerable mischief, and may very properly be awarded if a sufficient case is made out; but when they affect the whole tax-levy, as they often do, a court should be extremely cautious in awarding on the complaint of one person, or even of several, a process which may reach the cases of others, not complaining, and which may seriously embarrass all the operations of the government depending on the source of revenue which by means of it would be stopped." The case under consideration is free from any such embarrassing circumstances as suggested by the learned author. It does not affect the source of revenue of the county of Marion except to the extent of \$53.76, and the county can much better afford to lose the entire sum than have its officers exact it from the appellant in violation of his substantial rights. The decree appealed from will be reversed, and the case remanded to the said circuit court, with directions to make the injunction perpetual, as prayed in appellant's complaint.

(18 Or. 414)

PURVIS v. KRONER.

(Supreme Court of Oregon. Feb. 11, 1890.)

COSTS—TAXATION—APPEAL—OPEN ACCOUNTS—MUTUAL ACCOUNTS.

1. On an appeal from the clerk's taxation of costs, the original judgment awarding costs to the prevailing party can neither be attacked nor reviewed. The only questions on such appeals are the items or amounts to be taxed.

2. Costs are allowed to the plaintiff of course upon a judgment in his favor in an action involving an open mutual account, where it appears to the satisfaction of the court that the sum total of such accounts of both parties exceeds \$150.

3. An open account is one in which some item of the contract is not settled by the parties, whether the account consist of one item or many; or where there have been running or current dealings between the parties, and the account is kept open, with the expectation of further dealings.

4. Mutual accounts are those having original charges by persons against each other.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

The only question in this case is, which party is entitled to costs? A brief statement of the issues is therefore necessary. The complaint alleges, in substance, that at the defendant's request the plaintiff performed work and labor for the defendant of the reasonable value of \$325.50, and that the defendant paid no part thereof, except the sum of \$242.55; that the plaintiff furnished board for the defendant, which was reasonably worth \$54, no part of which had been paid; and prayed judgment for \$136.95. The answer denied specifically plaintiff's allegations, except as thereafter alleged, and then admitted that plaintiff performed labor for the defendant to the value and amount of \$195, and admits the item of board to the amount of \$52. The answer then alleges that defendant had paid the plaintiff in money and merchandise, for and on account of said labor

and board, \$248.50, and demanded judgment for \$160, amount due defendant. The reply denies payment in any greater amount than as alleged in the complaint. The cause was referred to C. H. Carey, as referee, to take the evidence, and find the facts and conclusions of law, who found that the plaintiff was entitled to recover of the defendant the sum of \$18.90. For this amount judgment was duly entered in favor of the plaintiff, together with costs and disbursements of the action. This judgment was entered June 29, 1889. On July 2, 1889, the defendant filed with the clerk his cost-bill; and on the 3d day of July, 1889, the plaintiff filed with the clerk his cost-bill; and on July 12, 1889, the clerk allowed and taxed the defendant's bill of costs and disbursements, from which decision the plaintiff appealed to the court. Upon that appeal the court reversed the clerk's allowance and taxation, from which the defendant has appealed to this court. After this appeal was perfected, and pending the argument, it was discovered that by some oversight the original judgment awarding costs to the plaintiff had not been appealed from, and that the question which the appellant was really desirous of litigating was not, therefore, before this court. Accordingly an appeal was then perfected from the original judgment, and, by stipulation between the parties, the questions in regard to costs presented by the entire record are submitted for our determination.

E. O. Doud, for appellant. *W. L. Nutting*, for respondent.

STRAHAN, J. (after stating the facts as above.) Upon an appeal from the clerk's taxation of costs, the original judgment, awarding costs and disbursements, can be neither attacked nor reversed. The only questions arising on such appeal are the items or amounts to be taxed and allowed. The judgment in the case has already concluded the question as to which party is entitled to costs, by awarding the same to the party entitled according to the facts of the case, and the clerk in the taxation or settlement of the amount has nothing whatever to do with the other question. That question was for the court, and is settled by the judgment. Such was the effect of the decision of this court in *Burt v. Ambrose*, 11 Or. 26, 4 Pac. Rep. 465. This view of the subject renders an examination of the question attempted to be raised on the appeal from the clerk's taxation entirely unnecessary, for the reason that the appellant's contention lies back of that. What he really complains of is that the judgment awarding costs to the plaintiff is erroneous, and that, under the facts disclosed by this record, the defendant was entitled to costs of course; and to that question our attention will be directed.

"Costs are allowed of course to the plaintiff upon a judgment in his favor in the following cases: * * * (3) In an action involving an open mutual account, where it appears to the satisfaction of the court that

the sum total of such accounts of both parties exceeds one hundred and fifty dollars." Hill's Code, § 549. Under this provision of the Code and the facts disclosed by this record two questions are presented: (1) Does this action involve an open mutual account? and (2) does the sum total of such accounts of both parties exceed \$150.

And, *first*, does this action involve an open mutual account? An open account is one in which some item of the contract is not settled by the parties, whether the account consist of one item or many; or where there have been running or current dealings between the parties, and the account is kept open, with the expectation of further dealings. 1 Amer. & Eng. Cyclop. Law, 109, and cases cited; and the author, at page 108, says that an "account" is a list or statement of monetary transactions, such as payments, purchases, sales, debts, credits, etc., in most cases showing a balance or result of comparison between items of an opposite nature, e. g., receipts and payments; and "mutual accounts" are those having original charges, by persons against each other; accounts kept between merchants. And. Dict. Law, tit. "Account." So in *Green v. Disbrow*, 79 N. Y. 1, in discussing a somewhat similar question, the court say: "The evidence is that he directed his son and his wife to take the butter and eggs to the plaintiff, and have them applied upon the account; and they took them to the plaintiff, and he received them, and, without any particular direction or agreement with him, he at once credited them in his account. No other account was kept of them, except that kept by him. That this is a mutual, open, and current account of reciprocal demands, within the meaning of the statute, I can entertain no doubt." The same statute received a like construction in *Norton v. Larco*, 30 Cal. 126. It is true the language construed in both of these cases was to be found in the statute of limitations, but the substance of it is the same as our statute concerning costs. From an inspection of the transcript, I have no hesitancy in saying that the accounts between the parties in this case were open,—that is, they were unsettled and unadjusted,—and that they were mutual. The defendant demanded an itemized statement of the plaintiff's account, which was furnished, and the same accompanies the transcript. It consists of nearly five pages of closely-written items of debit and credit. The debit side of the account amounts to \$379.50, and the credit side to \$242.55; showing a balance in favor of the plaintiff of \$136.95. On the other hand, the plaintiff demanded of the defendant an itemized statement of his account, set up in his answer, which also is in the transcript. It consists of three pages of items, and shows a balance in favor of the defendant of \$4.60. These accounts cover nearly the same period of time, and are in the fullest sense of the word mutual accounts. They show the daily transactions between the parties, as they understood them; each making charges against the

other, and giving credits to the other, according to his own view of the transaction. It was the difference which arose in regard to these transactions which caused this litigation.

Second. The most casual inspection of the pleadings and the accounts on file shows that the sum total of such accounts of both parties exceeds \$150, clearly bringing the case within the very words of the statute above quoted. Counsel for appellant seeks to avoid this view of the subject, by treating the items of his side of the account as payment; but I do not think the parties so regarded or treated them, and they do not on their face purport to be payments. When called upon by the plaintiff to furnish an itemized statement of his account, the appellant served with said account a notice reciting that, "in pursuance to your demand for verified copy of the account claimed by defendant as existing between plaintiff and defendant, with regard to the matter at issue in the above-entitled action, defendant hereby furnishes the following as such account, to-wit." And then follow the items. More than that, the plaintiff's account opens on the 12th day of December, 1888; the defendant's, on the 15th day of October, 1888; and according to the defendant's account the plaintiff was indebted to him for merchandise and cash in the sum of \$36.75,—that is, up to December 11, 1888,—before the plaintiff had performed any labor whatever for him. I think it cannot be successfully claimed that this payment was made before there was any labor performed on the other side, or debt or liability incurred. But it is useless to follow this question further. This case shows that it has been litigated with perhaps unnecessary tenacity, where there was only a small difference between the parties, and a large amount of cost unnecessarily incurred; but this court has no power to aid the parties. The law has fixed the right to costs with just as much certainty as it has any other right which is successfully maintained in court, and, when the prevailing party brings himself within the statute, he is as justly entitled to recover the same. It follows that there was no error in the judgment, and it must be affirmed.

(18 Or. 419)

JEWETT v. OLSEN.

(*Supreme Court of Oregon.* Feb. 11, 1890.)

CARRIERS — SEIZURE OF GOODS IN TRANSIT ON LEGAL PROCESS.

1. When property is in the hands of a carrier for transportation, and, in the course of transit, is seized upon legal process sued out against the owner of the property, and taken out of the carrier's possession, such property is placed in the custody of the law, and is so placed by a superior power, the power of the state, and excuses the carrier from liability for not delivering the goods.

2. When goods are taken out of the possession of the carrier by legal process, he should give notice forthwith to the parties interested.

(*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

N. Steves, for appellant. *T. B. Handley*, for respondent.

LORD, J. The facts are that on the 18th day of November, 1887, one Northrob delivered at Tillamook, Or., a lot of apples to William Olsen, to be carried on the steamer Rosa Olsen, and delivered at Portland. The apples were not marked in any way, nor consigned to any one. On the 21st day of November, 1887, at Astoria, the constable came on board of the steamer with writs of attachment, and, by virtue of the same, levied upon the apples, and took them off the steamer, and sold them. These actions were against Northrob, and were for the purchase price of said apples; and judgment was rendered in them on February 13, 1888. When the apples were seized under the writs of attachment, Northrob was at once notified, but remained passive, and made no defense. On the 13th day of February, 1888, the said Northrob sold said apples to one Jewett, who since has brought the present action against Olsen for failure to deliver the apples according to the contract of shipment made by Northrob with Olsen. It will be noted that the property, when delivered to the carrier, was not marked, nor consigned to any one, but was to be delivered at Portland, and presumably to Northrob, or to whomsoever he should authorize to receive them, by assignment or otherwise; that while such property was *in transitu* it was seized, under writs of attachment, at an intermediate port, and being perishable property was sold, but that Northrob, who was then the owner of the apples, was immediately notified, in order that he might make his defense to the suits against him on which the property had been seized; and that he disregarded such notice, and refused or failed to make any defense in the premises, but two or three months subsequently sold the property to the plaintiff in this action. As a separate defense to the action, the proceedings, etc., in the writs of attachment were set up, and upon demurrer were sustained, as stating facts sufficient to constitute a defense, and the demurrer overruled, but during the trial, when offered in evidence in support thereof, were excluded by the court, and now constitute one of the assignments of error upon this appeal.

Upon the facts, the proceedings under which the goods were taken by the officer from the custody of the carrier was against Northrob, to whom the property belonged, and who subsequently sold them to the plaintiff in this action. It will be seen then, that the question we are to decide is whether a common carrier is excused from liability for not carrying and delivering the goods when they are, without any fault or fraud on his part, seized by virtue of a legal process, and taken out of his possession. "That this will excuse the carrier," says one author, "is now almost universally conceded by the courts, in the absence of connivance or collusion on the carrier's part; and it seems to make no difference by or against whom the

process is sued out, if it be valid." Hutch. Carr. § 396. "If this defense were not valid," says another learned author, in a note, "it might compel the party to resist the acts of a public officer in the discharge of his duty, which the law will never do." 2 Redf. Ry. *159. In the supreme court of the United States, where goods in the hands of a carrier had been attached by a third party in a suit brought by the consignees on a bill of lading, Mr. Justice NELSON said: "After the seizure of the goods by the sheriff under the attachment, they were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it, even admitting the goods to have been at the time in his actual possession. The case, however, shows that they were in the possession of the sheriff's officer or agent, and continued there until disposed of under the judgment upon the attachment. It is true that these goods had been delivered to the defendant as carriers by the plaintiffs, to be conveyed for them to the place of destination, and were seized under an attachment against third persons; but this circumstance did not impair the legal effect of the seizure or custody of the goods under it, so as to justify the defendant in taking them out of the hands of the sheriff. The right of the sheriff to hold them was a question of law to be determined by the proper legal proceedings, and not at the will of the defendant, nor that of the plaintiffs. The law on this subject is well settled, as may be seen on a reference to the cases collected in sections 290, 350, 453, of Drake, Attachment, (2d Ed.)," Stiles v. Davis, 1 Black, 101. See, also, The Idaho, 93 U. S. 575. In Railway Co. v. Yohe, 51 Ind. 184, the objection was taken by demurrer, and sustained by the court, that the answer did not state facts sufficient to constitute a defense; but it was on the ground of the want of an averment that the defendant gave immediate notice to the plaintiffs that the goods had been seized and taken out of his possession, which is duly alleged in the answer herein. In delivering the opinion of the court, Mr. Justice DOWNEY said: "It is impossible for the carrier to deliver the goods to the consignee when they have been seized by legal process, and taken out of his possession. The carrier cannot stop, when goods are offered to him for carriage, to investigate the question as to their ownership. Nor do we think he is bound, when the goods are so taken out of his possession, to follow them up and be at the trouble and expense of asserting the claim thereto of the party to or for whom he undertook to carry them. We do not think it material what the form of the process may be. In every case the carrier must yield to the authority of legal process. After the seizure of the goods by the officer, by virtue of the process, they are in the custody of the law; and the carrier cannot comply with his contract without a resistance of the process, and a violation of law. The right of the sheriff to hold the goods involved questions which could only be determined by the tribu-

nal which issued the process, or some other competent tribunal; and the carrier had no power to decide them. If the goods were wrongfully seized, the plaintiffs have their remedy against the officer who seized them, or against the party at whose instance it was done. As between the parties, the process would be no justification if the plaintiffs were the owners, and entitled to the possession of the goods. * * * The carrier is deprived of the possession of the property by a superior power, the power of the state,—the *vis major* of the civil law,—and in all things as potent and overpowering, as far as the carrier is concerned, as if it were the 'act of God, or the public enemy.' In fact, it amounts to the same thing. The carrier is equally powerless in the grasp of either." In Railroad Co. v. Wilcox, 48 Ga. 433, where goods were delivered to a common carrier for transportation, and were seized by legal process, and taken out of his possession by the sheriff, and the carrier forthwith gave notice to the consignor and consignee, and they made no reply and took no further notice of the proceedings, it was held that the carrier had a legal right to presume they had abandoned the property as subject to legal process, which had seized it. And, further, that a seizure under the warrant of the goods while in the carrier's possession would be a good excuse for their non-delivery. In Van Winkle v. Steam-Ship Co., 37 Barb. 122, a case where goods were seized on attachment, the court held: "If goods are taken from a bailee or carrier by authority of law, in any case coming within these exceptions, there is no doubt that it is a good defense to an action by the bailor or shipper for a non-delivery." In Bliven v. Railroad Co., 36 N. Y. 403, it was held that a common carrier is exonerated from his obligation to his bailor where the property of the latter is taken from him by legal process, and where the carrier immediately notifies him of such taking. Burton v. Wilkinson, 18 Vt. 186; Edson v. Weston, 7 Cow. 278.

Now, according to the facts, Northrob was the owner of the apples at the time they were seized, under writs of attachment, upon a debt or debts against him, and taken out of the possession of the defendant, and when he was notified of such attachment and seizure; and yet he disregarded the notice, and allowed the proceedings to go on without any defense thereto, and subsequently sold the property, and his claim thereto, to the plaintiff. At the time of the seizure there was no consignee to whom the goods were delivered; nor were they marked, nor any other person known to the carrier, other than Northrob, upon whose debts the property was seized, as owner, and whose subsequent conduct in selling it indicates that he was the recognized owner. When property is in the hands of a carrier for transportation, and in the course of transit is seized upon process sued out against the owner of the property, and taken out of the carrier's possession, such property is placed in the custody of the law, and is so placed by a superior power,—the power of

the state,—and excuses the carrier from liability for a non-delivery. It follows that the judgment must be reversed, and a new trial ordered.

(18 Or. 423)

STATE v. GALLO.

(*Supreme Court of Oregon. Feb. 11, 1890.*)

APPEAL—ERRORS NOT APPARENT ON RECORD.

Where a defendant in a criminal case offers himself as a witness, and the district attorney, on his cross-examination, propounds questions to him to which his counsel excepts, but the record does not disclose what answers the witness made to the questions, *held*, that this court could not say that the defendant was prejudiced by his answers. In such a case the errors, if any, are not made to appear, and they will not be presumed.

(*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.

The defendant was indicted for the crime of grand larceny, and convicted by a jury, and by the court sentenced to the penitentiary, from which judgment he has appealed to this court. There was some conflict in the evidence as to the manner of the commission of the larceny; the prosecuting witness, one Morris Baillon, testifying, in substance, that he met the defendant on the morning of the 27th day of May, 1889, and went with him to several saloons. That, in the third or fourth saloon to which he had gone, he (Baillon) took out of his pocket five \$20 bills, and was counting them in the presence of the defendant, when the defendant, taking them, passed them to a third person, who made off with the money. The defendant offered himself as a witness in his own behalf, and testified, in substance, that he and the prosecuting witness and another went to several saloons, and had several drinks together, and then they went to the third saloon, and began to play cards for money; that the defendant wagered \$100, and the prosecuting witness \$100, and the third party wagered \$200, on the result of a game; that the third person held the winning cards, and pocketed the stakes, including the \$100 of the prosecuting witness. On the cross-examination of the defendant, the district attorney asked him the following questions, which were objected to by defendant's counsel, and exceptions saved: "Did you have these papers in your possession?" showing to the defendant two notes of Confederate currency of the denomination of \$100 each, and one bill of the empire of Brazil of the value of 500 quintos. "Did you wager \$100 of good money?" "Is it not a fact that you staked this Confederate money on the result of the game?" The record fails to disclose what answers, if any, the defendant made to any one of these questions.

Gilbert McGinn, for appellant. *Henry B. McGinn*, Dist. Atty., for the State.

STRAHAN, J., (*after stating the facts as above.*) 1. The main question sought to be litigated by the appellant on this appeal is that the trial court permitted the district attorney to propound to him the foregoing questions

on his cross-examination, and that they related to matters not testified to by him in chief. I am inclined to think that these questions do not fall within the objections successfully urged in *State v. Lurch*, 12 Or. 102, 6 Pac. Rep. 408, and *State v. Saunders*, 14 Or. 302, 12 Pac. Rep. 441. The defendant had testified that he wagered \$100 at the game. Whether he did so was a question for the jury; and if, by his cross-examination, the state could make it appear that what he did in fact wager was of no value, it would tend to contradict him, and I think would be legitimate cross-examination. But, however this may be, the state of this record renders the consideration of that question immaterial in this case. The record is silent as to what answers, if any, the defendant made to those questions. In such case I do not think we can infer that he answered the questions, or that he was prejudiced by his answers. We have held several times, where the trial court refused to allow a witness to answer, and the record failed to disclose what answers the witness was expected to give, that no question was presented for review in this court. *Kelley v. Highfield*, 15 Or. 277, 14 Pac. Rep. 744; *Tucker v. Constable*, 16 Or. 409, 19 Pac. Rep. 13. And for the like reason I think, where it is claimed that the court improperly required a witness to answer a question, before we could be called on to review that ruling the substance of the answer ought to appear in the records, so that we might be able to determine whether the appellant was prejudiced by the evidence or not. We cannot presume error. It must affirmatively appear.

2. What Barry testified to was properly in rebuttal of the defendant's evidence in chief. It was a circumstance somewhat remote, it is true; but its tendency was to connect the defendant with the Confederate currency and the Brazilian note at the very time he was claiming to have wagered \$100 with the prosecuting witness. And his concealment of this money was a fact which the jury might properly consider, in connection with the same subject; that is, his betting with the witness. All the facts in connection with this branch of the case were properly for the jury, and are disposed of by the verdict. There being no error, we cannot do otherwise than affirm the judgment.

(18 Or. 474)

HEMBREE et al. v. DAWSON et al.

(*Supreme Court of Oregon. Feb. 11, 1890.*)

RECEIVERS—COMMISSIONS—DISCRETION OF COURT.

Where the plaintiffs in a suit against defendants to declare void a certain instrument held by the latter, which affected certain personal property that the plaintiffs had a lien upon, procured the appointment of a receiver to manage and sell this property, who accordingly sold it, and held the proceeds subject to the order of the circuit court by which he was appointed, and it was found upon the trial of the suit that the instrument constituted a valid chattel mortgage against the property, in favor of the defendants, given to secure debts far in excess of the proceeds arising from the sale of the property, *held*, notwithstanding that an order of the court directing the receiver

to retain out of such proceeds his commissions, and expenses incurred in conducting the business, before applying the fund to the payment of the defendants' debt, was within the discretion of the court, which should not be interfered with, where it was not shown to have been abused.

(*Syllabus by the Court.*)

Appeal from two decisions of the circuit court for the county of Yamhill, upon collateral questions arising out of a suit pending in that court. The merits of the said suit were determined upon appeal to this court. The case will be found reported in 16 Or. 153, 19 Pac. Rep. 73. After it was remanded to the said circuit court for final disposition, that court, upon motion of the respondents' counsel, and against the objection of the appellants' counsel, allowed to the receiver, who had been appointed in the suit soon after its commencement, the sum of \$1,269.15, on account of his commissions and expenses incurred therein. Thereupon the appellants' counsel included in their bill of costs and disbursements said amount allowed to the receiver, as an item of such disbursements, which the clerk of said circuit court disallowed, and the court, on appeal from the taxation of costs by the clerk, affirmed. These constitute the two decisions referred to.

Milton W. Smith, for appellants.

In a case where a receiver is wrongfully appointed, his commissions and expenses are not properly chargeable against the fund in his hands. High, Rec. § 796; *Howe v. Jones*, 66 Iowa, 156, 161, 23 N. W. Rep. 376; *Lammon v. Giles*, 3 Wash. T. 117, 123, 13 Pac. Rep. 417. Where a receiver is wrongfully appointed, the court should allow the defendant to tax as part of his disbursements the commissions and expenses of the receiver, if he is allowed to deduct them from the funds in his hands. High, Rec. § 796; *Hutchinson v. Hampton*, 1 Mont. 39; *French v. Gifford*, 31 Iowa, 428; *Howe v. Jones*, 66 Iowa, 156, 23 N. W. Rep. 376; *Johnson v. Garrett*, 23 Minn. 565; *Verplanck v. Insurance Co.*, 2 Paige, 438, 453.

H. Hurley, for respondents.

PER CURIAM. We are of the opinion that the decision of the circuit court herein, allowing to the receiver his commission and expenses out of the funds in controversy, should not be disturbed. The appointment of the receiver, under the view presented by the respondents, was correct; and although they failed to maintain the suit, still the appointment was proper, as the respondents had a residuary interest in the property mortgaged, and, although the mortgagees had priority, they were creditors of the mortgagors, and had a lien by virtue of their attachments, on any surplus which might remain after the mortgage was satisfied. The cases cited by the appellants' counsel, in which it was held that the allowance to a receiver for compensation out of the fund in suit was error, are cases where the parties intervening in the suit, and procuring the appointment of receivers, were mere interlopers who had no

interest in the subject-matter of the suit, under any view. Here the case was otherwise, and hence it was within the discretion of the circuit court to allow the receiver his commissions and expenses out of the property; and we are not authorized to interfere with that discretion, unless satisfied that it has been abused, which the evidence shows was not the case. This view, upon this decision of the circuit court, being adverse to the appellants, necessarily determines the decision of the other question against them, as their right to tax the item allowed to the receiver, as a part of their disbursements, depended upon the right of the court to allow it out of the fund. Both decisions will therefore be affirmed.

(33 Cal. 240)

MULLER v. SOUTHERN PAC. B. RY. CO.
(No. 13,453.)

(*Supreme Court of California. Feb. 27, 1890.*)
RAILROAD COMPANIES—EMINENT DOMAIN—COMPENSATION—EVIDENCE.

1. Under Code Civil Proc. Cal. § 1870, subd. 11, providing that evidence of common reputation existing prior to the controversy may be given on the trial in cases of boundary, hearsay evidence establishing the common reputation as to the beginning point of the survey of a street, to show the boundary of such street, is admissible.

2. In an action to recover damages for land taken by a railroad company under the right of eminent domain, evidence as to offers made for the purchase of the land is admissible to prove its value; the weight of such evidence, and the *bona fides* of the offers, being for the jury.

3. In an action against a railroad company for damages for a street taken by it to build its road, one-half of the fee of which is in plaintiff, and for damages to an abutting lot not taken, plaintiff is entitled to recover the value of his interest in the street taken, subject to the easement for a public street, and for damages to the lot not taken, the measure of which is the difference between its value when defendant entered to construct the road and its value when the road was completed.

4. The damage to the lot cannot be shown by proving what its value would have been if the road had been constructed along some other street.

5. In arriving at the value of the lot, evidence as to its adaptability, and the uses to which it may be put, is admissible.

Department 2. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

R. B. Canfield, for appellant. *B. F. Thomas*, for respondent.

THORNTON, J. Action to recover damages for a strip of land, situate in the city of Santa Barbara, taken by defendant on which to build its road, and for damages to the abutting lot not taken. Judgment passed for plaintiff, and defendant appeals. It became necessary to prove the boundaries of the land of plaintiff, in order to adjust the damages suffered. The official map of the city of Santa Barbara was produced. The lot is situate on Gutierrez street, in that city. There was a controversy in regard to the line of the street, and it became necessary to prove it. No beginning point was designated or shown on the map. To show where the beginning point was, (the map appeared to have been made by one Haley, in pursuance of a survey of

the city, showing streets, etc., made by him,) the plaintiffs called F. N. Guiterrez, and put to him this question: "Well, have you learned from reputation, hearsay, or otherwise as to where the initial point was in the making of this survey?" Defendants objected to the question on the ground that it called for hearsay and incompetent testimony. That common reputation or hearsay is admissible to establish a boundary line of general and public interest, we think, is settled at common law, and in this state by statute. Code Civil Proc. § 1870, subd. 11.¹ Such reputation which is hearsay must have existed before the controversy has arisen. We think that the objection to the competency of the question on the ground that it was hearsay was not well taken; and this is, in our opinion, all that the objection amounted to. The question, as a preliminary one, was permissible. Probably, the further examination might have brought out testimony which was inadmissible; but this does not make the question improper. There was no error in allowing the question. We add, on this point, that, if the boundary may be proved by hearsay, certainly the beginning point—the most material point—can be so proved. The greater includes the less.

The testimony of Muller as to offers made for the purchase of the lot of land above mentioned not taken was admissible to prove its value, and the question properly allowed upon the issue of damages. *Bona fide* offers for property afford some test as to its value, and are, we think, admissible. *Harrison v. Glover*, 72 N.Y. 451. What weight such testimony is entitled to is for the jury; so, also, the *bona fides* of the offer is a question of fact to be determined by the jury. A cross-examination as to all the circumstances of the offer will show to the jury what weight is to be given to the testimony.

We must consider this a case where the fee of one-half of the street is in the plaintiff; for the jury, by their verdict, have so affirmed. Hence the plaintiff is entitled to recover the value of the land taken, subject to the easement for a public street, and, in addition, damages to the part not taken,—here to the abutting lot,—by reason of the part taken for railroad purposes. The value of the land taken is that which it had when the defendant entered to construct its road. The value of the part not taken is to be determined by ascertaining the value of such part when the defendant entered to build its road, and by deducting from it, if a depreciation occurred, the value when the road was completed. If there had been no depreciation when the road was completed, there has been no damage, and none can be allowed. On this subject, see the following cases: *Imlay v. Railroad Co.*, 26 Conn. 249; *Kucheman v. Railway Co.*, 46 Iowa, 366; *Railroad Co. v. Esterle*, 13 Bush. 667; *In re Coney Island R. Co.*,

13 Hun. 345; 16 Hun. 261; *In re New York Cent. R. Co.*, 15 Hun. 63; *Henderson v. Railroad Co.*, 78 N.Y. 423; *Hegar v. Railway Co.*, 26 Wis. 624. We are inclined to think, in this case, that the difference between the value of the lot when the defendant entered to construct its road and the value when the road was completed will show what the plaintiff is entitled to recover. The value of the land taken on the street, when the street is subject to public easement, is so small as to be scarcely appreciable. There seems no probability of the termination of the easement, and until that is terminated the plaintiffs can only use the land for the purposes of a street. The depreciation of the abutting lot is caused only by the obstruction to the street by the embankment raised on it by defendant, and thus impairing plaintiffs' use of the street in connection with his lot. We do not intend, however, to say that plaintiffs cannot recover the proved value of the land taken.

The court below admitted evidence as to the value the lot would have had, had the railroad been built on some other street in Santa Barbara. This could only have been admitted as affecting the damage to the lot by the defendant. We cannot see on what view or principle this evidence was admitted. The damage to plaintiff must be estimated on the actual facts of the case; not on any speculative theory of what might have been the result if something had occurred which in fact did not occur. It is difficult to see what effect this evidence could have had on the subject of damage. If the court intended to allow the jury to add to the difference in values above pointed out as legitimately allowable the enhancement in value which would have occurred had the road been built on some other street in the city, it was a departure from the just rule. The damage allowed is not a failure to realize a profit which, under another state of matters, might have been realized, but the loss actually suffered; and the defendant is only called on to make compensation for that loss. The court was requested by defendant to tell the jury that, "in estimating the damage to the portion of plaintiff's land not taken by the railroad, you must not consider what the value of the land would have been if the railroad had been constructed through the city, but along some other street than Gutierrez street." For the reasons above given the admission of the evidence was an error. The failure to give the requested direction above quoted was also an error, as it in effect allowed the jury to take into consideration the question of value as affected by the building of the road on a different street, the consideration of which tended to lead them (the jury) away from the true rule. We see nothing in this case which raises the question of setting off benefits to plaintiffs against damages suffered by them; and we say nothing in regard to the point, except to refer to the former decision of this court in *Railroad Co. v. Porter*, 74 Cal. 261, 15 Pac. Rep. 774, which meets our approval.

¹Said section provides that evidence may be given, on the trial, of "common reputation, existing prior to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree and boundary."

In arriving at the value of the land, all its capabilities, or the uses to which it is adapted, should be taken into consideration. These capabilities are estimated by a purchaser, and we cannot see why evidence in regard to them is not admissible. The same considerations are to be regarded as in a sale of land between private parties. *Town Co. v. Neale*, 78 Cal. 67, 20 Pac. Rep. 372; *Boom Co. v. Patterson*, 98 U. S. 409; and cases cited in 3 *Suth. Dam. p.* 441, note 4. If the abutting lot is rendered less valuable by the obstruction because the owner is using the lot for a particular business, and the obstruction renders the lot less valuable for that business, we do not see why that should not be considered on the question of damage. This is a use to which the lot may be put, and for which it is actually employed. Such damage is actually incurred, and should be allowed. *Driver v. Railroad Co.*, 32 Wis. 569. We find no error in the record, save the one pointed out; and for that error the judgment is reversed, and the cause remanded for a new trial in accordance with the views herein expressed.

So ordered.

I concur: SHARPSTEIN, J.

MCFARLAND, J. I concur in the judgment on the ground upon which the reversal is based in the opinion of Mr. Justice THORNTON. With respect to the views therein expressed on other points I express no opinion.

(3 Cal. Unrep. 211)

UNITED LAND ASS'N *et al.* v. KNIGHT. (No. 12,748.)

(Supreme Court of California. Jan. 2, 1890.)

PUBLIC LANDS—PATENTS—AUTHORITY OF LAND-OFFICE.

1. Act. Cong. 1864, § 7 (13 U. S. St. at Large 334), provides that "it shall be the duty of the surveyor general of California, in making surveys of private land claims finally confirmed, to follow the decree of confirmation as closely as practicable, whenever such decree designates the specific boundaries of the claim; but when such decree designates only the outboundaries within which the quantity confirmed is to be taken, the location shall be made as near as practicable in one tract, and in a compact form, * * * and it shall be the duty of the commissioner of the general land-office to require a substantial compliance with the directions of this section before approving any plat and survey forwarded to him." Act Cong. 1861, § 13, (9 U. S. St. at Large 631.) provides that "the patent shall issue to the claimant on his presenting to the general land-office an authentic certificate of confirmation, and a plot or survey of said land duly certified and approved by the surveyor general, whose duty it shall be to cause all private land claims which shall be finally confirmed to be accurately surveyed, and furnish plots of the same." The decree confirming defendant's land claim described the land as "a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark, * * * on which the city of San Francisco is situated, as will contain an area of four square leagues. Said tract being bounded on the north and east by the Bay of San Francisco, on the west by the Pacific ocean, and on the south by a due east and west line drawn so as to include the area aforesaid." The survey made under this decree included by metes and bounds land below the line of ordinary high tide. The patent following the survey described the

lands by metes and bounds, but recited the decree of confirmation. *Held*, in ejectment for the lands below high tide, that the north, east, and west boundary lines given in the decree and recited in the patent would prevail over those given in the survey and the granting clause of the patent, as there was no power by which land could be included in the survey and patent, the claim to which had not been confirmed by the decree. MCFARLAND, J., dissenting.

2. In an action of ejectment, plaintiff can attack the patent from the United States, under which defendant claims, on the ground that the land-office had no power to issue a patent for the lands embraced therein.

In bank. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Ejectment by the United Land Association and others against Knight. Judgment for plaintiffs, and defendant appeals.

E. F. Preston and James A. Waymire, for appellant. Doyle, Golpin & Scripture, for respondents.

PATERSON, J. This is an action of ejectment to recover a block of land lying below ordinary high tide in the city and county of San Francisco, and being a portion of that part of San Francisco known as "Mission Creek lands." The defendant claims under a patent of the United States to the city, issued June 20, 1884, in satisfaction of a pueblo grant of four square leagues, which was confirmed, by the decree of the United States circuit court, May 18, 1865. The tract confirmed by this decree is described as "a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark, (as the same existed at the date of the conquest of the country, viz., 7th of July, 1846,) on which the city of San Francisco is situated, as will contain an area of four square leagues; said tract being bounded on the north and east by the bay of San Francisco, on the west by the Pacific ocean, and on the south by a due east and west line drawn so as to include the area aforesaid,"—subject, however, to certain deductions for lands previously reserved or dedicated to public use by the United States. Under the decree referred to, a survey was made, and on August 13, 1868, was approved by the United States surveyor general for the state of California, which fixed the southern boundary of the land by following the high-water mark; thus excluding the lands of Mission creek, of which the land in suit is a part. Subsequently, in 1884, the secretary of the interior caused another survey to be made, one line of which ran directly across the mouth of Mission creek; thus including the lands of Mission creek as a part of the grant to the city. The patent to the city recites the decree confirming the grant. Plaintiffs' claim of title is based upon a deed from the tide land commissioner to Ellis, dated November 24, 1875, and subsequent conveyances to them. They contend that the state, upon its admission into the union, by virtue of its sovereignty, became seized of the land; it being tide land. This right of the state, they claim,

is recognized by the decree confirming the grant to the city. It is claimed that the patent is bound to follow the decree in fixing the boundary at high-water mark, and that so much of the patent as attempts to convey lands below high-water mark is void because in excess of the authority of the officials issuing the patent.

Appellant contends that a party in an ejectment suit cannot question the validity of a United States patent for land upon the ground that it does not follow the decree confirming the grant; that the patent from the United States government to the city and county of San Francisco for the pueblo lands confirmed to it under the acts of congress of March 3, 1851, and of July 1, 1864, by the decree of the United States circuit court, which patent conforms in its description of the lands granted to the final survey, made, as provided in the latter act, in accordance with the instructions of the commissioner of the general land-office, is conclusive evidence, as against the state of California and its grantees, of the right of the city and county to all the lands embraced within the exterior limits of the survey, including tide lands lying below the line of ordinary high tide. It is said that the question is no longer an open one in this state. The case of the *People v. City and County of San Francisco*, 75 Cal. 388, 17 Pac. Rep. 522, is cited and relied on in support of this contention. It did not appear in *People v. City*, etc., whether the decree of confirmation was made a part of the patent. In this case it is shown that the patent contains full recitals of the decree, and shows upon its face that the tract confirmed embraced "so much of the extreme upper portion of the peninsula above ordinary high-water mark, (as the same existed at the date of the conquest of the country, viz., 7th of July, 1846,) on which the city of San Francisco is situated, as will contain an area of four square leagues," etc. It shows that three sides of the tract are bounded by natural monuments, namely, "on the north and east by the bay of San Francisco, on the west by the Pacific ocean, and on the south by a due east and west line drawn so as to include the area aforesaid." If it be conceded, however, that the decision referred to covers the questions involved as fully as is claimed by the appellant, we feel satisfied that the supreme court of the United States would not follow it in this case or any other, involving the same questions, which might go to that court on a writ of error. "It has always been the practice here to adopt that view of a legal question which has been taken by the supreme court of the United States, when the question is within the branch of the jurisdiction of that court which may be exercised by writ of error to this court." As the question is a federal question, it is one which will be decided ultimately by the supreme court of the United States. *Belcher v. Chambers*, 53 Cal. 635.

The question involved in this case is whether the officers of the land department

had power to patent land outside of the natural boundaries given in the decree of confirmation. If the land department had no jurisdiction to act, if any portion of the land described in the patent was not a part of the public domain, or if there was no legislation authorizing its conveyance by the land department, then, under the decisions of the United States supreme court in *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228; and other cases therein cited, the patent is inoperative to pass the title; and objection can be taken to it on these grounds at any time, and in any form of action.

Upon her admission into the Union, the state of California became the owner, by virtue of her sovereignty, of all tide-water lands within her borders lying below high-water mark, except such as had been disposed of by the Mexican government prior to the treaty of Guadalupe Hidalgo. The territory acquired from Mexico was by the express terms of that treaty taken by the United States subject to the trust of protecting all legal and equitable interests of prior grantees under the former sovereign. The state, of course, could not take more than the United States received; and the claim of the state, by virtue of her admission and her sovereignty, was subordinate to such prior equities, and subject to the power of the federal government to confirm prior Mexican grants, and to locate grants of specific quantities of land within the exterior boundaries of larger tracts. *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 674. The United States government has exercised the power vested in it, and has through its courts and the officers of its land department, attempted to define the boundaries of the four leagues of land to which the city of San Francisco, as successor in interest of the pueblo of San Francisco, a Mexican citizen, was entitled. The court, having jurisdiction to hear and determine the right of this claimant, finally confirmed its claim to four square leagues of land in the extreme end of the peninsula, giving, as the boundaries thereof on the west, the north, and the east, the natural lines of high-water mark, leaving the southern boundary to be fixed by the surveyor on such a line as would include, between it and the high-water lines north of it, said four square leagues of land. This, it seems, the surveyor did not do; but, ignoring the natural boundaries fixed by the court in its decree for the west, north, and east, ran his line below the line of high tide, and across the mouth of Mission creek, and included within his description the lands described in the complaint,—lands of the state not included within the decree of confirmation. Following the survey, the patent describes the land by metes and bounds.

The government of the United States is in duty bound to carry into effect the stipulations contained in the treaty of Guadalupe Hidalgo; but the power to do so must be exercised in the manner provided by congress, and it would seem that when congress vest-

ed in the federal courts the power to determine the rights of Mexican claimants, and provided (section 7) that in making the survey the surveyor general should "follow the decree of confirmation as closely as practicable, whenever such decree designates the specific boundaries," and that "it shall be the duty of the commissioner of the general land-office to require a substantial compliance with the directions of the section before approving any survey and plat forwarded to him;" that the officers of the land department are, as to such lands, merely auxiliary to the court, with special and limited jurisdiction to carry out its decrees. Section 13 of the act of 1851, (9 U. S. St. 631,) provides that "the patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of confirmation, and a plat or survey of said land, duly certified and approved by the surveyor-general, whose duty it shall be to cause all private land claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of said claims the said surveyor general shall have the same power and authority as are conferred on the register of the land-office by section 6 of the Act, to create the office of surveyor of the public lands of the state of Louisiana, approved March 3, 1831. Under this provision, we think it clear that the power of the surveyor general is restricted to the claim as finally confirmed. It has been decided in several cases, on appeal from decrees of confirmation, that the description must be followed; that "the decree is a finality, not only on the question of title, but as to the boundaries which it specifies." (U. S. v. Halleck, 1 Wall. 455; the Fossat Case, 2 Wall. 649; Higuera v. U. S., 5 Wall. 829; Van Reynegan v. Bolton, 95 U. S. 35.) In Higuera v. U. S. the court declared that "confirmation must precede the survey which is made subject to such an order; and, if the decree of confirmation is so indefinite and incongruous that it cannot be executed, then it is void, and of no effect, and the claim to the land stands upon the same footing, in legal contemplation, as a claim which was never presented to the commissioners for adjudication." In the Fossat Case the court held that it was not competent for the district court to depart from its own decree in the exercise of the power conferred by the act of June 14, 1860; that the court was bound to execute the decree by fixing the lines on the grant in conformity with the provisions of the decree, the decree being not only the foundation of the validity of the grant, but of the proceedings in the survey and location of the land confirmed. In that case, as in this, the decree provided for specific boundaries on three sides of the tract, and left one side to be surveyed. If the court, which then had the power to supervise and confirm or reject the survey, as the land department now does, could not alter or depart from the specific boundaries given in its own decree, how can the officers of the land department?

These cases, to be sure, were direct appeals to the supreme court of the United States; but they bear directly upon the question of the authority of the officers of the land department to patent lands outside of the boundaries of the decree of confirmation, and that is the question here. If the land granted is not within the power of the officer, the grant or patent is invalid. In *Polk v. Wendal*, 9 Cranch, 87, Chief Justice MARSHALL said: "There are cases in which a grant is absolutely void, as where the state had no title to the thing granted, or where the officer had no authority to issue the grant." In *New Orleans v. U. S.*, 10 Pet. 662, 731, the court said: "It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face, it is conclusive, and cannot be controverted; but if the thing granted was not in the grantor no right passes to the grantee." So in this case, unless congress has given the land department power to dispose of land belonging to the state of California,—lands lying outside of the boundaries of the decree,—a patent to land shown to be outside of such decree is invalid. In *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985, it appeared that land which had been previously granted to the state by the swamp land act was held by the defendant under a patent from the United States issued on a pre-emption claim. The court held the patent to be invalid as a conveyance, because the land was not. At the time it was patented to the defendant, within the granting power of the land-office. The state of California took the lands in controversy, in 1850, as effectually as if she had received them by grant from congress. If the land department had the power to determine that land outside of the decree of confirmation should be conveyed, it would necessarily have the power to pass on its own right to convey the land, but the decree of confirmation was the foundation of the power to make the patent. It precedes and limits the power of the officers of the land department. If the latter are not limited by the decree, then the court may confirm a tract in one place, and the officers locate it in another, and the patent which attempts to convey the latter tract controls the former. This cannot be, for the whole power of deciding what shall be granted in pursuance of the treaty is intrusted to the judicial department. Section 7 of the act of 1864, (13 U. S. St. p. 334,) shows that the power of the land department is limited by the provisions of the decree: "It shall be the duty of the surveyor general of California, in making surveys of private land claims finally confirmed, to follow the decree of confirmation as closely as practicable whenever such decree designates the specific boundaries of the claim; but, when such decree designates only the outboundaries within which the quantity confirmed is to be taken, the location shall be made, as near as practicable, in one tract, and in a compact form, * * * and it shall be the duty of the commissioner of the general land-office to require a sub-

stantial compliance with the directions of this section before approving any survey and plat forwarded to him." Here is an emphatic declaration by congress that the decree is the limit of the power of the land department, and shows very clearly, we think, that congress has not given to the officers of the land department the exclusive and final power of determining whether any land is within or without the location of the decree, or of locating grants in places where the courts have not located them. If such power is not conferred upon the land department, any attempt to convey land outside of the permanent boundaries named in the decree is not an error of judgment simply, but is an act void for want of jurisdiction.

Under the laws of Mexico existing at the time of the treaty, lands below and within 190 *varas* of the seashore could not be held in private ownership, (Wheeler, Land Titles, 13;) and the land officers of the United States could not, in the absence of a judicial adjudication that such land belonged to a Mexican claimant, convey to him. "All that place is called 'sea-beach' which is covered by the waters of the sea when at its highest point during all the year." Hall Mex. Law 448. The king could not alienate such lands. *New Orleans v. U. S.*, 10 Pet. 726; *Milne v. Girodeau*, 12 La. 324. The shore of the sea is that part of the land covered by water in its greatest ordinary flux, the ports, bays, roadsteads and gulfs, and the rivers, although they may not be navigable (Mission creek is navigable,) their beds, mouths, and the salt marshes. Hall, Mex. Law, 448-503; Civil Code Mex. art. 802.

A patent cannot be issued by the land department to a person not named in the decree, because the courts, and not the department, are given the power to determine the person to whom the lands were granted by Mexico. If the judgment of the court should decree that the grant is a forgery, and therefore void, and the land department should patent the land claimed, the action of the department would be shown to be void upon the production of the decree, because congress has given to the courts jurisdiction to determine the validity or invalidity of the claim. Of course, in cases where the court, by its decree, has established the validity of the grant, and a tract of a certain number of acres has been confirmed to be located within the exterior limits of a larger tract, it is left to the officers of the land department, in their discretion, to locate and survey the requisite number of acres within the larger tract; and their action in execution of the decree is not subject to attack in any collateral proceedings, because it is within their jurisdiction, and in pursuance of the decree. In such cases there cannot possibly be any conflict between their action and the directions of the decree. It is auxiliary to the decree, and as conclusive as the decree itself. Unless we bear in mind the distinction between cases of this kind—the confirmation of a certain number of acres to be located within the ex-

terior boundaries of a larger tract, and designated by the supreme court of the United States as "floats"—and cases in which the boundaries, or some of them, are definitely fixed by the decree, the decisions upon the subject will appear to be very conflicting. An examination of the authorities cited at the argument of this case and the argument of *People v. City and County of San Francisco*, with this distinction in view, will illustrate the principle stated, and explain what would otherwise seem to be a conflict of decisions on the subject. In *Moore v. Wilkinson*, 13 Cal. 478, relied on by parties claiming under the patent from the United States, the court regarded the grant "as conveying an interest to four leagues lying within a larger tract." Page 486.

It is true the patents, in some cases, seem to have gone beyond the boundaries of the *diseno*, and yet they were held not to be void; but it was so held in each case because the parties attacking the patent had no title to land lying outside of the exterior boundaries, and were not, therefore, in a position to attack the validity of the patent. In *Doolan v. Carr*, the court held (only *WAITE, C. J.*, dissenting) that one who had not even connected himself with the paramount source of title might question the validity of the patent. 125 U. S. 618, 8 Sup. Ct. Rep. 1228. In *Ward v. Mulford*, 32 Cal. 369, the district court, as it had the right to do under the law then applicable to its decrees, had reviewed the survey, and confirmed it. Even if its action were irregular, it was not void. But at the time the grant before us in this case was confirmed the surveyor was not required to report his action to the court for confirmation, and no report was made.

In *Chipley v. Farris*, 45 Cal. 539, the patent covered only a portion of the tract described in the decree, but not the land in controversy. Plaintiff had no legal title, because no patent had been issued to him under the decree. The question as to the power of the land department to patent lands outside of the boundaries of the decree was not involved. Within the boundaries of the decree it may act. Without the boundaries it has no jurisdiction. Furthermore, in that case the descriptions were both by metes and bounds, and it is expressly admitted by respondent in that case, in his written points, that if the side lines of the tract in controversy were the seashore a different rule would apply. In *Teschemacher v. Thompson*, 18 Cal. 11, the court assumed that the grant was of "a specific quantity lying in an area of larger extent." Page 24. In *Cassidy v. Carr*, 48 Cal. 339, there was no conflict between the decree and the patent. The survey and patent, as the court said, simply carried out the decree, and were conclusive between the parties. Of course, where "the survey and patent but carry out the decree" the patent is conclusive between the parties. In none of the cases cited is the question of the power of the officer to issue a patent for land not embraced in the decree considered. It does not follow

logically that because the patent is conclusive in all cases where the land department had jurisdiction, it is conclusive as to all lands lying without the boundaries of the decree, as well as within them. The surveyor cannot incorporate into the decree lands not confirmed, nor can he shift on the surface of the earth the natural boundaries,—mountains, bays, or oceans. The presumption always is, doubtless, that the metes and bounds follow the decree; but to hold that the positions of the natural monuments are indisputably fixed by the courses and distances of the surveyor, and approval of the land-officers, would be placing a construction upon the acts of congress never intended by that body, and not warranted by the decisions of the national courts. The land department has power to do what the court cannot do, viz., locate, survey, and patent tracts of land designated by the court within larger areas; and when a rancho is confirmed by name to fix its boundaries, but when the court itself, in its decree, fixes one or more of the boundary lines, the department has no jurisdiction to go beyond it. The distinction between the different kinds of grants is clearly and fully stated in *U. S. v. McLaughlin*, 127 U. S. 423, 8 Sup. Ct. Rep. 1177, and in *U. S. v. Curtner*, 38 Fed. Rep. 1. In *Doolan v. Carr*, supra, the court said: "There is no question as to the principle that, where the officers of the government have issued a patent, in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law, as distinguished from suits in equity, subject, however, at all times, to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority; if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority,—then their act was void,—void for want of power in them to act on the subject-matter of the patent, not merely voidable. In which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction, established by law, and it has been often asserted in this court that even a patent from the government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue." Under this and other decisions, including many decisions of this court, (*McLaughlin v. Powell*, 50 Cal. 64; *McLaughlin v. Heid*, 63 Cal. 208; *Railroad Co. v. McCusker*, 67 Cal. 67, 7 Pac. Rep. 122; *Mining Co. v. Oliver*, 75 Cal. 194, 16 Pac. Rep. 780, quoted approvingly in *Wright v. Roseberry*, supra,) the evidence of-

ferred and admitted was competent, relevant, and material, and fully established the findings of the court. The deeds to Ellis, and evidence of the location on the earth's surface of the line of high tide, were properly admitted.

Now, if it be true, as a matter of law, that the surveyor general had no power to include in a survey any land, the claim to which was not confirmed by the decree of the circuit court, and that neither the commissioner of the land-office nor the secretary of the interior had any power to direct or approve such a survey, the only question is, which of the west, north, and east boundary lines, respectively shall prevail,—those given in the decree, and recited in the patent, or those given in the survey, and employed in the granting clause of the patent? In determining this question, there is no violation of the principles which forbid a collateral attack upon such instruments. There is no such attack. It becomes simply a question of construction. Both descriptions are upon the face of the patent, and the case is one in which the plaintiffs claim that the defendant's title depends upon a deed describing the property by natural boundaries, and also by metes and bounds; that the description by metes and bounds includes land not included within the natural boundaries, and which defendant claims to own, but which is in fact owned by plaintiffs; that their title should be quieted because the natural and permanent boundary lines should prevail over the description by metes and bounds. A determination of this question will in no way affect the location of the south line. By the decree, the surveyor was to fix that line; but, if the surveyor had run his line through the bay of San Francisco, and taken in lands of the state lying below the high-water mark on the eastern shore of the bay, or lands lying in the foothills of the county of Contra Costa, would it be contended that the patent, although reciting the decree confirming four leagues on the peninsula of San Francisco, with the bay of San Francisco as the eastern line thereof, is conclusive evidence, as against the state or its grantees, of the right of the city and county of San Francisco "to all the lands embraced within the exterior limits of the survey, including tide land lying below the line of ordinary high tide," and in fact conclusive against everybody as to all lands included in the survey, wherever located? If the plaintiff, in the case supposed, would not be prevented from showing that the metes and bounds included land belonging to him, not confirmed by the decree, and which the land-officers could not convey, why may he not show the same thing in this or any other kindred case? In *More v. Massini*, 37 Cal. 432, the court said: "The call for the seashore as the southern boundary must be regarded as the more definite and certain, and will prevail over a call for a mere station and over the courses and distances."

But, whether we consider it as a collateral attack, or a mere matter of construction, it

is clear, we think, that, under the decisions of the supreme court of the United States in *Doolan v. Carr*, supra, and other cases there cited, "want of power in an officer of the land-office to issue a land patent may be shown in an action at law by extrinsic evidence, although the patent has been issued with all the forms of law required for a patent of public land." There were no errors in the rulings of the court. The evidence shows beyond doubt that the land in controversy is outside of the natural boundaries of the decree. The judgment is therefore affirmed.

We concur: WORKS, J.; FOX, J.; SHARPSTEIN, J.

THORNTON, J. I concur in the judgment, and will file an opinion hereafter.

I dissent: MCFARLAND, J.

(32 Cal. 122)

HANNAN v. McNICKLE. (No. 12,179.)

(Supreme Court of California. Dec. 19, 1889.)

VENDOR AND VENDEE—CONTRACT—IMPROVEMENTS—ACTION FOR POSSESSION.

1. Where a contract for the sale of land for \$900, under which possession is given, fails to specify the time of payment further than to provide that the price shall be payable in monthly installments, a period of nearly three years is more than a reasonable time for payment.

2. A stipulation that interest is to be paid on overdue installments does not operate to extend the time for payment of the principal.

3. A tender of a deed on payment of the purchase price and interest, no mention being made of a payment of \$10 when the contract was executed, is sufficient, where defendant does not object to the amount, but denies that anything is due.

4. Where a vendee takes possession of land under a contract of purchase, and fails to make any payment, a judgment for rents and profits accruing after demand by the vendor for possession, and up to the time of trial, is proper.

5. Code Civil Proc. Cal. § 741, provides that "when damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant * * * holding under color of title adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a set-off against such damages." *Held*, that defendant is not entitled to set off the value of his improvements where he enters under a contract which says nothing about his taking possession, and is ejected on account of default in his payments, and where the improvements are made by him before a demand for possession, as, before demand made, his possession is not adverse.

6. An offer to rescind the contract before bringing suit is not necessary where defendant is in default in his payments, as he cannot be allowed to hold both the land and money.

Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

J. C. Bates, for appellant. A. H. Loughborough, for respondent.

PER CURIAM. Ejectment. Judgment for plaintiff for possession of the premises, and \$70 rents and profits. Defendant appeals. It is conceded that the plaintiff was the owner on August 29, 1883. On that day he gave to the defendant a contract in the following words: "San Francisco, August 29, 1883, John Hannan, party of the first part, sold to James McNickle, party of the second part,

lots 10, 11, 12, 23, 24, 25, in block 160, Outside Land, in the Hannan tract, for the sum of nine hundred (\$900) dollars, United States gold coin, to be paid in monthly installments; deferred payments to bear 8 per cent. per annum until paid. Title guarantied to be perfect, and clear of all incumbrance. JOHN HANNAN. JAMES McNICKLE." This agreement, it is to be observed, says nothing about possession. But it is in evidence that the defendant went into possession with the consent of the plaintiff, but whether this consent was verbal or in writing does not appear. The defendant "graded the lots, sunk a well, fenced in the lots, and built barns and other buildings for a milk business;" which improvements, he testifies, cost him \$1,000, but which he states in his answer were "of the cost and value of \$950." On the day the writing was executed the defendant says he "paid him \$10, the first payment;" but nothing further has been paid. On May 4, 1886, the plaintiff tendered to the defendant a sufficient deed of the property, and "offered to deliver said deed on payment of \$900 and interest;" but the defendant did not pay any part of said sum, and the deed was not delivered. The plaintiff then served upon the defendant a demand in writing for the possession of the property. Upon these facts, we think that the judgment was right.

1. The contract does not fix any time for the payment of the purchase price. Nothing can be gathered from the statement in the contract that the price was to be paid "in monthly installments," because there is nothing as to the amount of such installments. The most that can be said is that there must be at least two installments. Nor can the amount of the installments be inferred from the statement in the defendant's testimony that when the agreement was signed he "paid him \$10, the first payment." Aside from any other reason, the inference from such a statement is too shadowy to serve as the basis for the addition of a new term to the contract. The defendant does not say that any oral agreement was made on the subject. He does not even say that this first "payment" was the first "installment" under the contract. The contract did not require any installment to be paid in advance; and it may be that the \$10 was paid because the parties supposed that it would serve to "bind the bargain." The proposition that the payment of a sum like \$900 was to be strung out over a period of seven years and a half, in sums of \$10 each, is one that requires some definite evidence to support it. The time not having been fixed by the contract, if the purchase money did not become due at once, or at the end of two months, it became due in a reasonable time, (see *Williston v. Perkins*, 51 Cal. 554; *Vance v. Pena*, 41 Cal. 686; *Luckhart v. Ogden*, 30 Cal. 548;) and we think that a period of nearly three years was more than a reasonable time for the payment of a sum like \$900. But taking the defendant's own theory, viz., that the purchase money was to be paid in

monthly installments of \$10 each, it follows that at the end of each month an installment became due; and therefore, at the time that a demand was made for possession, there were at least 32 installments due and unpaid. In any view that can be taken, therefore, the defendant was in default with his payments. He did not perform what his contract required of him; and, this being so, the fact that he made valuable improvements does not avail him. Such improvements cannot enable him to refuse to perform his contract, and yet retain possession of the property. The performance of his contract is an essential feature of any equitable defense on his part. If any authority were needed for such a plain proposition, it is to be found in some of the cases cited by the appellant himself. *Hicks v. Lovell*, 64 Cal. 20; *Whittier v. Stege*, 61 Cal. 241. The fact that interest was to be paid on overdue installments does not operate to extend the time for payment of the principal. To say that the defendant was entitled to hold the possession until all the installments became due is the very reverse of the true rule, which is that he has no sufficient equity until he has paid all that are due. *Alston v. Wingfield*, 53 Ga. 22. There is no question as to whether time was of the essence of the contract; for the defendant does not offer to pay what is due under the contract, but denies that he is in default.

2. This case is determined in favor of plaintiff by *Hoffman v. Remnant*, 72 Cal. 1, 12 Pac. Rep. 804, which is precisely in point, and shows that the plaintiff had a right to recover. See *Seabury v. Stewart*, 22 Ala. 207-217, where the point is ably discussed, and the authorities cited. The plaintiff was not called on to rescind the contract, or return any part of the purchase money. His right of recovery is consistent with the contract. He recovers because the defendant was in default in paying the purchase money, and defendant cannot have land and money both. *Railroad Co. v. Mudd*, 59 Cal. 585; *Seabury v. Stewart*, supra; *Hansbrough v. Peck*, 5 Wall. 506. Equitable principles cannot affect plaintiff's rights, since equity follows the law, and rules as the law rules.

3. It is argued for the appellant that the tender of the deed was ineffectual, because, as a condition of its delivery, the vendor demanded the payment of \$900 and interest, which did not allow for the \$10 which had been paid. This is upon the theory that the making of the deed and the payment of the price were conditions concurrent under the contract. But, if we are right in the foregoing position, the contract had nothing to do with the question of possession. All that can be claimed to have been necessary, under this view, was to have converted the possession into a tortious one by a unconditional demand that it be restored; and such a demand was made. But waiving this, and assuming that the tender of a deed was necessary, we think that what was done was sufficient. For the vendee made no objection on the score of amount. He did not offer to

pay anything, but denies by his answer that anything was then due. Under these circumstances the objection to the tender was waived.

4. The judgment for rents and profits was proper. They were evidently allowed for the period commencing with the demand for possession, and extending up to the time of the trial. The evidence shows that \$70 was not too much for this period, and the finding on the subject is not attacked by a specification.

The defendant, being in default under his contract, is not entitled to set off the value of his improvements. That is the rule, independent of statutory provision. *Tyler v. Fickett*, 75 Me. 211; *Guthrie v. Holt*, 9 Baxt. 527; *Buell v. Irwin*, 24 Mich. 145. The provision of section 741 of the Code of Civil Procedure that the improvements may be set-off if made by one holding "under color of title adversely to the claim of the plaintiff, in good faith," applies only where the holding is adverse, (*Bay v. Pope*, 18 Cal. 694;) and before the demand above mentioned the possession of the defendant was not adverse, (*Kerns v. Dean*, 77 Cal. 556, 19 Pac. Rep. 817; *Knox v. Hook*, 12 Mass. 329; *Greeno v. Munson*, 9 Vt. 37; *Browning v. Estes*, 3 Tex. 476; *Bishop v. Truett*, 85 Ala. 376, 5 South. Rep. 154.) Judgment and order appealed from affirmed.

(32 Cal. 642)

CONNOLLY v. HINGLEY. (No. 13,437.)

(Supreme Court of California. Jan. 27, 1890.)

VENDOR AND VENDEE—EJECTMENT—EQUITABLE DEFENSES.

1. One who is in default in his payments on a contract of purchase under which he claims possession, and who has made no offer to pay what is due, cannot rely on the contract as an equitable defense in ejectment by a subsequent grantee.

2. A verbal promise by the owner of the land, made without consideration, to extend the time of payment for two years beyond the time fixed in the written contract, is not an equitable defense to an action of ejectment brought seven years after the expiration of that period, during all of which time no payments have been made.

3. Where the plaintiff has been in possession for seven years, when defendant enters on the land, claiming under a prior contract of purchase, no demand by plaintiff is necessary to make defendant's possession tortious.

Commissioners' decision. In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

W. D. Tupper, H. H. Welsh, and E. D. Edwards, for appellant. Geo. A. Nourse, for respondent.

HAYNE, C. Ejectment. Judgment for plaintiff. Defendant appeals. Both parties claim through one Chapman. The defendant claims to be in possession under a contract of purchase from Chapman made in November, 1875. This contract provided that defendant should pay for the property the sum of \$1,000, as follows: \$100 cash on the execution of said instrument; \$750 in 60 monthly installments of \$12.50 each, payable on the 1st day of each month; and \$150 on the 1st day of November, 1880. Of this sum

he paid only \$487.50. His last money payment was in 1877, and there was allowed him for a deficiency in fencing a credit of \$25 in 1879. These facts are established by the findings, which are sustained by the evidence. The burden was clearly upon the defendant to sustain the allegations of his equitable defense; and, having failed to do so, the finding was properly against him. *Leviston v. Ryan*, 75 Cal. 294, 17 Pac. Rep. 289; *Speegle v. Leese*, 51 Cal. 415. In 1879 he removed with his family to the Sandwich Islands, where he remained until 1887, when he returned to California, and, after several months' sojourn in different places, re-entered upon the land. The plaintiff claims under a deed from Chapman made in 1880. He was in possession under this deed from about the time it was made until the defendant's entry, in 1887. This is expressly found. The finding is not unsupported by the evidence, and there is no sufficient specification attacking it. It is apparent that the defendant can have no greater right against the plaintiff than he has against Chapman. And, so far as the possession is concerned, he has no equity against Chapman, because he was in default under his contract without excuse. As was said in *Hannan v. McNickle*, ante, 271, (filed December 19, 1889,) which is similar in principle: "The performance of his contract is an essential feature of any equitable defense on his part."

Defendant relies, however, upon an extension of time. In 1879, being then in default, he asked Chapman for an extension, and the latter replied: "If you pay me in two years, all right; and, if you don't pay me in two years, that will settle it." There was no consideration for this verbal promise; and, assuming that it would be a waiver of delay, it was not a valid alteration of the written contract. Civil Code, §§ 1607, 1608.¹ Furthermore, the two years expired in 1881. Seven years elapsed before the commencement of the action; and the evidence does not show that defendant has paid, or offered to pay, anything further than was paid before he went to the islands. He does not even offer by his answer to pay what is due, but merely says that he "has been willing to perform, and has performed, and has offered to perform, each and all the covenants in said agreement on his part to be performed;" which was by no means the case. The conveyance to the plaintiff did not relieve the defendant from his obligation to comply with his contract. Whether such conveyance operated in equity as an assignment of the contract to plaintiff or not, it did not have the effect of giving the defendant the land without payment of what his contract required of him. He was bound to pay some one, and he has not paid any one, or offered to do so. This

¹Civil Code Cal. § 1607, provides: "The consideration of a contract must be lawful." Section 1608 provides: "If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void."

prevents him from having any right to equitable relief.

No demand was necessary to make the defendant's possession tortious. At the time of the entry complained of he had not been in possession under the contract for several years. The court finds that when he went to the Sandwich Islands he "abandoned" possession of the lots. We are not prepared to say that this finding is not sustained by the evidence. All that defendant says about it is that he "did not leave the lots vacant," and that he "rented the property for a year, when I went away, to J. R. Palmer." But, if we assume that Palmer went into possession, it does not appear how long he remained so. Waiving this, however, and assuming in favor of defendant that he did not "abandon" the possession, it sufficiently appears, as above stated, that plaintiff was in possession from the time of the deed under which he claims until the entry of defendant, in 1887. Under these circumstances it seems clear that, whatever may be the rule as to demand upon a vendee in possession under a contract of sale, it has no application to this cause.

A number of exceptions were taken during the trial, but no argument is made in support of any of them, and consequently they must be held to be waived. We therefore advise that the judgment and order appealed from be affirmed.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(83 Cal. 51)

RHORER et al. v. BILA et al. (No. 13,422.)

(*Supreme Court of California*. Jan. 31, 1890.)

VENDOR AND VENDEE—ACTION FOR PRICE—DEFECTS IN TITLE.

1. Vendees in possession of land are not discharged from paying the purchase price by the fact that a former tender was refused by the vendors; and it is immaterial whether or not the price was due at the time the tender was made.

2. The existence of a mortgage on the land in a smaller amount than the purchase price remaining unpaid, to which mortgage the vendees did not object when the vendors tendered a deed, and which has been released before trial, is no defense to an action for the purchase price.

Department 1. Appeal from superior court, Los Angeles county; WALTER S. VAN DYKE, Judge.

Action by George Rhorer and others against Augustin Bila and others to compel the payment of the purchase price of certain land, and, in case of defendants' failure so to do, to cancel an agreement of purchase under which defendants hold possession. There was a decree in plaintiffs' favor and defendants appeal.

Lee & Scott, for appellants. *J. M. Murphey*, for respondents.

PATERSON, J. On the 18th day of February, 1887, the plaintiffs entered into an agreement with the defendant Bila, by the terms

of which they agreed to sell, and he agreed to buy, the land in controversy, for the sum of \$3,375. One dollar of the purchase price was paid at the time of the execution of the agreement, and the balance (\$3,374) was to be paid "as soon as said second party shall receive the second payment on a certain contract made between Frank P. Firey, Charles French, and George Rhorer, parties of the first part, and Augustin Bila, party of the second part." On the 26th of May, 1887, the defendant Bila tendered to the plaintiffs the balance of the purchase price, and demanded a deed. Defendants allege in their counter-claim that the plaintiff Firey, at the time of the tender, "in bad faith refused and failed to accept said money, or any part thereof, or to execute or deliver said deed, or any deed of said land, either jointly with said plaintiff George Rhorer, or otherwise, and then and there in bad faith repudiated said contract, and denied that he was obligated in any manner thereby, * * * and that the said George Rhorer, at the time of said tender and demand, failed to execute or deliver said deed, or any deed of said land, to said Bila, either jointly with said Firey or otherwise, and continued so to fail to execute or deliver said deed until the month of June, 1888." This action was commenced September 13, 1888, to compel the defendants to pay plaintiffs the balance of the purchase price, and, in case they fail to do so, for a decree canceling the agreement under which the defendants claim, and awarding the possession of the premises to plaintiffs. It is alleged in the counter-claim of defendants that the defendant Bila took possession of the premises under said contract, and placed valuable and permanent improvements thereon, aggregating in value not less than \$300; that thereafter the defendant Bila entered into a contract with the defendants Mills and Arnold, whereby he agreed to sell all of the land and improvements to them for the sum of \$2,500, a portion of which price was paid; that on the 26th day of May, 1887, the defendants Mills and Arnold duly tendered to the plaintiffs the balance of the purchase money, and demanded that said plaintiffs execute and deliver to them a good and sufficient deed; that the plaintiffs refused in like manner as they had refused to accept the tender made by the defendant Bila; that plaintiffs knew the defendants Mills and Arnold had purchased from Bila, and, Bila being present, consented that plaintiffs might convey to them, (said Mills and Arnold;) that after making said tender, and on the same day, May 26, 1887, Bila conveyed to Mills and Arnold. It was admitted at the trial that the defendants had never paid the balance of the purchase price, or any part thereof; that on the 19th of April, 1888, the plaintiffs tendered to the defendants Mills and Arnold a deed purporting to convey in fee-simple the real estate described in the complaint, and demanded that they pay the balance of the purchase price; that the value of the rents, issues, and profits is equal to the value of the improvements made by the

defendant Bila; that on the 29th day of April, 1886, plaintiff Firey executed and delivered to the Pomona Valley Bank a mortgage upon a tract of land, including the land in controversy, for the sum of \$2,500, payable one year from said date, with interest at the rate of 1 per cent. a month, and that said mortgage was a valid lien upon the premises for the amount of the principal sum from its date until February 8, 1889, when it was released. At the trial the plaintiffs tendered a good and sufficient deed to the defendants, but the defendants refused to accept the same, and refused to pay the balance of the purchase price; giving as a reason that the plaintiffs had damaged them, as set out in their counter-claim. The defendants Mills and Arnold in their counter-claim aver that, by reason of the plaintiffs' failure to convey, they (said defendants) have been damaged in the sum of \$9,126. They allege that at the time of the tender to plaintiffs said real estate was of the value of at least \$12,500, but that on the 1st day of January, 1888, and subsequent thereto, said real estate was not, and is not now, worth more than the sum of \$3,374. They therefore pray for judgment against the plaintiffs for the sum of \$9,126. The plaintiffs have received but \$1 of the purchase price. The defendants not only refuse to pay the balance of the purchase price, but seek to recover from the plaintiffs the title to the land, and also the sum of \$9,126. Plaintiffs had judgment as prayed for.

By the terms of the agreement the balance of the purchase price (\$3,374) was to be paid "as soon as said second party shall receive the second payment on certain contract as made between Frank P. Firey, Chas. French, and George Rhorer, parties of the first part, and Augustin Bila, party of the second part;" and it is admitted that the second payment referred to had not been made at the time defendants tendered to plaintiffs the balance of the purchase price, (\$3,374,) and demanded a deed. Under the strict letter of the contract, therefore, the tender was made too soon to put the respondents in default. Appellants claim, however, that the words "as soon as said second party shall receive the second payment," should be construed to mean, "not later than the time of said second payment," which would authorize the defendants to pay the balance of the purchase price, and demand a deed at any time. But, whether this be true or not, we deem it immaterial for us to determine, in view of the fact that defendants took possession of the land under the contract, and continue to hold the same, and refuse to pay the balance of the purchase price. A purchaser cannot remain in possession of lands under a contract, and at the same time refuse to pay the purchase price. If the title fails, or the vendor refuses to convey, an action on the covenants of his deed or contract will give him all the relief to which he is entitled; but to allow him to hold possession, and at the same time defend against an action for the purchase price, would enable him to hold the land dis-

charged of the obligation under which he acquired it. The rejection of an offer to perform by one party to a contract excuses the other party from performance as a condition precedent. The latter cannot be held to be in default; but such rejection does not release him from his obligation to perform, so long as he insists upon the enforcement of the agreement for his own benefit. He cannot claim under the contract, and at the same time repudiate it. The law requires him to surrender the possession of the property, or prove an eviction therefrom, before permitting the defense of a failure of consideration, or a suit to recover the purchase price or damages. *Cooper v. Pena*, 21 Cal. 412; *Haynes v. White*, 55 Cal. 39; *Whittier v. Stege*, 61 Cal. 241; *Hicks v. Lovell*, 64 Cal. 20; *Gates v. McLean*, 70 Cal. 42, 11 Pac. Rep. 489; *Hannan v. McNickle*, ante, 271, (filed Dec. 19, 1889); *Kirtz v. Peck*, 113 N. Y. 231, 21 N. E. Rep. 130; *Abbott v. Allen*, 2 Johns. Ch. 519; *Wickham v. Evered*, 4 Madd. 53; *Younge v. Duncombe*, *Younge*, 275; *Tindal v. Cobham*, 2 Mylne & K. 385; *Sugd. Vend.* §§ 406, 407. "If a person be let into possession of land under a contract for its purchase, and no steps be taken by either party to enforce the agreement, it will be presumed that each is satisfied, and neither can insist on lapse of time as a bar to a suit for specific performance." *Wat. Spec. Perf.* § 463; *Scarlett v. Hunter*, 3 Jones, Eq. 84. So long as the purchaser retains possession, he waives all previous objections, whether of defect of title or delay in completing it, and is bound to accept title according to the terms of the contract, if offered while he still retains possession. *Thompson v. Dulles*, 5 Rich. Eq. 370. See, also, *Hale v. Wilkinson*, 21 Grat. 75; *Bellamy v. Ragsdale*, 14 B. Mon. 293. The mortgage for the sum of \$2,500 had not been paid off when Rhorer and Firey tendered the deed to the appellants, but the deed was not objected to on that ground, and the mortgage was in fact released before the trial of the action. Furthermore, the amount due on the mortgage being less than the balance of the purchase price, the defendants could have retained a sufficient sum to satisfy the mortgage debt. *Gates v. McLean*, supra. Upon the facts admitted at the trial, we think the court did not err in refusing to allow the evidence offered by defendants. Judgment and order affirmed.

We concur: FOX, J.; WORKS, J.

(82 Cal. 427)

WHITE v. WHITE. (No. 12,642.)

(Supreme Court of California. Jan. 2, 1890.)

DIVORCE—PROOF OF MARRIAGE—WITNESS—DEPOSITIONS—HARMLESS ERROR.

1. Plaintiff, in an action for divorce on the ground of adultery, went to live with defendant as his housekeeper, and within a week illicit intercourse was commenced between them, children were born to them, and plaintiff testified that, after the birth of the first child, defendant declared that "before God and man she was his wife under the laws of California;" but defendant

denied this. There was no formal marriage, but defendant sometimes called plaintiff his wife, and sometimes "madam," and introduced her in society as his wife. For about five years from the time they first lived together they were not reputed to be husband and wife in the community, but they removed to another community, and afterwards, for 20 years or more, they were uniformly reputed to be husband and wife. They cohabited together, and treated each other as man and wife. *Held*, that the facts were sufficient to prove a marriage by consent of the parties. *WORKS, J.*, dissenting.

2. Where the only evidence of cruelty pleaded in recrimination was the firing of a pistol by plaintiff behind defendant many years before they quit living together, judgment will not be reversed for want of a finding on that issue.

3. Where the court refuses to allow portions of a deposition of plaintiff, taken before the trial, to be read to plaintiff for the purpose of contradicting her statements on the trial, and afterwards the whole deposition is put in evidence, an objection that defendant was not allowed to contradict plaintiff in such way cannot be sustained, as the contradictory statements were all placed before the court when the deposition was admitted.

4. The allowance of leading questions is no cause for reversal, unless the court manifestly abuses its discretion in allowing them.

5. Where the court tries a case, judgment will not be reversed for the admission of irrelevant evidence, unless it appears that the court relied on it.

In bank. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

Jarboe, Harrison & Goodfellow and *George A. Nourse*, for appellant. *T. I. Bergin*, for respondent.

THORNTON, J. This is an action for a divorce *a vinculo* on the ground of adultery, brought by plaintiff, Jane White, against the defendant, Lorenzo E. White. Judgment was recovered by plaintiff. Defendant moved for a new trial. This motion was denied, and defendant brings this appeal from the judgment and order. The defendant denied that he was ever married to the plaintiff. He claims that their relations during the whole period of the cohabitation were those of man and mistress. On this issue the court found against him. The court found the following facts: The plaintiff, Jane White, arrived in this state in the month of May, 1850. She was then a young widow of 20 or 21 years of age, with an infant of tender age. In the month of July, 1850, the defendant, at the city of San Francisco, engaged the plaintiff to act as housekeeper for him on the rancho San Geronimo, situate in the county of Marin, at a compensation of \$100 per month. In pursuance of this engagement, plaintiff went to the place of defendant, the San Geronimo ranch, to act as housekeeper, and did there act as housekeeper for defendant. Shortly after the arrival of plaintiff at the house of defendant on the ranch, defendant had illicit intercourse with plaintiff; and thereafter, in the year 1851, a child was born, the fruit of such intercourse. About the year 1853 another child was born to the parties. Between the birth of the first child and the birth of the second, the plaintiff and defendant mutually agreed to marry, and did marry, each other, and did thereafter live and cohabit together as husband and wife, and continued to do so

from that time continuously up to a short time before this action was begun. The marriage of the parties was not performed by any clergyman or minister of the law, but was assented to and agreed upon and entered into by and between the parties themselves, and from that time to the commencement of this action the parties have ever treated and held each other out to the community, their friends and acquaintances, as husband and wife, and they have always been accepted, received, and treated as such by their friends and acquaintances and the community. Other children than those mentioned were born to the parties. At the time this suit was begun there were two children living, the fruits of the intercourse between the parties. One of these was a daughter, named Nellie, born in March, 1856, and the other a son, named William, born in January, 1859.

In regard to the issue of the marriage, it is clear that there was never any promise to marry made between the parties, either by present words, (*per verba de presenti*), or by words in the future, (*per verba de futuro*). But it is urged on behalf of plaintiff that the evidence shows cohabitation and repute sufficient to establish a marriage. Such seems to have been the view of the case taken by the court below. That a marriage may be inferred from cohabitation seems to be the settled law of most countries. The law of Scotland is set forth, and the cases on this subject are collected and commented on, by a learned and distinguished writer, Patrick Fraser, LL.D., in his able work on the law of Scotland regarding the relation of husband and wife. See chapter 8 of Fraser's "Husband and Wife" of the work above referred to. The law is thus stated in the initial sentence of the chapter just referred to: "If a man and a woman cohabit together as husband and wife, and are held and reputed by their neighbors and friends as married persons, they are presumed to have entered into marriage." The learned author adds to the above, by way of explanation, that "cohabitation and repute do not make marriage. They are merely items of evidence from which it may be inferred that a marriage had been entered into." The facts in evidence must be such as to justify the inference that matrimonial consent had been interchanged between the parties, for the matrimonial contract is formed by consent, and consent alone. See 1 Fras. Husb. & Wife, 399. Lord CRANWORTH, in his judgment in the case of *Campbell v. Campbell*, (a Scotch appeal case,) L. R. 1 H. L. Sc. 200, 201, thus expresses himself on this subject: "Marriage can only exist as the result of mutual agreement. The conduct of the parties, and of their friends and neighbors, in other words, habite and repute, may afford strong, and in Scotland, attending to the laws of marriage there existing, unanswerable, evidence that at some unascertained time a mutual agreement to marry was entered into by the parties passing as man and wife. I cannot, however, think it correct to say that habite and repute in any

case make the marriage; * * * but I prefer to say that habite and repute afford, by the law of Scotland, as, indeed, of all countries, evidence of marriage always strong, and in Scotland, unless met by counter-evidence, generally conclusive." Lord WESTBURY observes, in the same case, as follows: "Exception may possibly be taken to some few words occurring in one of the judgments [referring to a judgment in the court below] which represents cohabitation with habit and repute as a mode of contracting marriage. Perhaps it may not be strictly correct to say that it is a mode of contracting marriage. It is rather a mode of making manifest to the world that tacit consent which the law will infer to have been already interchanged. If I were to express what I collect from the different opinions on the subject, I should rather be inclined to express the rule in the following language: That cohabitation as husband and wife is a manifestation of the parties having consented to contract that relation *inter se*. It is holding forth to the world, by the manner of daily life, by conduct, demeanor, and habit, that the man and woman who live together have agreed to take each other in marriage, and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live, by their relatives, neighbors, friends, and acquaintances, to these representations, and this continued conduct, then habit and repute arise, and attend upon the cohabitation. The parties are holden and reputed to be husband and wife; and the law of Scotland accepts this combination of circumstances as evidence that consent to marry has been lawfully interchanged. Probably, therefore, in the correct expression of the law, it would be more proper to say that cohabitation, with habit and repute, is a mode of proving the fact of marriage; rather, a mode of contracting marriage." Id. 211. To the same effect is the opinion of Lord MONCREIFF in *Lapsley v. Grierson*, 8 Ct. Sess. Cas. (2d Series,) 61, and in *Lowrie v. Mercer*, 2 Ct. Sess. (2d Series,) 966. The same rule is recognized by the law of England. See *Goodman v. Goodman*, 28 Law J. Ch. 745; *Plunkett v. Sharpe*, 1 Lee. Ecc. 441; *Bond v. Bond*, 2 Lee, Ecc. 45; *Diddear v. Faucit*, 3 Phillim. Ecc. 580; *Hervey v. Hervey*, 2 W. Bl. 877. See *Starkie, Ev.* (4th Ed.) 45, where the doctrine is explained. The observations of *Starkie* are quoted in 1 Fras. Husb. & Wife, 397. See, also, remarks of Lord CRANWORTH in L. R. 1 H. L. Sc. 199, 200. Fraser states that the rule is acknowledged to a limited extent in Code Civil of France, in relation to the legitimacy of children. Fras. Husb. & Wife, 397, 398.

The proof of marriage by cohabitation and repute has been recognized in many cases in the United States; as in *Fenton v. Reed*, 4 Johns. 52; *Clayton v. Wardell*, 4 N. Y. 230; *Jones v. Hunter*, 2 La. Ann. 254; *Barnum v. Barnum*, 42 Md. 251; *Cargile v. Wood*, 63 Mo. 501; *Foster v. Hawley*, 8 Hun, 68; *Bickling's Appeal*, 2 Brewst. 202; *Purcell v. Pur-*

cell, 4 Hen. & M. 512; Brinkley v. Brinkley, 50 N. Y. 197, 198; Hynes v. McDermott, 10 Daly, 428, 82 N. Y. 46, 91 N. Y. 451; Badger v. Badger, 88 N. Y. 554; Van Tuyl v. Van Tuyl, 57 Barb. 237; Rose v. Clark, 8 Paige, 580-582. That a marriage in this state may be established *per verba in presenti*, or by a contract *per verba de futuro, cum subsequente copula*, was recognized in Estate of McCausland, 52 Cal. 577. The contract characterized as entered into *per verba de futuro* is only evidence of marriage as proving the requisite matrimonial consent. Such consent is essential to every marriage, (1 Fras. Husb. & Wife, 415;) and, prior to the adoption of the Civil Code in this state, consent alone constituted marriage. The law at that time was correctly expressed by the Latin words, "*consensus non concubitus facit nuptias*." As cohabitation and repute are only a mode of proving the required consent, and thus establishing marriage, there is no reason why the rules above stated regarding cohabitation and repute did not obtain in this state during the greater part of the period of the cohabitation of the parties to this action.

The evidence in this case plainly shows, and it is so found, that the intercourse between the parties was in its beginning illicit and meretricious, and it is contended (1) that it is presumed to continue illicit and meretricious until such presumption is overcome by distinct proof of marriage; and (2) that mere continued cohabitation and reputation of marriage create no presumption of a subsequent marriage in such case. With regard to this contention, we think it may be considered as sound and settled law that as regards the cohabitation of a man and woman, not shown to have been in its origin illicit, the presumption is that it is lawful. Per Lord ELDON in *Cunningham v. Cunningham*, 2 Dow, 482; per Lord REDESDALE in same case. The law always presumes, in the absence of proof to the contrary, that the conduct of men is lawful, and in accordance with the rules of morality. *Lapsley v. Grierson*, 1 H. L. Cas. 498. But when the intercourse was illicit from the beginning, in the absence of evidence from which a change to the matrimonial relation may be inferred, it is presumed to continue. The state of illicit intercourse is presumed to continue until the evidence shows that the intercourse of the parties has become matrimonial. The above, we think, is the meaning and extent of the decision in the case of *Cunningham v. Cunningham*, (known as the "Balbougie Case,") above cited. No greater change than that above indicated is required. There are some expressions in opinions in the cases of *Cunningham v. Cunningham* and *Lapsley v. Grierson* which seem to go further. But on a particular examination of the above cases it is manifest that the learned court that decided those cases did not intend to hold that in the case where the intercourse in its inception was illicit, that that circumstance prevented the establishment of the marriage *status* by the subsequent conduct of the par-

ties, showing a general, undivided, and uniform habit and repute that they had interchanged the requisite matrimonial consent. In each of these cases the whole facts as to the lives and conduct of the parties were examined to see if they did not prove a marriage by habit and repute, and it was held insufficient because the repute was not general and uniform, but singular and divided. The opinions in the cases above referred to were examined in *Campbell v. Campbell*, (known as the "Breadalbane Case,") 1 L. R. 1 H. L. Sc. 182, and the language of the opinions in them explained; and the conclusion there reached was that, though the connection was in its beginning illicit, yet the subsequent conduct of the parties might be such as to give satisfactory proof, by habit and repute, that the married *status* had been assumed. Three eminent law lords discussed the question, and reached the conclusion above stated. In the Breadalbane Case the controversy arose as to the legitimacy of a son of James Campbell, who eloped with the wife of one Ludlow in 1780 or 1781. Ludlow died in 1784. Up to that time no marriage could take place. The court held that the evidence proved that after that time, and during the life of James Campbell, the habit and repute was all uniform and undivided, and established a marriage between Campbell and the former wife of Ludlow.

The change must be such as is above pointed out. This must be so when the connection in its origin is illicit, and there is no impediment to the marriage. There was none in this case, nor in the Balbougie Case. In the case before us, as in the Balbougie, there was merely illicit cohabitation. Surely, there must be a change from mere illicit cohabitation, or a marriage cannot be said to be proved, since illicit cohabitation cannot establish a marriage. There must be a change operated by a cohabitation which the law regards as illicit; and such change may be operated by cohabitation and reputation. In the case of *Lapsley v. Grierson*, and in the Breadalbane Case, where the connection began, one of the parties, the woman, had a husband living. In the Breadalbane Case, the marriage was not contended for during the life-time of Ludlow, the husband. He died in 1784, and the parties continued to cohabit from that time until the death of James Campbell, in 1806; and during this period, from the death of Ludlow to the death of Campbell, and undoubtedly from 1798 to 1806, the woman, Eliza Marie Blanchard, was received and treated as his wife by his family and friends and all their acquaintances. There was evidence in the Breadalbane Case tending to show that there had been a formal marriage celebrated in 1781 or 1782, and some evidence that Eliza Marie Blanchard was recognized by Campbell's family as his wife; and it was in regard to this it was argued that there was a change. It was said that Campbell was deceiving his family and friends by passing the woman off as being his wife, and leading his relatives and friends

to believe that she was his wife. It was said that this system of deception continued during the entire period of the cohabitation of Campbell with the woman; and on this it was argued that, as there was no change in this system of deception, there was no evidence which operated a change, and showed cohabitation and repute, and therefore no marriage was proven. It was in thus regarding the case, or in regarding the conduct of the parties as the same, whether before or after the death of Ludlow, that it is stated in the head-note that the court held that the change in the character of the connection from adulterous to matrimonial need not be indicated by any public act, or by any observable change in the outward demonstration. It cannot be seen how such a proposition can be true, unless the public acts and outward demonstrations were the same before as after the removal of the impediment to the marriage by the death of Ludlow. If the conduct of the parties, and their treatment and reception by their friends and relatives, had been such before the death of Ludlow as would, but for Ludlow's being alive, have shown a sufficient habit and repute to evidence marriage, the continuance without change of the same conduct, reception, and treatment after Ludlow had died might also prove a marriage between the parties. In this view, what is stated in the head-note is correct, and only in this view; for, if the conduct and treatment and reception of the parties before the death of Ludlow had not shown cohabitation and repute, then, necessarily, after Ludlow's death, there must have been a change in the conduct, treatment, and reception of the parties to have evidenced a cohabitation and repute which would establish a marriage. We do not think that the court laid down the proposition announced in the head-note above referred to; for the opinions of the judges do show that there were public acts and outward demonstrations of parties from which habit and repute could have been inferred. This is plain from the lord chancellor's opinion; for after saying that, taking the rule to be settled by the case of *Cunningham v. Cunningham* that an illicit connection at the beginning can only be changed in character by some undoubted and open act of the parties, he proceeds to consider whether the circumstances of the case before him were not sufficient to establish a marriage between James Campbell and Eliza Marie Blanchard, and concludes that they did. To the same effect is the argument of the other learned judges, Lords CRANWORTH and WESTBURY. That they do find in the evidence uncontradicted and open acts of the parties which show cohabitation and repute, and a marriage will be plainly seen on a perusal of the discussions of the evidence in the case by the learned law lords. It cannot be perceived how repute can be established in such a case, except by the open, undisguised, and undoubted acts of the parties which are visible to outsiders. As reputation is no more than hearsay derived from those who had means

of knowing the fact. (1 Starkie, Ev. 4th Ed. p. 40,) how can the means of knowledge be derived from anything other than the acts of the parties, and how can anything be known by others from the acts of the parties, unless they are open and visible?

There are many cases in which it is held that, when the connection between the parties is illicit, the presumption will be that the relation continues as it began. *Floyd v. Calvert*, 53 Miss. 40, 46; *Rundle v. Pegram*, 49 Miss. 756; *Badger v. Badger*, 88 N. Y. 546; *Barnum v. Barnum*, 42 Md. 297; *Foster v. Hawley*, 8 Hun, 68; per Lord CAMPBELL in *Queen v. Millis*, 10 Clark & F. 749; *Hunt's Appeal*, 86 Pa. St. 294; *Physick's Estate*, 2 Brewst. 179; *Williams v. Williams*, 46 Wis. 478, 1 N. W. Rep. 98; *Dysart Peerage Case*, L. R. 6 App. Cas. 539, per Lord WATSON. It is a disputed question whether the presumption here referred to is one of law or fact. The decisions leave it in doubt. In *Cargile v. Wood*, 63 Mo. 511-514, an instruction in which it was stated that the presumption was one of law was approved. In *State v. Worthingham*, 23 Minn. 536, it is held not to be a presumption of law, but one of fact. We find but one case (*Cargile v. Wood*, supra) where it is held distinctly a presumption of law. Bishop, in his work on *Marriage and Divorce*, says it is a presumption of fact. See 1 Bish. Mar. & Div. §§ 506, 507a, 509, 513. Certainly a condition of things once existing is presumed to continue. *Eames v. Eames*, 41 N. H. 177. The distinction between a presumption of law and one of fact, or an inference from facts, (Code Civil Proc. § 1958) is sometimes very thin; but, treating the question arising on the testimony here as one of fact, it is both logical and just to hold that a connection, illicit in its origin, will be presumed to continue to be so until some change is established by evidence. Whatever be the character of the presumption, "it ceases to a contrary probation." In fact, it is not necessary to decide here whether the presumption is one of law or of fact, for in either case it is rebuttable. We think it may be safely held that the law will presume intercourse from cohabitation, and, where the illicit cohabitation continues, that the law will presume illicit intercourse. It seems to be well settled that the repute which, with cohabitation, will be proof of marriage must be uniform and general, not divided and singular. *Cunningham v. Cunningham*, 2 Dow, 482; *Jones v. Hunter*, 2 La. Ann. 254; *Hamilton v. Hamilton*, 1 Bell, App. Cas. 736, 9 Clark & F. 327; *Com. v. Stump*, 53 Pa. St. 132; *Barnum v. Barnum*, 42 Md. 297. If repute lacks uniformity and is divided, then such repute cannot prove a marriage. Let us look to the evidence here on this matter of repute. It should be stated here that a change from illicit to licit or matrimonial relations may occur, and be satisfactorily established, although the precise time or occasion cannot be clearly ascertained. *Badger v. Badger*, 88 N. Y. 554; *Caujolle v. Ferrie*, 23 N. Y.

90. Such seems to have been the opinion of the judges who decided the Breadalbane Case. We proceed to the consideration of the evidence of this case.

The testimony shows that the connection between the plaintiff and defendant began in 1850. The parties were then living on the San Geronimo ranch, in Marin county. The defendant came from that place to San Francisco in July, 1850, where defendant met plaintiff, and, after an acquaintance of not more than a week, he engaged her to go and live with him on the ranch as housekeeper. She was a young widow, with one child, and had come to San Francisco from Australia. The defendant was about the same age. She went over to the ranch with him in the month mentioned above. The house occupied by the parties there had two rooms, one of which was used as a kitchen. The defendant slept in the kitchen, and the other room was given up to plaintiff. The illicit intercourse commenced within a week after plaintiff reached the ranch, and continued for a period which cannot be definitely designated. In 1882 the defendant quit living with plaintiff. In 1851 a child, the fruit of the intercourse of the parties, was born. Another was born in 1853. A third child was born at Corte Madera, in Marin county, and a fourth at Petaluma in January, 1859. The plaintiff testifies that she was his wife from the beginning; that after the birth of the first child defendant said to her that before God and man she was his wife, under the laws of California. Defendant denies that he ever said so. There was never any formal ceremonial marriage between them. In a deposition, which appears in the record, the following question was put to her by counsel for defendant: "Then, what I understand you to say is that the way that you became his wife was by sleeping with him and being called wife by him in the presence of others?" to which she answered: "Yes, sir." She subsequently added to this: "In society, what little we go, he has always called me his wife." She states that White introduced her to his acquaintances as his wife. Defendant admits that he did at times, after the birth of his daughter Nellie, in 1856, introduce her as his wife. That he did so when he found himself in a position that he had to say something. When she was with him, and he had to say something for the protection of his children, he had introduced her as his wife. That he sought no opportunity to do so, and had not gone into society with her. The plaintiff states that he introduced her to his father and mother as his wife. Defendant testified that he made them acquainted some way,—he could not tell how; that he treated plaintiff well; that they were living together, and he left his parents to infer the relation between them. Mrs. B. F. White, mother of defendant, testified on this point. She and her husband (father of defendant) came to this state from New York at defendant's expense. They lived in defendant's home for some months when he kept an hotel

at Albion, in Mendocino county, arriving there in 1866. A daughter came with them. The mother testifies that the defendant introduced plaintiff as "the madam," and that she supposed that she was his wife, and treated her as his wife. The daughter (defendant's sister) testifies substantially to the same effect. She does not remember who introduced her to the plaintiff, or how she was introduced. She supposed plaintiff was his wife; that they lived together as husband and wife; and she further states that the plaintiff was received and treated by her father and mother and her relatives as the wife of defendant. She further states that she did not remember that she ever heard defendant address plaintiff as his wife. He addressed her as "Jane" or "Madam." This evidence shows that he sometimes called her "wife." On the point whether the parties were reputed to be husband and wife during the period of their connection, the evidence in regard to the period extending from 1850 to 1855 or 1856 shows a divided repute; the evidence that plaintiff was the mistress of defendant, and not his wife, greatly preponderating. This appears from the testimony of Dickenson, Taylor, Curran, Clingan, and Moulthrop. The evidences of the witnesses above mentioned is all one way as to the repute during the period just mentioned. The only contrary evidence, which is of small consequence, comes from the witness Clingan, that the women around Corte Madera called her Mrs. White. There was no other repute than the above during the time they lived in Marin county, from which they removed to Mendocino county in the spring of 1858, at which time they went to Long Ridge, in that county. From this place they removed to Albion, in the same county, in September or October, 1861, where they remained until October, 1868, when, in the month just named, they came to San Francisco, and have resided there together until August, 1882, when the defendant quit living with plaintiff. After the parties removed to Long Ridge, in the spring of 1868, we hear nothing of any reputation that they were living together as man and mistress.

We rarely collate the evidence in regard to its sufficiency to justify the decision, but we propose to do so in this case, by giving the substance of the testimony of each witness bearing on the point. A. W. McPherson knew the parties as Mr. and Mrs. White from 1861. They addressed each other as Mr. and Mrs. White. They were introduced to him as Mr. and Mrs. White. H. H. Hundley has known the parties since 1866. They were commonly known as Mr. and Mrs. White. Has known the children during the same period by the names William White and Nellie White. Patrick Cleary has known the parties since 1862. Recollects one time they visited his family. May have visited his family other times. When they made this visit he lived in the city, and they lived at Albion. He visited them as Mr. and Mrs. White. They behaved towards each other as

any other man and wife behaved. Never heard anything to the contrary, except a rumor about two years ago. (This would be about the time of the separation of the parties, which was in August, 1882. The witness gave his evidence at the trial, which took place in December, 1884.) Thomas Pollard has known defendant about 20 years, and plaintiff 14 or 15 years. They are known as Mr. and Mrs. White. Have known the children about 14 years. They go by the name of White. He was asked to state to the court how the plaintiff and defendant have been commonly reputed,—as husband and wife, or otherwise; to which his reply was: "I never knew anything to the contrary till recently." This witness stated that he lived with his family in this city, right across from White; that White never took plaintiff to visit his (witness') family at his house; that he has "no direct knowledge of White's ever taking her into any company to visit the neighbors, or anything of the sort." George M. Smith stated that he had known White since 1861. Had known the plaintiff since 1862 or 1863. Knew them as Mr. and Mrs. White. They had two children. He knew them by the names Nellie and Willie White. Has heard defendant address plaintiff as "Madam." Could not swear that he had heard White call her "wife" or "Mrs. White" in speaking to or of her. The next witness was Mrs. Smith, the wife of the former witness. She met the plaintiff about 20 years ago (this testimony was given on the trial, in December, 1884,) and Mr. White about 22 or 23 years ago. She met them at Albion, in Mendocino county. She lived near them. Knew the children Nellie and Willie. Sometimes she had seen plaintiff and defendant half a dozen times a day,—sometimes more; sometimes less. So far as she knew, they were known at Albion as Mr. and Mrs. White. She had heard the defendant call the plaintiff "the madam," "my wife," and "Jane." She was not very sure of any particular instance when she heard defendant call plaintiff his wife. She was very positive she had heard White call plaintiff his wife, and more than once, and this in addressing her. The next witness is Mrs. Helen M. Kimball, who was the sister of defendant. Has known the plaintiff since 1866. Became acquainted with her at her brother's (White's) house, in Albion, when he was keeping the hotel there. She was introduced to her. Cannot tell how she was introduced to her. Was introduced by her brother. He usually addressed her as "Jane," and in speaking of her he called her "Madam;" and, in speaking to the children, "your mother." She does not remember that her brother introduced plaintiff to her as his wife. Does not remember that he told her she was his wife. Her understanding was that she supposed she (plaintiff) was his wife. They lived as husband and wife. She and her father and mother lived in the house with them 8 months. She testifies further that plaintiff was received and treated by her father and mother (father and mother of de-

fendant also) and their relatives as the wife of defendant. She does not remember hearing her brother speak of plaintiff as Mrs. White. She thought it a little peculiar that he addressed her as "Jane" or "Madam." She does not know that she spoke of it while living at the hotel. While they lived there they regarded her as White's wife. Mrs. W. L. Jenny testified that she had known the parties 19 or 20 years. She was introduced to plaintiff by a lady named Cunningham. Mr. White was not present. White never introduced plaintiff to her. He always called her "the madam." Knew the children. They went by the names of Nellie White and Willie White. She had not been to their house for 20 years. Before that, used to call there once in a while. Have taken dinner there a good many times. Mr. White was present. The witness was a married woman. She always thought the parties acted towards each other as husband and wife. She never heard him call her "wife." The children addressed Mr. White and the plaintiff as their father and mother. George W. Le Mont had known the parties some 10 or 12 or 14 years. Had frequently taken lunch at White's house. He always judged from their conversation that they were man and wife. He and his wife had visited their house together. They always appeared like a family living in harmony. Miss Annie Manning had known the parties about 4 years. She thinks they acted towards each other as husband and wife. They acted towards their children as a father and mother should. Jerome B. Ford became acquainted with defendant at Albion some time between 1855 and 1865. Was at the hotel in Albion frequently. Had never been introduced to Mrs. White, and never spoke to her. They were said to be then Mr. and Mrs. White,—L. E. White and wife. Had known the parties 4 years next March. Mr. White used to speak to plaintiff as any man would to his wife. Could not say what name he called her. B. H. Madison testified that he had known Mr. White 10 or 12 years. Had visited the house several times on business, and thinks he once made a social call with his wife and eldest daughter. Both White and plaintiff were present. He called her Mrs. White in the presence of defendant, and of his wife and family. James Brett had heard defendant speak of plaintiff as his wife. His (witness') wife addressed plaintiff in presence of defendant as his wife. James Kenny had known the parties for 25 or 26 years. Had known them at Cuffey's Cove. He believed they had lived on a ranch there for 5 or 6 years as Mr. and Mrs. White. He was on friendly and social terms with them during their residence at Cuffey's Cove. The reputation of their relation while they resided there was that of man and wife, so far as he ever heard. He first called at defendant's house. Then Mr. White introduced her; "but not sure defendant was accustomed to speak to me and to others in my presence of plaintiff as Mrs. White. If I remember right, defendant introduced me to plaintiff

as his wife;" but he has no distinct recollection of the introducing. While the parties lived at Cuffey's Cove, heard a rumor that they were not married. Eugene Brown had known defendant a little over 20 years, the plaintiff a little less, while they resided in Mendocino county. He knew the reputation in the community in which the parties lived of the relation they bore to each other since he first knew them, and up to the time he gave his testimony. The reputation was that they lived together as married people in Mendocino county, and had never heard anything to the contrary until this divorce case came up. He did not think he had confounded his impression of the facts with public reputation thereof. Heard her called his wife once or twice in Mendocino county. Had heard her called Mrs. White frequently, but do not distinctly remember of hearing her called Mrs. White at the Albion. He could not remember who of the people at the Albion he had heard say that plaintiff and defendant were husband and wife. Mark D. Gray testified that he saw plaintiff at the Albion once in 1877. Defendant introduced plaintiff as "the madam."

There is evidence here, at least since 1861, of cohabitation and repute which tends to show a marriage between the parties. Such cohabitation and repute "is a mode," as said by Lord Westbury in *Campbell v. Campbell*, supra, "of making manifest to the world that tacit consent which the law will infer to have been already interchanged." L. R. 1 H. L. Sc. 211. The repute, which was nearly all one way prior to 1858, afterwards underwent a change. We think the evidence tends to show that the parties had agreed to stand in the relation of husband and wife. The defendant treated the plaintiff as his wife. If he did not in so many words formally introduce the plaintiff to his father and mother and sister as his wife, his conduct convinced them that she was his wife; and, according to the testimony of the sister, (Mrs. Kimball,) she and the father and mother of defendant received plaintiff and treated her as defendant's wife. They did not go much into society, but in the contracted circle into which they went they were regarded and treated as husband and wife. This treatment was induced by the conduct of defendant and plaintiff. We do not think that the law requires the formal introduction by the husband of the woman as his wife to each member of the social circle into which they go, but that his conduct should justify her reception in such circle as his wife. The defendant's styling the plaintiff "the madam," might well induce persons to whom he so introduced her, or to whom he thus spoke of her, to believe that she was his wife. He admits that he did introduce her as his wife, and this is evidence that he sometimes spoke of her as his wife. He explains the introduction of her as his wife as a mode of shielding his children, but such mental reservation cannot be considered of much weight. The credit to be given to such reservation, and the weight

and value of the testimony, are matters for the consideration and determination of the court below. That tribunal weighed the testimony, and found a marriage; and there is not such a lack of testimony here as will authorize this court to say that the evidence was insufficient to justify the conclusion of the trial court.

But it is urged that, inasmuch as the divorce is sought here on the ground of adultery, that a marriage cannot be proved by cohabitation and repute; and, to sustain this, two cases are referred to, decided in this court: *Case v. Case*, 17 Cal. 600, and *People v. Anderson*, 26 Cal. 133. In the latter case, which was an indictment for murder, a witness was called for the people, whose competency was challenged by the defendant on the ground that she was his wife, and an attempt was made to show that such was the relation of the witness to the defendant by cohabitation and repute. The court, per SANBURNSON, C. J., said that the general rule is that such evidence was admissible, (citing several authorities to sustain this proposition,) and then adds: "Actions of crim. con., divorce, indictments for bigamy, and like cases, where the marriage is the foundation of the claim to be enforced, or the crime to be punished, are exceptions to this rule." 26 Cal. 134. *Case v. Case* was an action for divorce on the ground of adultery. The only evidence of marriage between the parties to the action was that of cohabitation and reputation. It appeared that defendant had, after this cohabitation, married another person. The evidence of cohabitation and reputation was objected to, and this court held it inadmissible. The court, per COPE, J., said: "We think that, under the circumstances, an actual marriage should have been proved. The general rule that in actions of this nature the marriage may be inferred from the cohabitation of the parties, we do not understand to be applicable. We cannot indulge this inference without presuming that the defendant has been guilty of the crime of bigamy; and the fact that it involves such a presumption is sufficient to repel it. In the absence of criminative proof, it is never to be supposed, as a matter of legal presumption, that a person has violated the criminal law; and the presumption in favor of innocence, says a learned writer, is not confined to proceedings instituted with a view of punishing the supposed offense, but holds in all civil suits where it comes collaterally in question." The learned justice then proceeds to quote two extracts from *Bishop on Marriage and Divorce*, and refers to *Rex v. Twynning*, 2 Barn. & Ald. 386, and *Clayton v. Wardell*, 4 N. Y. 230. The cases cited sustain the decision of the court in *Case v. Case*. But it will be observed that in both cases there had been an actual marriage, by which, if there was a prior actual marriage, the party would have been guilty of a violation of the criminal law from having committed the offense of bigamy. *Case v. Case* and the two cases go no further than what is just above point-

ed out, and they proceed on the ground that where a presumption of marriage is met by the presumption of innocence, which the defendant, on his trial for bigamy, has a right to make, the weaker presumption gives way to the stronger, which is the presumption of innocence. This question is considered and passed on in a criminal action in *People v. Feilen*, 58 Cal. 218, and is thoroughly discussed in *Jones v. Jones*, 45 Md. 157, 158, 48 Md. 397, 398, et seq. In every case above referred to, the strife was between two marriages; the antecedent marriage being one attempted to be made out by the presumption or inference from cohabitation and repute, and the other an actual marriage. See *Taylor v. Taylor*, 1 Lee, Ecc. 571, 5 Eng. Ecc. R. 454; *King v. Inhabitants of Twynning*, 2 Barn. & Ald. 386; *Poultney v. Fairhaven*, Brayt. 185; *Senser v. Bower*, 1 Pen. & W. 450; *Myatt v. Myatt*, 44 Ill. 473; *State v. Holdskins*, 19 Me. 158, 159, etc.

The presumption of innocence will only arise when there is evidence brought to show that a party has been guilty of a penal offense; and this, we think, is the meaning of the portions of the text of *Best on Presumptive Evidence*, (page 64,) and *Bishop on Marriage and Divorce*, (sections 324, 325,) referred to in *Case v. Case*. The language in the work on *Presumptive Evidence* denotes that a violation of the criminal law is referred to. The author says that the presumption of innocence is not confined to proceedings for punishing the supposed offense, but holds in all civil suits where it comes collaterally in question. What can it refer to but to the offense which is punishable? It is evident that *Bishop*, in the extract made in the opinion, (17 Cal. pp. 600, 601,) refers to adultery as an offense against the public law. He speaks of the benign influence of the presumption of innocence, "in order to prevent the suspicion that an offense has been committed." We cannot find this section (325) in the last edition of *Bishop on Marriage and Divorce*. In section 442 (volume 1) *Bishop* states the rule thus: "The marriage has been required to be proved by evidence other than of cohabitation and repute in actions for criminal conversation, and in indictments for polygamy, for adultery, for incest, and for loose and lascivious cohabitation," citing cases which sustain this as to adultery. It will be remarked that he confined this rule to indictments for adultery. This could only be so where adultery was an indictable offense. Now, we have no statute, and never have had one, in this state, making mere adultery a penal offense. It was not a penal offense at common law. 4 Bl. Comm. 65. The statute in this state makes the living in open and notorious cohabitation and adultery an offense. See St. 1871-72, p. 380; *People v. Gates*, 46 Cal. 52. Section 123 of the act concerning crimes and punishments only refers to adultery between persons living within the degrees of consanguinity within which marriages are declared by law to be incestuous and void.

We think that the weight of authority shows the rule to be that evidence of cohabitation and repute is admissible to show a marriage in all cases where there is no question of a public offense involved. The statement of the rule in *People v. Anderson*, supra, as regards actions for divorce, is a mere *dictum*, outside of the case, and is not sustained by the decided cases or by the law. There are cases which tend to show that such evidence is admissible in a civil action, when it proves the commission of a public offense. *Archer v. Haithcock*, 6 Jones, (N. C.) 421, 422, 423; *Sneed v. Ewing*, 5 J. J. Marsh. 464, 491. In *Jewell v. Jewell*, 1 How. 224, the evidence seems to have been admitted by the lower court without objection, and the point was not distinctly made in the supreme court. In the North Carolina case it is said that the only exceptions to the rule are an indictment for bigamy and an action for criminal conversation. The court expressed the opinion that what is competent evidence in one case ought to be so in another. In this case the evidence was admitted in an action of ejectment to defeat rights under a second marriage, though the second marriage was formally solemnized and proved by direct evidence. *GARDINER, J.*, in a dissenting opinion in *Clayton v. Wardell*, supra, expressed the opinion that such evidence should be held admissible in all cases. He said the distinction between civil actions and criminal or *quasi* criminal proceedings was established by Lord MANSFIELD, and has been adopted without question or investigation, apparently. We think such evidence was admissible here, and that nothing in *Case v. Case* is adverse to it. The point was not decided in *People v. Anderson*. It was not involved in the case, and we are convinced that the *dictum* there pronounced is not sustained by authority or law.

It appears that a deposition of the plaintiff had been taken herein previous to the trial and returned to the court below. During the cross-examination of the plaintiff, defendant's counsel, with a view of showing contradictory statements made by her, read to her from this deposition several questions and answers, and inquired of the witness "if that was correct;" "Is that what you said then?" "Is that true?" An objection was made to this mode of cross-examination. The court sustained the objection, and the defendant excepted. The court, no doubt, would have allowed the defendant to put in such portions of the deposition as he might have selected to discredit the witness. The defendant certainly has a right to show the contradictory statements. To do this, as the witness was a party to the action, it was not necessary to call her attention to the statements formerly made, inconsistent with her statements made on her then examination. Her statements appearing in the deposition were admissions, and might have been offered as such. The mode of cross-examination was objectionable. It consumed time in doing what was utterly useless in asking

the questions as above stated. The court has the power, and should have it, to control the mode of examination of a witness, provided it does not trench on the rights of a party. The defendant might have put in portions of the deposition to show the contradictory statements, and the court would have allowed the contradictory statements, and the court would have allowed the plaintiff to put in the remaining portions. The deposition was subsequently offered and admitted. The statements which the defendant desired to get before the court did thus get before it. In this state of the case, conceding that the court erred in its ruling, putting a stop to defendant's mode of cross-examination, the error was rendered harmless to the defendant by placing the deposition before the court as evidence; and, as no injury was done by defendant, there can be no reversal for such ruling.

It is objected that the plaintiff's counsel was permitted to ask of the plaintiff, on her re-examination, a question admitted by the court to be leading. The allowance of leading questions, it is a well-settled rule in this state, is in the discretion of the trial court, and there should be no reversal for such allowances, unless there is a manifest abuse of this discretion. As we find no such abuse here, there is no error.

The admission of the mortgage of plaintiff and defendant to W. B. Spears, over the objection of defendant that it was irrelevant, is not error. When the court tries the case, this court never reverses for the admission of irrelevant evidence, unless it appears that the court, in making its decision, relied on the irrelevant evidence. It does not appear herein that the court relied on such evidence. Conceding that the admission of the acknowledgment of the mortgage was erroneous, the court is of the opinion that the evidence is of so trifling a character that it could not have prejudiced plaintiff, and it declines to reverse for such ruling.

It is contended that there is no finding on the issue of extreme cruelty, which was pleaded by defendant in recrimination. The court is of opinion that the evidence on this issue was insufficient to have sustained or justified a finding by the court below of extreme cruelty by plaintiff to defendant. The only evidence worthy of consideration is that regarding the firing of a pistol behind defendant by plaintiff many years before the former quit living with the latter. From this circumstance, it is evident that defendant did not regard himself in peril or danger of any kind from plaintiff. If he had regarded himself in danger, he would not have continued to live with her for five or six years after the firing of the pistol occurred. As the evidence would not have justified a finding of extreme cruelty on the part of plaintiff, and as this court would have reversed for such a finding, as not justified by the evidence, if it had been made, it will not reverse for want of such finding, and send the cause back for a

finding on that issue. Judgment and order affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

FOX, J. I concur in the judgment. I think that the first part of the second finding negatives every allegation of extreme cruelty made by the defendant, and that a separate finding upon that subject was unnecessary. The other errors of law, if they were errors, are of so insignificant a nature as that they could not possibly have changed the result. It is true that consent lies at the foundation of every marriage, and without consent there can be no marriage; but as was said in *Campbell v. Campbell*, cited by Mr. Justice THORNTON, there are cases in which a tacit consent will be inferred. Even under our Code it will be presumed "that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage." Code Civil Proc. § 1963, subd. 30. And after a quarter of a century of that kind of deportment towards each other, and towards the world, the parties ought to be estopped to deny such presumption. Then the conclusive presumption arising under subdivision 3, § 1962, Id., ought to prevail: "Whenever a party has by his own declaration or act * * * intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration or act * * * be permitted to falsify it."

WORKS, J. I dissent. To my mind the evidence shows conclusively that these parties were never married. Cohabitation and repute may be sufficient to raise a presumption of marriage, and, if undisputed, authorize a judgment to that effect; but here the testimony of both of the parties shows beyond any question, not only that the intercourse of these parties was illicit in the beginning, but that it continued to be so up to the time of their separation. The positive and direct evidence of both of the parties is that there never was any promise or agreement to marry, or to live together as husband and wife. Therefore the evidence of cohabitation and repute, which in this case is extremely weak and unsatisfactory, cannot and should not prevail. A mere presumption of a marriage, arising from cohabitation, cannot stand as against positive evidence to the contrary by both of the parties interested.

Rehearing denied.

(83 Cal. 126)

SWASEY v. ADAIR. (No. 13,178.)

(*Supreme Court of California*. Feb. 10, 1900.)

APPEAL—DISMISSAL—RECORD.

1. An appellant who has neglected to file a proper certificate under Code Civil Proc. Cal. § 953, which expressly requires, on appeal, that the clerk or attorneys must certify that an undertaking in due form has been properly filed, will be al-

lowed to amend the certificate pursuant to rule of court 13, which provides that, where appellant has been given five days' notice of any technical exception to the record in a civil cause, he may present and file at the hearing of the cause such additional record or other matter as will remove or answer the exception.

2. Where but one judgment has been rendered in the case, an appeal will not be dismissed because the notice of appeal contains a mistake of two days in the date of entry of judgment.

3. Neither will the appeal be dismissed because of a mistake in the undertaking, both as to the year and day of the entry of judgment, where the judgment is otherwise correctly described, so that the sureties are bound thereby.

4. The failure of the sureties on an undertaking on appeal to justify after exception has been taken to their sufficiency is not a ground for dismissing the appeal, but only affects the stay of execution of the judgment appealed from.

5. An objection that an appeal is without merit will not be considered on motion to dismiss.

In bank. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Action by G. A. Swasey against O. Adair. Judgment for plaintiff, and defendant appeals. Rule 13 of the rules of the supreme court provides that "any technical exception or objection to the record in civil cases, affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken and notified to the appellant in writing at least five days before the hearing, or they will not be regarded; and, when so noted, it shall be the duty of the appellant to present and file at the hearing of the cause such additional record, certificates, or other matter, if such there be, to remove or answer the objection or exception so taken."

B. F. Thomas, for appellant. E. B. Hall, J. W. Taggart, and R. B. Canfield, for respondent.

BEATTY, C. J. The respondent in this case moves on several grounds to dismiss the appeal.

1. The transcript contains a copy of an undertaking on appeal with its indorsements, certified by the county clerk to be correct, from which it appears that an undertaking on appeal in due form was properly filed; but this court has held that such evidence of compliance with the statutory provisions as to taking and perfecting appeals (Code Civil Proc. § 940 et seq.) does not satisfy the express requirement of section 953 that the clerk or attorneys must certify that an undertaking in due form has been properly filed, (*Railroad Co. v. Anderson*, 77 Cal. 299, 19 Pac. Rep. 517.) In this case, however, the appellant has offered to do what in that case it refused or neglected to do, *i. e.*, to file an amended certificate pursuant to our rule No. 13. I think he should be allowed to file his amended certificate, and that such amended certificate should be held to cure the defect in the original.

2. The notice of appeal, properly entitled in the action, and dated and served on February 6, 1889, refers to the judgment as entered

October 24, 1888, and to the order denying a new trial, as entered January 25, 1889. The date of the order is correctly given; but the judgment was rendered on the 23d, and entered on the 26th of October. There was, however, but one judgment in the case, and it cannot be held that the slight mistake in the date of its entry had the effect of invalidating the notice of appeal.

3. The undertaking on appeal was dated and filed February 6, 1889, and was properly entitled in the action. It recites a judgment entered October 24, 1889, and an order denying a new trial, dated January 25, 1889. Here the year as well as the date of the judgment is incorrectly stated; but the mistake in the year is an obvious slip of the pen, and corrects itself, and the mistake as to the day is immaterial. Besides, the judgment is otherwise correctly described, so that the sureties on the undertaking would be bound by it, and therefore it is sufficient.

4. The sufficiency of the sureties was excepted to, and they failed to justify. This is no ground for dismissing the appeal. It only affects the stay of execution. *Wittram v. Cronmelen*, 72 Cal. 89, 13 Pac. Rep. 160, and cases cited.

5. The printed record is badly disfigured by interlineations, but it is not worse than others that have been tolerated here. It is not so bad as to call for a dismissal of the appeal, or a reprint of the record.

6. It is claimed that the appeal is without merit. We cannot consider that question on a motion to dismiss. The appellant may file an amended certificate, and the motion to dismiss is overruled.

We concur: MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; FOX, J.; THORNTON, J.

(83 Cal. 147)

EMERSON v. WHITAKER *et al.* (No. 13,380.)
(*Supreme Court of California*. Feb. 12, 1890.)

CLAIM AND DELIVERY.

Claim and delivery will not lie for grain raised by defendants while in the actual possession of land to which they claimed title under an invalid conveyance from plaintiff. *Martin v. Thompson*, 63 Cal. 618, followed.

Department 2. Appeal from superior court, San Joaquin county; J. G. SWINNEKTON, Judge.

S. C. Denson and C. H. Oatman, for appellants. J. C. Campbell and Louttit, Woods & Levinsky, (P. W. Bennett, of counsel,) for respondents.

SHARPSTEIN, J. This is an action of claim and delivery brought by the plaintiff, as the administratrix of the estate of H. G. Emerson, deceased, against the defendants, partners doing business under the firm name of Whitaker & Ray, for the recovery of the possession of 945 sacks of wheat. The court finds, among other things, that on the 27th day of December, 1886, the plaintiff, as such administratrix as aforesaid, executed and delivered to the defendants a deed purporting to convey to said

defendants the premises upon which the said wheat was grown, and that "shortly after obtaining such deed the said Whitaker & Ray, believing that such purchase was valid, and that they had thereby become the owners of said land, and with the full knowledge and consent of said administratrix, went into possession of said land, and, at their own expense, plowed, sowed, and planted the same in wheat, and harvested and sacked said wheat. The said crop amounted to 945 sacks of good grain, which are of the value of \$1,701.83, and ——— sacks of screenings, which were sold by them for \$17.10, which was the reasonable value thereof." The court further finds that on the 15th day of October, 1887, the said sale and conveyance of plaintiff to defendants was by the court, which made the orders for such sale, and the confirmation thereof, set aside, and declared null and void. The case is simply this: The defendants raised, harvested, threshed, and removed the wheat in controversy from the land in which they were in the actual possession, claiming title thereto under an invalid conveyance from the plaintiff, *i. e.*, under color of title. In *Martin v. Thompson*, 62 Cal. 618, this court said: "The action is brought to recover the possession (or the value thereof) of certain grain sown and harvested by the defendant upon lands to which he claimed title, and of which he had the actual, adverse, and exclusive possession. The action cannot be maintained." That we understand to have been the well-established doctrine before that case arose. Under that doctrine the defendants are entitled to a judgment in their favor upon the findings. Judgment reversed and cause remanded, with direction to the court below to enter judgment for the defendants upon the findings.

We concur: THORNTON, J.; MCFARLAND, J.

(83 Cal. 185)

EATON v. RICHERI. (No. 13,067.)

(Supreme Court of California. Feb. 23, 1890.)

ADMISSIONS IN PLEADINGS—PAYMENT—CONTRACT.

1. Where there is a discrepancy between the admissions of the pleadings and the findings, the former will govern.

2. Plaintiff served defendant under an agreement that payment should be made in provisions and supplies, "and for any balance that might be due plaintiff, plaintiff was to wait until the mining property aforesaid was sold, or until a sum sufficient to pay plaintiff said balance was realized from said mine." When plaintiff's services ceased, a balance was due him. Thereafter a contract of sale of the mine to a third person was made, the contract being signed by defendant, and a sum greater than the balance due plaintiff was paid on the contract. *Held*, that plaintiff was then entitled to sue for the balance due him.

3. It is immaterial whether defendant was the owner of the mine or not, as, if the contract is to be construed as meaning that he was the owner, he is estopped from denying his ownership, and, if it is to be construed that he was not the owner, the contract calls for the payment when the owner, whoever he was, sold the mine, etc.

Commissioners' decision. Department 2. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

F. W. Street, for appellant. *F. D. & G. W. Nicol* and *F. P. Oils*, for respondent.

HAYNE, C. This was an action to recover for services rendered. The trial court gave judgment for the plaintiff, and the defendant appeals. It is admitted by the pleadings that the defendant agreed to pay plaintiff at the rate of three dollars a day, such payment to be made in provisions and supplies; "and, for any balance that might be due plaintiff, plaintiff was to wait until the mining property aforesaid was sold, or until a sum sufficient to pay plaintiff said balance was realized from said mine." If the contract stated in the findings is any different from the foregoing, it is to be disregarded, and the one admitted by the pleadings is to govern.

The plaintiff rendered services during a long period, and only a portion of the price was paid; leaving a balance of \$1,490.05. After the services had ceased, a contract of sale was made of the mine for \$15,000, which contract was signed by the defendant, and the sum of \$5,000 was paid on account. We think that the time of payment specified in the contract had arrived when the action was brought. The word "sold" does not necessarily, and in all connections, mean that a conveyance must be made, or that the title must pass. See, generally, *Blackwood v. Packing Co.*, 76 Cal. 218, 18 Pac. Rep. 248. And we think that it does not have such meaning in the contract above stated. In our opinion, the time of payment arrived when the contract to sell was made, and the \$5,000 paid on account of the purchase money.

It is argued, however, that the defendant was not the owner of the mine, and did not receive any of the purchase money paid. But there is no merit in this contention. If defendant's contract is to be construed as meaning that he was the owner, he will not be allowed to contradict such statement for the purpose of evading payment. If, however, the contract is not to be construed as meaning that he was the owner, then the fact that he was not the owner is immaterial. Parties may adopt any event as fixing the time for their obligations to mature, just as they may fix a date therefor. In this view, the contract simply means that the money was to be paid when the owner, whoever he was, sold the mine, etc. No other point is made. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

(83 Cal. 173)

GRAHAM v. LARIMER. (No. 13,167.)

(Supreme Court of California. Feb. 23, 1890.)

NEGOTIABLE INSTRUMENTS—ACTIONS—WITNESS.

1. In an action on a negotiable note which defendant alleged was given on the payee's promise

not to prosecute her brother for a crime, and to keep the crime secret, where counsel on both sides treat the court's findings that neither plaintiff nor his indorser had any notice of the "want of consideration" or "invalidity" of the note as equivalent to a finding that the consideration was illegal, a new trial will not be granted for the failure of the trial judge to find specially as to the consideration.

2. Where the court has found that plaintiff's indorser took the note without notice of the illegal consideration, to which finding defendant has not excepted, a finding that plaintiff himself had no knowledge of the illegal consideration becomes immaterial, and is not a ground for a new trial, though without evidence to support it, and properly excepted to.

3. Though Civil Code Cal. § 1615, provides that "the burden of showing want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it," yet, when the maker of a note has shown that the consideration therefor is illegal, a *prima facie* case of notice to the indorsee is made out, who must then prove that he took the note for value, and without notice of the illegality of the consideration.

4. Where plaintiff's indorser has testified that he took the note in good faith, and for value, it is error to refuse permission to cross-examine him as to whether he knew that the consideration for the note was illegal at the time he bought it, and whether at that time he did not know that the maker had warned all persons, in a newspaper notice, from purchasing it, on account of its illegality.

5. The fact that defendant has not objected to the examination in chief of one of plaintiff's witnesses out of the proper order does not deprive defendant of the right to cross-examine the witness.

Commissioners' decision. Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

A. Burrows, for appellant. Caldwell & Little, for respondent.

VANCLIEF, C. Suit on a promissory note, dated June 2, 1888, made by defendant, payable on demand to James Ward or order. The note was twice assigned before June 4, 1888,—first by Ward to George Lord, and second by Lord to plaintiff, who demanded payment on June 4, 1888. Among other defenses, the defendant pleaded "that said promissory note was signed on a void, illegal, and invalid consideration, in support of which she shows that on June 2, 1888, said James Ward was about to prosecute one Robert Larimer, brother of defendant, on a charge of felony; that said Ward then and there promised and agreed with defendant that if she would sign said note he would refrain from such prosecution, and keep silent as to the alleged crime; that in consideration of his so doing, at his request, the said defendant signed the said promissory note." The answer further alleges that each of the assignees of the note had notice of the character and illegality of the consideration at the time of the assignment of the note to him. Judgment was rendered for the plaintiff for the full amount of principal and interest of the note, and for costs, from which, and from an order denying her motion for a new trial, the defendant appeals.

The third finding of the court is that at the time of the assignment to him "Lord had no notice or knowledge of any want of consideration for, or invalidity in or to, the inception or making of said note." The fourth

finding is "that said plaintiff had no notice or knowledge of any fact or facts or acts of any person tending to impeach, or in any way affect, the validity of said note at the date of his said purchase." But there is no finding of what was the consideration for the note, nor of whether or not the consideration was such as it was alleged to be in the answer of the defendant, although there was evidence bearing directly upon this issue. On her own behalf, the defendant testified "that she gave the note to Ward for the sole consideration of his promising to keep quiet about a burglary that Ward claimed had been committed in his cabin by a brother of the defendant. Ward had agreed that, if such note was given to him, that he would keep silent about the crime." P. H. Paynter, on behalf of defendant, testified "that he drew the note for Ward, and that at the time Ward told him it was to be given to prevent the prosecution of defendant's brother for burglary." The only evidence against this is the testimony of Ward, who said "that he took the note in payment and for the money her brother took from him, and never agreed not to prosecute her brother."

1. The appellant contends that the judgment should be reversed for want of a finding as to what was the consideration, and whether or not it was as was alleged in the answer. On the other hand, counsel for respondent contends that the third and fourth findings, as to want of notice to the assignees of the note, Lord and plaintiff, supersede the necessity of any finding as to what the consideration was; that is, as I understand counsel, that, admitting that the only consideration for the note was the promise of Ward not to prosecute defendant's brother for burglary, and to keep secret the fact of the crime, yet, if the assignees of the note took it for value, and without notice of what was the original consideration, the plaintiff was entitled to recover, and that the defendant is not injured by the want of a finding which would have been no defense to the action. Admitting that the court found that Lord and plaintiff paid value for the note, and had no notice that the consideration was the promise of Ward not to prosecute defendant's brother for burglary, or to keep the crime secret. I think the position of respondent's counsel would be correct, under sections 3122 and 3123 of the Civil Code; but it seems extremely doubtful, to say the least, whether or not the third and fourth findings mean that Lord or plaintiff had no notice of the facts that the consideration was a promise of Ward not to prosecute, etc., or a promise to keep the crime secret. The finding that Lord had no notice "of any want of consideration," or "invalidity" of the note, and the finding that plaintiff had no notice of "any fact tending to impeach or affect the validity of the note," if not pure conclusions of law, are not necessarily equivalent to findings that the consideration of the note was a promise of Ward not to prosecute defendant's brother for the

crime of burglary, and to keep the crime secret, since a "want of consideration," and "invalidity" of the note, may be inferences properly or improperly drawn from other and different facts; and the finding that plaintiff had no notice of any fact "tending to impeach or affect the validity of the note" may have proceeded from a mistaken view of the law as to what facts would or would not tend to impeach or affect the validity of the note. Again, the third and fourth findings expressly refer and apply only to "want of consideration" and "invalidity" of the note, although the material issue is taken upon allegations of fact constituting an illegal consideration; and the distinction between mere "want of consideration" and an illegal consideration is obvious, and, as will hereafter appear, becomes important in this case. But, as counsel on both sides tacitly assume that the third and fourth findings are equivalent to findings that plaintiff and Lord had no notice that the consideration consisted of a promise not to prosecute defendant's brother for the crime of burglary, and to keep the crime secret, the point under consideration may be disposed of on that assumption, from which it follows that a finding on the issue as to the illegality of the consideration becomes immaterial, and therefore that the defendant was not injured by the failure of the court to find upon that issue. But then the effect of this assumption, viz., that a finding as to the illegality of the note is immaterial, and therefore that its illegality may be conceded, must be allowed, for all purposes of this appeal, since it would be illogical, as well as unjust, after conceding the illegality of the note for the purpose of excusing the want of a finding as to its illegality, to deny the illegality for the purpose of exempting plaintiff and his assignor from the burden of proof which would be cast upon them by the concession of illegality for the former purpose. This will be exemplified under the next point.

2. The next point made by appellant is that the evidence does not justify the finding that plaintiff had no notice of the nature or illegality of the consideration. The only evidence applicable to this issue was that on the part of defendant, tending to prove the illegality of the consideration, as to which there was no finding, but, for the purpose of dispensing with the necessity of a finding as to the nature of the consideration, it has been necessarily conceded that the consideration was, or may have been, illegal; and, as above shown, that concession must be held good for all purposes of this appeal, and therefore must not be denied for the purpose of sustaining the finding under consideration. Section 1615 of the Civil Code provides that "the burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it." Conceding that this section applies to cases of illegal consideration, which is not quite clear, since the same Code distinguishes between a mere want of consideration and an illegal con-

sideration (sections 1607, 1608, and 1667,) yet, when the defendant has proved, or the plaintiff has conceded, that the consideration for a promissory note, upon which the former is sued by an indorsee thereof, is illegal, a *prima facie* case of notice to the indorsee of the illegality of the consideration is thereby made, which discharges the burden of proof on the part of the defendant, and casts it upon the plaintiff to prove that he took the note for value, and without notice of the illegality of the consideration. Story, *Prom. Notes*, § 196; 1 *Pars. Notes & B.* 188, 189; *Fuller v. Hutchings*, 10 Cal. 526; *Sperry v. Spaulding*, 45 Cal. 548. Mr. Parsons, on pages above cited, says: "But if the defendant can show that the note was originally obtained by fraud or duress, or has been fraudulently obtained from an intermediate holder, or has been lost or stolen, or has been in any way the subject of fraud or felony, this will throw the burden of proof upon the plaintiff. In such cases the presumption is that he who has been guilty will part with the note for the purpose of enabling some third party to recover upon it for his benefit; and such presumption operates against the holder, and it devolves upon him to show that he gave value for it. So where the note was given for a distinctly illegal consideration." In *Bailey v. Bidwell*, 13 *Mees. & W.* 73, Baron PARKES said: "It certainly has been, since the later cases, the universal understanding that if the note were proved to have been obtained by fraud, or affected by illegality, that afforded a presumption that the person who had been guilty of the illegality would dispose of it, and would place it in the hands of another person to sue upon it, and that such proof casts upon the plaintiff the burden of showing that he was a *bona fide* indorsee for value." In *Fitch v. Jones*, 5 *El. & Bl.* 245, 32 *Eng. Law & Eq.* 134, Lord CAMPBELL, after expressing the rule as above stated, added: "It is not properly that the burthen of proof as to there being consideration is shifted, but that the defendant, on whom the burthen of proof that there was no consideration lies, has, by proving fraud or illegality in the former holder, raised a *prima facie* presumption that the plaintiff is agent for that holder, and has therefore, unless that presumption be rebutted, proved that there was no consideration. But no such presumption arises where there was in the former holder a mere want of consideration, without illegality or fraud." Therefore, as it has been assumed and conceded in this case that the consideration was illegal, the effect of which was to cast the burden upon Lord and plaintiff of proving that one of them, at least, took the note without notice of the illegality of the consideration; and as there is no evidence that plaintiff so took the note, it follows that the finding by the court that the plaintiff had no such notice is not justified by the evidence. But, as the court also found that Lord had no notice, which finding is not excepted to, the finding that plaintiff had no notice is immaterial, and the defendant is not

injured thereby. If Lord took the note for value, and without notice of the illegality and want of consideration, the plaintiff, as Lord's assignee, could recover upon it even though he had notice. Story, *Prom. Notes*, §§ 178, 191; *Edw. Bills*, § 441; *Poorman v. Mills*, 39 Cal. 351.

3. Upon the trial, plaintiff placed upon the stand George Lord, who testified "that he purchased the note mentioned in the complaint from Ward for a valuable consideration, and afterwards assigned it to the plaintiff; that he paid Ward \$336 for the note." On cross-examination he was asked the following question: "At the time you bought this note did you have any notice that it was executed for an illegal consideration?" To this question plaintiff's counsel objected on the ground that it was not proper cross-examination. The court sustained this objection, and defendant's counsel excepted. Defendant's counsel next asked the witness "if, at the time of the purchase, he did not know that the defendant had warned all persons, in a newspaper notice, from purchasing it, on the ground of illegal consideration?" The plaintiff also objected to this question as not being proper cross-examination. The court sustained this objection, and defendant's counsel excepted. The appellant's counsel contends that the court erred in sustaining these objections, and I think this point should be sustained. The tendency of Lord's testimony in chief was to prove that he took the assignment of the note in good faith, by showing that he paid full value for it. Therefore, any question, the answer to which might tend to prove that he did not take the assignment in good faith, was proper cross-examination. The answers to the questions asked on cross-examination might have proved that he took the assignment with notice that there was no legal or valid consideration for the note, and that he knew "that the defendant had warned all persons, in a newspaper notice, from purchasing it on the ground of illegal consideration." The facts that Lord's testimony in chief was intended to meet and avoid the anticipated defense, and, properly, should have followed the evidence of that defense, make no difference as to defendant's right of cross-examination. The plaintiff chose to introduce his evidence in that order; and defendant did not object to it, but simply claimed the right to cross-examine the witness. The plaintiff had the benefit of the testimony in chief, and had no right to deprive the defendant of the privilege of proper cross-examination. Nor did the plaintiff object to the questions on any other ground than that they were not within the limits of proper cross-examination. There was no objection on the ground that plaintiff had examined the witness in chief out of the proper order. In view of the fact that appellant's second point, above considered, would have been well taken but for the finding that Lord had no notice, the matter to which his cross-examination was directed

was material, and very important. Had the cross-examination been permitted, it might have disclosed that, before the assignment to him, Lord had notice of the illegality of the consideration; and this would have cast the burden upon the plaintiff of proving that he had no notice. For the error in sustaining the objection to the cross-examination of Lord, I think the judgment and order should be reversed, and a new trial granted.

We concur: FOOTE, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

(83 Cal. 181)

CLARK v. BROWN *et al.* (No. 13,335.)

(*Supreme Court of California*. Feb. 24, 1890.)

MINING PARTNERSHIP—ACCOUNTING—LOCAL ACTIONS.

Though, in the absence of an express allegation in a complaint for dissolution of a mining copartnership, and for an accounting, it be deemed to appear by implication that the firm has an interest in the mine therein described, the presumption, in the absence of evidence to the contrary, is that the interests of the partners therein are equal, and require no adjudication, within Code Civil Proc. Cal. § 392, subd. 1, which provides that an action for the recovery or determination of an interest in land, or for an injury thereto, must be tried in the county where it or some part thereof is situated, subject to the power of the court to change the place of trial under the Code.

Commissioners' decision. Department 2. Appeal from superior court, Stanislaus county; JOHN W. ARMSTRONG, Judge.

Action by W. A. Clark against H. B. Brown and others, for the dissolution of a mining copartnership and for an accounting. Code Civil Proc. Cal. § 392, subd. 1, provides that an action "for the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property," must be tried in the county where it, or part thereof, is situated, subject to the power of the court to change the place of trial, as provided in the Code. From an order denying their motion to change the place of trial defendants Brown and Flaherty appeal.

F. W. Street, for appellants. James H. Budd, for respondent.

VANCLIEF, C. This action was commenced in the superior court of the county of Stanislaus, in which two of the defendants resided. It is alleged in the complaint, substantially, that in 1880 the plaintiff and the defendants Brown and Flaherty entered into a mining copartnership, for the purpose of working mining claims situated in Tuolumne county, called the "Green Claims," and extensions thereof. That they actually engaged in working said claims, and extracting mineral therefrom, from said date until October 25, 1887, when Flaherty sold to the defendants Clark and Crittenden "his interest in the above mine, and claim and business, since which date said

defendants Clark and Crittenden have, with defendant Brown and this plaintiff, been actually working said mine and claim, and extracting minerals therefrom. That in the working of said mine and claim, * * * as above, plaintiff has advanced and used to and for the defendants, and each and all of them, large sums of money, amounting to many thousands of dollars. That between the 1st day of January, 1881, and the 25th day of October, 1887, plaintiff advanced in the working of the mine and claim aforesaid, and in extracting minerals therefrom, many thousands of dollars, and since said date has advanced for such purpose, and in working said mine, several thousands of dollars, all for the use of said copartnership. That there has never been any settlement of any of the partnership accounts of plaintiff and defendants, or any of them, nor of the accounts between plaintiff and each or all or any of the defendants herein. That the defendants Flaherty and Brown have refused, and still refuse to carry on the aforesaid business, or to settle their, or either of their, accounts with the copartnership, or with this plaintiff on account thereof, or to have or make any accounting whatever for the moneys that they, or either of them, have received on account of the said copartnership. That the copartnership aforesaid can be carried on only at a pecuniary loss. That plaintiff is desirous of dissolving the same, and having a liquidation of its affairs. That no term was ever prescribed or fixed between the parties hereto, or any of them, during which the said copartnership should continue. That defendants Clark and Crittenden are residents of Stanislaus county, state of California." The prayer is that the partnership be dissolved, and an account taken of all the partnership dealings and transactions from the commencement thereof, and of the moneys received and paid by the plaintiff and the defendants, respectively, in relation thereto; that the affairs of the firm be wound up, and the copartnership debts and liabilities be paid; and that plaintiff be paid his advances, and that the surplus, if any, be paid to the plaintiff and defendants according to their respective interests, and for such other and further relief as the nature of the case may require. To this complaint the defendants Brown and Flaherty interposed a general demurrer, on the ground that it does not state facts sufficient to constitute a cause of action; and, at the same time, regularly demanded that the place of trial be changed to the county of Tuolumne, for the reason that the real property in the complaint described appears to be situated in Tuolumne county, and that it further appears by the complaint that the "action is brought to determine the interest of the parties to said action in and to said real property." The appeal is by Brown and Flaherty, from the order denying their motion to change the place of trial; and the only question presented for decision is, does it appear from the complaint that the action is

"for the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest," in the true sense of subdivision 1 of section 392 of the Code of Civil Procedure?

Counsel for appellants contend that the action is for the determination of the rights and interests of the respective parties in and to the mining claims described in the complaint, and therefore that the court erred in refusing to change the place of trial to the county in which the mining claims are situated. The plainly apparent object of the action is to obtain a dissolution of a mining copartnership, and an accounting between the partners. It does not expressly appear that the copartnership concern had any estate or interest in the mine described; but conceding that this appears by implication, which is the most that can be claimed, yet, in the absence of evidence to the contrary, the legal presumption is that the interests of the partners were equal, and that there was no necessity nor occasion in this action "for the determination, in any form, of the right or interest" of any party to this action, in or to the mine. The mine alleged to have been worked by the concern is described as "the Flaherty Quartz mine, known as the Green vein or claims, and the extensions thereof;" and for aught that appears the vein or claims, and the extensions thereof, may have been owned in severalty by the individual partners, and the partnership may have been limited to the working of those claims without any interest or estate in them, and the partnership may have been so limited, even if the partners had been tenants in common of all the claims and extensions. It is enough, however, for the disposition of this appeal in favor of the respondent, that it does not appear that the action is "for the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest;" and that it does appear that all the relief prayed for may be granted without the determination, even incidentally, of any right or interest in real property. I think the order should be affirmed.

We concur: BELCHER, C. C., FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

(33 Cal. 167)

KITTS v. AUSTIN. (No. 13,284.)

(Supreme Court of California. Feb. 22, 1890.)

QUIETING TITLE—CLAIM TO PUBLIC LANDS.

1. 23 U. S. St. at Large 1883-85, p. 321, provides that one taking possession of government land without connecting himself with the title is a mere trespasser. St. Cal. 1873-74, p. 544, § 2, provides that every qualified claimant under the homestead laws of the United States, residing on public land of the United States within this state, who shall have made his original homestead entry in accordance with said laws, shall, from the date of such entry, be deemed to have title to, and be in possession of, all the land described in such

entry, as against trespassers, and all persons having no superior right or title to the same, as long as he shall continue to reside thereon, and to comply in good faith with said homestead laws. *Held*, in an action to quiet title to land, by one in no wise connected with the government title thereto, against one who had filed her homestead entry on certain land embracing the land on which she resides, and also the land in dispute, that, as against plaintiff, defendant had title to the premises.

2. Where plaintiff relies solely on naked possession for a recovery, he cannot, on rebuttal, show that a third person resides on the land under a title superior to defendant's.

3. Where defendant's answer sets up her adverse claim of title, the court having found that title superior to plaintiff's may properly include in its decree an award of the possession to defendant, under Code Civil Proc. Cal. § 380, providing that in an action by a person out of possession to determine an adverse claim of an interest therein, if the judgment be for plaintiff, he may have a writ for possession as against the defendants in the action.

Commissioners' decision. Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Chas. W. Kitts, for appellant. *Thos. S. Ford*, for respondent.

GIBSON, C. This was an action to quiet title. The defendant set up her adverse claim, and judgment passed in her favor, from which, and an order denying a new trial, plaintiff appeals. From the findings, which are fully sustained by the evidence, it appears that the land in controversy is a portion of the public domain, and is comprised of 10 acres within a larger tract, to which the defendant acquired the right of possession by a deed from Wilson and wife in 1867, who were at the time and prior thereto had been, in the exclusive possession of the whole tract. Under this deed the defendant immediately entered upon the exclusive possession of the land, built a house, and made other improvements upon a portion not included within the 10-acre tract. The latter was used, in connection with her dwelling, as a pasture for her cattle. In 1869, one of the predecessors of plaintiff entered upon the land, and inclosed the 10-acre tract with a fence, which was sufficient to exclude stock for three years thereafter, during which time defendant was prevented from using the land; but thereafter, that is to say, from and including the year 1872 until the year 1886, the defendant used the land the same as before, except that such use was in connection with, but hostile to, that of the plaintiff and his predecessors. April 17, 1885, the defendant, who was duly qualified to do so, made and filed her original homestead entry upon certain public land, embracing the land upon which she resides, and the 10 acres in dispute, and received the certificate of entry therefor, which she owns, and the same has never been suspended, canceled, or revoked. Neither the plaintiff, nor any of his predecessors, ever connected himself with the government title to the tract in dispute; but the plaintiff, in 1886, after defendant had made her homestead entry, erected, and has since maintained, a substantial inclosure around the said tract.

At the trial considerable evidence was introduced by both parties tending to prove that they and their respective predecessors had, as against each other, acquired the right to the possession of the land in dispute by adverse use. This evidence shows that neither the predecessors of plaintiff, nor himself, ever had the exclusive possession of the land against the defendant, except perhaps during three years from 1869 to 1871, both inclusive; and even during those years, it seems, a school was maintained in a school-house, previously built upon the land by the permission of the defendant's husband, since deceased, who was at the time one of the trustees of the school-district that maintained the school. But the case seems to have turned in defendant's favor upon the right she acquired as a homesteader. This was right. The plaintiff, not having shown any connection with the government title to the land in controversy, was a mere naked trespasser; and his inclosure of it was made and maintained in violation of the provisions of the act of congress of February 25, 1885, (23 U. S. St. at Large, 1883-85, p. 321,) while the defendant, as a qualified homesteader, possessed of a certificate of entry which remained in full force, was deemed, as against trespassers and others not having a superior right or title to the land, to have title to, and be in possession of, all the land described in her certificate of entry, (St. Cal., 1873-74, p. 544; *Whittaker v. Peindola*, 78 Cal. 296, 20 Pac. Rep. 680.) That case was parallel with the one here. There the plaintiff sought to recover all but two or three acres embraced within his homestead entry, which was evidenced by a receiver's duplicate receipt. The plaintiff, on the trial, introduced this receipt in evidence, together with testimony, from which it appeared that before the commencement of the action, he had, in addition to making the payment mentioned in the receipt, built a house, and established his residence, upon the two or three acres within his homestead claim, that were not sued for; that for two years prior to the issuance of the receipt the defendant had maintained an inclosure around, and cultivated a large portion of, the homestead, and had a house and barn thereon. On the case thus made, defendant moved for a nonsuit on the ground that no title to the land had been shown by plaintiff. The court denied the motion; and the defendant thereupon, without offering any evidence on his part, submitted the case, and judgment was rendered for plaintiff. In passing upon the appeal, this court said: "The defendant, not having shown any capacity in himself to acquire the government title to the demanded premises, nor any effort or intention to do so, stands in the position of a mere naked trespasser upon the public domain, with an inclosure erected and maintained contrary to the express provisions of the act of congress of February 25, 1885, (23 St. at Large, 1883-85, p. 321;) and the main question in the case is whether by

such unauthorized inclosure he can prevent a homestead entry of the land by a citizen of the United States who goes peaceably upon a portion of the tract, and in other respects complies with the law. This is the precise question, or the converse of it, involved and decided in the case of *Haven v. Haws*, 63 Cal. 514; and on the authority of that case we hold that this plaintiff had the right to make his homestead entry of the whole tract, notwithstanding the possession by defendant of the greater portion of it." And, with regard to the certificate of entry as evidence of the right of the plaintiff as a homesteader, it further said: "The evidence, therefore, brought the plaintiff squarely within the provisions of the second section of the act of the legislature of this state passed March 23, 1874, (St. 1873-74, p. 544,) which reads as follows: 'Sec. 2. Every qualified homestead claimant under the homestead laws of the United States, residing on public land of the United States within this state, who shall have made his original homestead entry in accordance with said laws, shall, from the date of such entry, be deemed to have title to, and to be in possession of, all the land described in such entry, as against trespassers, and all persons having no superior right or title to the same, as long as he shall continue to reside thereon, and to comply in good faith with said homestead laws.' Under this law, the plaintiff must be deemed to have the title, as against the defendant, to the demanded premises."

The offer of plaintiff to prove in rebuttal that one Luey, as a qualified pre-emptor, had entered the land as such, had received his certificate therefor, which bore date one month prior to that of defendant, and that he was residing upon the land, was properly rejected. It was not evidence in rebuttal. He relied solely upon naked possession, and could only recover, if at all, upon the strength of his own title, and not upon the weakness of the defendant's; and the attempt to show that the land was in the possession of a third person, to say nothing of its inconsistency with his own claim, could not aid him. It could not avail him in any way, unless he could show some connection on his part with whatever right or title Luey may have had. *Niagara C. G. M. Co. v. Bunker Hill C. M. Co.*, 59 Cal. 612; *Wilson v. Madison*, 55 Cal. 5; *Funk v. Sterrett*, 59 Cal. 613. All of these cases were to quiet title to land. In the first, the defendant offered to prove prior possession of the mining claim in a stranger. This was rejected because the defendant disclaimed any intention of connecting itself with such prior possession. The ruling was sustained. In the next case it was held that the defendant could not rely upon an outstanding title in the United States; he not having shown any privity with it, or any title whatever. In the last case it was decided that the plaintiff, a mere possessor of a mining claim, who had not brought himself in privity with the title of the United States by

a location of the claim, could not prevail over one who had.

It is objected that the court, in this form of action, erred in awarding the possession to the defendant. But there is warrant for the relief granted in section 380 of the Code of Civil Procedure, which is as follows: "Sec. 380. In an action, brought by a person out of possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants; and, if the judgment be for the plaintiff, he may have a writ for the possession of the premises as against the defendant in the action against whom the judgment has passed." See, also, *Polack v. Gurnee*, 66 Cal. 266, 5 Pac. Rep. 229, 610. The defendant here, in her answer, set up her adverse claim of title to the property. She thereby became an actor, with the burden of proof upon her to establish her claim. And the court, having found that her adverse claim was superior to that of the plaintiff's, from which the right of possession flowed, properly included in its decree an award of the possession. We have discovered no prejudicial error in the record, and therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(83 Cal. 215)

BURGESS v. FAIRBANKS et al. (No. 13,262.)
(*Supreme Court of California*. Feb. 26, 1890.)

VENDOR'S LIEN—PLEADING—WAIVER OF LIEN.

1. A complaint alleging that plaintiff sold land to defendant W. for a certain sum, of which a part was paid, leaving a specified balance due and unpaid; that at the time of the sale, for reasons known to W., and at his request, a conveyance of the land was made with the name of defendant F. inserted therein, and that the latter knew all the facts of the transaction,—is sufficient to warrant the enforcement of the vendor's lien for such balance as against F.

2. It is not necessary that, in such case, the vendor, before suing in equity to enforce his lien, shall have first exhausted his remedy at law.

3. An instrument in the words, "Due G. W. B., and payable when the suit now in court, between him and C. B. R. is settled, \$750," is not a promissory note, and the vendor, by taking it as security for the balance of the purchase money for the land, does not waive his lien.

Department 2. Appeal from superior court, Trinity county; T. E. JONES, Judge.

Barclay Henley, for appellants. *John W. Turner*, for respondent.

McFARLAND, J. This is an action to enforce a vendor's lien for balance of unpaid purchase money. Judgment was for plaintiff, and defendants appeal from the judgment on the judgment roll alone.

The complaint is sufficient. It avers clearly enough that plaintiff sold the land to the defendant George E. White for \$4,150; that,

of said purchase money, said White paid plaintiff \$2,400, and also, according to the terms of the sale, paid to one McMurray \$1.-025 due on a mortgage on the land, and that the balance, \$750, with interest, is due and unpaid; that at the time of the sale, for reasons known to the said White, and at his request, a conveyance of the land was made by plaintiff, with the name of the defendant H. T. Fairbanks inserted therein; and that the latter knew all the facts of the transaction. These averments warrant the enforcement of the lien as against Fairbanks.

There is nothing in the point that the remedies at law must first be exhausted before a bill in equity to enforce a vendor's lien can be resorted to. *Sparks v. Hess*, 15 Cal. 186.

The point that plaintiff waived his lien by taking as security the promissory note of a third person is not tenable. The written instrument relied on to sustain this point is as follows: "\$725 Kikawaka, Nov. 15, 1886. Due to George W. Burgess, and payable when the suit now in court between him and C. B. Rice is settled, seven hundred and twenty-five dollars. [Signed] Wm. T. WHITE, Agent for George E. White." This instrument is not a promissory note; and it is unnecessary to determine whether, *prima facie*, it is the personal obligation of the principal or the agent. It at least bears a strong suggestion of agency; and it would have been competent to show by parol evidence how it was received, and who was intended to be bound by it. *Bean v. Mining Co.*, 66 Cal. 451; 6 Pac. Rep. 86; *Sayre v. Nichols*, 7 Cal. 535. And, as it is averred in the complaint, and found by the court, that the instrument was made by George E. White, the finding will be presumed to be supported by the evidence. We see no material insufficiency in the findings. Judgment affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

(83 Cal. 217)

RILEY v. SIMPSON *et al.* (No. 13,233.)

(Supreme Court of California. Feb. 26, 1890.)

NEGLIGENCE—DANGEROUS PREMISES—EVIDENCE.

In an action for injuries sustained by the falling on plaintiff, while on a public street, of an awning and part of the wall of defendant's premises, the evidence showed that the wall was not of sufficient strength to support the awning, though it had done so for several months, and that it was carelessness to put it up; that the premises were occupied and the awning erected by lessees of defendants, with permission of the latter, who furnished some of the material therefor. *Held*, that defendants were liable.

Department 2. Appeal from superior court, San Joaquin county; J. G. SWINNER-TON, Judge.

W. L. Dudley and W. M. Gibson, for appellants. J. C. Campbell and James H. Budd, for respondent

SHARPSTEIN, J. This action is brought

to recover damages caused by the falling of an awning and a portion of a brick wall upon the plaintiff while passing along upon a sidewalk under said awning. Defendants were the owners and lessors of the building to which said awning was attached. The case was tried by a jury, which rendered a verdict in favor of the plaintiff for \$5,000. Defendants moved for a new trial on several grounds, one of them being "insufficiency of the evidence to justify the verdict." The motion for a new trial was overruled, and from the order overruling it and the judgment this appeal is taken. There was sufficient evidence to justify a finding that the wall to which the awning was attached was not of sufficient strength to support that burden, although it did support it several months. But the evidence is abundantly sufficient to justify a finding that it was carelessness to hang such an awning to a wall in the condition that this wall is proven to have been. And somebody was guilty of carelessness in placing it there. The building, or some part of it, was occupied by tenants of appellants, and it was doubtless at the instance of those tenants that the awning was put up, and it was put up by contractors employed by said tenants. But appellants not only knew of and consented to the erection of the awning, but contributed the lumber for its construction; the tenants providing the iron used in the construction of it, and paying the contractors for the work on it. In *Kalis v. Shattuck*, 69 Cal. 593, 11 Pac. Rep. 346, this court said: "It is well settled that a landlord is not liable for such consequences, unless (1) the nuisance occasioning the injury existed at the time the premises were demised; or (2) the structure was in such a condition that it would be likely to become a nuisance in the ordinary and reasonable use of the same for the purpose for which it was constructed and let, and the landlord failed to repair it, (*Jessen v. Sweigert*, 66 Cal. 182, 4 Pac. Rep. 1188; *Rector v. Buckhart*, 3 Hill, 193; *Mullen v. St. John*, 57 N. Y. 567; *Hussey v. Ryan*, 2 Atl. Rep. 729; *Wood, Nuis.* §§ 295, 676; *Wood, Landl. & Ten.* 918;) or (3) the landlord authorized or permitted the act which caused it to become a nuisance occasioning the injury." In this case appellants not only authorized or permitted the act, which caused the nuisance occasioning the injury, but contributed to it by furnishing material to be used in creating it. Under the rule above stated, appellants are certainly liable for the consequences of an act to which they contributed. We perceive no merit in any of the exceptions taken to the rulings of the court during the trial. The damages awarded the plaintiff are not, in our opinion, excessive, and the instruction of the court upon the subject of damages was not erroneous. Judgment and order affirmed.

We concur: THORNTON, J., MCFARLAND, J.

CATTS v. SIMPSON et al. (No. 13,234.)
(*Supreme Court of California.* Feb. 26, 1890.)

SHARPSTEIN, J. The only difference between this case and that of *Riley v. Simpson*, (No. 13,233,) ante, 293, recently decided by this court, is that the plaintiffs are not the same, and the judgment is for a larger sum in this case than in that. In all other respects the cases are similar, and, for the reasons given in *Riley v. Simpson et al.* for the affirmance of the judgment and order in that case, the judgment and order in this case are affirmed.

We concur: **THORNTON, J., MCFARLAND, J.**

(83 Cal. 239)

McMULLIN v. LEITCH et al., Supervisors.
(No. 13,271.)

(*Supreme Court of California.* Feb. 27, 1890.)

TOLL-ROADS—DEDICATIONS.

A toll-road, at the time of its construction, becomes a public highway by dedication, subject to the right of the company to collect tolls for the period prescribed by statute; and after the expiration of that period neither the company nor its stockholders have any interest in the road for which they are entitled to compensation.

Department 2. Appeal from superior court, San Joaquin county; **J. G. SWINNER-TON, Judge.**

Petition of **Eliza McMullin**, a stockholder in the **Stockton & French Camp Turnpike Company**, to have reviewed the proceedings of **A. Leitch** and others, supervisors of San Joaquin county, to have the order and proceedings of said commissioners, declaring the road of said company a free public highway declared null and void. From a decree in favor of petitioner, respondents appeal.

Avery C. White, Dist. Atty., for appellants.
J. C. Campbell, Edward I. Jones, and W. L. Dudley, for respondent.

PER CURIAM. The court is of the opinion that when the toll-road in question was constructed in 1867, by a corporation formed under the act of 1853, it became a public highway by dedication, subject to the right to collect tolls for a limited period. This period has expired, but the dedication to the public remains. Neither the plaintiff nor the corporation, nor the corporation which constructed any road, on the termination of the franchise to collect tolls, had any interest for which either of them can demand compensation. The questions arising in this case are settled by the decisions of this court in *People v. Davidson*, and *People v. O'Keefe*, in 79 Cal. 166 and 171, 21 Pac. Rep. 538, 539. See, also, *Wood v. Turnpike Co.*, 24 Cal. 474. The judgment and order are reversed, and the cause remanded, with directions to the court below to enter judgment for the defendants.

(83 Cal. 201)

FOGEL v. SCHMALZ et al. (No. 13,617.)
(*Supreme Court of California.* Feb. 26, 1890.)

APPEAL-BOND.

An appeal will not be dismissed, because the undertaking was not filed in time, where the certificate of the clerk shows that an undertaking was filed on the day the appeal was taken, but, the appellee's attorney having filed ex-

ceptions, a year thereafter, to the sufficiency of the sureties, another undertaking was given and approved within 20 days thereafter.

In bank. Appeal from superior court, city and county of San Francisco; **T. H. REARDEN, Judge.**

Henry H. Davis, for appellant. **H. H. Lowenthal**, for respondent.

PATERSON, J. Respondent has submitted a motion to dismiss the appeal herein on several grounds. The transcript does not, in some respects, conform strictly to the rules of this court; but the defects are matters of form, and not so irregular in character as to call for a dismissal of the appeal. The interlineations and erasures were made before the transcript was filed or certified to by the clerk, and do not in any respect render the record difficult to read or understand. Another ground of the motion is that the undertaking on appeal was not filed within time. The certificate of the clerk, however, filed herein with the appellant's affidavit in opposition to the motion, shows that an undertaking on appeal was filed in the court below on the day the appeal was taken, viz., on September 1, 1888; but, plaintiff's attorney having filed exceptions to the sufficiency of the sureties on the 6th day of September, 1888, another undertaking—the one set forth in the transcript—was given and approved within 20 days thereafter. Motion denied.

We concur: **MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.; THORNTON, J.**

(83 Cal. 155)

CLEGHORN v. ZUMWALT. (No. 13,394.)
(*Supreme Court of California.* Feb. 23, 1890.)

REFORMATION OF DEED—MISTAKE.

1. When the contract of sale by plaintiff to defendant of all her interest in certain lands was made, both parties supposed that plaintiff's interest was an undivided one-fifth, but before the execution of the deed defendant learned that plaintiff's interest was an undivided three-fifths. Plaintiff, however, had no knowledge of this until after the conveyance was made. *Held* that, the mistake being mutual at the time of the agreement, the deed would be reformed.

2. If it be held that the right to reformation must relate solely to the condition and understanding of the parties at the time of the execution of the deed, the same relief would be granted under Civil Code Cal. § 3399, providing that "when, through fraud or a mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention."

Department 1. Appeal from superior court, Colusa county; **E. A. BRIDGFORD, Judge.**

John C. Deuel and **Oliver P. Evans**, for appellant. **Richard Bayne**, for respondent.

FOX, J. Action to reform a deed. Judgment for defendant, and plaintiff appeals. The case comes up on the judgment roll. It appears from the findings that in October, 1885, **Mary Cleghorn**, then a minor, was the owner of an undivided one-tenth interest in

the N. W. $\frac{1}{4}$ of section 11, township 18 N., range 6 W., M. D. M., which she had inherited from her father; that upon the death of her father a one-half interest in said land passed to her mother, who had also died in October, 1885; that in the course of settlement of the estate of the mother, and on the 8th day of May, 1886, the said one-half interest so held by the mother was, by an order of the probate court, duly given and made, set apart to, and declared to be the property of, said Mary, but she was then advised by her counsel that this order only gave her the use of the property during her minority, and that upon her becoming of age her brothers and sisters would take each a one-fifth interest therein, the same as they had done in her father's estate, leaving one-fifth to her, thus vesting in her at her majority two undivided tenths, or one undivided fifth, of the whole title to the tract. The court finds that this, the one-fifth interest, is what she and the defendant both supposed she owned when, in November, 1887, she being then of lawful age, defendant agreed with her to purchase her interest in the tract, and pay her \$500 therefor, which price the court finds was the value of an undivided one-fifth of the tract. The court further finds that subsequently, and before the deed was executed, upon examination of an abstract of title, defendant was informed by his attorney, and at the time of the execution and delivery of the deed and payment of the money knew, that the interest of plaintiff in the tract was three-fifths instead of one-fifth, but did not disclose the fact to plaintiff. The deed was in a form that conveyed all her interest, whatever it might be. The relief sought is to so reform the deed that it shall convey an undivided one-fifth, as both parties expected it would, and intended it should, at the time the bargain was made for it, and the price was fixed, and as one of them believed it did when it was made. The granting of this relief is resisted, not on the ground that it would be inequitable, or would not make the deed conform to the purchase as actually made, but on the technical ground that at the time of the actual execution and delivery of the deed there was not a mutual mistake of fact as to what it conveyed.

While, from its full finding of facts, the court below seems to have been fully impressed with the equity of plaintiff's case, it seems to have thought the point made by the defense to have been well taken; for it finds, as conclusion of law, that, "under the complaint as it now stands, said plaintiff is not entitled to the relief prayed for," and judgment is entered for defendant. In this we think the court erred. There is no doubt whatever that, at the time the minds of the parties met, and the bargain was actually made, the mistake was mutual. Both then understood and believed that what the one was selling and the other was buying was the undivided one-fifth, and the price was fixed on that basis. The execution and delivery of

the deed afterwards was but the carrying into effect of the agreement already made. The mistake relates to the time of the agreement, not merely to the time of the carrying of the agreement into effect.

But, even if it be held that the cause of action must relate solely to the condition and understanding of the parties at the time of the execution and delivery of the deed, the case is one which comes within the provisions of section 3399, Civil Code, and entitles the plaintiff to the relief demanded. That section reads: "When, through fraud or a mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." Here no question of the rights of third persons is involved, and the court expressly finds that at the time of the execution and delivery of the deed the defendant knew that the plaintiff believed she was the owner of only an undivided one-fifth, and she was not informed by the defendant, or any one else, to the contrary, until after the execution of said deed. The allegations of the complaint are ample to cover either "mutual mistake" or "mistake of one party which the other at the time knew and suspected," or to entitle the plaintiff to the relief provided for in the section quoted. Judgment reversed, and case remanded, with instructions to the court below to enter judgment on the findings in favor of plaintiff, as prayed in her complaint.

We concur: PATERSON, J.; WORKS, J.

(83 Cal. 333)

FOX *et al.* v. STOCKTON COMBINED HARVESTER & A. WORKS. (No. 13,274.)

(Supreme Court of California. Feb. 28, 1890.)

BREACH OF WARRANTY—EVIDENCE—HARMLESS ERROR.

1. In an action for breach of contract of a sale of machines, evidence that other machines, made on the same pattern, and of like materials, did good work, is inadmissible.

2. Where papers are offered in evidence and admitted, they are in the case for all purposes for which they were admissible; and it is no error for the court to refuse to admit them when offered a second time, though the ground of such refusal may not be tenable.

Department 2. Appeal from superior court, Stanislaus county; WILLIAM O. MINER, Judge.

W. L. Dudley, J. H. Budd, and Hatton & Fulkerth, for appellant. W. E. Turner and J. C. Campbell, (Edward L. Jones, of counsel), for respondents.

THORNTON, J. Action to recover damages for breach of contract of sale by defendant of two harvesting-machines. Verdict

and judgment for plaintiffs. Appeal by defendant from the judgment and order denying its motion for a new trial.

Several points have been discussed by counsel which have to be determined. We are of opinion that the court did not err in its ruling in excluding the papers, copies of which are annexed to defendant's answer, when offered the second time. They had been already offered and admitted. We cannot see that, because they were read in evidence as a part of the cross-examination of other witnesses, therefore they were not in the case for all purposes for which they were admissible. The papers having been already put in evidence, the court did not err in refusing to allow them to be put in the second time. Nor does it make any difference that they were excluded, when offered a second time, for a reason not legally tenable. They were, as said above, already in for all purposes. Though the ground of their exclusion on the second offer may have been untenable, that was not equivalent, when they were already in, to a ruling that they were not evidence at all. We see no error in the ruling of the court which would justify a reversal.

There is no error in refusing defendant's request designated by the letter "A." The evidence tended to show a much broader and more particular warranty than that designated in the request; and the granting it would have tended to confuse and mislead the jury, by diverting their attention from the other evidence in the case.

The refusal of the court to allow evidence that other machines, made on the same pattern, and of like materials, did good work, is not error. It involved an inquiry into the working of other machines on an outside issue. The other machines may have worked well, and still those in question may have failed to do so. The conditions may not have been the same in both cases. The machines may have been better constructed than those involved in this case.

We think the instructions 1, 3, and 5 were properly given. They were applicable to the evidence. Instruction 5 was in accordance with the testimony as to representations referred to in it, which were properly submitted to the jury to determine whether or not they were intended by defendants as warranties.

We perceive no such variance between the averments in the complaint and the evidence as to render any of the instructions erroneous. The averments in the complaint are sufficient to embrace such warranties. There was no error in the instruction given as to the return of the machines in the spring of 1885. The averments of the complaint were sufficient to include it. Instruction B, requested by defendant, was properly refused, for the reason that it had already been given at the request of defendant in instruction 3. The court did not err in allowing the question, respectively, put to Fox and Tilton. The evidence is sufficient to justify the ver-

dict. The record discloses no error, and the judgment and order are affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

Hearing in bank denied.

(3 Cal. Unrep. 238;

SUKEFORTH v. LORD. (No. 13,363.)¹

(*Supreme Court of California*. Feb. 22, 1890.)

FRAUD—PLEADING AND PROOF—EXCEPTIONS.

1. In an action for the conversion of merchandise levied on under an execution on a judgment against S., the answer alleged "that the defendant is informed and believes, and, upon such information and belief, so avers the fact to be, that, * * * while said S. was so as aforesaid engaged in business, and while he was so as aforesaid indebted, he, said S. and the plaintiff, who is his brother, conspired together for the purpose, and with the intent, to hinder, delay, and defraud the creditors of said S. out of their just debts and demands against him, said S.; and with such purpose and intent said S. made a pretended false and fraudulent sale of the property mentioned in plaintiff's complaint * * * to the plaintiff; and with such purpose and intent the said plaintiff received said pretended false and fraudulent conveyance; and thereupon said plaintiff took possession of said property, and so held the same, and not otherwise." *Held*, that defendant could not prove fraud, under the answer, as it merely alleged a conclusion.

2. After the case was given to the jury, counsel for defendant said that he desired certain exceptions entered, to which the judge replied, "Have any exceptions entered that you desire," and in answer to counsel's question, "Shall I have the clerk enter them?" the judge replied, "If you choose, do so." Counsel, however, never had any exception entered, either by the court or clerk, and never prepared or had settled any bill of exceptions. *Held*, that this did not entitle defendant to a review of the rulings. WORKS, J., dissenting.

Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Geo. A. Rankin, for appellant. Cross & Denson and P. F. Simonds, for respondent.

Fox, J. This is an action against the sheriff of Nevada county for the recovery of the sum of \$4,000 damages, for the unlawful conversion of a stock of merchandise. The sheriff justifies under an attachment, and subsequent judgment, in the superior court of the city and county of San Francisco, in a suit wherein George D. Cooper was plaintiff and L. M. Sukeforth was defendant. No exception is taken to the regularity or legality of the proceedings or writ in that case. The goods were levied upon as the property of L. M. Sukeforth, the judgment debtor, but found in and taken from the possession of E. G. Sukeforth, the plaintiff in this action. The action was tried before a jury, verdict and judgment in favor of plaintiff in the sum of \$3,000, motion for new trial made and denied, and defendant appeals. The value of the property alleged to have been unlawfully converted is admitted by the pleadings to have been \$4,000, and the verdict and judgment was for \$3,000. This disposes of one point made on the motion for new trial, and insisted upon on the appeal,—that the verdict was excessive.

¹ Reversed in banc. See 25 Pac. 487, 87 Cal. 399.

Another point made on the motion, and insisted upon here, is that the evidence was insufficient to justify the verdict. It is not disputed that L. M. Sukeforth and E. G. Sukeforth, the plaintiff in this case, are brothers; that for nine years prior to August 15, 1888, L. M. Sukeforth was a retail merchant doing business at Nevada City; that in August, 1888, he had on hand a stock of goods, principally furniture and carpets, the accumulation of that nine years, which would inventory at a cost price, with freight added, at about \$6,000, with a lot of book-accounts of uncertain value, and a small amount of other personal property not exempt from execution, and was in debt to wholesale merchants between \$5,000 and \$6,000, beside the indebtedness due to his brother, L. M. Sukeforth, and to some others. It is also shown in the evidence, without material conflict, that by reason of the age of the goods, the patterns being out of date, and many of them shop-worn and remnants, and of the state of the market, the stock was not worth at Nevada City over 50 cents on the dollar of its cost price. It is also shown, and contradicted, that on the 15th day of August, in that year, L. M. Sukeforth made to E. G. Sukeforth, the plaintiff, a bill of sale of this entire stock, and of all his book-accounts and personal property not exempt from execution, and put the vendee in possession, himself leaving the premises and going to Sacramento; that E. G. Sukeforth remained in the exclusive possession, and was actively engaged in trying to sell off the property and close out the business, until some time afterwards, when the stock was seized on attachment against L. M. Sukeforth, as above mentioned. The actual consideration of this sale to plaintiff was shown to have been in part an indebtedness actually due to the plaintiff, and upon which plaintiff was then threatening to attach if settlement could not be made; in part certain indebtedness due to other persons, which the plaintiff then assumed, and afterwards actually paid, either in cash or by giving his own notes therefor, and in part cash paid at the time by plaintiff to the vendor, and amounting in the aggregate to \$2,845. From the relationship of the parties; from what he insists was inadequacy of consideration; from the fact that L. M. Sukeforth was insolvent; and from the fact that this sale was made without taking an account of stock and accounts, or making a formal inventory of the goods and property conveyed,—appellant argues that this sale to respondent was fraudulent, and made with intent to hinder, delay, and defraud the creditors of L. M. Sukeforth. Upon this proposition he makes a very plausible argument, and selects many disconnected passages from the testimony which would tend to support it; but at the same time it appears that the evidence upon that subject is conflicting, and it therefore follows that, under the rule of this court announced in nearly 300 cases, the verdict of the jury ought not to be disturbed.

For this reason, as well as for the one announced in response to the next point, we are not disposed to discuss this evidence to the extent that we might otherwise feel called upon to do.

Another point made is that the court erred in its rulings as to the admissibility of certain evidence. We have examined the exceptions upon this point which are urged in the appellant's brief, and fail to perceive any prejudicial error; but, even if there were error, the appellant is not in position to avail himself thereof in this case, or of the point of insufficiency of evidence on the question of fraud in the transfer by L. M. Sukeforth to the respondent. It is conceded, even by the appellant, that an insolvent debtor, in the absence of any adjudication of insolvency, has the right to pay one or more creditors in preference to others, and to dispose of his property for that purpose, if it is fairly done, the transfer is *bona fide*, and not made under a secret trust, or to secure a personal advantage to himself, nor with intent to hinder, delay, and defraud his creditors generally. All the questions upon which these rulings claimed to have been erroneous were made, were propounded to prove fraud, and want of *bona fides* in the transaction between L. M. Sukeforth and the respondent; and this, also, is the point upon which it is claimed that the evidence was insufficient to justify the verdict.

The appellant was not in position to avail himself of the question of fraud in this transfer. There was neither in law nor in fact any issue upon the subject under the pleadings. It follows that if there was error in this regard it was not material error. The complaint alleged title and possession in the plaintiff at the time of the seizure by defendant, and the proof sustained it. To overcome this, it was incumbent upon the defendant to prove fraud and want of *bona fides* in the transaction by which the plaintiff became the owner and in possession. He was not entitled to prove it, unless he had laid the proper foundation therefor in his pleading. The only attempt at laying the foundation for such proof in his pleading was as follows: "That the defendant is informed and believes, and upon such information and belief so avers the fact to be, that on or about the 15th day of August, 1888, while said L. M. Sukeforth was so as aforesaid engaged in business, and while he was so as aforesaid indebted, he, said L. M. Sukeforth, and the plaintiff, who is his brother, conspired together for the purpose and with the intent to hinder, delay, and defraud the creditors of said L. M. Sukeforth out of their just debts and demands against him, said L. M. Sukeforth; and with such purpose and intent said L. M. Sukeforth made a pretended, false, and fraudulent sale of the property mentioned in plaintiff's complaint, and of all other property save such as is by law exempt from execution, owned by said L. M. Sukeforth, to the plaintiff, and with such purpose and in-

tent the said plaintiff received said pretended false and fraudulent conveyance; and thereupon said plaintiff took possession of said property, and so held the same, and not otherwise." By this pleading the defendant alleges a conclusion only. He concludes what constitutes a fraud, instead of stating the facts, and allowing the court to conclude whether they constitute fraud or not. This form of pleading has been held, in a long line of decisions by this court, to be insufficient. All the epithets, and much of the exact language, used in this answer, will be found in the complaint in *Pehrson v. Hewitt*, where a judgment by confession was sought to be set aside on the ground of fraud. It was fully considered by the court in bank, (79 Cal. 598, 21 Pac. Rep. 950,) and held that it did not state facts sufficient to constitute a cause of action; that the facts showing the fraud must be made to appear by averment. The question was again considered in *Albertoli v. Branham*, 80 Cal. 633, 22 Pac. Rep. 404, a case almost exactly like the present one, except that the pleading was less objectionable than this; but it was held to be insufficient,—that, in pleading fraud, it is not sufficient to allege it in general terms, but the facts constituting the fraud must be stated. That case is decisive of this, so far as the sufficiency of this pleading is concerned. Because of its insufficiency, the defendant is not entitled to be heard to impeach the *bona fides* of the sale to plaintiff.

Appellant also assigns as error certain rulings of the court in giving and refusing instructions to the jury. He is not entitled to be heard upon these assignments, for the reason that he saved no exception to such rulings. After the case was given in charge to the jury, counsel did step up to the judge, and say to him that he desired certain exceptions entered; to which the judge replied: "Have any exception entered that you desire." Counsel then said: "Shall I have the clerk enter them?" to which the judge replied: "If you choose, do so." But he never did have any exceptions entered, either by the court or the clerk, and never prepared or had settled any bill of exceptions. This is in no sense a compliance with the statute, and does not entitle the party to a review of the rulings. Judgment and order affirmed.

I concur: PATERSON, J.

WORKS, J. I concur in the judgment, but do not agree to what is said in the opinion of Mr. Justice Fox as to the manner of entering an exception to the giving of instructions. I think the record sufficiently shows that the exceptions were properly taken, and in time. It was enough that the judge was notified that the appellant excepted, and the record shows that this was done. It was not necessary that the exception should have been entered at the time by either the judge or the clerk.

INGRAM v. SMITH *et al.* (No. 13,847.)

(Supreme Court of California. Feb. 27, 1890.)

ACTIONS BY ASSIGNEE FOR BENEFIT OF CREDITORS
—FICTITIOUS CREDITORS.

Under Civil Code Cal. § 3439, providing that every transfer of property, or charge thereon made, and every obligation incurred, with intent to delay or defraud creditors, is void as against creditors, and against any person on whom the estate of the debtor devolves in trust for the benefit of others than the debtor; and section 3412, providing that "a written instrument, in respect to which there is reasonable apprehension that, if left outstanding, it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up and canceled," an assignee for the benefit of creditors may sue the payee of a note fraudulently made by his assignor, to enjoin him from negotiating the note, and to require him to deliver it up for cancellation to such an extent as will enable the creditors to obtain the full amount of their claims.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; B. F. MYRES, Judge.

L. T. Hatfield and John M. Fulweiler, for appellant. *D. W. Spear, E. L. Craig, and Wallace & Prewett*, for respondents.

GIBSON, C. Plaintiff appeals from a judgment for defendants, rendered upon their general demurrer to his amended complaint. It appears from the complaint, which contains much evidential matter that should have been omitted, that on November 8, 1888, Smiley, being then insolvent, made an assignment for the benefit of his creditors to the plaintiff, who accepted the trust, and qualified as such assignee. Smiley, on the 3d day of October of the same year, was, and for a long time prior thereto had been, engaged in the business of dealing in merchandise, and was indebted to divers parties in different amounts, aggregating more than \$5,000; which he was, on the last-mentioned date, unable to pay in accordance with the terms of his several obligations, although possessed of personal property reasonably worth \$6,000. On or about that date, Smiley, for the purpose of hindering, delaying, and defrauding his creditors, and of securing to himself and his co-defendant, Smith, the benefit of his property, fraudulently entered into an agreement with him, the terms of which are to plaintiff unknown, but the moving consideration was that Smiley was to pretend to convey and assign to Smith all his property for the alleged consideration of \$2,300, asserted to be due to Smith from Smiley, when in fact he was not in any way indebted to Smith. Pursuant to this transfer Smith claimed to be in possession of all the property from the 3d until the 22d of October, 1888, during all of which time, however, Smiley continued to exercise acts of ownership over it, making sales of merchandise, taking pay therefor, and communicating with his creditors as though he had not parted with his property. Smith, who is

and was, at all times mentioned in the complaint, without property, and wholly dependent upon his earnings for a livelihood, knew of the insolvency of Smiley; and all his acts performed in concert with Smiley were for the purpose of cheating the creditors of the latter, for their joint benefit. About October 20, 1888, a firm of wholesale dealers in Sacramento, who were creditors of Smiley, first learned of the transfer to Smith; Smiley having never, prior to that time, disclosed to his creditors that Smith was one of them. On the 22d of the same month, after an interview with a member of the said firm, Smiley procured Smith to make him a deed, which expressed no consideration, purporting to reconvey the real property embracing the store previously conveyed to him by Smiley. The latter, upon receiving the deed, placed it on record, and thereupon made, and caused to be recorded, a declaration of homestead upon the same property. Thereafter, and in furtherance of their corrupt agreement, Smiley made and delivered to Smith, without receiving any consideration therefor, his promissory note for \$1,000, the true time and date of which are unknown to plaintiff. At the same time he delivered to Smith two solvent interest-bearing notes, payable to himself, for the sum of \$720 and \$750, respectively. On November 18th, in furtherance of their fraudulent design, Smith represented to the maker of the \$750 note that he was the *bona fide* owner of it, and procured from him, in payment of it, a deed to a one-twentieth interest in a mining claim, of the value of \$500. The other note is worth \$700. Smiley fraudulently included in his schedule of indebtedness the name of Smith as one of his creditors on account of the note for \$1,000.

The plaintiff, after qualifying as assignee, took possession of the stock of merchandise and other personal property; all of which personality, with the exception of the stock of merchandise, was estimated by Smiley at a much greater value than it was reasonably worth, some of the notes and accounts being at the time barred by the statute of limitations. The two notes delivered by Smiley to Smith with the \$1,000 note have not been offered to plaintiff. The actual value of Smiley's assets will not exceed \$5,000. His total indebtedness, as scheduled, including the \$1,000 on the note to Smith, is \$6,121.75; and is all justly due, except the amount of said note. Creditors' claims to the amount of \$419.83 have been exhibited to the assignee, and the expenses of executing the trust imposed by the assignment will be at least \$800. These last two amounts added to the scheduled indebtedness, less the \$1,000 on the note to Smith, bring the total liabilities up to \$6,341.58. And unless the note for \$1,000, held by Smith, is canceled, the creditors of Smiley will not receive more than 80 per cent. of their demands against him. The prayer is, among other things, for a temporary injunction to restrain Smith from negotiating the note; and that he be required to

deliver it for cancellation *in toto*, or to such an extent as will enable the creditors to obtain the full amount of their claims.

The assignment in this case was made pursuant to division 4, pt. 2, tit. 3, Civil Code; the first provision of which is as follows: "Sec. 3449. An insolvent debtor may, in good faith, execute an assignment of property to one or more assignees, in trust for the satisfaction of his creditors, in conformity to the provisions of this chapter; subject, however, to the provisions of this Code relative to trusts and to fraudulent transfers, and to the restrictions imposed by law upon assignments by special partnerships, by corporations, or by other specific classes or persons." By section 3439, under the title relating to transfers with intent to defraud creditors, referred to in the section quoted, it is provided that "every transfer of property, or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor." The promissory note to Smith, which upon its face purports to have been made for a valuable consideration, having been given by Smiley to and received by Smith for the purpose of defrauding the creditors of the former, clearly constitutes such an obligation as is contemplated by section 3439, and is therefore void against all of Smiley's creditors, and also the plaintiff, upon whom the estate of Smiley devolved for the benefit of his creditors. "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged and ordered to be delivered up or canceled." *Id.* § 3412; 3 Pom. Eq. Jur. § 1377. From the fact that the note is scheduled as one of the insolvent's items of indebtedness, it is *prima facie* a charge against his estate in the hands of the plaintiff. As the estate is insufficient to pay the *bona fide* creditors in full, it is manifest that although the plaintiff, as assignee, knowing the note to be fraudulent and without consideration, might successfully resist the payment of it, yet Smith, before it matures, may, unless restrained, transfer it for value to an innocent purchaser, who could enforce it, and thereby cause serious injury to such creditors by reducing the already insufficient assets of the estate. The date and time of maturity of the note are both unknown to plaintiff, but, in view of the other facts stated, his apprehension that it may not have matured, and may be so used as to result in injury to the beneficiaries of the trust imposed upon him, is well founded. For these reasons we think the court erred in sustaining the demurrer, and we therefore advise that the judgment be reversed, and the trial court directed to

overrule the demurrer, and grant the defendants leave to answer.

We concur: VANCLIEF, C.; FOOTE, O.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the trial court is directed to overrule the demurrer, and grant the defendants leave to answer.

(83 Cal. 290)

WASHINGTON v. BLACK *et al.* (No. 13,479.)

(Supreme Court of California. Feb. 28, 1890.)

EXECUTORS—ACCOUNTING—ASSETS—DEVASTATION.

1. The rents and profits of a testator's land accruing after his death are assets of his estate, under Code Civil Proc. Cal. § 1452, providing that the executor is entitled to receive the rents and profits of the real estate until the estate is settled, or until delivered by order of the court to the heirs or devisees.

2. The fact that the executrix did not include the rents and profits so received in her report, or settling her account before the probate court, does not estop her to say that she received them as assets of the estate, nor can she, after such settlement, be sued therefor by the devisee; since Code Civil Proc. Cal. § 1687, provides that the settlement of an executor's account, and allowance thereof by the court, or on appeal, shall be conclusive, as against all persons in any way interested in the estate.

Department 2. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

E. E. Bush and C. W. Thomas, for appellants. A. P. Catlin, for respondent.

THORNTON, J. James Moore died in 1884, leaving a will, which was afterwards duly admitted to probate in Yolo county. He died possessed of a large estate. By his will he bequeathed, among other things, a handsome estate to his wife, the defendant Mary A. Black, who since his death has married her co-defendant, James R. Black. He also bequeathed to her all of his personal property, in trust to pay his debts, funeral expenses, and costs of administration, and the remainder of this personal property to her. He devised to his daughter, Martha Washington, in fee, the S. $\frac{1}{2}$ of section 11, township 9 N., range 1 W., M. D. meridian, saving and excepting about 10 acres, etc. The defendant Mary A. was appointed, qualified, and acted as executrix, and administered the estate under the will. The personal property demised to her in trust was more than sufficient to pay the testator's debts, funeral expenses, and the expenses of administration. While the defendant Mary was executrix, she received in the year 1885, as rents, issues, and profits of the land devised as above-mentioned to the plaintiff, the following sums: \$2,652.82, on the 14th day of August, 1885, from the sale of wheat received by her as rent of said land; also, about the same time, the further sum of \$91.81 from the sale of other wheat received by her as such rent; also the further sum of \$100, received for pasturage of said land; also the further sum of \$676.50, received by her as proceeds of the sale of certain summer

fallow on said land,—all received prior to the 15th day of November, 1885, and making a total thus received of \$3,521.12. The defendant Mary rendered a final account of her administration to the proper superior court, which was settled and approved. The court further finds that on or about the — day of April, 1888, the defendant was discharged as executrix. The court further finds that the land devised to plaintiff was by the proper court ordered to be delivered to her, upon her giving security as provided by article 1 of chapter 2 of title 2 of part 3 of the Code of Civil Procedure. It is further found that the superior court of Yolo county did not at any time make an order for the sale by the executrix of the personal property above mentioned, as received for rents and profits of the land devised to plaintiff, or of any part of it; nor did the executrix ever sell said personal property, or any part thereof, under any order or direction of said superior court; nor did the said court at any time make any order confirming any sale of said personal property, or any part thereof; nor did said superior court at any time make an order or decree that said rents, issues, and profits, or any part thereof, were assets of said estate; nor did the said superior court at any time make any order or decree in the matter of said estate distributing to said defendant the said rents, issues, and profits, or any part thereof. The plaintiff, before this suit was begun, demanded of defendant Mary the payment of the rents and profits above mentioned, which she refused to pay. On the facts above detailed, the plaintiff, by the judgment of the court, recovered, of defendant Mary, \$3,112.12, with interest from the 13th of November, 1885.

It will be observed that it is found as a fact that the rents and profits in controversy here were received by the executrix while she was executrix. Whether she received them as executrix is not found. It appears from certain probative facts which are found that she did not treat them as assets of the estate. She never included them in any account rendered by her to the court, and she did render her accounts, which were by the court settled and allowed. Nor were they ever referred to in any report made by defendant to the court. But these probative facts do not necessarily show that the defendant did not receive these sums as executrix. And as she had lawful authority to receive them in her official capacity, and no authority to receive them in any other capacity, we must hold, until otherwise appearing, that she received them as executrix, in the only way she was authorized by law to receive them. There is not the least evidence that the defendant assumed to receive them as bailiff or steward or agent of the plaintiff, or that the latter ever empowered or authorized her to receive them as her agent. Conceding there is some evidence tending to show this, it is not so found.

The land out of which these rents and profits issued was ordered to be distributed to plaintiff prior to the receipt of some of

them by the defendant, but it was not delivered into her possession until the 16th of November, 1885. To this date the executrix was clearly entitled to receive these rents by virtue of the provisions of section 1452 of the Code of Civil Procedure. By this section she is entitled to receive the rents and profits of the real estate until the estate is settled, or until delivered by order of the court to the heirs or devisees. It is true that the devisee of this land, the plaintiff, takes title from the death of the testator, and has a right to the rents and profits arising from it from the same date; but this right is subject to the right of the executrix to the possession of the land, and to receive the rents and profits arising therefrom until the happening of the events above designated. Conceding that the plaintiff might have maintained an action to recover the rents, etc., on a promise to pay such to her by the executrix, we find no evidence of such promise here, and no such promise is found. As the facts appear, we see no ground for holding that the plaintiff could maintain an action on this case prior to the regular distribution by the proper court. It is argued that the executrix is estopped to say that they are rents of the estate of Moore by her conduct in withholding them from her account and report to the probate court; in never treating them as such. But we cannot see that this plaintiff was misled in any way by this conduct, and therefore it cannot be held that there is any such thing as an estoppel. How the failure on the part of the executrix to do her duty in relation to those rents and profits, in making return of them to the probate court, and accounting for them, can work an estoppel, we cannot see. We are bound to hold that the plaintiff was cognizant of her rights, and that she could have compelled an account of them to her by the executrix in due course of procedure in the probate court. She was notified regularly of the settlement of the accounts of the executrix, and made no attempt to charge the executrix with this money on the settlement. She might have examined the executrix before that court, and obtained a disclosure of the receipt of those rents.

In a case like the one before us, the matters in controversy are under the sole jurisdiction of the probate court. The remedy must be sought there. This, we think, is conclusively determined by this court in *Reynolds v. Brumagim*, 54 Cal. 254. It was there attempted to charge Brumagim for a neglect to sue as administrator within the period prescribed by the statute of limitations, for land in the possession of adverse claimants, whereby the land was lost to the estate. It was ruled that the action could not be maintained; that under our system the probate court had jurisdiction to settle the accounts of an administrator, and to ascertain and determine his liability to the estate, and the decree of that court settling the accounts and fixing the amount of liability was conclusive. See Code Civil Proc. §§

1637, 1908. Section 1637 declares that "the settlement of the account, and the allowance thereof by the court, or upon appeal, is conclusive against all persons in any way interested in the estate," with a saving which does not apply here, as it does not appear that the plaintiff was under any disability. The learned counsel for plaintiff lays some stress on the fact that the executrix in this case was guilty of a *devastavit* by her neglect to account, for which she is personally bound. This may be conceded, yet it does not change the result. The question is, by what mode of procedure is such personal obligation to be enforced? and that, as pointed out above, is to be enforced by a resort to the court which settled the account.

It is said by counsel for plaintiff that the rents and profits of the land were not assets of the estate. This contention cannot be maintained. The whole estate, real and personal, under our system, is assets, and may be, if required, applied to the payment of the debts of the estate. It was so held in *Re Woodworth*, 31 Cal. 605, 613, 617, 618. SANDERSON, J., in his concurring remarks, expressly includes accruing rents of the real estate among the assets. In a general sense, every part of the estate is assets which comes under the law to an executor and administrator. 1 Story, Eq. Jur. § 531. The ruling in *Re Woodworth*, supra, that "the rents and profits of real estate accruing subsequent to the death of the testator are not personal property in the hands of the executor, to be first applied to the payment of debts in exoneration of the general personality," does not hold that such rents are not assets for the payment of debts. On the contrary, the language used implied that they are such assets. The case was one calling for the marshaling of the assets of Woodworth's estate. What necessity was there to say anything about the accruing rents, in the marshaling of the assets, unless they were assets? But it is clearly held that such rents are assets. 31 Cal. 605, supra. It cannot be said that that which under the law comes to the hands of an executor or administrator is not assets. Such estate is all assets. Whether it is needed to pay debts or not is not the question. It cannot be said that that which is required to pay debts is assets, and that which is not required is not. The amount of assets is not determined by the amount of the indebtedness of the estate, but by the amount of the estate. We cannot perceive how the judgment and order in this case can be sustained. They are therefore reversed, and the cause remanded. So ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

(83 Cal. 319)

BUNNEL v. STOCKTON *et al.* (No. 12,469.)
(Supreme Court of California. Feb. 23, 1890.)

APPEAL—REVERSAL—FINDINGS—NEW TRIAL.

1. In an action to foreclose a mortgage against the estate of defendants' testator, wherein defend-

ants allege that testator declared a homestead in the property, which had never been abandoned, the fact that there is no direct finding on these issues will not cause a reversal, where the court finds that testator's divorced wife, one of the defendants, has no interest in the mortgaged premises, by homestead declaration or otherwise; that the other defendants have an interest under the will, subject to the mortgage; and that no probate homestead was ever designated out of the mortgaged premises. *BEATTY, C. J.*, dissenting.

2. Under Code Civil Proc. Cal. §§ 659, 1054, requiring a statement of the case to be filed within 10 days after service of notice of intention to move for a new trial, and authorizing the court to extend the time for not more than 30 days without the consent of the adverse party, the fact that the latter consents to one extension beyond the 30 days does not authorize the judge to grant still another extension without his consent, and a statement filed during such extension is too late.

In bank. On rehearing. For former report, see 21 Pac. Rep. 961.

Spencer & Raker, for appellants. *Goodwin & Dodge*, for respondent.

WORKS, J. Appeal from a decree foreclosing a mortgage on real estate, and from an order denying the defendants a new trial. The case was decided against the appellants on a former hearing on the ground that the homestead relied upon by the defendants was void for the reason that the declaration thereof did not contain an estimate of the cash value of the property, as required by section 1263 of the Civil Code. *Knock v. Bunnell*, 21 Pac. Rep. 961. It was discovered subsequently that at the time this homestead was declared the statute did not require a statement of the value of the property, and a rehearing was granted; and the case has again been heard.

The motion for a new trial was properly denied, for the reason that no statement of the case was filed in time. The Code requires that the statement be served within 10 days after the service of notice of intention to move for a new trial. Code Civil Proc. § 659, subd. 3. The moving party must prepare and serve his statement within the time allowed by law for that purpose, or it cannot be settled, or, if settled, cannot be considered either at the hearing of the motion, or on appeal to this court. *Quivey v. Gambert*, 32 Cal. 304, 309; *Chase v. Evoy*, 58 Cal. 348; *Cooney v. Furlong*, 66 Cal. 520, 6 Pac. Rep. 388. The time allowed by section 659 may be extended by the court or judge, but not longer than 30 days, without the consent of the adverse party. Code Civil Proc. § 1054. In this case the judge of the court below extended the time for the full 30 days, and then, upon a stipulation of the adverse party, extended it an additional 20 days, and then again, without the consent of the adverse party, gave the appellant another 20 days; and the statement was not filed until the last day of the last extension of time. This was too late. The judge of the court below exhausted his power when he extended the time 30 days, and the last extension of time by him was unauthorized. The fact that the respondent had consented to one extension of time beyond the

30 days did not give the judge any additional authority.

The action was against an estate, and the heirs of the deceased, to foreclose a mortgage; and the defendants, in their answer, averred that the deceased in his life-time declared a homestead on the property; that the same had never been abandoned; and that the mortgage had not been filed as a claim against the estate in which an administrator had been appointed, and notice to creditors duly given. It is contended by the appellants that the findings of the court do not find upon these issues, except that the mortgage was not filed as a claim against the estate. The court does not find, in direct terms, whether the homestead ever existed, or whether, having been declared, it had been abandoned; but it does find that Annie E. Stockton, one of the appellants, and the divorced wife of the deceased, had no interest in or title to said mortgaged premises, by homestead declaration or otherwise, and that the other defendants, minor heirs of the deceased, had an interest in the property as the devisees under his will, but that their interest was subsequent and subject to the mortgage, and that no probate homestead was at any time designated out of the mortgaged property, or any portion thereof. These findings are not as full and specific as they should have been, but we think they are such that the judgment should not be reversed in the absence of the evidence, which, we have shown, is not properly in the record. Judgment and order affirmed.

We concur: *PATERSON, J.*; *SHARPSTEIN, J.*; *FOX, J.*; *MCFARLAND, J.*

BEATTY, C. J. I dissent. The findings do not respond to all the material issues.

(3 Cal. Unrep. 243)

EMHOFF et al. v. MCMANN. (No. 12,752.)
(*Supreme Court of California*. March 7, 1890.)

FRIVOLOUS APPEAL.

Where, on failure of an appellant to appear when his cause is called, and the judgment appealed from is affirmed, with damages for frivolous appeal, on motion of respondents, there being no brief on file, and it thereafter appears that failure to file a brief was due to appellant's ignorance that his cause was on the calendar, and an examination of the record shows that the appeal was not frivolous, that part of the judgment imposing damages for frivolous appeal will be set aside.

In bank. Appeal from superior court, city and county of San Francisco; *JOHN F. FINN*, Judge.

On application for rehearing. No opinion was rendered on previous affirmance of the judgment.

Vincent Neale, for appellant. *F. J. Castlehun*, for respondents.

PER CURIAM. This cause was regularly on the January calendar, 1890. When it was reached in due course and called for hearing, the appellant failed to appear, and no brief being on file, on motion of counsel for re-

spondents, and his suggestion that the appeal was frivolous, the judgment and order appealed from were affirmed, with damages. In making this order, the court acted upon the assumption that the appellant had voluntarily abandoned his appeal, and, as parties do not ordinarily abandon their appeals when there is even a plausible ground to support them, we were forced to conclude that this appeal had not been taken in good faith. It now appears that the failure of appellant to file a brief was due to his ignorance of the fact that his cause was on the calendar, and an examination of the record convinces us that the appeal was not frivolous. So much of the judgment, therefore, as imposes damages for a frivolous appeal is erroneous, and is hereby set aside. We do not think, however, that counsel has offered an excuse for his failure to note the time his cause was set for hearing sufficient to justify us in ordering a rehearing in bank. Rehearing denied, but the judgment is modified to one of affirmance simply, without damages.

(83 Cal. 134)

DESMOND v. FAUSS *et al.* (No. 13,553.)

(Supreme Court of California. Feb. 10, 1890.)

MOTION TO DISMISS APPEAL—ORDERS.

Under Code Civil Proc. Cal. § 1003, which defines an order to be any direction of a court or judge in writing, not included in a judgment, a writing signed by four justices of the supreme court, extending the time for filing transcript, is an order, though it is not filed; and a failure to file it is not ground for dismissing the appeal, especially where it was an inadvertence, and respondents had notice thereof by service of a copy on their counsel.

In bank. On motion to dismiss appeal.

F. J. Castelhun, for the motion.

THORNTON, J. Motion to dismiss appeal for failure to file transcript in time. By stipulation, the time to file the transcript had been extended to and including the 10th of October, 1889. By a writing signed by four justices of this court on the 8th of October, 1889, the time to file the transcript was further extended 20 days from the 10th of October, 1889. This paper was not filed, but a copy of it was served on the attorney of defendants on the said 10th of October. The order was filed after notice of motion to dismiss was served, and before hearing of the motion. It is now objected that the writing was of no force,—was not an order until filed,—and therefore the time was not extended. We are inclined to think that the paper signed by the four justices was an order of court before filing. It was a writing signed by the justices, and purported to be an order. See Code Civil Proc. § 1003.¹ We are satisfied that the failure to file the writing was an inadvertence, and that the appeal should not be dismissed. The respondents

knew that the writing existed, by the service of a copy on their counsel. We do not think the ends of justice would be promoted by dismissing this appeal, (*Grant v. De Lamori*, 71 Cal. 329, 12 Pac. Rep. 228,) and the motion must be denied. So ordered.

We concur: BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; FOX, J.; PATERSON, J.

(83 Cal. 393)

PEOPLE v. CENTRAL PAC. R. CO. (No. 12,257.)

(Supreme Court of California. March 8, 1890.)

COLLECTION OF TAXES—PLEADING—CONSTITUTIONAL LAW.

1. Pol. Code Cal. §§ 4480, 4481, provide that "the provisions of the four Codes shall be treated as if passed at the same moment of time," and that, "if the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title." Code Civil Proc. § 421, which is part of a title, the subject of which is "Pleadings in Civil Actions," being the only title in the four Codes devoted specially to the subject, provides that "the forms of pleading in civil actions, and the rules by which the sufficiency is to be determined, are those prescribed in this Code." *Held*, that a complaint in an action for the collection of taxes must conform to the requirements of the Code of Civil Procedure, and contain a statement of facts constituting a cause of action, as required by section 421, though the Political Code, in a title devoted to "Revenue," authorizes a special form of complaint in such cases.

2. Where such complaint avers an assessment of "the franchise, road-way, road-bed, rails, and rolling stock of the defendant," but does not allege that defendant is the owner of such property situate within the jurisdiction of the assessing board or of the court, it is defective.

3. A complaint, in such action, averring that the board apportioned the assessment among different counties, without showing its authority so to do, or that any portion of the property assessed, or of any property of defendant was situate in any one of such counties, and without describing any of the property, is defective.

4. An averment of indebtedness for taxes, without an averment that any taxes were ever levied on defendant or its property, or, if levied, when, where, and by whom the levy was made, or whether the taxes were based on the assessment mentioned above, or that there are any taxes against defendant, delinquent or unpaid, is insufficient.

5. Where such complaint states in one count an indebtedness to the state for state taxes, and to many different counties for county taxes, and demands payment of all, there is a misjoinder of causes of action.

6. An averment of defendant's corporate existence is necessary in every count of a complaint against a corporation.

7. Pol. Code Cal. § 3670, providing a special form of complaint in actions to collect taxes on railroads situate in more than one county, conflicts with Const. Cal. art. 4, § 25, subd. 3, which forbids the legislature to pass special laws "regulating the practice of courts of justice," as such provision is a "special law," though found in the Political Code, which is general.

8. Pol. Code Cal. §§ 3665-3670, providing a mode for the collection of taxes on railroads situated in two or more counties, differing from that found in the general law, are in conflict with Const. Cal. art. 4, § 25, subd. 10, forbidding the legislature to pass any special laws "for the assessment or collection of taxes."

9. Such law cannot be justified by Const. Cal. art. 13, § 13, which provides that "the legislature shall pass all laws necessary to carry out the pro-

¹ Code Civil Proc. Cal. § 1003, provides that every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an "order."

visions of this article," on the ground that section 10 of that article provides a different method for assessing property of railroads operated in more than one county, from that provided for other property, as this does not refer to levy and collection of taxes, but to "assessment" only, and the general laws for the collection of taxes are sufficient to carry into effect the provisions of article 13.

BEATTY, C. J., and THORNTON, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

George A. Johnson, Atty. Gen., and *D. M. Delmas*, for the People. *Creed Haymond*, *John Garber*, and *H. S. Brown*, for respondent.

FOX, J. This is an action, brought in the name of the people of the state, to recover from the defendant a certain sum of money alleged to be due the state for taxes, and also various other sums of money alleged to be due to divers of the counties of the state, for taxes for the year 1886. The defendant demurred to the complaint, which demurrer was, upon argument, sustained by the court below, and judgment entered for the defendant, from which the plaintiff appeals. So far as we are advised, this is the first case in which the precise questions here involved, under the present constitution, has been presented for adjudication. To a complete understanding of it, we give the pleadings at some length. The complaint, after giving the title of the court and cause, is as follows: "Plaintiff avers that on the 14th day of August, in the year 1886, the state board of equalization assessed the franchise, road-way, road-bed, and rolling stock of the defendant at the sum of \$20,000,000. That the board apportioned the said assessment as follows: To the county of Alameda, the sum of \$2,607,230, [and here follows similar language as to 16 other counties, differing only in amount.] That the defendant is indebted to plaintiff, for state and county taxes for the year 1886, in the following sums: For state taxes, in the sum of \$112,000; for county taxes of the county of Alameda, in the sum of \$16,225.34, [and here follows a statement in similar form as to the other 16 counties before named, differing only as to amount,] with 5 per cent. added to each of said several sums for non-payment of taxes. Plaintiff demands judgment for said several sums, with 5 per cent. added thereto, together with costs and counsel fees as allowed by law, and prays that an attachment may issue in form as prescribed by section 540 of the Code of Civil Procedure." To this complaint the defendant demurred on the following grounds: "First. That the court has no jurisdiction of the subject-matter of the action, nor the person of the defendant herein. Second. That the plaintiff has not the legal capacity to sue herein, for the following reasons: That sections 3668-3670 of the Political Code, under the provisions of which said action was instituted, are unconstitutional and void, in this: that said sections are in contravention

of subdivisions 3 and 10 of section 25 of article 4 of the constitution of the state of California. They also are in contravention of section 21 of article 1 of the constitution of the state of California, and of section 1 of article 12 of the constitution of the state of California. That said sections of the Political Code are in contravention of section 1 of the fourteenth amendment of the constitution of the United States. That, so far as the assessment of railroad property is concerned, sections 4 and 10 of article 13 of the state constitution, upon which the said action is founded, are in contravention of section 1 of the fourteenth amendment of the constitution of the United States. Third. That several causes of action have been improperly united. Fourth. That several causes of action have been improperly united, which are not separately stated in the complaint; that is to say: (1) a cause of action for state taxes; (2) a cause of action for county taxes of the county of Alameda. [Followed by a separate subdivision, in similar form, for each of the other 16 counties.] Fifth. That the complaint does not state facts sufficient to constitute a cause of action. Sixth. That the complaint is ambiguous, unintelligible, and uncertain, in this: that it does not appear how or when defendant became indebted for taxes; that it does not appear how or when 5 per cent. was added. Wherefore, defendant prays judgment against plaintiff, and that it may have its costs in this behalf expended."

1. It will be unnecessary to consider these grounds of demurrer separately, at any considerable length. The questions of jurisdiction, of misjoinder of causes of action, of insufficiency of facts, and of ambiguity, all turn upon the constitutionality of the provisions of the Political Code under which the plaintiff is attempting to proceed, and under which alone, if anywhere, this form of complaint can be justified. But, tested by the provisions of the Code of Civil Procedure, every point made against the complaint is well taken. Outside the Political Code of this state, it is doubtful if either authority or precedent can be found which would have induced any lawyer to file in a court of justice a complaint like this. It does not contain "a statement of the facts constituting the cause of action," as required by section 426, Code Civil Proc., or as required by any other rule of pleading known to the profession. And yet, by section 421 of the same Code,—the general statute of this state devoted specially to the subject of pleadings and procedure in civil actions,—it is expressly provided that "the forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this Code." And by the provisions of the Political Code, from which Code it is conceded that this form of complaint is taken, it is expressly declared that "the provisions of the four Codes shall be treated as if passed at the same moment of time, and were parts of the

same act," and that, "if the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title." Pol. Code, §§ 4480, 4481. The sections of the Code of Civil Procedure referred to are part of title 6, pt. 2. The "subject-matter" of that title is "Pleadings in Civil Actions," and it is the only title in the four Codes devoted specially to that subject. It is therefore, the title which section 4481 of the Political Code declares "must prevail as to all matters and questions arising out of that subject-matter." How, then, can we test the sufficiency of pleadings by the provisions of section 3670 of the Political Code? That section is the only warrant for this complaint, and is found in title 9, pt. 3,—a title devoted entirely to the subject of "Revenue." Responsive to this, the appellant says that the same legislature passed both Codes; that its power to legislate is supreme, except when and where limited by the constitution; and that its power is ample to prescribe one form of complaint for one class of cases, and another form for another class. That is true; but the same legislature had the power to say, and did say, that "the forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this act," to-wit, the Code of Civil Procedure, which is a separate act from other Codes, though deemed to have been passed at the same moment of time, and, in the exercise of the same power, at the same moment of time, in another act, which defines the rights and duties of all persons subject to the jurisdiction of the state, and a part thereof devoted to a "definition of the sources of the law," and a title of such part defining "the effect of the Codes," it expressly tells the courts by what rule they shall be governed in case the provisions of the four Codes, or of either Code, are found to be conflicting.

Guided by that rule, when we examine this complaint we find it defective in all these particulars: (1) The defendant is sued by a name indicating that it is not a natural person, but a company of some kind, but there is no averment of the fact of incorporation, or of any fact to show that it is an artificial being capable of being sued; nor, if incorporated, is there any averment to show where, or under what law, so that the court may determine where jurisdiction of its person lies. An averment of defendant's corporate existence is necessary in every count of a complaint against a corporation. *Loup v. Railroad Co.*, 63 Cal. 99. (2) There is an averment of the fact of assessment of "the franchise, road-way, road-bed, rails, and rolling stock of the defendant;" but there is no averment that the defendant is the owner of such or any property situate in this state or elsewhere,—nothing to show that the property so assessed was or is within the jurisdiction of the board making the assessment,

or of this court, nor indeed, that there was any such property *in esse*. (3) There is an averment that the board apportioned the said assessment to 17 different counties in the state, but there is nothing to show its authority to make any such apportionment; that any portion of the property, or of any property of defendant, was situate in any one of said counties. The apportionment is of the total sum at which the assessment is made, without a word of description of the property so assessed, or of the part thereof so apportioned to any one of said counties. (4) There is an averment of indebtedness for state taxes, but no averment that any taxes were ever levied or imposed upon the defendant or its property; or, if a levy was made, when, where or by whom it was made, or whether the taxes were based or levied upon the assessment so made, or the property so assessed as aforesaid, or that there are any state taxes against the defendant, delinquent or unpaid. (5) There is an averment of indebtedness for county taxes in each of the 17 counties named, but as to each the same defect exists as above noted in reference to state taxes. (6) If there is any cause of action stated in this complaint at all, there are 18 separate and distinct causes of action, all in one count, and not separately stated. They affect—and if the money is collected it will belong to—18 different persons, to-wit, the state, and 17 separate counties. The only provision in the title of the Code on the subject of pleadings which authorizes the uniting of several causes of action in the same complaint requires that they shall all belong to one class, affect all the parties to the action, and must be separately stated. Code Civil Proc. § 427. (7) The complaint is also ambiguous, for the reason stated in the sixth ground of demurrer. Tax proceedings are *in invitum*, and, to be valid, must be *stricti juris*. *Cooley Tax'n*, 259, 260; *Moss v. Shear*, 25 Cal. 46; *People v. Mahoney*, 55 Cal. 288; *Lake County v. Mining Co.*, 66 Cal. 20, 4 Pac. Rep. 876. If not valid, they constitute no cause of action. It therefore becomes necessary that a complaint in an action for the collection of a tax should show upon its face facts sufficient to make out a *prima facie* case of valid tax and that it is delinquent. It is true that the title on "Revenue" provides that "no assessment, or act relating to assessment or collection of taxes, is illegal on account of informality, nor because the same was not completed within the time required by law." Pol. Code, § 3885. But the waiving of informality does not waive the necessity for action. That an assessment shall not be invalid because of some informality does not excuse the total want of assessment. There can be no assessment unless there is some property assessed; and, to be assessed, there must be some attempt at description of the property. At least, its general character must be shown, and its *situs* must be shown to be within the

state or the county where assessed. It will be observed, also, that the section quoted refers to informality in the matters of assessment and collection only. The statute nowhere waives informality in the matter of levy of the tax. There is no tax until one is levied, and a complaint shows no indebtedness for taxes unless it shows the levy of a tax. In this complaint there is no intimation that a tax, either state or county, was ever levied. Counsel for appellant has cited several decisions of this court in support of the power of the legislature to prescribe by special act a special form of complaint in actions for the collection of taxes. Unfortunately for his argument, those decisions were all based upon special acts, passed at a time when the legislature had power to pass special laws upon almost any subject, and even before the adoption of the Codes; forgetting that here he is attempting to proceed under the Codes themselves, and that in them the legislature has itself provided for just such a contingency as arises here, and directed us as to which shall prevail in case of conflict between the different parts of the same general law.

2. But the respondent, by its demurrer, attacks this complaint, and all the proceedings upon which it is based, upon other and higher ground than that which we have thus far considered. The law upon which these proceedings are based is attacked as being in conflict with the constitution of the state. The provisions of the constitution on the subject of revenue are all found in article 13, and comprise the whole law of the constitution on the subject of the assessment of property for purposes of taxation, and of the levy and collection of taxes. Those provisions which bear most directly upon the questions here involved are found in sections 10 and 13, which read as follows: "Sec. 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, road-way, road-bed, rails, and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization at their actual value; and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts." "Sec. 13. The legislature shall pass all laws necessary to carry out the provisions of this article." The last section quoted is the one to which we have to look for authority to levy the tax. The first section of the article commences by providing that "all property in the state * * * shall be taxed in proportion to its value, to be ascertained as provided by law," and several subsequent sections speak of the "levy" and the "taxes so levied," and one says that "income taxes may be assessed to and collected from," etc.; but nowhere in

the article is there any provision made as to when, or by whom, or in what manner, any property tax shall be levied. Provision for that must be made by the legislature under section 13,—the last section of the article. The same is true with reference to the provision for the collection of property taxes. Both these subjects are relegated entirely to the legislature. We are therefore compelled to turn to the article of the constitution on the subject of the "Legislative Department," to ascertain whether or not there are any limitations upon the mode and manner in which the legislature may exercise the powers and perform the duties imposed upon it by this section 13, or as to the extent which it may go in the exercise of those powers. These provisions are found in article 4 of the constitution. Turning to section 25 of that article, we find this provision: "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * *Third*, regulating the practice of courts of justice; * * * *tenth*, for the assessment or collection of taxes; * * * *thirteenth*, extending the time for the collection of taxes; * * * *twentieth*, exempting property from taxation; * * * *twenty-fourth*, authorizing the creation, extension, or impairing of liens." An examination of the whole section shows conclusively that the intention of the framers of the constitution, and of the people in adopting it, was to prohibit the legislature from passing local or special laws which should in any wise affect questions of taxation, or the liens of taxes, or the practice in courts of justice. All these must be provided for by general and uniform law. The legislature has provided a general and uniform law "regulating the practice of courts of justice." That law requires that the complaint in a civil action shall be such as we have already indicated, and that its sufficiency shall be determined as therein prescribed. Yet, in the teeth of this constitutional inhibition, and in spite of the fact that the provisions of the constitution are "mandatory and prohibitory unless by express words they are declared to be otherwise," (article 1, § 22.) the legislature has provided—*First*, a general scheme for the assessment, levy, and collection of taxes; and, *second*, a special scheme for the assessment, levy, and collection of taxes on railroads situate in more than one county, and in that special scheme has provided for the form of complaint adopted in this action. The special scheme referred to is found in sections 3665 to 3670 of the Political Code, the form of complaint being authorized by the latter section. The whole scheme, so far as it relates to the collection of taxes, is claimed to be in conflict with the constitution, and in due course will be considered, but for the moment we are dealing only with that part of it which provides for this complaint.

It is claimed by appellant that this is not in conflict with the third subdivision of said section 25 of article 4, for that it relates to

pleading and not to practice. But this is taking too narrow a view of the language of the constitution. It is evident that the words of this inhibitory clause of the constitution are used in their general sense, and in that sense the words "practice of courts of justice" include all "pleadings," although the word "pleadings" never includes all "practice." It is impossible to contemplate the subject of "practice of the courts of justice," and eliminate from the mind all thought of "pleading." Burrill defines "practice," first, as "the course of procedure in courts," and says that "in a general sense practice includes pleading." Rapalje's & Lawrence's Law Dictionary gives the following definition of the word "practice:" "The law of practice or procedure is that which regulates the formal steps in an action or other judicial proceeding. It therefore deals with writs, summonses, pleadings, affidavits, notices, motions, petitions, orders, trials, judgments, appeals, costs, and executions."

But it is further claimed by appellant that, even if "practice" includes "pleadings," the provision is not in conflict with this inhibition of the constitution, for the reason that it is found in the Political Code, which is a general law. It does not follow that, because an isolated provision is found in a general statute, the provision is itself a general law. Such a provision may be purely "special," and come within the inhibition of the constitution, even when found in the Code itself. It was so held, with reference to a section of the Political Code, in *Earle v. Board*, 55 Cal. 489. In *Miller v. Kister*, 68 Cal. 142, 8 Pac. Rep. 813, it was held that a provision found in the general law, entitled "An act to establish a uniform system of county and township governments," temporarily suspending the operation of some of the provisions of the act as to four of the counties of the state, was "special" legislation, and void under the clause of the constitution here under consideration. So it appears that a clause or provision special in its character—applying to particular individuals, particular places, or particular cases—is none the less special because inserted in the most general of public acts. A special act cannot be converted into a general act by a declaration of the legislature that it shall be so considered." *San Francisco v. Water-Works*, 48 Cal. 493. Nor can it be so converted by being embodied or entombed in an act which in its general scope and purpose is a general law. If it can be so converted into a general law, then, as was said by the court in *Investment Co. v. School-Dist.*, 21 Fed. Rep. 151, "every prohibition * * * contained in the constitution may be violated with impunity. * * * An act cannot be both public and private; but it can be either and be special." In *Manning v. Klippel*, 9 Or. 367, it was held that an act providing for the compensation of the sheriffs and clerks of 14 out of 20 counties of the state was a "local law" for the assessment and collection of taxes for county purposes,

and therefore within this constitutional prohibition, and void.

8. But the objection goes not alone to the form of complaint, but to the entire legislative scheme for the collection of taxes upon railroads operated in more than one county. It is to the effect that the entire scheme is special, and in conflict with the different subdivisions of section 25, art. 4, of the constitution, which we have quoted, and that being so in conflict, no action can be maintained thereunder for the collection of taxes, whatever may be the form of the complaint. If this scheme is special, then the cases which we have already cited will apply to it in all its parts, and to them many others might be added from the courts of last resort in very many of the different states in the Union; but this court has already expressed itself so plainly upon the subject in the cases cited that it is unnecessary to go elsewhere for authority. Practically admitting that the scheme is "special," the appellant justifies it under section 13 of article 13 of the constitution above quoted, claiming that the legislature is not only authorized, but required, to pass all laws necessary to carry that article into effect. That is true, but it is not authorized, required, or empowered to pass laws that are not necessary to carry it into effect, nor to destroy the uniform operation of laws which are required by the constitution itself to have a uniform operation. It will be borne in mind that the constitution provides for a difference in the mode of assessment only,—not in the mode of levy, or of collection of the tax on the property when assessed. Under the constitution, it became necessary, or if not necessary, at least proper, for the legislature to pass laws providing the details for the assessment and apportionment of the assessment of this class of property by the state board of equalization. It is the only property in the state of which that board is authorized by the constitution to make assessment; and, as the board is only authorized to make such assessment when the property is situate in two or more counties, apportionment thereof to the several counties became necessary. To provide for the details of that apportionment, and of notice to the several counties interested, it became necessary and proper that the legislature should act; and, in so far as its action relates to the assessment, and the apportionment thereof, it is not attacked as being in conflict with the constitution. But this legislation also provides a mode of collection differing from that found in the general law on the subject,—not necessary for the purpose of carrying into effect any of the provisions of article 13 of the constitution, and special, because not applicable to all property, or even to railroad property generally, but only to such railroad property as is situate or operated in two or more counties. For this reason, it is in direct conflict with, and is specially forbidden by, subdivision 10 of section 25 of article 4 of the constitution. It is therefore

void, and furnishes no cause of action upon which suit can be maintained under it. The provisions of the Code for the collection of taxes generally, and those for the collection of taxes upon the portion of this class of property, especially which lies in two or more counties, are too long to justify quotation in full in this opinion; but a reference to a few of the points of difference between them will serve to illustrate the special character of the legislation against which this objection is pointed.

Before calling attention to those differences, however, it is proper to note a few general provisions of the revenue law which are alike applicable to all persons and all property, and which serve to show a total absence of necessity for any difference in the mode of collection. "Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all the property of the delinquent. The judgment is not satisfied, nor the lien removed, until the taxes are paid, or the property sold for the payment thereof." Pol. Code § 3716. "Every tax due upon personal property is a lien upon the real property of the owner thereof from and after 12 o'clock M. of the first Monday in March in each year." Id. § 3717. "Every tax due upon real property is a lien against the property assessed, and every tax upon improvements upon real estate assessed to others than the owner of the real estate is a lien upon the land and improvements, which several liens attach as of the first Monday of March in each year." Id. § 3718. These provisions apply to, and these liens attach to, the property of railroad companies owning and operating roads situate in two or more counties, the same as to all other property in the state. It will thus be seen that for the taxes upon this class of property the state, and every county in it, has the same security that is provided for taxes upon all other property in the state,—a lien upon all the property of the owner,—not even excepting that which is by law exempt from execution, and by other provisions of the statute it is made a first lien. So that in no event can the state be defeated in the collection of its taxes if its own proceedings in the assessment, levy, and collection have been lawful.

Under the general law, the taxes upon all property, except that here under consideration are collected by the tax collector of the county in which the property is situated. The state assumes the burden, the expense, and the risk of transporting its portion of the taxes so collected from the respective county-seats to the state treasury. Under this special law, all the taxes upon this class of property must be paid at the office of the state treasury, after first getting a certificate of the comptroller as to the amount thereof. This includes not only the state but the county taxes for the several counties; thus imposing upon the tax-payer the burden, the

expense, and the risk of transporting to the capitol of the state moneys which, in the aggregate, may be estimated by tons, as all taxes in this state must be paid in coin. Under both laws, if the tax becomes delinquent, 5 per cent. is added. Under the general law, on or before the first Monday in February the tax collector publishes in his county a delinquent list, which notifies the tax-payer of the amount of his delinquency, and of the time when the lien will be enforced by the sale of his property. Until that time, he has the right to pay the tax, with the 5 per cent. for delinquency, and 50 cents for the cost of publication of each separate description of real property assessed to him, and upon each assessment of personal property. If he does not pay it, the least amount of his property which any bidder will take and pay the tax and percentage and costs will be sold; and he will thereafter have at least one year in which to redeem the same. Under this special law, no notice of delinquency is ever published, but, if the taxes remain unpaid until after the first Monday in February, the comptroller must then commence an action for the recovery of the taxes due the state, and the various counties and cities and counties of the state, together with the said 5 per cent. penalty for delinquency, and the costs of suit; and it is specially provided that, whether the tax be then paid before or after judgment, the defendant shall also pay such counsel fees as the court may allow. It is further provided that in such action the unverified complaint, in the form used in this case, shall be sufficient, and that upon the filing of such complaint the clerk must issue the writ of attachment prayed for. It will thus be seen that under this law the tax-payer is not only burdened with heavy costs and expenses not provided for by the general law, but, in addition to that, and notwithstanding the fact that the state has, as in all other cases, a first lien upon everything which he owns, any particular portion of his property which the representatives of the state may see fit to direct is liable to be summarily seized upon attachment, and, if it be personal property, taken out of his possession, held pending the suit, and finally sold under judgment for what it will bring. If there then be a deficiency; the original first lien still remains upon all the balance of his property. The inequalities, and the possibilities of injustice, under such a provision, are certainly very great. Take the case at bar. The total amount sued for in this case, exclusive of costs and counsel fees, is \$330,800.44. For this the state has a first lien upon the property, and most of it fixed property, assessed by itself at \$20,000,000. Notwithstanding that vast security, she asks for—and, having asked, must have it—an attachment, under which her officers may direct the sheriff to seize and take possession of all the rolling stock of the company, stopping its entire traffic, and holding it for months,—possibly years,—until the litigation is con-

cluded. Such a provision is not only in conflict with subdivision 10, *supra*, but also with subdivision 3, *supra*; for the general law regulating the practice of courts of justice authorizes the writ of attachment only when the plaintiff, by affidavit, shows that the debt for the recovery of which the action is brought is not secured by any mortgage, lien, or pledge of real or personal property. We make no point of the want of undertaking for the writ, for the reason that the state is not, under the general law on that subject, required to give an undertaking in any action brought by it. Under the general law, the sale for taxes upon realty is of the realty, or some part thereof. Such a sale will also be for the taxes upon personal property, if assessed to the same person. Under such a sale, there is a year at least in which to redeem. Under this special law, if the proceeding goes to judgment and sale, the sale may be entirely of personal property, from which there is no redemption. If of realty, there is but six months in which to redeem.

These are but a few of the points of difference between the general and special provisions of this law, but they are sufficient to show a marked and broad discrimination against the owners of railroad property situate or operated in two or more counties of the state. It is a discrimination which is not made against, and does not apply to, railroad property, and the owners of railroad property generally, but only when the property is situate in two or more counties. It is a matter of common knowledge that there are numerous railroads in this state, each situate wholly within one county. To such this special mode of collection of taxes has no application. While it is true that a law which applies to all of a class in a state is held to be a general law (to which rule, however, this court has held that there are some exceptions, as in *Ex parte Westerfield*, 55 Cal. 550,) it is equally true that one which applies to only a part of a class is special, and, under a constitutional inhibition like ours, is void. The case of *Investment Co. v. School-Dist.*, 19 Fed. Rep. 359, is directly in point. The state of Oregon had a constitutional provision providing that the legislature should not pass "special or local" laws for the assessment and collection of taxes for state, county, township, or road purposes. An act was passed providing for the taxation of mortgages upon real property situate in no more than one county, in which it was provided that mortgages upon land situate in more than one county should be void. An attempt was made to enforce the collection of taxes upon mortgages upon land situate in no more than one county, by sale of the notes and mortgages, as provided might be done, under the act. The sale was enjoined, and the act declared void, because it provided for the taxation of mortgages upon lands situate in not more than one county, and not upon all mortgages. Judge DEADY, in discussing the question, said: "An act providing for the assessment of mortgages

generally is, so far, a general act. It comprehends the *genus*. But an act providing for the assessment of all mortgages for sums exceeding \$500, or not payable within one year from the date of their execution, is special. It comprehends only a species of mortgages. So an act providing for the assessment of mortgages on wood-lands, plow-lands, or river-lands, is special; and, in my judgment, an act that taxes mortgages on land in no more than one county, to the exclusion of those on land in more than one, is in the same category. It does not comprehend the *genus* mortgages, but only the species,—one county mortgages." So, here, these provisions of law now under consideration do not comprehend the *genus* railroads, but only the species,—two county railroads.

The general law for the collection of taxes in this state provides for the bringing of suit in certain cases; but this is not one of them, and is not brought in accordance with that general law. This is a fact which still further serves to mark the provisions under which this proceeding is had as special, and in violation of the prohibitions of the constitution. Section 3899 of the Political Code, a part of that general law, reads as follows: "The comptroller may, at any time after the delinquent list has been delivered to a collector, direct such collector not to proceed in the collection of any tax on said list, amounting to \$300, further than to offer for sale but once any property upon which such tax is a lien. Upon such direction, the collector, after offering the property for sale once, and there being no purchaser in good faith, must make out and deliver to the comptroller a certified copy of the entries upon the delinquent list relative to such tax; and the tax collector—or the comptroller, in case the tax collector refuses or neglects, for fifteen days after being directed to bring suit for collection by the comptroller—may proceed, by civil action, in the proper court, and in the name of the people of the state of California, to collect such tax and costs." This is the provision under which tax-payers other than those owning railroads situate or operated in two or more counties may be sued for the collection of taxes. The proceedings and form of complaint are then similar to those in this case, and are open to the same objection, when tested by the Codes, or by subdivision 3, § 25, art. 4, of the constitution, as already noted, but the action cannot be brought or maintained until the property has been offered for sale by the tax collector once, at least; and even then it must be commenced in the county where the property is situate, and the money, when paid,—whether before or after judgment,—must be paid to the county treasurer, and not to the state treasurer. *Id.* § 3900.

The appellant argues that all these special provisions now under consideration operate as, and constitute, an immunity in favor of the respondent, and that it cannot, therefore, complain of them. If appellant is correct in

this, then these provisions are in direct conflict with section 21, art. 1, of the constitution, and void. That section reads: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." But appellant is mistaken as to the party to whom these special privileges and immunities are granted. It is not to the few whose railroads are situate in two or more counties, but to those whose railroads are situate each entirely in one county, and to all other taxpayers except those of the class to which this defendant belongs. As to this defendant, and the few others situate like it, these provisions impose burdens not imposed upon other railroad corporations. All railroad corporations in this state are organized under one general law, and the constitutional provision with reference to that law is: "Corporations may be formed under general laws, but shall not be created by special act." Article 12, § 1. This court has held, in the most emphatic terms, that any attempt to confer a benefit or impose a duty upon one or more corporations formed under a general law, not conferred or imposed upon all corporations formed under the same law, is in conflict with this provision of the constitution, and void. "Private corporations, formed for similar purposes, will stand upon the same footing, enjoy the same rights, and be subject to the same burdens, which cannot be increased or diminished, except by general laws applicable to all. * * * The rights and duties of all corporations formed under the general law * * * are fixed and determined by its terms, and can only be changed or modified by amendment of the general law; and every such amendment must be made applicable to all corporations created under the general law." *San Francisco v. Water-Works*, 48 Cal. 493. The same doctrine has since been laid down and adhered to in *Road Co. v. Cole*, 51 Cal. 381; *Water-Works v. Bryant*, 52 Cal. 132; and *Railroad Co. v. Baldwin*, 57 Cal. 160. That these provisions for the collection of taxes upon the property of railroad companies operating in two or more counties do impose burdens not imposed upon other railroad companies organized under the same general law, seems to us too plain for argument. From what we have already said, it follows that the judgment appealed from in this case must be affirmed. It therefore becomes unnecessary to consider the only other point made upon the demurrer. Our decision of that point either way would not change the result. Judgment affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; WORKS, J.

I dissent: THORNTON, J.

BEATTY, C. J. I dissent. The prevailing

opinion goes entirely upon the ground that the provisions of the Political Code relating to the assessment and collection of taxes levied upon railroads operated in two or more counties are in conflict with section 25 of article 4 of the state constitution,—a section which prohibits local and special legislation on certain enumerated subjects. In my opinion, the legislation referred to is neither local nor special. It is not local, because it operates throughout the state; and it is not special, because it applies to all railroads of a class created and defined by the constitution itself. I content myself with this brief indication of the grounds of my dissent because want of time precludes a more elaborate statement. The question as to the alleged conflict of our revenue law with the fourteenth amendment to the constitution of the United States not having been considered in the opinion of the court the occasion does not call for any expression of my individual views.

PEOPLE v. CALIFORNIA PAC. R. CO. (No. 12,258.)
(*Supreme Court of California*. March 8, 1890.)

FOX, J. This case is exactly like that of *People v. Railroad Co.* ante, 303, (No. 12,257,) decided this day, except as to amount involved, and identity of counties interested; and on the authority of that case the judgment is affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; WORKS, J.

I dissent: BEATTY, C. J.

I dissent: THORNTON, J.

PEOPLE v. NORTHERN PAC. RY. CO. (No. 12,259.)
(*Supreme Court of California*. March 8, 1890.)

FOX, J. This case is like that of *People v. Railroad Co.*, ante, 303, (No. 12,257,) this day decided, except as to the amount involved, and counties interested; and on the authority of that case the judgment is affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; WORKS, J.

I dissent: BEATTY, C. J.

I dissent: THORNTON, J.

PEOPLE v. SAN PABLO & T. R. CO. (No. 12,260.)
(*Supreme Court of California*. March 8, 1890.)

FOX, J. This case differs from that of *People v. Railroad Co.*, ante, 303, (No. 12,257,) this day decided, only as to the amount involved, and the counties interested; and on the authority of that case the judgment is affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; WORKS, J.

I dissent: BEATTY, C. J.

I dissent: THORNTON, J.

PEOPLE v. SOUTHERN PAC. R. CO. (No. 12,261.)
(*Supreme Court of California*. March 8, 1890.)

FOX, J. This case is in all respects like that of *People v. Railroad Co.*, (No. 12,257,) ante, 303, this

day decided, except as to amount involved, and counties interested; and on the authority of that case the judgment is affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; WORKS, J.

I dissent: BEATTY, C. J.

I dissent: THORNTON, J.

(83 Cal. 198)

WIEDEKIND v. TUOLUMNE COUNTY WATER CO. (No. 13,493.)

(Supreme Court of California. Feb. 25, 1890.)

EVIDENCE—RELEVANCY—TRIAL.

1. In an action for damages caused by the breaking of defendant's reservoir, defendant's witness, after testifying that he had "been in the water business 35 years," and had "had experience with earth dams," was asked by defendant, "What is your experience and observation in regard to the breaking of such earth dams through the earth at one end or the other?" also, "How many different reservoirs of earth have you had charge of and had under construction and management during the last 35 years?" Held, that objections to the questions were properly sustained, as defendant's dam was a wooden dam, which the evidence tended to show broke away by reason of decayed timbers.

2. The fact that the court compelled defendant's counsel to go on with the case at an evening session, against his objection that he was too ill to proceed, is not sufficient ground for granting a new trial, where it appears that defendant was not thereby prevented from having a fair trial, but that the trial proceeded as it would if defendant's counsel had not been ill.

Department 2. Appeal from superior court, Tuolumne county; C. V. GOTTSCHALK, Judge.

Edwin A. Rodgers, for appellant. *Frank W. Street*, for respondent.

SHARPSTEIN, J. This action is brought by plaintiff for alleged damages caused him by the breaking of defendant's reservoir, by reason of which a large volume of water flowed over and into the mining claim of plaintiff, situated below said reservoir, filling said claim with earth, rock, and timber, and carrying away mining implements and a bridge constructed by plaintiff, and depriving plaintiff of the use of said claim during a period of four months. Plaintiff avers that said dam was poorly constructed, and at the time of the break was in a rotten and decayed condition, and was badly and carelessly attended by defendant, and by reason of such carelessness and negligence it broke away, and caused the injuries of which plaintiff complains. All the material allegations of the complaint are denied by the answer of the defendant. The cause was tried by a jury, which returned a verdict in favor of plaintiff; and a judgment was entered in his favor for the damages awarded him by the verdict. Defendant moved for a new trial, which was denied, and from that order and the judgment he appeals to this court. Appellant's main contention is that the evidence is insufficient to justify the verdict. He admits that a break occurred by which the water of the reservoir escaped, but contends that it was not in the dam proper, but in the native earth at or near

the east end of the dam, which, if proven, he claims would negative the averment of its having occurred through carelessness or negligence in the construction or maintenance of the dam. But there is evidence tending to prove that the break occurred as alleged in the complaint, and that is sufficient to justify the verdict, although there is evidence tending to prove that the break occurred where the defendant alleges it to have occurred. It is a clear case of conflict of evidence, and we cannot disturb the order denying defendant's motion for a new trial on the ground of "insufficiency of the evidence to justify the verdict."

There are two exceptions to rulings of the court in sustaining plaintiff's objections to questions asked of defendant's witness Smith. After testifying that he had "been in the water business thirty-five years," and had "had experience with earth dams," he was asked by counsel for defendant, "What is your experience and observation in regard to the breaking of such earth dams through the earth at one end or the other?" Defendant's counsel objected to it as irrelevant. The court, in sustaining the objection, remarked that it did not see "how an earth dam might break would assist the jury in determining how the break in this case had occurred," this not being an earth dam. The ruling was correct.

Defendant's counsel then asked the following question: "Mr. Smith, how many different reservoirs of earth have you had charge of, and had under construction and management, during the last thirty-five years?" Plaintiff's counsel objected, and the objection was properly sustained. Defendant's dam was a wooden dam, and there is testimony tending to prove that it broke away by reason of the weakness of some of the timbers, which had become decayed by age and exposure. Any amount of familiarity with earth dams would not qualify a witness to testify as an expert in regard to wooden dams.

The last ground upon which defendant's counsel insists is "irregularity in the proceeding of the court, and abuse of discretion by the court, by which defendant was prevented from having a fair trial." The specification is as follows: "That on the 12th day of February, A. D. 1889, this case was on trial from 10 o'clock A. M. to 5 o'clock P. M., at which time the court took a recess until 7 o'clock P. M., to which defendant's counsel objected, stating that he was too unwell to attend an evening session. At about twenty minutes to 9 o'clock P. M. defendant's counsel again stated he was physically and mentally unable to proceed further. The court directed defendant's counsel to go on and call his next witness, and defendant here assigns that this order and direction were such an irregularity and abuse of discretion as to prevent defendant from having a fair trial." While it would have been eminently proper, under the circumstances, for the court below to have granted counsel's request, it does not

appear to us that the defendant was thereby prevented from having a fair trial. The trial appears to have proceeded, in all respects, as it would if defendant's counsel had not been ill. The application was one which addressed itself to the discretion of the court, and the denial of it is not a sufficient ground for granting a new trial, unless the party was prevented by it from having a fair trial, of which we find no evidence in the record. Judgment and order are affirmed.

We concur: THORNTON, J.; MCFARLAND, J.

(33 Cal. 225)

MCGUIRE v. DREW *et al.* (No. 13,402.)

(Supreme Court of California. Feb. 27, 1890.)

NEW TRIAL—ABSENCE OF DEFENDANT—JURY TRIAL—ORDERS.

1. The case was tried in defendant's absence. He knew, on the day before the trial, that it was set for that day; also that plaintiff would grant no further continuance. It did not appear that the result would have been different if he had been present. *Held*, that these facts did not show accident or surprise entitling defendant to have the judgment vacated, and to have a new trial.

2. The fact that defendant was a candidate for office, and on the day of trial was looking after the returns, did not excuse his negligence in failing to appear or secure representation at the trial.

3. Defendant telegraphed the judge, demanding a jury trial. *Held*, that it was immaterial that a jury was not ordered, as the court was authorized, by Code Civil Proc. Cal. § 631, to dispense with a jury, on failure of defendant to appear in person or by counsel.

4. The court proceeded with the trial of the case at the same time with another case against the same defendant, allowing the testimony, so far as applicable, to be used in both cases, though the witnesses were separately sworn, in each case. Defendant claimed that counsel who went to the court to demand a jury in this case, were thus prevented from doing so. *Held*, that the course pursued by the court was within its discretion, and, that as no demand for a jury and a continuance was made, it could not be said that defendant was injured thereby.

5. A ruling on the admission of evidence is not an order, within Code Civil Proc. Cal. § 1003, which declares "every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an 'order,'" and must therefore be excepted to at the time it is made in order to be available on a motion for a new trial or on appeal, within section 646.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Thomas J. Clunie, (Andrew J. Clunie, of counsel,) for appellant. R. T. Devlin, for respondent.

GIBSON, C. This appeal is by T. J. Clunie alone, from a judgment rendered against himself and co-defendants, as partners, in an action prosecuted by plaintiff upon an account for material furnished to and work done for defendants; also from an order denying him a new trial, and an order refusing to vacate the judgment. At the time this case was called and set for trial another action was pending, which had been brought by Towle Bros. & Co. against the same defendants as partners, except C. A. Drew, to recover up-

on an account for building material furnished to them, and it was set for trial for the same day, namely, November 14, 1888. Notice that the case had been set for trial on the date mentioned was given to the defendant Clunie. On the day of the trial the plaintiffs and defendants in both cases, with their counsel, were present, except the defendant Clunie, who neither appeared in person nor by counsel. The court, it seems, proceeded with the trial of both cases at the same time, although no order of consolidation appears to have been made; but in the case here separate findings were made, and a separate judgment thereon rendered, in favor of the plaintiff, and against the defendants N. L. Drew and T. J. Clunie, as partners under the name of Sacramento Warehouse Company; the court first having granted a nonsuit as to C. A. Drew, the other defendant. Subsequently defendant Clunie made a motion for a new trial, which was denied. He then moved to set aside the judgment, with a like result. The first motion was based upon the grounds of the irregularity of the proceedings on the trial; accident or surprise which ordinary prudence could not have guarded against; insufficiency of the evidence to justify the decision; and that the same was against law; and the second motion was upon the ground of mistake, inadvertence, surprise, and excusable neglect. Excusable neglect is not one of the grounds of a motion for a new trial, under section 657, Code Civil Proc.; but, by section 473 of the same Code, it is one of the grounds, in addition to the ground of surprise, upon which a judgment may be vacated. Hence we suppose appellant made the motion to vacate the judgment in order to avail himself of the ground of excusable neglect, and as this last motion embraces the ground of accident or surprise, and is more fully presented upon the affidavits that were used upon the hearing, we shall consider it first; and the disposition of it will include the other motion, upon the ground last mentioned. The facts relied upon to establish accident, surprise, or excusable neglect may be briefly stated, as follows: At a general election in this state on November 6, 1888, appellant was a candidate for congress in the fifth congressional district, embracing a portion of the city and county of San Francisco. The contest was very close between himself and his competitor; and in consequence his presence in the city on that day, and almost continuously until the 23d of November, was necessary, in order that he might see that the returns were properly canvassed and declared. Having previously succeeded in obtaining from counsel for plaintiff a postponement of the trial until after the day of the election, on account of his political engagements, and relying upon his former success, he requested another postponement by letter, which the counsel for plaintiff on the 13th of November telegraphed he could not accede to. Thereupon the appellant notified the judge before whom the case would

come that he (appellant) could not be present on the 14th, and, in the same telegram demanded a jury trial, believing that the judge, upon the receipt of the telegram, would order a jury, and postpone the trial to some other day for that purpose. The appellant was the only witness who could prove the facts constituting his defense. Appellant's brother, at 9:15 o'clock in the forenoon of the 14th of November, by telephone requested the law firm of Johnson & Johnson, of Sacramento, to move for a jury in and a continuance of this and the case of Towle Bros. & Co. v. Clunie et al. In compliance with this request, which was not received by them until after 10 o'clock in the forenoon, they, or one of them, went to the court-room, and found both cases upon trial, and, apparently for this reason, made no demand or motion. E. J. Dwyer, an attorney at law at Sacramento, also on the same day, shortly after 10 o'clock in the forenoon, went on behalf of appellant to the court-room for the same purpose, and, finding both cases on trial, took no action. On the trial there was no evidence introduced on behalf of the appellant.

1. The terms "accident" and "surprise," though not strictly synonymous, have, as used in legal practice, substantially the same meaning, as each is used to denote some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any default or negligence of his own, (see *Bouv. L. Dict.*; *And. L. Dict.*.) which ordinary prudence could not have guarded against, (Code Civil Proc. § 657, subd. 3.) Whether the appellant was chargeable with notice of the setting of the case for trial on the 14th of November, under rule 13 of the trial court, set forth in the affidavit of counsel for respondent, or not, it seems that he had actual notice before the day of trial that the case was set for that date; and also knew on the day before the 14th that no further postponement of the trial would be agreed to by counsel for respondent. It was therefore his duty to have either appeared in person or by an attorney at the opening of the court on the day of the trial. *Haight v. Green*, 19 Cal. 113; *Mulholland v. Heyneman*, Id. 605; *Ekel v. Swift*, 47 Cal. 619. He must have known that the probable consequence of his failure to appear in person or by attorney at the trial would be a trial of the case in his absence. See Code Civil Proc. § 594. There is nothing in the affidavits used on behalf of the appellant to show any fault or omission of duty on the part of respondent or his counsel. It may be that the previous good nature of the latter misled the appellant, but, as he had no right to suppose that it would continue indefinitely, he cannot complain because it was terminated by the telegram of the 13th of November. We are therefore unable to see how the appellant can claim to have suffered an accident, or been surprised, when he knew or might have expected the result which followed his omission to appear

or secure representation at the trial. He also fails to show another necessary quality to entitle him to relief upon the ground of surprise, namely, injury. *Patterson v. Ely*, 19 Cal. 28; *Cook v. De la Guerra*, 24 Cal. 238; *Brooks v. Douglass*, 32 Cal. 208. There is nothing presented to show that a different result would be reached.

2. The omission on his part to appear or secure representation at the trial amounted to negligence, and, unless it was excusable, he is not entitled to any relief upon that ground. Now, it may be that the condition of the election returns were such that it was to the interest of the appellant to remain in San Francisco from the day of the election until the 23d of November, 1888, in order to ascertain the true result of the election; but we have been referred to no law, and know of none, that required him to personally watch and guard the canvassing of the election returns. On the contrary, we must presume that the canvassing board would have properly performed its duty without his presence; from which it follows that appellant's presence at the canvassing of the election returns was a matter of choice, and not of necessity; and he, having chosen to consider his interest in the election of more concern than his interest in this action, cannot now avail himself of his neglect of the latter as something that ought to be excused. *Haight v. Green*, supra; *Mulholland v. Heyneman*, supra.

3. Regarding the demand for a jury trial made by a telegram to the judge, sent by the appellant the day before the day of trial, it is sufficient to say that, even if the judge had ordered a jury upon the receipt of the telegram, yet, by reason of the failure of the appellant to appear in person or by counsel at the trial, the court was authorized to dispense with a jury. Code Civil Proc. § 631.

4. Another irregularity urged is that the court tried this case with that of *Towle Bros. & Co. v. Clunie et al.*, without the consent of appellant. It appears from the statement, on motion for a new trial, "that said court, on said 14th day of November, 1888, tried this cause, and the cause of *Towle Bros. v. Clunie et al.*, then pending in said court, at the same time, and permitted the testimony of the witnesses taken in the said case of *Towle v. Drew et al.* to be used and considered as testimony in this cause, so far as applicable, without said witnesses being separately examined in this case, but they were separately sworn in each case; that said action of the court was taken by consent of the parties present, but without the consent or agreement of this defendant, *Thomas J. Clunie*." From this it appears that the cases were, in effect, tried separately; and the course pursued, we think, was within the discretion of the court, and the appellant does not appear to have been injured by it. The only injury he claims that resulted from it is that the counsel who went to the court-room for him on the day of the trial, and found

both cases on trial, and then went away without doing anything, were prevented from demanding a jury trial in the second case, and obtaining a continuance for that purpose. There is nothing in the record to show, and we are therefore unable to say, that, if such counsel had made a proper application to the court for a jury in and for a continuance of the trial of the second case, it would not have been granted.

5. It is further urged that the court erred in permitting N. L. Drew to testify to the partnership between himself and appellant, it appearing in evidence that the agreement relating to such partnership had been reduced to writing, and was then within the jurisdiction of the court; and that, as the act of receiving such evidence was an order made in the absence of the appellant, it is deemed excepted to under section 647, Code Civil Proc. We do not understand that a ruling made during the progress of a trial, either admitting or excluding evidence, is an "order," within the meaning of the above section. By section 1003, Id., an "order" is defined as follows: "Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an 'order.' An application for an order is a motion." And by BENNETT, J., in *Loring v. Illsley*, 1 Cal. 24, as "a decision made during the progress of the cause, either prior or subsequent to final judgment, settling some points of practice or some question collateral to the main issue presented by the pleadings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution the final judgment." This, we think, is a correct definition, and shows the proper scope of the term "order," as used in the above section, relied upon by the appellant, and excludes a mere ruling upon the reception or rejection of evidence made during the course of a trial, which, under section 646 Code Civil Proc., must be excepted to at the time it is made, in order to be made available upon a motion for a new trial or on appeal. The evidence complained of, although, perhaps, not the best that might have been had by the court, not having been excepted to upon the trial, cannot now be taken advantage of; and the absence of the appellant makes no difference. *Clark v. Gridley*, 35 Cal. 398. Besides, if the appellant desired to show that the best evidence referred to by him was different from that received by the court, he should have set it forth in his affidavit used in support of his several motions. We are of the opinion, however, that it is the duty of the trial court, when only one side is represented at the trial, to insist upon the best evidence attainable.

6. Appellant further contends that the evidence does not justify the findings and decision. Findings of fact were not necessary, so far as the appellant was concerned, because the Code of Civil Procedure, (section 634,) provides that they may be waived by the

several parties to an issue of fact, by failing to appear at the trial. But we have reviewed the evidence, and find that it fully justifies the findings and decision. As this disposes of all the points relied upon, we therefore advise that the judgment and orders appealed from be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and orders appealed from are affirmed.

Hearing in bank denied.

TOWLE *et al.* v. CLUNIE *et al.* (No. 13,403.)

(Supreme Court of California. Feb. 27, 1890.)

Commissioners' decision. Department I. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Thos. J. Clunie, (Andrew J. Clunie, of counsel,) for appellant. Chauncey H. Dunn, for respondent.

GIBSON, C. This was an action brought by plaintiffs, as partners, against the defendants, as partners under the firm name of "Sacramento Warehouse Company," to recover the sum of \$324.07, for goods, wares, merchandise, lumber, and building material sold and delivered by plaintiff to defendants at their request. At the trial all the parties to the cause were present or represented, except defendant Clunie, who neither appeared in person nor by attorney. Judgment passed for plaintiffs, against the defendants, as partners, for the amount demanded. Defendant Clunie afterwards made a motion for a new trial and a motion to vacate the judgment, both of which were denied. This appeal is from the judgment, and also from orders denying said motions; and is the case mentioned and referred to in *McGuire v. Drew*, ante, 312, (No. 13,402,) this day affirmed, and involves the same questions therein considered. For the reasons given in that case, we advise that the judgment and orders appealed from be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders appealed from are affirmed.

(83 Cal. 344)

SMITH *et al.* v. BISCAILUZ *et al.* (No. 12,327.)

(Supreme Court of California. Feb. 27, 1890.)

SALE OF INFANT'S LAND—PLEADING.

Code Civil Proc. Cal. § 1781, applicable to sales of estates of infants by guardians, provides that the petition shall set forth the "condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale." *Held*, that a petition which shows that the land to be sold consists of three-sixteenths, undivided, of about 800 acres subdivided into lots containing from 17½ to 23 acres, and that "said real estate is now unproductive, and may remain so for years, and a constant expense, without income," but which is silent as to the existence of any personal estate of the ward, is sufficient to give the probate court jurisdiction to make the order of sale, without reference to section 1537, providing that a failure to set forth in the petition the facts showing the sale to be necessary will not invalidate the proceeding, if the defect be supplied at the hearing, and the "general facts showing such necessity be stated in the decree."

In bank. On rehearing. For former report, see 21 Pac. Rep. 15.

Code Civil Proc. Cal. § 1537, provides that, in a petition for the sale of real estate to pay the allowances of a family or debts outstanding against a decedent, or the debts, expenses, or charges of administration, or legacies, "a failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing such necessity be stated in the decree."

F. H. Howard, Bicknell & White, R. Dunnigan, and Smith & Patton, for appellants. *Chapman & Hendricks* and *W. J. Foley*, for respondents.

BEATTY, C. J. A former decision of this case is reported in 21 Pac. Rep. 15. After that decision was filed, a rehearing was granted on the second point discussed in the opinion, viz., the alleged insufficiency of the guardian's petition for the sale of Victoria Jordan's interest in the real property in controversy. For the purpose of that decision, we conceded, without deciding, that the petition was radically defective, but held that the order of sale was rendered valid by the clause added to section 1537 of the Code of Civil Procedure by the amendment of 1874. Upon the rehearing, counsel for the respective parties have elaborately reargued both the question as to the sufficiency of the petition and the effect of said amendment. Appellants contend that the petition in this case cannot be distinguished, on principle, from the petition which was held sufficient in *Fitch v. Miller*, 20 Cal. 352. Respondents, conceding the binding authority of that decision, point out what they contend are substantial differences between the two petitions. No doubt there are differences, but whether they are substantial and vital or not is a question not free from difficulty. What the statute then required,—as it does now,—in order to give the court jurisdiction to proceed, was a verified petition by the guardian setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition was founded, tending to show the necessity or expediency of a sale. *Fitch v. Miller*, 20 Cal. 382; Code Civil Proc. § 1781. Respondents contend that a first essential of every such petition is that it shall show by express averment that it contains a description of the whole estate of the ward, real and personal,—not only that which the guardian desires to sell, but all his other estate,—and that it shall set forth the condition of the whole estate, *i. e.*, the situation of the different parcels, and whether they are improved or unimproved, vacant or occupied, productive or unproductive. But this is a stricter construction than was given to the statute in *Fitch v. Miller*. The petition in that case did not purport to contain a description of all the estate of the wards, but only of the estate devised by their father. *Non constat* that they had no other estate. But, as court and counsel seemed to have as-

sumed in discussing the petition that it purported to set forth the entire estate of the wards, the case cannot be considered authority for the proposition that a petition deficient in this particular would satisfy the requirements of the statute. It does, however, decide that in the case of guardian's sales, unlike sales by executors or administrators, it is not necessary to state in the petition the values of the separate items of the ward's estate or their condition, except so far as may be necessary to enable the court to determine upon the necessity or expediency of a sale. Page 383. In other words, it holds that the sole office of the petition is to state facts—including the condition of the estate—from which the necessity or expediency of a sale may be inferred, and that the only reason for stating the condition of any part of the estate is that its condition may affect the question of such necessity or expediency. In consonance with this view, it was held that the petition there in question was sufficient to give the court jurisdiction to order the sale, although confessedly it contained no statement of the condition of the estate of the wards, (other than that which was to be sold,) except that it yielded a small income, and could not be sold without sacrifice. And even as to the property to be sold, the allegations of the petition, though somewhat more detailed and specific than those of the petition in question here, merely tended to show that the land was unproductive and expensive. These allegations, it was held, (pages 385, 386,) presented a case for the judgment of the court upon the question of expediency of a sale of the land, and investment of its proceeds. Turning to the petition in this case, we find that, fairly construed, it purports to contain a description of all the real estate of the ward, but it is completely silent as to the existence of personal estate.

Before considering to what extent this omission affects the sufficiency of the petition, we will notice the further contention of respondents, that it is also radically defective in failing to show the condition of the real property sought to be sold. As above stated, the petition in *Fitch v. Miller* was more detailed and specific as to the condition of the property to be sold than is the petition here, but the difference between the two is not essential. Here it is shown that the land to be sold consists of three-sixteenths, undivided, of about 300 acres of land subdivided into lots containing from 17½ to 22 acres, respectively, and that "said real estate is now unproductive, and may remain so for years, and a constant expense, without income." Substantially, this is all that was alleged in the petition sustained in *Fitch v. Miller*. The allegations there, though more specific, only tended to show that the land to be sold was unproductive and expensive; and, as affecting the question of jurisdiction, it seems to us that no just distinction can be made between general and specific allegations of fact, which, in substance, amount to the same thing. Our

conclusion, on the authority of *Fitch v. Miller*, is that if this petition was insufficient in any particular to give the court jurisdiction to order the sale, it was solely because it failed to describe and show the condition of the ward's personal estate. Counsel for respondents contends that this omission constituted a radical and incurable defect in the petition, and they cite many decisions concerning sales of decedents' estates in support of their argument. But there is this distinction to be observed between sales by guardians and sales by executors or administrators. Ordinarily, no sale of a decedent's estate is authorized, except when it is necessary—*First*, to pay family allowance; *second*, debts of the decedent; *third*, expenses of administration; or, *fourth*, legacies.

Mines and mining interests, belonging to estates of decedents, are, however, an exception to this rule. They may be sold when it is expedient to do so in the interest of the estate, although the proceeds are not needed to pay debts, expenses, etc. Code Civil Proc. §§ 1529–1533. But none of the cases cited by respondents arose under these provisions. On the contrary, they all depended on sections 1536, 1537, and could be sustained only upon the ground that they were shown to be necessary. For this purpose, and in order to enable the court to intelligently exercise its judgment in the selection of the property of the estate which can be most advantageously sold, the condition and value of all parts of the estate must be set forth, in addition to the other matters enumerated in section 1537. *Estate of Boland*, 55 Cal. 315, and cases cited. But, in case of mining property which is sought to be sold for the interest of the estate, it is not required that the petition should set forth the condition of any property except that which is to be sold. Code Civil Proc. § 1530. The manifest reason of this is that the expediency of such sales is in no wise dependent upon the condition of other portions of the estate. This brief consideration of the difference of the provisions concerning the sale of mining claims and other real estate of decedents affords a valuable clew to the proper construction of the provisions concerning sales by guardians. Sales by guardians are authorized in two cases—*First*, when necessary to maintain or educate the ward; *second*, when expedient for the purpose of a more profitable investment of the proceeds. Id. § 1777 et seq. To obtain an order for such sale, the guardian must present a verified petition to the court by which he was appointed, "setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale." Id. § 1781. This section applies indifferently to necessary and to expedient sales, and should receive a sensible and reasonable construction, according as the sale is asked on the one ground or upon the other. If the sale is asked upon the ground that it is necessary, there is the same reason for re-

quiring a statement of the condition of the ward's whole estate as exists in the ordinary case of a sale by an executor or administrator, *i. e.*, to enable the court to decide what particular part it is best to sell. But if the sale is asked upon the ground that it is for the interest of the ward that some portion of his land should be sold, and the proceeds invested, it is manifest that the condition of the property to be sold is the only matter to be inquired into, and that the policy or expediency of selling it is in no wise affected by the condition of other portions of his estate. The beginning and the end of the inquiry in such case is whether the price of the land to be sold can be invested to better advantage in something else, and a petition which fairly presents this question ought to be sufficient to give the court jurisdiction to make the order, as it is by express enactment in the case of mining claims belonging to estates of decedents. We think it is doing no violence to the letter, and that it is in perfect accord with the spirit, of section 1781 of the Code of Civil Procedure to hold that its requirements are fully satisfied by stating the condition of the estate to be sold, when, as in this case, the sale is asked upon the sole ground that for the benefit of the ward his real estate, or some part of it, should be sold, and the proceeds otherwise invested. We conclude that the petition in this case was sufficient to give the probate court jurisdiction to make the order of sale, and that the sale made in pursuance thereof was valid and effectual, without reference to the amendment of section 1537 of the Code of Civil Procedure. This conclusion leads to the same result reached in our former opinion, and it is accordingly again ordered that the judgment and order appealed from be, and they are, reversed as to all parties except Miller and Guy, and as to them said judgment and order are affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.; FOX, J.

(83 Cal. 219)

HIGGINS v. RAGSDALE. (No. 13,261.)
(Supreme Court of California. Feb. 27, 1890.)

BOUNDARIES—NONSUIT—WAIVER.

1. Where the only issue in ejectment was as to the dividing line between plaintiff and defendant, a surveyor testified for plaintiff that he went on the land, and sought for the missing quarter section corner, but could not find it, but that the north and south section corners could be easily found without field-notes, and that he established the lost corner by dividing the distance between the two section corners equally; that the line was over a mile long, while the survey called for only a mile; that he discovered a line of blazed trees from the south stake, which were originally line trees, and following this line he set a stake near which, and about the right distance and direction, was the remains of a pine stump, which he considered the bearing tree; and that he found line trees all along the line run by him, and that the line, as claimed by defendant, inclosed the land in dispute, which belonged to plaintiff. *Held*, that a motion to nonsuit plaintiff, on the ground of insufficiency of the testimony, was properly denied.

2. Where defendant, after a denial of his motion to nonsuit plaintiff on the ground that plaintiff had not shown that the corner between plaintiff and defendant was lost, and that the field-notes used by plaintiff's surveyor were not copies of any official survey or record, introduces a properly certified copy of the original field-notes, which are found to correspond with those used by plaintiff's surveyor, he thereby removes or waives the alleged ground of nonsuit.

Commissioners' decision. Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Wallace & Prewett, for appellant. *Chas. W. Kitts*, for respondent.

VANCLIEF, C. Action of ejectment for a narrow strip of land containing about 2.23 acres. The parties are owners of adjoining lands. The division line between them is one of the lines surveyed by the United States government, dividing a section into quarters. Their disagreement as to the true location of this division line was the only issue tried. The judgment was for plaintiff, from which, and from an order denying his motion for a new trial, defendant appeals. The only point made by the appellant is that the court erred in denying defendant's motion for a nonsuit. A part of the testimony for the plaintiff was that of C. E. Uren, as follows: "I am a surveyor and civil engineer. I know the lines in controversy. I went upon the ground this spring at the request of plaintiff, to make a survey to establish the corner. I sought for the missing corner, and could not find it. The north and south section corners are in place, and are easily discoverable without the aid of field-notes. Not being able to find the corner, I established it as a lost corner by dividing the distance between the two section corners equally. The line is over a mile long, while the survey calls for a mile long only. I examined carefully all the marks that would aid me. I discovered a line of blazed trees from the south stake, which were originally line trees. I followed along the same, and at half a mile set a stake near which, and about right distance and direction, was the remains of a yellow pine stump, badly burned, but which I believe was the bearing tree. The only pine tree which is now standing has two blazes on the west side, which are old, and made quartering, just like line blazes. This tree could not be a witness tree. I examined it very carefully. It has a large burned place on the side defendant claims the stake to be, and facing stake. There is no mark outside the burned place. Surveyors do not make bearing marks on dead trees or burned wood. About 250 feet south of the pine is an oak 18 feet east of my line, with old blaze on the west side. If the line ran where defendant claims, it would be on the east side of this oak tree. I found line trees all along my line. I also found line trees on the north half of the line. Section lines are always originally run from the south towards the north. I ran the line line through from section post to section post, and placed a stake exactly midway; the dis-

tance from said post to the north and south stakes being exactly 40.875 chains in each instance. The fence of defendant is 57½ feet north of the stakes so placed, and incloses 2.66 acres of plaintiff's land. I was absolutely unable to find or establish the original one-quarter section stake, and there is nothing on the ground by which it or a bearing tree can be established. I examined very carefully." At the close of the evidence for plaintiff the defendant moved for a nonsuit, "upon the ground that plaintiff had not shown that the corner was lost, and had not shown that the field-notes which he used to determine the fact that the corner was lost were copies of any official survey or record." After the motion was denied, the "defendant introduced in evidence a certified copy of the original field notes of survey. * * * These were compared with field-notes used by Surveyor Uren and Meredith, and all found to correspond." There can be no question that the testimony of Uren tended to prove plaintiff's case, and therefore that the motion for nonsuit was properly denied. If the testimony of Uren was deficient by reason of his having been guided by an uncertified copy of the field-notes, the deficiency was supplied by defendant, who introduced a properly certified copy of the original field-notes, which corresponded with those used by Uren, and thereby removed or waived that alleged ground of nonsuit. *Smith v. Compton*, 6 Cal. 26; *Perkins v. Thornburgh*, 10 Cal. 191; *Association v. Willard*, 48 Cal. 614. I think the judgment and order should be affirmed.

We concur: FOOTE, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(83 Cal. 222)

CARTER *et al.* v. GREEN MOUNTAIN GOLD MIN. CO. *et al.* (No. 13,031.)

(Supreme Court of California. Feb. 27, 1890.)
LABORERS' LIENS—SERVICE ON ATTACHMENT CREDITOR.

Code Civil Proc. Cal. § 1206, provides that, "in cases of executions, attachments, and writs of a similar nature, issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks, and laborers, who have claims against the defendant for labor done, may give notice of their claims, and the amount thereof, sworn to by the person making the claim, to the creditor and the officer executing either of such writs, at any time before the actual sale of property levied on; and, unless such claim is disputed by the debtor or a creditor, such officer must pay to such person, out of the proceeds of the sale, the amount each is entitled to receive for services rendered within the sixty days next preceding the levy of the writ, not exceeding \$100." Held that, as the only purpose of the notice is to divert from the execution or attaching creditor money which he would otherwise be entitled to receive as the result of the levy, the service of the notice on plaintiff's attorney was sufficient.

Commissioners' decision. Department 1. Appeal from superior court, Plumas county; G. G. CLOUGH, Judge.

Goodwin & Goodwin, for appellants. *W. W. Kellogg*, for respondents.

BELCHER, C. C. The facts out of which the controversy in this case arises are as follows: The defendant was a corporation engaged in quartz mining at Crescent Mills, in Plumas county. On the 30th of September, 1887, the plaintiffs commenced an action against the defendant to recover a debt due for goods, wares, and merchandise sold and delivered, and at the same time took out a writ of attachment, which on the next day was levied by the sheriff on all of defendant's personal property. Such proceedings were afterwards had in the action that on the 24th of October, 1887, judgment for more than \$3,300 was entered therein in favor of the plaintiffs, no part of which had been paid. The personal property so attached was, on the 17th of December, 1887, sold by the sheriff under execution for the sum of \$991.48, over and above all his costs, and this sum was thereafter duly paid into court on his petition, showing that conflicting claims were made upon him for the money. The appellants, 51 in number, were miners, and during the 60 days next preceding the levy of the attachment were employed by the defendant as laborers in and about said mine. Their claims for the labor so performed amounted in the aggregate to \$3,488.18, no one of them, however, being for more than \$100. Before the sale—that is, on the 21st of October—each one of the appellants made out and duly verified his claim, as required by law, and the same was certified to be correct by the superintendent of defendant. Three days later copies of these claims, with notice attached that the claimant demanded that the amount thereof be paid to him out of the proceeds of the sale of any property of the defendant as a preferred claim, under sections 1206 and 1207 of the Code of Civil Procedure, were delivered to the sheriff, and to the attorney of the plaintiffs in the action; and on the same day like copies of a portion of the claims and notice were served on the defendant, by delivery thereof to its superintendent and managing agent. All of the claims, as originally subscribed and sworn to, with the notice and proof of service attached, were then filed by the clerk with the papers in the said action. None of the claims were disputed by either the plaintiffs or defendant, and, after the money realized from the sale was paid into court by the sheriff, the appellants filed their petition, asking that it be paid to them *pro rata*, in satisfaction of their respective claims. The plaintiffs contested the right of appellants to receive the money, or any portion of it; and after a hearing before the court it was ordered that the petition be denied, and that the whole of the money be applied towards the satisfaction of the plaintiffs' judgment. From this order the appeal is prosecuted. The only question is, did service of the notices of the appellants' claims upon the attorney of plaintiffs meet

the requirements of section 1206 of the Code of Civil Procedure? That section reads as follows: "In cases of executions, attachments, and writs of a similar nature, issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks, and laborers, who have claims against the defendant for labor done, may give notice of their claims, and the amount thereof, sworn to by the person making the claim, to the creditor and the officer executing either of such writs, at any time before the actual sale of property levied on; and, unless such claim is disputed by the debtor or a creditor, such officer must pay to such person, out of the proceeds of the sale, the amount each is entitled to receive for services rendered within the sixty days next preceding the levy of the writ, not exceeding \$100," etc. We think the service sufficient. The purpose of the notice provided for is to divert from the execution or attaching creditor money which he would otherwise be entitled to claim and receive as the result of his levy. The laborer is not required to commence an action to establish his claim unless it is disputed. He, however, has an interest in the action already commenced, as against both plaintiff and defendant, and his proceeding is in the nature of an intervention. It is true he is not made a formal party to the action, but, in effect, he is a party to it, and obtains benefit from it. The attorney for the plaintiffs in an action is their agent for all its purposes, and on him all papers made by defendants and counter-claimants are to be served. He may direct the sheriff as to what property he shall seize, and may receive and receipt for any money realized from a sale thereof. The learned judge of the court below seems to have thought that the notice was the initiation of a new and independent proceeding, and that, to be effective, it must be served, like a summons, upon the parties, and not their attorney. In this we think he erred, and we therefore advise that the order appealed from be reversed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed.

(83 Cal. 270)

MOORE v. HOPKINS. (No. 12,334.)

(Supreme Court of California. March 1, 1890.)

BREACH OF MARRIAGE PROMISE—EVIDENCE—INSTRUCTIONS.

1. It is a good answer to a plea in abatement, of the pendency of a former action between the same parties, and for the same cause, that such action has been dismissed since the trial of the second action was commenced, but before its conclusion.

2. The certificate of acknowledgment or proof of a receipt and release from liability for breach of promise of marriage, taken before a notary public, is, under Code Civil Proc. Cal. § 1943, only *prima facie* evidence of the execution of the writing; and plaintiff, in an action for such breach, may by her own testimony controvert the facts therein contained, under Code Civil Proc. Cal. § 1961, pro-

viding that "a presumption, unless declared by law to be conclusive, may be controverted by other evidence, direct or indirect."

8. In an action for breach of marriage promise, where there is no evidence to show that defendant entered into the alleged contract of marriage with improper motives, it is reversible error to instruct the jury that "a man who enters into a contract of marriage with a woman with improper motives, and then ruthlessly and unjustifiably breaks it off, does a wrong to the woman for which she is entitled to exemplary damages."

Commissioners' decision. Department 1. Appeal from superior court, San Mateo county; E. F. HEAD, Judge.

Wilson & Wilson, for appellant. *Moses G. Cobb, D. M. Delmas, Geo. C. Ross*, and *Henry E. Wills*, for respondent.

FOOTE, C. This action was instituted to recover damages from the defendant based upon an alleged breach of a promise of marriage made by him to the plaintiff. The jury returned a verdict for the plaintiff. From the judgment rendered thereon, and an order denying a new trial, the defendant has appealed.

Among other matters, by way of defense the defendant pleaded in abatement that another action was pending at the time this suit was brought, between the same parties, and for the same cause of action. It is contended that the judgment of dismissal of a former action between the same parties, and for the same cause, was not admissible in evidence on the trial of the present cause, because, as is claimed, it is no answer to a plea in abatement of a pending action that a judgment of dismissal of the former action is entered after the trial of the second action has commenced, but before its conclusion. This contention, we think, is not well founded. A dismissal of a prior action may be made, and judgment entered, at any time before the trial of the second action is completed. *Dyer v. Scalmanini*, 69 Cal. 639, 11 Pac. Rep. 327; *Hixon v. Schooley*, 26 N. J. Law, 461, 462; *Averill v. Patterson*, 10 N. Y. 501.

The appellant further urges that the certificate of acknowledgement of a notary public to a release and receipt, such as here involved, is conclusive as to the facts stated in the certificate, and they cannot be contradicted by the parol evidence of the plaintiff. The statute under which instruments of the kind under consideration are allowed to be acknowledged provides, among other things: "And the certificate of such acknowledgment or proof is *prima facie* evidence of the execution of the writing." Section 1948, Code Civil Proc. "*Prima facie* evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence." Section 1833, Code Civil Proc. "Conclusive or unanswerable evidence is that which the law does not permit to be contradicted." Section 1837, Code Civil Proc. "A presumption, unless declared by law to be conclusive, may be controverted by other evidence, direct or indirect." Section 1961, Code Civil Proc. It therefore appears that

the facts recited in the certificate attached to the release and receipt given by the plaintiff to the defendant or his agent, admitted in evidence, are only *prima facie* presumed to be true, and can be contradicted by any evidence, direct or indirect. Wherefore, the instruction asked for by the defendant, viz.: "In this case, the plaintiff has offered no evidence, other than her own, which denies either the genuineness or the due execution of the receipt and release in evidence in this case; and I therefore instruct you that her evidence alone is not sufficient to overcome the certificate of acknowledgment of the notary public annexed to said release, and direct you to render a verdict in favor of the defendant,"—was properly refused by the court. We do not conceive that what we have here said is at all in conflict with the decision in *Banning v. Banning*, 80 Cal. 272, 22 Pac. Rep. 210, which was in reference to the force and effect of a notary's certificate to a conveyance of a married woman under section 1187 of the Civil Code, which provides that a conveyance by a married woman has no validity unless acknowledged in the manner prescribed by the statute; and the acknowledgment of such a conveyance has been held to be a part of the execution of the instrument itself. *Joseph v. Dougherty*, 60 Cal. 360.

As to the other main contention of the defendant, for a reversal of the judgment and order, viz., that the verdict of the jury was for excessive damages, and that a certain instruction granted by the court was misleading and caused such verdict to be rendered, it may be said with propriety that, whether the amount of the verdict was excessive or not, (about which we express no opinion,) it is clear that the jury may have been misled by the following instruction: "A man who enters into a contract of marriage with a woman with improper motives, and then ruthlessly and unjustifiably breaks it off, does a wrong to the woman for which she is entitled to exemplary damages." There was no evidence whatever in the record to show that the defendant, if he entered into a contract of marriage with the plaintiff, intended to make any effort to undermine her chastity, or to do any other improper act of that sort. Nor is there any evidence (which the plaintiff's counsel argues to exist) that he entered into the contract with any levity, or in a heartless way, having the intention to break it off after amusing and enjoying himself in her society as her betrothed. There is certainly no evidence proceeding from the defendant that he had any but true and honest motives in the matter, for he says that all his conduct towards her was through "cordial friendship." If, then, his testimony does not show him to be guilty of any improper motive, prompted by levity, deceit, or faithlessness, he certainly cannot be said to have had any such motive; for the plaintiff, in the most unmistakable manner, stamps him as one not capable of such conduct, when she

says: "He was a gentleman. There is no mistake about it. He treated me as a gentleman should treat a lady."

Since the record discloses no sort of improper motive on the part of the defendant in entering into the alleged contract of marriage with the plaintiff, it was prejudicial to him for the court to intimate to the jury, as it did, that there was evidence tending to show such improper motive to have been entertained by him. The existence of evidence tending at least to show such motive on the part of the defendant is assumed in the instruction; and, as no such evidence was before the jury, and no such charge in the pleadings, we must presume that the jury was influenced by the importation of a fact into the case, through the language of the court, which did not appear in the evidence. For this reason we advise that the judgment and order be reversed.

We concur: **BELOHER, C. C.; GIBSON, C.**

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

Hearing in bank denied.

(33 Cal. 334)

QUAN WO CHUNG et al. v. LAUMEISTER,
Sheriff. (No. 13,651.)

(*Supreme Court of California.* March 5, 1890.)

EJECTMENT—RESTITUTION—MANDAMUS.

In an action for the possession of land, wherein plaintiff had judgment, defendants were wrongfully dispossessed by the sheriff after proceedings had been stayed. Their motion to be restored to possession was granted by the supreme court, "with directions to the superior court to enter an order commanding the sheriff to restore the possession of the property in controversy to the defendants." Held that, on the sheriff's failure to execute an order made in conformity to the mandate of the supreme court, a writ of mandate would issue against him, though a third person who had since gained possession of the land, asserting title adverse to both plaintiff and defendants, had procured a temporary injunction in proceedings to enjoin the sheriff from executing the order.

In bank. Appeal from superior court, city and county of San Francisco; **JOHN HUNT, Judge.**

James F. Smith and A. N. Drowne, for petitioners. Dorn & Dorn, for respondent.

BEATTY, C. J. This is a proceeding by *mandamus* upon the following case: In an action to recover possession of certain real property situate in San Francisco, in which one Lee Chuck was plaintiff, and the above-named petitioners were defendants, the superior court rendered a judgment in favor of the plaintiff, whereupon a writ of restitution was issued, under which petitioners were ejected from the demanded premises, and said Lee Chuck placed in possession. The petitioners afterwards moved the superior court to restore them to possession, on the ground that the writ of restitution had been wrongfully executed by the sheriff after stay of proceedings granted. This motion was re-

sisted by Lee Chuck, and denied by the superior court; but on appeal to this court the order was reversed, "with directions to the superior court to enter an order commanding the sheriff to restore the possession of the property in controversy to the defendants." 81 Cal. 222, 22 Pac. Rep. 594, (1889.) The *remittitur* upon this judgment was filed in the superior court, December 21, 1889, and an order was thereafter made in conformity to the mandate of this court. But when the sheriff, the respondent here, was about to execute the order, he was met by the claim of a Chinese firm calling itself the Kwong Lun Hing Company, that they were rightfully in possession of the property under title adverse to both parties in the suit, and not in collusion with Lee Chuck. In consequence of this claim, and threats of an action for damages, the sheriff refused, or at least failed, to execute the order to restore the petitioners to possession, and this proceeding was thereupon commenced to compel him to do so. An alternative writ of mandate was issued, to which the sheriff makes return, showing the facts above stated among other things, and also the fact that a suit has been commenced in the superior court of San Francisco by or on behalf of said Kwong Lun Hing Company, to enjoin him from executing said order; in which case a temporary injunction has been issued and served upon him, the question of making it permanent being held under advisement by the judge of the superior court. Besides these proceedings, various other steps have been taken by said Kwong Lun Hing Company, all designed to frustrate the execution of the order of this court to restore the petitioners to the possession of the premises from which they were, by the agency of the superior court, wrongfully ejected. It is not necessary, however, to recapitulate these various devices, and we shall content ourselves with noticing the position upon which the Kwong Lun Hing Company bases its claim of right to keep possession of the disputed premises. They say they were not parties to the action of Lee Chuck v. Quan Wo Chung Co., and therefore are not bound by the judgment, or any orders made therein; that they are peaceably in possession of the premises, under title derived from an independent source, and cannot be ejected, except in consequence of a proceeding to which they are made parties, and in which they may have their day in court to litigate their rights. In support of this proposition, they cite us to numerous cases, in which it has been held that the plaintiff, in an action of ejectment or other suit to recover possession of real property, cannot, by his writ of restitution or assistance, dispossess a stranger to the proceeding holding the premises under an independent title or claim of title, and not in collusion with the defendant. But these cases have no application where the party seeking to be restored to the possession has been wrongfully dispossessed by the agency of the court. He does not stand in the position of the actor in a suit who seeks

the aid of a court to regain a possession lost by his own negligence or misfortune. On the contrary, he is out of possession only because the court has wrongfully put him out, and whoever is in is there only because the court has wrongfully made room for him to get in. All that the one has gained and all that the other has lost is due to the agency of the court, and therefore no injustice is done in restoring the party wrongfully dispossessed without stopping to investigate the rights of the party who has thereby gained the possession. He is in no worse position, after being put out by the court, than he would have been in if the court had never acted, and the court cannot, without putting him out, undo its own wrong. If he has a superior right to the possession, he can, after going out, assert it with the same effect as if he had never been in, and he loses nothing but the advantage of holding the premises pending the litigation, an advantage to which he was never entitled. It must be understood, therefore, that our order remanding the case of *Lee Chuck v. Quan Wo Chung Co.* meant precisely what it said,—neither more nor less,—viz., that the defendants in that action, petitioners here, were to be restored to the possession of the property in controversy, and that any other party who might have got in pending the litigation, whether by collusion with *Lee Chuck* or otherwise, must be put out. As to the injunction issued by the superior court restraining the respondent from executing the order entered in pursuance of our judgment in the appeal case, we assume that it was issued in consequence of an erroneous construction of that judgment, and that it will be vacated upon the rendition of our decision herein; but, however that may be, the order of this court must control, and any conflicting order from the superior court must be disregarded. It is ordered that the peremptory writ issue, as prayed for by the petitioners, forthwith.

We concur: MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.; THORNTON, J.; PATERSON, J.

(83 Cal. 419)

PEOPLE v. BEAVER. (No. 20,596.)

(*Supreme Court of California*. March 8, 1890.)

RECORD ON APPEAL—REMARKS OF COUNSEL.

1. Instructions not authenticated by the trial judge, nor shown by the bill of exceptions to have been either given or refused by him, form no part of the judgment roll, and will not be considered by the supreme court. *People v. Rogers*, 23 Pac. Rep. 592, followed.

2. Objections to statements of counsel for the people, in his argument to the jury in a criminal trial, cannot be considered by the supreme court where there has been no request for the action of the trial court with reference to such statements. *People v. Ah Fook*, 1 Pac. Rep. 347, followed.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Oregon Sanders and Chas. G. Lambertson, v. 23P. no. 5—21

for appellant. Geo. A. Johnson, Atty. Gen., for the People.

FOOTE, C. The defendant was charged with murder, and convicted of manslaughter. From the judgment rendered in the premises, and an order denying a new trial this appeal is taken.

Objection is made to certain portions of the charge of the court, alleged to have been given of its own motion, at folios 13, 14, 17, and 29 of the transcript. There is nothing in the record to show that such a charge was either given or refused by the court. It is not shown by any bill of exceptions that any such action was taken by the court. The alleged charge is not authenticated in any manner by the judge, is no part of the judgment roll, and is not to be considered by the appellate court. *People v. Rogers*, 81 Cal. 209, 210, 22 Pac. Rep. 592, and cases cited.

As to the question raised that the defendant did not have a fair trial by reason of the argument made by the district attorney and his associates, it may be said that, even if such comments as they made, brought out, as they were, by the argument of defendant's counsel, were improper, (which we do not decide,) the defendant cannot be heard here to assign error, for the reason that "the exceptions or objections to statements of counsel for the people in argument, and in the presence of the jury, cannot be considered. No action of the court with reference to allowing or forbidding such statements was demanded or requested." *People v. Ah Fook*, 64 Cal. 383, 1 Pac. Rep. 347. No prejudicial error appearing, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(83 Cal. 49)

PEZUELA v. SUPERIOR COURT. (No. 13,409.)

(*Supreme Court of California*. Feb. 1, 1890.)

PROHIBITION—DISMISSAL.

An alternative writ of prohibition was issued to the superior court on the petition of an executor, who alleged that, notwithstanding his appeal from an order settling his account, the court, on the application of the heirs, was proceeding to a final distribution. Held that, on the withdrawal of their application by the heirs, and their stipulation not to renew it until the determination of the appeal, the alternative writ would be dismissed, though the heirs expressly reserve the right to apply for a partial distribution.

In bank. Prohibition to superior court, city and county of San Francisco; J. V. COFFEY, Judge.

T. I. Bergin, for petitioner.

PATERSON, J. On August 19, 1889, plaintiff filed a petition herein, alleging that, notwithstanding the fact that he had appealed from an order of the superior court settling his account as executor,—in which he was

required to account for \$9,847.29 more, he alleged, than he should be charged with,—said court claimed that the appeal did not suspend the operation of the order settling said account, and, on application of the heirs, was proceeding to a final distribution of the estate. Upon this petition an alternative writ of prohibition was issued out of this court, commanding the superior court to refrain from further hearing the said petition for final distribution, and to show cause on September 20, 1889, why it should not be prohibited “from further proceedings upon the aforesaid petition for final distribution of said estate until the appeal of the petitioner from the order of said superior court, settling the final accounts of the petitioner and executor, to this court, shall have been finally disposed of.” Thereafter respondent filed an answer herein, and argument was had upon the question as to the effect of the appeal referred to. Pending decision upon that issue, the heirs mentioned in the petition, and who filed the application for a final distribution, have filed a petition herein asking that the alternative writ of prohibition be dismissed, on the ground that since the argument on the return to the writ they had, by leave of the superior court, withdrawn their application for final distribution. In said petition they stipulate to make no application for final distribution of the estate until the determination of the appeal from the order settling the final account, expressly reserving, however, their right to apply for partial distribution if advised so to do. In support of the request, they have filed herein a certified copy of an order of the court below, allowing them to withdraw their application for distribution. We see no good reason for refusing to grant the application. The writ, if made peremptory, would prohibit the court only from proceeding to a final distribution until the determination of the appeal from the order settling the account of the executor. As that proceeding has been entirely abandoned in the court below, and the parties interested have stipulated not to renew their application, the issuance of a peremptory writ could serve no useful purpose. The question whether the heirs are entitled to proceed, under section 1658, Code Civil Proc., for a partial distribution pending the appeal from the order settling the account, is not before us in this proceeding. It is ordered that the writ heretofore issued herein be discharged, and that the moving parties pay the costs incurred.

We concur: BEATTY, C. J.; MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.

(14 Colo. 291)

FORD v. ROBERTS.

(Supreme Court of Colorado. Feb. 23, 1890.)
DISMISSAL BY STIPULATION—MEASURE OF DAMAGES
—CONVERSION.

1. Defendant failed to perform his part of a contract under which plaintiff was to move a build-

ing, furnish the necessary blocking, and allow it to remain 10 days, when defendant was to have a permanent foundation put in, so as to release the blocking. *Held*, that a dismissal by stipulation of a suit for the value of the blocking, and for its detention and use by defendant, barred another action on the same demand, unless the right to sue again was reserved by plaintiff.

2. Defendant, at the expiration of the 10 days, having told plaintiff that he might remove the blocking, plaintiff's measure of damages is the expense of the removal, provided it is practicable.

3. If the blocking cannot be removed unless defendant complies with his contract, his failure so to do amounts to a conversion, and plaintiff's measure of damages is the value of the blocking at the time of its conversion, and not the value of its use to plaintiff.

Commissioners' decision. Appeal from Arapahoe county court.

Geo. W. Miller and John A. Perry, for appellant. *Brown & Putnam*, for appellee.

REED, C. It appears that the appellant, Ford, made a contract with Roberts, appellee, by which Roberts was to furnish the necessary tools and appliances, move a building, place it in position, furnish the necessary temporary blocking or underpinning, level the building, and allow the blocking to remain 10 days, in which time Ford was to have a permanent foundation put in, so as to release the blocks of Roberts, and allow a removal of them. Such seem to be the facts, so far as ascertainable from the record. The building was moved, and, as claimed by Roberts, leveled and blocked up, in accordance with the contract. Some controversy arose over the matter, and a suit was commenced by Roberts in the district court. Ford failed to have the foundation put in, and the blocking released, so he could remove it. A bill for \$60, the alleged value of the blocking at the time it was put in, in June, 1881, and a bill for \$150, for its detention, and the value of its use from the 14th of June to August 17th, was filed in the suit in the district court. The record in this suit does not say what, if any, adjudication was had; and shows that in March, 1883, suit was dismissed by stipulation at the cost of Ford, who paid the costs. This suit was brought before a justice of the peace, appeal taken to the county court, transcript filed September 13, 1883, tried by the court in January, 1886, and judgment for Roberts for \$100 and costs. The suit was brought for the detention and use of the blocking, and was the same as that for which the bill was filed in the district court. What was done in that court cannot be determined from anything in the record in this case, except a dismissal by agreement. The bill filed in that case became part of it; might have been adjudicated. If that case was settled by the parties without reserving a right to Roberts to again sue, that extinguished the cause of action. The court might have required proof, and, if the facts were found as above, the suit should have been dismissed at the cost of the plaintiff. If the supposed claim was not disposed of by the disposition of the suit in the district court, the case must be reversed for errors upon the trial.

It appears that Ford not only made no objection to Roberts' removing the blocks at the expiration of 10 days, but told him to do so. Proof should have been made in regard to the practicability of the removal by Roberts, and, if practicable, he could have recovered only the expenses incident to taking the blocks out. If found impracticable, and that they could not be removed without Ford complied with his contract,—put in the foundation, and released them,—the court should have treated it as a conversion by Ford at the expiration of the 10 days, and the proper inquiry was as to the value of the blocks at the time of the conversion. This should have been fixed by competent testimony, and could not have exceeded the sum of \$60, as fixed by Roberts in his bill. Roberts was under no obligation to take the blocks back when they were released by Ford, in September. He elected to do so, however, and did take them; and their value at the time of their recovery by Roberts should have been fixed, and the amount deducted from their value at the time of their conversion. There was no contract of hire, and the measure of damage adopted by the court was erroneous, as may be seen at a glance. Roberts testified that he had replaced them at an expense of \$60. If Ford had not seen fit to release them, the time for which Roberts could have recovered for their use would have only been limited by the time they would resist natural decay; and Roberts, under the rule adopted by the court, and according to his evidence of the value of their use to him, could at intervals have recovered from \$750 to \$1,000 a year for the detention and use of material worth \$60. The judgment should be reversed, and cause remanded for further proceedings, in accordance with suggestions herein made.

RICHMOND and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed, and the cause remanded.

(14 Colo. 71)

HUER v. CITY OF CENTRAL.

(Supreme Court of Colorado. Jan. 31, 1890.)

CONSTITUTIONAL LAW—APPEAL FROM POLICE JUDGE —DISMISSAL.

1. Where, before the adoption of the state constitution, a city was incorporated under a special charter, and no abandonment of this charter, and reincorporation under the general laws relating to towns and cities, has taken place, the original charter, and amendments thereto, are not unconstitutional on the ground of special or local legislation; and, unless inconsistent with the constitution, they may stand.

2. Originally, the charter of defendant provided for the election of "one justice of the peace, to be denominated 'police judge,' for the City of Central." By subsequent amendment, the language was so changed as simply to require the election of "one police judge." The city charter further contained the following provision: "Appeals shall be allowed from decisions in all cases arising under the provisions of this act, or any ordinance passed in pursuance thereto, to the district

court; and every such appeal shall be granted in the same manner, and with like effect, as appeals are taken from and granted by justices of the peace under the laws of this territory." Afterwards, the course of appeal from justices of the peace to the district court was changed to the county court. *Held*, notwithstanding, that an appeal would lie from the police judge to the district court.

3. On such an appeal, irrespective of the question of jurisdiction, the district court was not authorized to dismiss the cause.

Appeal from district court, Gilpin county.

Clement E. Huer was tried and convicted before the police magistrate under an ordinance of the City of Central. He appealed from the judgment pronounced to the district court. In the latter court, on motion, his appeal was dismissed for want of jurisdiction, and judgment was rendered against him for costs. To reverse this judgment the present appeal was taken, under the act of 1885, regulating practice in this court.

J. McD. Livesay, for appellant. E. W. Hurlbut, for appellee.

HELM, C. J. Prior to the adoption of the constitution, Central City was incorporated under a special charter. No abandonment of this charter, and reincorporation under the general law relating to towns and cities, has since taken place. Therefore, provisions of the original charter, and legitimate amendments thereto, are not unconstitutional upon the ground of special or local legislation; and, unless inconsistent with the constitution, they may stand. *People v. Londoner*, and citations, 13 Colo. —, 22 Pac. Rep. 764.

Originally, the charter in question provided for the election of "one justice of the peace, to be denominated 'police judge,' for the City of Central." But by subsequent amendment the language was so changed as simply to require the election of "one police judge." *Sess. Laws 1866*, p. 94. While the office has since been made appointive, instead of elective, the requirement that the incumbent be a justice of the peace has not been restored. This police judge, or "magistrate," as he is termed in some parts of the charter, is now appointed by the council. By statute, he is given jurisdiction over actions for the violation of city ordinances. By ordinance, such jurisdiction is made exclusive except in case of absence or disability. If it were a fact that the police judge is also clothed with the powers of a justice of the peace, the present inquiry would not be affected thereby. In the case at bar, he was not acting, or attempting to act, as a justice of the peace. He proceeded as police judge or magistrate, exclusively, and discharged the duties peculiar to that office. Appeals do not now lie, under the general law, from justices of the peace to the district court. The judgment of the court below was predicated upon the proposition that for this reason no appeal would lie from the police judge of Central to the district court. The special charter of Central City contains the following provision: "Appeals shall be allowed from decisions in all cases arising under the provisions of this act, or any

ordinance passed in pursuance thereto, to the district court; and every such appeal shall be granted in the same manner, and with like effect, as appeals are taken from and granted by justices of the peace under the laws of this territory." The foregoing statute, which was adopted in 1864, contains, in substance, two affirmative declarations: *First*, that appeals from decisions of the police judge, in cases relating to the violation of city ordinances, shall lie to the district court; and, *secondly*, that such appeals are to be granted and prosecuted in the same manner, and with like effect, as are appeals from judgments of justices of the peace. The two clauses of this provision are therefore separate, and in a certain sense independent of each other. The first specifies the forum to which the appeals in question shall be taken. The second points out the manner of prosecuting such appeals. It is true that when the statute first became a law the right of appeal from justices of the peace to the district court also existed. It is likewise true that this right has been taken away, and that for the last 12 years appeals from justices of the peace have been returnable exclusively to the county court. But there is nothing in the constitution requiring that appeals from police magistrates, in actions under ordinances, be taken to the same tribunal as those from justices of the peace acting within their ordinary jurisdiction. Nor has the statute under consideration been changed or repealed by other legislative enactment. In view of the plain statutory declaration on the subject, and of the fact, above mentioned, that the statute is not void because local in its operation, we are of opinion that the appeal in question was erroneously dismissed. Substituting the word "state" for the word "territory" in the provision, as we are authorized to do, the foregoing construction involves no inconsistency or difficulty. The appeal lies to the district court; but it is to be granted in the same manner, and prosecuted with the same effect, as appeals, under the present general laws, from justices of the peace to the county court.

We have not seen fit to notice the fact that, according to the record recital, the district court dismissed the cause itself, instead of the appeal from the police magistrate. In any view of the case, this would, at the stage of the proceeding when taken, be erroneous. If the court had no jurisdiction of the appeal, it could not dismiss the cause, while, if the court did have jurisdiction of the appeal, it had no authority to summarily dispose of the cause in this manner. The judgment is reversed, and the cause remanded.

(14 Colo. 491.)

CAMPBELL v. SHILAND.

(Supreme Court of Colorado. Jan. 31, 1890.)

ASSUMPSIT—PLEADING.

A complaint averring "that defendant is indebted to plaintiff for money paid, laid out, and expended by plaintiff between December 6, 1879, and

December 20, 1883, for the use and benefit of the defendant, and at his special instance and request, in the sum of \$11,476.07; that said sum is due, but defendant has not paid the same, nor any part thereof," states a cause of action.

Appeal from district court, Arapahoe county; ELLIOTT, Judge.

J. W. Vroom, for appellant. *Edgar Cayless*, for appellee.

HELM, C. J. It is conceded in the argument of this case that, upon motion to make the complaint more definite and certain, the court below ordered a bill of particulars to be filed. The record shows that thereupon a general demurrer challenging the sufficiency of the complaint was presented and overruled. From the order thus made the present appeal was taken under the act of 1885, and the sole matter presented for adjudication may be resolved into the inquiry, does the complaint state a cause of action? The pleader evidently endeavored to unite in one count four or five of the common-law counts in *indebitatus assumpsit*, all of which, however, related to the same subject-matter. This course was allowable at common law, and, though hardly to be commended, is not obnoxious to a general demurrer under the present practice. A count in *indebitatus assumpsit*, framed substantially as required at common law, is now held to be a sufficient compliance with the Code mandate as to allegations of fact. *Gale v. James*, 11 Colo. 540, 19 Pac. Rep. 446; *Allen v. Patterson*, 7 N. Y. 476; *McManus v. Mining Co.*, 4 Nev. 15; *Grannis v. Hooker*, 29 Wis. 65; *Meagher v. Morgan*, 3 Kan. 372; *Wilkins v. Stidger*, 22 Cal. 232; *Ball v. Fulton Co.*, 31 Ark. 379; *Bliss*, Code Pl. (2d Ed.) §§ 298, 299. This position is more easily reconciled with the underlying principle of code pleading, because of the provision (Civil Code, § 63) which excuses setting forth in the first instance the items of an account, requiring, however, the delivery of a copy thereof upon demand therefor. *Bliss*, Code Pl. § 299, *supra*. If, therefore, in the present case, any one of the counts which plaintiff attempted to plead would be sufficient at common law, so far as allegations of fact are concerned, the complaint states a cause of action, and the demurrer was properly overruled. Among other things, this pleading avers, substantially, that defendant is indebted to plaintiff for money paid, laid out, and expended by plaintiff between December 6, 1879, and December 20, 1883, for the use and benefit of defendant, and at his special instance and request, in the sum of \$11,476.07; that said sum is due, but defendant has not paid the same, nor any part thereof. The complaint is not framed in the precise language employed by common-law pleaders; nor does it allege the legal inference that defendant, by virtue of the premises, "promised," etc.; but it will be observed that no material averment of fact is wanting to constitute a good common-law declaration for "money expended." Therefore, without analyzing or commenting

upon the remaining portions of the pleading in question, we shall hold that the action of the court below in the premises was not error, and the judgment is accordingly affirmed.

ELLIOTT, J., having presided as district judge at the trial of this cause, did not participate in its consideration in this court.

(14 Colo. 75)

SMITH v. BRUNK *et al.*

(*Supreme Court of Colorado. Jan. 17, 1890.*)

REFORMATION OF INSTRUMENTS.

At the time of the execution of a negotiable note, the maker also executed a title-bond, agreeing to convey to the payee an undivided one-half interest in certain mining claims, which were carefully described. It was also agreed that the payee should have a lien on these premises for the payment of the note, and the maker inserted a special condition, providing that "this bond shall be and remain a special lien upon, and for the payment" of the note; but by mistake or fraud he omitted the words, "the said property above described," after the words, "lien upon." *Held*, that as between an indorsee of the note and the maker, and as against subsequent purchasers or incumbrancers of the premises, with full notice of the payee's and indorsee's rights, the bond would be reformed so as to express the meaning of the parties thereto.

Appeal from district court, Summit county.
M. B. Carpenter, for appellant. *Bailey & Wilkin*, for appellees.

HELM, C. J. The complaint in this case averred, among other things, that on the 12th day of March, 1884, Brunk made and executed to one Gorton his promissory note for \$2,500, payable in two years, with interest at the rate of 8 per cent. per annum; that at the same time Brunk also executed to Gorton a title-bond, agreeing to convey, upon payment of \$12,000, an undivided one-half interest in certain mining claims, which were carefully described; that as a part of the same transaction a special agreement was entered into between Brunk and Gorton, to the effect that the latter should have a mortgage lien upon said premises for the payment of note mentioned, and that the title-bond should contain a paragraph reducing the lien contract to writing; that Brunk drew the alleged bond and mortgage, inserting therein the following clause: "Special Condition. It is agreed by the said George W. Brunk that this bond shall be and remain a special lien upon, and for the payment of, a certain promissory note executed on the day of the date hereof by the said George W. Brunk, payable to the order of S. S. Gorton at the First National Bank of Denver, Colo., two years after the date hereof, for the principal sum of \$2,500, with interest at 8 per cent. per annum." The complaint further alleged "that, in writing the said special condition above mentioned, the said defendant Brunk left out, by mistake, inadvertence, or fraud, the words, 'the said property above described,' after the words, 'a special lien upon;' that such mistake was not discovered by the said Gorton or defendant Brunk until after the recording of the said title-bond,

which was recorded on the 17th day of March, 1884, in Book 51 of Deeds, on page 277, of the records of Summit county, Colo.; that it was the intention of the defendant Brunk to give to the said Gorton a lien upon the said property above described, for the payment of the said note of \$2,500, and a good security upon such mining property for the payment of the said note, but that, through mistake, inadvertence, or fraud, the bond was drawn, executed, acknowledged, and delivered with the said words, 'the property above described,' left out;" that the alleged claim or interest of the remaining defendants in the premises was procured subsequent to the recording aforesaid; that the promissory note was, before maturity, for valuable consideration, duly assigned to plaintiff; and that defendant Brunk was wholly insolvent, and unable to pay the note, or satisfy any judgment obtained against him thereon. The prayer was that the instrument be reformed so as to express the full intention and meaning of the parties thereto; also that, unless the note and interest be paid, a decree of foreclosure be entered in accordance with law. To this complaint a demurrer was filed and sustained. Judgment being entered upon these pleadings in favor of defendants, the present appeal was taken.

The purpose of the parties in executing the instrument described by the complaint is too clear to be misunderstood. A cursory examination of this instrument shows clearly that, while intended to be a title-bond, it was also designed to operate as a mortgage upon the premises mentioned, securing payment of the \$2,500 note. The so-called "special condition" is not worded in accurate legal terms; it was written by Brunk, who was not a lawyer; but it declares that the bond "shall be and remain a special lien upon, and for the payment of, a certain promissory note," etc. Lien upon what? No one could read the language employed without being impressed with the certainty that some words were omitted, but no real doubt could exist as to what the omission related. The natural and reasonable inference, from the entire context of the writing, is that the intention of the parties was to create a valid incumbrance upon the real estate previously therein described. It is hardly necessary to remind counsel that we are not here dealing with a case where no property is described in any part of the writing. By the assignment of the note to Smith, the security, such as it was, passed also to him. Were Brunk the only defendant, we would have no hesitation in saying that, upon the averments of the complaint, properly supported by proofs, a court of equity might reform the instrument, and carry out the original intent of the parties thereto. The alleged interest or claim of the remaining defendants did not, under the circumstances, destroy the legal sufficiency of the pleading. The complaint avers that such claim or interest, whatever it might prove to be, was "obtained with full notice

and knowledge of the said Gorton's and plaintiff's rights in the premises." This averment might have been couched in more technical language, but its meaning is reasonably plain. Whether appellant relies upon actual notice or knowledge, or upon constructive notice through the prior recording of the instrument, we are not advised; and whether or not the record of the instrument, containing, as it did, the special condition mentioned, and also a perfect description of the property bonded, was sufficient to put them upon inquiry, and thus charge them with notice, we need not now determine. Accepting, as we must, the material allegations of the complaint as true, it does not at present appear that Brunk's co-defendants were in any better position than Brunk himself. We do not discuss the question of misjoinder of parties. If plaintiff is entitled to a mortgage lien upon the premises, subsequent purchasers or incumbrancers are certainly proper parties to his action for reformation and foreclosure. The court erred in sustaining the demurrer. The judgment is accordingly reversed, and the cause remanded.

(14 Colo. 290)

RILEY v. RILEY.

(Supreme Court of Colorado. Feb. 28, 1890.)

APPEAL—CONFLICTING EVIDENCE.

Where the evidence is conflicting, the findings of fact by the lower court will not be disturbed.

Commissioners' decision. Appeal from superior court of Denver.

G. W. Miller and J. A. Perry, for appellant.
Markham & Dillon, E. A. Clark, and Bartels & Blood, for appellee.

REED, C. This suit was brought by the appellee against his brother, the appellant, to recover one-half of \$2,400 received by him for grading done on the Denver & South Park Railroad. The contract for the grading was signed by appellant alone. Appellee claimed to be an equal partner, and entitled to one-half of the proceeds of the work. The only question that was to be determined was that of the alleged partnership. The case was heard before the court, the testimony being oral, and a decree entered finding that the partnership had existed, and that appellee was entitled to receive from the appellant \$1,200 and interest. The only assignment of error relied upon in argument is the third, as follows: "The evidence is wholly insufficient to justify the findings and decree of the court." The question tried and determined by the court, and brought here for review, was purely one of fact. The evidence was very conflicting and contradictory. There was sufficient evidence to warrant the finding and decree, but it cannot be said that there was any great preponderance of evidence in favor of the finding. Under such circumstances, the finding will not, according to the well-settled rule of this court, be disturbed. Counsel for appellant insists in

argument that the court erred in allowing interest on the amount decreed. No good reason is shown why appellant should not have been chargeable with interest for withholding the money. The court may have found from the evidence that the money was unreasonably and vexatiously withheld, and that interest was properly chargeable under the statute. The decree should be affirmed.

RICHMOND and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment of the court below is affirmed.

(14 Colo. 254)

THOMAS v. PEOPLE.

(Supreme Court of Colorado. Feb. 28, 1890.)

CONTEMPT.

An attorney presented a petition to the court, without reading it, for the removal of a cause, alleging prejudice of the judge; and the judge, after reading the petition, appointed a committee "to inquire into the matters alleged in said petition." The petition was presented in a respectful manner, and there was nothing in the language used which constituted a contempt *per se*, but the committee, after hearing the evidence, made a report that the charges were a reflection on the honor, integrity, and dignity of the court, and were made recklessly, and without sufficient inquiry as to the truth of the allegations. The district attorney then filed an information against the attorney for contempt, and an attachment was issued. Neither the report of the committee nor the information was verified. *Held* that, as the information was not verified, it was insufficient to confer jurisdiction on the court to issue the attachment, under Code Civil Proc. Colo. § 348, which provides that, when a contempt is not committed in the immediate view and presence of the court, an affidavit shall be presented containing a statement of the facts constituting the contempt.

Commissioners' decision. Error to district court, Gunnison county.

Thomas Bros. & Weggener, for plaintiff in error. *H. M. Hogg*, Dist. Atty., for the People.

PATTISON, C. The judgment sought to be reviewed in this case was rendered in a proceeding instituted against plaintiff in error and others for an alleged contempt of court. It appears from the record that prior to July 12, 1886, there were pending in the court below certain actions at law, wherein one Carrie L. Davis was plaintiff, and John H. Bowman, then sheriff of that county, was defendant. Plaintiff in error was one of the attorneys for the defendant in these actions. On the day named he caused a petition, which had theretofore been prepared by him, praying for a change of the place of trial of the actions mentioned, to be presented to the court. The petition was made under section 31 of the Code of Civil Procedure, then in force. This section provided for change of the place of trial, whenever a party "shall fear that he will not receive a fair trial in the court in which the action is pending, on account that the judge is interested or prejudiced," etc. The petition alleged prejudice of the judge.

In compliance with the requirements of the section, as construed by this court, the facts and circumstances upon which the allegation of prejudice were predicated were set forth in detail. *Christ v. People*, 3 Colo. 394; *Hughes v. People*, 5 Colo. 436. It is unnecessary to recite these facts and circumstances. When the petition was presented to the court, it was not read by counsel, but was submitted to the judge for his consideration. Immediately after reading the petition, the judge, upon his own motion, caused an order to be entered, appointing a committee, consisting of three members of the bar, "to inquire into the matters alleged in said petition, with full authority to administer oaths, and send for persons and papers, and to take such action in the premises as they may deem proper." The committee was not required to take the oath of office. Subsequently the committee presented a report, the concluding paragraph of which was as follows: "Your committee would, therefore, conclude from the charges presented in said affidavit, as well as from the evidence adduced before us, that such charges are a serious reflection upon the honor, integrity, and dignity of this court, and that the same were made recklessly, and without sufficient inquiry as to the truth of the allegations therein contained, so far as they affect the judge of this court, and that the party making, as well as the persons causing, said affidavit and petition to be filed, are in contempt of this honorable court." The report was not verified by the committee, or any one of them. Plaintiff in error was not permitted to participate in the proceedings had before the committee in any manner. When the report was submitted, the court caused the same to be spread upon the minutes of the court, directed the evidence taken to be filed with the clerk, and ordered the district attorney of the district to file an information "against all of the parties concerned in filing the said petition." Pursuant to the order, the proceeding now sought to be reviewed was instituted. The information alleged that plaintiff in error and the other parties concerned in the suit in which the petition was filed, in making and presenting the petition, committed gross acts of contempt of the district court, in that they caused the petition to be filed, published, etc. A copy of the petition was set forth in the information. The information was not verified. Upon the filing of the information, the court ordered an attachment for contempt to issue against plaintiff in error and others, returnable forthwith. When the warrant of attachment was returned by the officer, motion to quash the information and warrant was filed, because—"First, the said information does not state facts sufficient to constitute a contempt of court; second, because the information filed herein is not verified." The motion was overruled. Thereupon plaintiff in error filed his separate answer to the information, in which, among other things, he expressly avers that, by the language con-

tained in the petition for change of venue, he intended no reflection "upon the character or integrity of the court, nor the judge thereof, but he thought he was within the line of professional duty to his client, and at the time thought it necessary to make the allegations contained in the petition." Upon the information and answer, plaintiff in error was adjudged to be guilty of contempt, and a fine of \$500 was imposed upon him.

It is only necessary for this court to determine whether the proceedings had prior to the issuance of the warrant of attachment conferred jurisdiction upon the court to issue the process. It is manifest, from the course of the proceedings, that the language of the petition for the change of venue was not deemed to be contempt *per se*; that the contempt, if any, was not regarded as direct, but constructive. The court was correct in its assumption. *Ex parte Curtis*, 3 Minn. 274, (Gil. 188.) The record clearly shows that the petition was presented in a respectful manner, and that there was nothing in the language of the petition itself which would constitute a contempt, unless it could be established by evidence that it was used either with a reckless disregard of the truth, or with the express intention, not only to establish prejudice within the meaning of the statute, but also to reflect upon the honor, integrity, and character of the judge. It was therefore necessary to inquire and ascertain the meaning and intention of the parties in the premises. The intention of the parties was a material element in the offense. *Rap. Contempt*, § 121. Investigation was therefore necessary.

At the time this proceeding was instituted, chapter 31 of the Code of Civil Procedure, relating to contempts and their punishments, was in force. The court below should in some measure, at least, have conformed with the rules prescribed by this chapter. The proceeding was instituted under its provisions. Section 348 expressly requires that, when the contempt is not committed in the immediate view and presence of the court, an affidavit shall be presented containing a statement of the facts constituting the contempt. No information is necessary, for the reason that it is the office of the affidavit to inform the court of the facts which constitute the foundation of the proceeding. *Worland v. State*, 82 Ind. 49. In the absence of the affidavit, the court is without the legal information necessary to warrant the issuance of the attachment. The judge cannot act upon mere hearsay statements. Knowledge must be brought home to him by the means prescribed by the statute. The statement of facts upon which the court may proceed, must be verified by an oath. An information is not an affidavit, and cannot be substituted for an affidavit, unless it is duly verified. The report of the committee appointed in this case could by no means perform the office of the affidavit. So far as this proceeding is concerned, the appointment of the

committee and its action were extrajudicial. It may not be improper to initiate a proceeding to punish for constructive contempt by information. The affidavit will still be necessary, however, unless the information contains a statement of the facts and circumstances constituting the contempt. In such case, the information simply performs the office of the affidavit prescribed by the statute. As the affidavit must of necessity be sworn to, it is clear that the information must be verified. In the absence of verification, it is insufficient, and confers no jurisdiction upon the court to issue the attachment. *Gandy v. State*, 13 Neb. 445, 14 N. W. Rep. 143; *Wilson v. Territory*, 1 Wyo. 155; *Young v. Cannon*, 2 Utah, 560; *In re Daves*, 81 N. C. 72; *State v. Myers*, 44 Iowa, 580; *Batchelder v. Moore*, 42 Cal. 412; *Whitem v. State*, 36 Ind. 196; *McConnell v. State*, 46 Ind. 298; *In re Judson*, 3 Blatchf. 148. In the light of these authorities, it is clear that the court erred in overruling the motion to quash the information and the warrant of attachment, for the reason that the information was not verified.

It is unnecessary to consider other questions presented by the record. The judgment is reversed, and plaintiff in error discharged.

REED and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed, and the contempt proceeding ordered dismissed.

(14 Colo. 202)

COORS v. GERMAN NAT. BANK.

(*Supreme Court of Colorado*. Feb. 28, 1890.)

NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASERS.

1. Where A. indorses drafts in blank to B., for collection, and B., wrongfully assuming to be the owner, sells and disposes of them to C., who has no knowledge of the want of ownership in B., C. is invested with good title, so as to retain the proceeds as against A.

2. C. is not chargeable with notice of ownership in A. by the fact that in B.'s letter, sending the drafts to C., they were described as "A.'s acceptances."

Commissioners' decision. Appeal from superior court of Denver.

Action by the German National Bank of Denver against Adolph Coors, to recover the amount of a \$1,000 note executed by defendant and discounted by plaintiff. There was judgment for plaintiff, with allowance of certain offsets. Defendant appeals.

L. S. Dixon, for appellant. *Patterson & Thomas*, for appellee.

REED, C. Coors, the appellant, who was defendant below, was, and for many years had been, a brewer at Golden, Jefferson county. His sales were mostly by car-lots or large quantities, shipped to various parties, and sold on time. It was his custom on the shipment to fill an order, to draw a draft payable to his own order, and, at the expiration

of the time of credit given, send the draft to the consignee for acceptance, to be returned to him. F. E. Everett was a private banker at Golden, and had been for many years. In July, 1884, he died insolvent. He kept an account and transacted business with appellee in Denver, and acted as agent and correspondent of appellee at Golden. Appellant, Coors, transacted his business and kept his account with Everett until the time of his death. His accepted drafts, when returned to him, were by him indorsed in blank, and deposited with Everett; the proceeds to be placed to his credit when collected. When in need of money, he made his notes payable to Everett, by whom they were discounted. It appears that Everett was in the habit of rediscounting these notes with appellee, which fact was not known to Coors; and, as appellee was in the habit of transmitting the notes at maturity to Everett for collection, Coors did not, necessarily, know that the notes had been rediscounted. On the 26th of March, 1884, Coors made his note to Everett for \$1,500, payable 90 days after date, with interest. On the 8th of May, Coors made a note for \$1,000, with interest, payable to Everett 60 days after date, which was the note on which this suit was brought. Both notes were indorsed in blank by Everett, and rediscounted for him by the appellee. After the death of Everett, Coors opened an account with the appellee. On the 8th day of May, 1884, Coors drew a draft on Keppler & Co., of Leadville, payable at 60 days, for \$471.90. On the 21st of May he drew a second draft on Keppler for the same amount, at 60 days. On the 27th of May he drew his draft on Dyer & Northington, of Rawlins, Wyo., for \$748.25, at 60 days. On May 14th he drew his draft on Crystal Bros., Pitkin, Colo., for \$228, at 75 days,—all of which drafts were accepted by the drawees, returned to Coors, indorsed by him in blank, and deposited with Everett for collection. The drafts above described amounted in the aggregate to \$2,181.12. The drafts were not discounted by Everett, nor passed by him to the credit of Coors. On the 24th of June, when the two notes of Coors for the sums, respectively, of \$1,500 and \$1,000, were nearing maturity, Everett applied to appellee to have the Coors drafts above described, and perhaps others, discounted to meet the maturing notes. On the 27th of June, an interview was had on the same subject, at which appellee declined to discount drafts to meet both notes, but discounted drafts on Crystal Bros. for \$228, Keppler's draft of May 21st for \$471.90, and draft on Dyer & Northington for \$748.25, to pay the note of \$1,500. The note, having been paid by Everett to appellee, was returned to Everett; and Coors, knowing nothing of the discount of his drafts by Everett to pay the note, and having no knowledge of the rediscount of the note by appellee, paid the same to Everett. The other drafts, not discounted, were left with appellee for collection. When col-

lected, the proceeds were to be put to the credit of Everett. At the time of Everett's death, the note of Coors for \$1,000 was unpaid in the hands of appellee. There was at that time, or afterwards, a small balance in its hands, the proceeds of collections of Coors' drafts, to the credit of Everett. At the time of the bringing of this suit there was also in the hands of appellee a small balance to the credit of Coors. This suit was brought to recover the amount of the \$1,000 note. The defendant pleaded payment, and set up as counter-claims the amounts received by appellee on each of the above-mentioned drafts of Coors, collected by appellee. The case was tried by the court without a jury, who allowed as offsets the balance of proceeds of the Coors drafts to the credit of Everett in the hands of the appellee, and the balance on the account of Coors in the bank to the credit of Coors; leaving a balance on the note of \$364.18, for which appellee had judgment. There was no serious dispute in regard to the facts. It was not claimed that Coors had any knowledge of the rediscounts of the notes made by Everett with appellee, nor the transfer and discounts of his drafts left for collection with Everett; nor is it claimed that appellee had any actual notice or knowledge that Everett was not the owner of the drafts of Coors.

The contention for Coors is—*First*. That under the circumstances proved, as above stated, appellee could not acquire title to the drafts. *Second*. That by the language used in the letters of Everett in regard to the Coors drafts, appellee was notified, or should have been, that they were not the property of Everett, but of Coors. The language relied upon was as follows: "Golden, Colo., July 8th, 1884. W. I. Jenkins, Esq., Cashier, Denver—Dear Sir: I advise Cr. to-day of 15,844, A. Coors, due Ju. 27, \$1,500, int. \$5, \$1,505. Of the list of collections left with you of his, amt'g \$2,617.05, \$697 has been paid, & placed to Cr. my ac.," etc. Also of July 12th: "I note disc'ts Coors, \$1,438.55, from list, leaving our 20,144, \$471.90, due 10th, and extended five days as a collection for Cr. when paid." And from a memorandum made by Everett, and handed Jenkins, cashier of appellee, dated June 27th, on which Everett had written: "Discount A. Coors accept'cs, coll'n No. 20,144. Rem. June 6th, Keppler & Company, Leadville, due June 23 & 26th, \$468.75," etc. We do not think the position of counsel on this last point tenable, and that there was anything in the language used by which appellee could be informed of anything in regard to the ownership of the drafts. It can only be regarded as description to designate the paper. We can find no authority, and none is cited by counsel, where it is held that any such descriptive language can be construed to indicate ownership; and certainly no such inference could arise when Everett was the holder of them, properly indorsed without limitation, and dealing with them as his own.

The only question to be determined is whether Coors, having indorsed the drafts in blank to Everett for the purpose of having them collected and the proceeds placed to his credit, and Everett, wrongfully assuming to be the owner, could sell and dispose of them, and appellee, without knowledge of the want of ownership in Everett, could be invested with good title, so as to retain the proceeds as against Coors. It is a well-settled rule of law that one who acquires negotiable paper, in the usual course of business, before maturity, in good faith, for a valuable consideration from one capable of transferring the same, becomes a *bona fide* holder, and takes it divested of all prior equities. See section 4, c. 1, Code. And it has been so held in this court. *Wyman v. Bank*, 5 Colo. 30, and *Bank v. McClelland*, 9 Colo. 608, 13 Pac. Rep. 723. It is contended by the able counsel of appellant that "it was the duty of the bank proposing to purchase from Everett to have sought Coors, and ascertained from him whether Everett had any authority to sell or not." This is not in harmony with the law or the decisions of this court. In *Bank v. McClelland*, *supra*, it was said by the present chief justice, at page 610, 9 Colo., and page 725, 13 Pac. Rep.: "If there is nothing upon the face of a negotiable instrument or in the written indorsement or assignment to notify the assignee that the instrument was originally given upon an illegal consideration, (gambling debts excepted,) or obtained through fraud, the assignee who pays value therefor, and takes the same in good faith before maturity, may recover, as against the maker. This is true, even though such assignee be in possession of facts or circumstances sufficient to arouse suspicion in the mind of a person of ordinary prudence, and though he is guilty of negligence in not first following up such information, for the purpose of discovering the fraud or illegality to which the suspicious circumstances may seem to point." The rule adopted in this court is that of the federal courts and a majority of the states. See *Bank of Metropolis v. New England Bank*, 1 How. 234, 6 How. 212; *Swift v. Smith*, 102 U. S. 442; *Hotchkiss v. Banks*, 21 Wall. 354; *Murray v. Lardner*, 2 Wall. 110; *Brown v. Spofford*, 95 U. S. 474. We are aware that in the state of New York, and some other states, following its decisions, the rule, as adopted in this state, is considerably modified. But the federal rule, as here adopted, appears to be the better rule, better founded in reason, and necessary in the interest of commerce, that requires that such paper should be allowed to pass from hand to hand with the greatest freedom possible consistent with safety; and it works no injustice to the owner of paper to say that he shall be held responsible for his own acts, and not an innocent party who has been misled by them. Coors could by a word have limited his indorsement so as to protect himself and others. That he failed to do so was not the fault of appellee, but his

own, and he must suffer the loss according to a principle so well known that a repetition here is unnecessary. The judgment should be affirmed.

PATTISON and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

(14 Colo. 277)

HAMILL v. WARD.

(Supreme Court of Colorado. Feb. 28, 1890.)

CONTRACTS—JOINT AND SEVERAL OBLIGATIONS.

Under Civil Code Colo. § 13, (Gen. St. § 1884,) making joint instruments several also, the holder of a note who sues the maker and indorser as joint makers, dismisses as to the indorser, without prejudice, and obtains judgment against the maker, may afterwards sue the indorser.

Commissioners' decision. Appeal from superior court of Denver.

Action on a promissory note.

R. S. Morrison, for appellant. J. W. Hornor, for appellee.

RICHMOND, C. June 17, 1884, O. H. Rothacker made his promissory note, payable four months after date, to the order of W. A. Hamill, for the sum of \$914.76, with interest at 10 per cent. per annum. This note Hamill indorsed to the Rounds Type & Press Company. December 19, 1884, appellee herein, and plaintiff below, Samuel D. Ward, as assignee of the Rounds Type & Press Company, brought suit in the superior court of the city of Denver against Rothacker and Hamill, alleging that they were joint makers of the note. To this complaint Hamill interposed a demurrer. The grounds of the demurrer do not appear in the abstract or transcript of record; but in the brief of appellee we are informed that the grounds of demurrer were "that it did not appear by the complaint that defendant Hamill was liable as joint maker." The demurrer was sustained. Thereupon, upon motion of plaintiff, it was ordered by the court that the cause be dismissed as to defendant Hamill, at the cost of plaintiff; said dismissal to be without prejudice as to the rights of plaintiff against said defendant Hamill. Default was taken against Rothacker, and judgment entered for the full amount of the note, with interest. Execution was issued, and \$500 obtained. April 7, 1885, plaintiff instituted this action against Hamill to recover the balance due on the note, alleging the proceedings above recited, the insolvency of Rothacker, and that there now remained due and unpaid the sum of \$542.40. The answer of defendant sets up previous suit, alleging that plaintiff had elected to proceed against Hamill and Rothacker as joint makers; that he obtained judgment against Rothacker as a joint maker; and therefore is barred from proceeding against the defendant Hamill in this action as indorser. To this answer plaintiff replies, admitting that the original complaint charged

Rothacker and Hamill as joint makers; but says that it is not true that in subsequent proceedings Rothacker and Hamill were charged as joint makers, or that judgment was taken against Rothacker as joint maker. Trial by the court, and judgment for plaintiff in the sum of \$568, to which defendant duly excepted, and prosecutes this appeal.

Neither the transcript nor the abstract contains the record evidence introduced in the trial court; therefore objection relating thereto will not be considered. In the abstract of the bill of exceptions it is recited that plaintiff offered in evidence the execution and return in the case of Samuel D. Ward, assignee, v. O. H. Rothacker, (No. 963,) which shows that a levy had been made, and that execution was returned satisfied to the extent of \$447.60 and costs, and unsatisfied as to \$540.40; that plaintiff offered record of judgment and the papers and proceedings in case No. 963. It is further recited that of the amended complaint in No. 962 a few paragraphs are the only ones material to the consideration of this case, and are those upon which the defense and appeal are based. By this amended complaint (if it be a part of the record in 963 instead of 962) it appears that defendants were proceeded against as joint makers, yet it also appears in the record that the demurrer was interposed to the complaint, and that plaintiff obtained leave to further amend complaint, and thereafter the order of dismissal, without prejudice, was entered. The contention of appellant is that plaintiff cannot have judgment against Rothacker as a joint maker with Hamill, and follow with a suit against Hamill as indorser. It is undoubtedly true that at common law a judgment against one of two joint promisors is a bar to an action against both jointly, and is also a bar to an action against the other. "Parties cannot be sued separately, for they have incurred no separate obligation. They cannot be sued jointly, because judgment has already been recovered against one who would be subjected to two suits for the same cause." "But, where the liability is joint and several, a judgment against one does not preclude procedure against the other or others." 2 Daniel, Neg. Inst. § 1296. By statute, however, in this state, joint instruments, including promissory notes, are declared to be several also, (Civil Code, § 13; Gen. St. § 1834;) and, under said section 13, the separate obligation of the indorser or surety is made so far joint as to permit the adjudication of their respective liabilities in the same action. Bliss, Code Pl. (2d Ed.) § 93 et seq.; Pom. Rem. § 194 et seq. But this is optional with plaintiff, and, upon the dismissal of the former suit as to Hamill without prejudice, his liability in the present action remained unaffected. But it may be claimed that section 107 of the General Statutes is (notwithstanding the Code provision above mentioned) still in force in this as well as in other particulars. Upon this question we need not pass, for the reason that it is unimportant. If we as-

sume that said section 107 is in force and applicable to the present case, there has been such a compliance with every material requirement thereof as perfects the liability of Hamill. He was the assignor of the promissory note, and since plaintiff exercised due diligence in prosecuting his action against the maker, and endeavoring by execution to thus make his debt, his right to proceed in this suit against Hamill for the uncollected balance cannot be questioned. The judgment is affirmed.

REED and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

(14 Colo. 376)

HARRINGTON v. SMITH *et al.*

(Supreme Court of Colorado. Feb. 28, 1890.)

EXEMPTIONS—WAIVER.

1. Gen. St. Colo. 1883, p. 601, § 33, provides that heads of families shall hold certain kinds of property, to a certain amount, exempt from execution sale. Section 34 provides that, if any person shall seize the exempted articles, he shall be liable for three times their value. *Held* that, when an execution debtor has property in excess of the exemption allowed by law, it becomes his duty to interpose his claim of exemption prior to the sale, provided he is notified of the levy, and in a position to interpose such claim; but, where he has only the amount of the exemption value, then a levy and sale under an execution is absolutely illegal, and without warrant, unless exemption be waived.

2. Where the debtor was out of the state at the time of the levy, a letter to his creditor asking for a postponement of the case until he could "come down, and fix up everything satisfactory," but making no claim to exemption, was not a waiver of his exemption rights.

Commissioners' decision. Appeal from district court, Larimer county.

Action by Perry Harrington against John L. Smith and Thomas H. Davy for trespass in seizing exempt property. Plaintiff was nonsuited, and appeals.

Haynes, Dunning & Annis, for appellant. *T. M. Robinson*, for appellees.

RICHMOND, C. May 29, 1885, appellant was the head of a family, residing in Larimer county, Colorado, a carpenter by trade, and was the owner of two bay horses, of the value of \$200; one lumber wagon, of the value of \$80; one set of double harness, of the value of \$25; one cow and calf, of the value of \$50, —which he claimed were exempt from levy of attachment and sale under an execution. Smith was constable for that county; and on that day appellee Thomas H. Davy caused a certain writ of attachment to be issued and delivered to said Smith, and directed him to take and seize the above enumerated property. It appears that at the time of the levy, and even until after the 20th day of June of that year, appellant was temporarily absent from the state. He seeks to recover for the triple value of the property so seized and sold. On the 30th day of May, 1885, Davy wrote a letter to appellant informing him that he had

attached all of his stock,—harness and wagon included. To this letter appellant replied, stating that he would return, without fail, by June 20th, and arrange everything satisfactorily, asking for a stay of proceedings until that date. In this letter no claim of exemption was set up, nor was the claim made by any member of his family. The sale of the property took place subsequent to the 20th of June, 1885, after the time when appellant had agreed to return and arrange matters. In addition to the above stock seized by the sheriff, it appears that the constable levied upon four other cows and one calf belonging to appellant. There seems to be no dispute about the ownership, nor that the stock levied upon was all that appellant owned at the time, nor of the fact that he was detained, and unable to reach Colorado prior to the sale under the execution. Motion for a nonsuit was granted, and exceptions noted. Thereafter a motion for a new trial was overruled. In denying the motion for a new trial, the court said that, "where the debtor knew that his property was attached while it was yet within the control of the officer, so that it could be returned to him, it was his duty to demand its return, or to give notice in some way of his disapproval of the act. But, even if he might be silent and be safe under such circumstances, if he says anything or does anything in respect to the levy upon his property, it must be a disapproval of the officer's act; or else the fact that he does say something, and does not do or say anything to disapprove of the levy, should be construed into an acquiescence." The court formed its conclusion on the letter of June 9, 1885, written by appellant to his creditor, which is in words and figures as follows: "Tunnel Camp, Wyo., June 9, 1885. Thos. H. Davy, Esq.: Yours of May 30th at hand to-day. In reply, I will say that it is impossible for me to come home now, as the high water has washed out the head-gates, and the superintendent has gone to Cheyenne to get instructions from the company. If your letter had reached me one day sooner, I could have made other arrangements; but, as it is, I can't do anything. I wish you would postpone the case until the 20th, and I can come down and fix up everything satisfactory. I won't leave the work until the superintendent comes home. I may not gain anything, but it is left in my charge. Yours, PERRY HARRINGTON. Do the best you can for me, and I will pay you. I will be there on the 20th without fail."

The judge, in the trial, intimated that he based his conclusion upon the principles laid down in *Drake*, Attachm. § 244a. The principle there announced is as follows: "The defendant, if aware of the levy, must at the time claim the exemption, or he will be considered to consent to it. Manifestly, he cannot set up such a claim after judgment rendered against him in the attachment suit." This principle is based upon Indiana authorities, which were undoubtedly influenced by the peculiar wording of the statute of that

state, hereinafter referred to. The sole question for our consideration, therefore, is whether or not the conclusions of the court were correct. This particular question has received no direct consideration in any of the causes involving the question of exemption heretofore heard in this court. The General Statutes of this state (1883, § 32, p. 601) provide as follows: "The following property, when owned by any person being the head of a family, and residing with the same, shall be exempt from levy and sale upon any execution or writ of attachment: * * * Working animals to the value of \$200; one cow and calf;" "tools and implements or stock in trade of any mechanic, minor, or other person, used and kept for the purpose of carrying on his trade or business, not exceeding \$200 in value." Section 34 of said act provides that, "if any officer or other person * * * shall take or seize any of the articles of property hereinbefore exempted from levy and sale, such officer or person shall be liable to the party injured for three times the value of the property illegally taken or seized, to be recovered by action of trespass with costs of suit." For the purposes of this discussion, the above is all of the statute necessary to be mentioned. It will be observed that nowhere in this statute referred to is there any language making it incumbent upon the debtor to select or point out which property he claims is exempt. Seemingly, there is great confusion in the authorities and text-writers as to what is the duty of the debtor at the time the officer seeks to levy upon the property, but a careful examination will disclose the fact to be that this confusion is the result of the different wording of the statutes. In Indiana, the statute provides that, "if any execution debtor shall claim property as exempted by virtue of this act, he shall elect whether he will claim personal or real property, or both, and shall designate the property so claimed." 2 Davis, St. 1876, p. 355, § 9. Undoubtedly, the decisions of Indiana are based upon this provision of that statute. The statute of Illinois also provides that the debtor, under certain circumstances, shall select the property which he claims shall be exempt; and yet, notwithstanding that provision of the statute, it was held, in the case of *Cole v. Green*, 21 Ill. 103, that, "where a judgment debtor has but sixty dollars' worth of property, he need not prove a formal or express selection by him of that property in order to protect it from levy and sale on execution. If a debtor has but sixty dollars' worth of property, the statute exempts it from the effect of any judgment, execution, or attachment. It is placed beyond the reach of the law, unless by the voluntary act of the owner."

The argument of the court in arriving at this conclusion is to the effect that there can be no selection where there is nothing left,—one may take the whole, but he cannot select the whole; and that the matter of selection, under the statute, could not be made in this

particular case. In such case, the statute, by its own office, sets apart the whole property to the use of the debtor, and absolutely exempts it from levy and sale on execution; and to it no judgment, execution, or attachment can exist. So far as the two horses were concerned, in the case at bar, there is no doubt, from the testimony, but what they were all that appellant had. Consequently, it would not be necessary for him to indicate, directly or indirectly, that the property was exempt. It was the duty of the officer, who is supposed to know the property exempt by the statute, to leave such property so exempt with the execution debtor. In the case of *Howard v. Rugland*, 35 Minn. 388, 29 N. W. Rep. 63, it was held that, "when an officer assumes to levy an execution upon and sell property which the law thus chooses and selects as exempt, the levy and sale are *per se* illegal, and the officer liable to the debtor without any demand, as is also the execution creditor who participates in the levy and sale." Where the statute exempts a particular chattel, as a horse or a work-beast, and the debtor has but one, a selection is obviously not required, nor is the debtor required to claim the benefit of the statute. The officer must take notice of the fact that the chattel is exempt; and, where an officer sold a debtor's only horse, under such circumstances, a conviction of misdemeanor under the statute was sustained against him. *State v. Haggard*, 1 Humph. 390. In *Gilman v. Williams*, 7 Wis. 288, it was held: "It is not necessary for the judgment debtor to select or point out to the officer such articles of property as are specifically exempt by law from execution."

Upon a careful examination of all the authorities, we are inclined to think, under the statute of this state, that, when an execution debtor has property of a certain kind in excess of the exemption, it becomes his duty to interpose his claim of exemption prior to the sale, provided he is notified of the levy, and in a position to interpose such claim. This seems to be the rule adopted by this court in *Belymer v. Cook*, 5 Colo. 399, and is undoubtedly supported by the majority of authorities of states with a similar statute. But, where the execution debtor had only a precise number, or property of the exemption value, under the statute, then, and in such case, a levy and sale under an execution is absolutely illegal, and without warrant, unless exemption be waived, and this is a matter of defense. — *State v. Haggard*, *supra*. In such case, it is the duty of the officer to set aside such property as is already exempt, under the statute, from levy and sale. In the particular case at bar, the court undertook or did construe the letter above recited as amounting to a waiver of the exemption rights, and granted a nonsuit. This, in our judgment, was error. The party was not present to claim the exemption until after the sale; and, so far as the evidence goes, the explanation of his absence was entirely

satisfactory. In *Haswell v. Parsons*, 15 Cal. 266, it was held: "The absence of the plaintiff * * * when the sale took place was a sufficient excuse for not claiming the exemption at the time." The purport of the letter, as we construe it, was that he desired particularly to have time allowed him in which he might settle the demand of the execution debtor. As has already been said, the levy of the attachment was illegal. The property was absolutely exempt from levy and sale. By the express terms of the statute under which the writ was issued, the office of the process was limited to property "not exempt by law from execution." Gen. St. § 2002. A judgment against the debtor would create no lien upon this property. The attachment levy was without force or effect. The defendant was a mere trespasser. Under such circumstances, it is clear that the owner of exempt property, either at the time the levy is made, or before or after the sale pursuant to the execution, may claim his property, unless his conduct has been such as to make it inequitable for him to assert his title. In this case, it must be assumed that the defendant knew when he seized the property that it was exempt, and that the seizure was a trespass. The silence of the plaintiff, under the circumstances, therefore, was not alone sufficient. Some of this property was undoubtedly exempt. And the court erred in determining, as a matter of law, that the letter of June 9th was sufficient to defeat a recovery. For error in granting nonsuit, we think the judgment should be reversed, and the cause remanded for further proceedings.

PATTISON and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed.

(9 Mont. 254)

NEWELL *et al.* v. MEYENDORFF.

(Supreme Court of Montana. Feb. 4, 1890.)

CONTRACTS—RESTRAINT OF TRADE—ESTOPPEL—RECORD ON APPEAL.

1. A contract to sell a brand of cigars to no one in the state but defendant, and to give him the exclusive agency for such sale, is not in restraint of trade.

2. Where, in an action for goods sold, plaintiffs, by demurrer to an answer alleging a special contract and damages by its breach, obtain a ruling that the contract is void, whereupon defendant pleads that fact in bar, a ruling at the close of the evidence and argument that the contract is valid is error, and plaintiffs are estopped to take advantage of it, defendant being by the rulings deprived of his right to recoup.

3. The record on appeal should contain an orderly and chronological statement of the case, and pleadings should be inserted but once, and then referred to by page.

Appeal from district court, Lewis and Clarke county; N. W. McCONNELL, Judge.

J. B. Clayberg, for appellant. Sanders & Cullen, for respondents.

DE WITT, J. The record in this case presents the following history: The complaint is for the price of cigars sold and delivered by plaintiffs to defendant. Defendant answered, and admitted the sale and delivery, and set up in recoupment a contract, the terms of which were, generally, that in 1886 he was dealing in cigars; that plaintiffs approached him to sell their "Flor de B. Garcia Cigars," agreeing that defendant should have the sole and exclusive right of selling, handling and dealing in said cigars in Montana; that plaintiffs would not sell said cigars to any one else in the territory; that defendant would cease advertising and selling various other valuable brands of cigars in which he was dealing, and from the sale of which he was deriving much profit; that he would accept said sole agency, would purchase said brand of cigars from plaintiffs, and would introduce and promote the sale thereof to the best of his ability. The answer further alleges, in detail, the performance by defendant of his part of the contract, and the expenditure of large sums of money in placing said cigars upon the market. Then follows the allegation of breach by plaintiffs, in that they sold the said brand of cigars to other dealers in the territory, by which breach the defendant suffered great damage in his business, which damage he recoups against the plaintiff's account for the cigars sold. The court below sustained a demurrer to this answer, on the ground that the contract pleaded was void, as against public policy, being in restraint of trade, and could not be pleaded in recoupment. Defendant accepted the ruling of the court, and took leave to amend, which he did by pleading the same contract, not in recoupment, but as an absolute defense, on the ground that, if the contract were void, the plaintiffs could not recover thereunder. The case went to trial in this condition, before the court without a jury. The theory of the case seems to have been preserved until the court made findings and conclusions of law, at which time he held that the contract was not void. Defendant presumably had not introduced evidence of damages by reason of breach, as he was not entitled to under the pleadings; and judgment was made and entered for plaintiffs for the amount claimed. Defendant seems not to have had a day in court. His motion for a new trial was denied. From that order, and the judgment as well, he appeals; having saved his errors complained of by exception.

We will first construe the contract as to whether it must be considered void as in restraint of trade. The rule that contracts that are in restraint of trade shall be void, as against public policy, is among our most ancient common-law inheritances. In *Alger v. Thacher*, 19 Pick. 51, MORTON, J., says: "As early as the second year of Henry V., (A. D. 1415,) we find, by the year-books, that this was considered to be old and settled law. Through a succession of decisions, it has been handed down to us unquestioned, till the present time." The learned judge traces

the history of the rule to its modern modification, that "contracts in restraint of trade, generally, have been held to be void; while those limited as to time or place or persons have been regarded as valid, and duly enforced." He gives the reasons for the rule in the following language: "(1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods, and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and they expose such person to imposition and oppression. (2) They tend to deprive the public of the services of men in the employment and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill. (4) They prevent competition, and enhance prices. (5) They expose the public to all the evils of monopoly; and this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public, by declaring all such contracts void." See, also, cases in that opinion cited.

The doctrine is again well stated in *Lawrence v. Kidder*, 10 Barb. 641, in which case the court, SELDEN, J., cites with approval *BRONSON, J.*, in *Chappel v. Brockway*, 21 Wend. 157, as follows: "There may be cases where the contract is neither injurious to the public nor the obligor, and then the law makes an exception, and declares the agreement valid." In *Navigation Co. v. Winsor*, 20 Wall. 68, Mr. Justice BRADLEY says: "There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is the injury to the public by being deprived of the restricted party's industry; the other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objections is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration, and a reasonable ground of benefit to the other party, it is free from objection, and may be enforced."

We have cited these reasons for the rule in full, in order to apply them to the contract under construction. They embody the modern doctrine, as held by the authorities. A recitation alone, of the rule and its reasons, seems to us sufficient to take the contract

under consideration out of the operation of its prohibitions. The contract is not general; it is limited as to place and person. The public is not deprived of the alleged restricted party's industry. On the contrary, the contract provides for the placing upon the Montana market the product of the plaintiffs' industry, by the selection and services of a local Montana agent, interested in the success of sales, and to be rewarded by such success. Nor is there any injury to the party himself, the plaintiffs, by their being precluded from pursuing their occupation. Rather, by the contract, they seem to have sought a means of extending the field of their operations, and not of restricting them. In the light of the authorities, the rule and the reasons therefor, and the facts, we are clearly of the opinion that the contract was not in restraint of trade, and not void. It was simply a contract, for a consideration, for the enlistment of the services of an agent for the plaintiffs in their business. The court below was therefore correct in his last view of the contract. It follows that he was wrong in his first position in sustaining the demurrer to the original answer.

Respondent urges that all the proceedings and pleadings, prior to the amended pleadings, on which the case was tried, are *dehors* the case on appeal; citing *SAWYER, J.*, in *Barber v. Reynolds*, 33 Cal. 501: "The old complaint, in the form first filed, ceases to be the complaint in the case, or to perform any further function as a pleading, but the amended complaint falls into its place, and performs the same, and not different, functions." Upon an examination of this case, we find the judge further saying, "The identity of the action is in no respect affected;" and it was preliminary to arriving at the conclusion last quoted that the previous utterance was made. The law, as counsel cites it, is true, as far as he goes. The old answer in the case at bar does not "perform any further function as a pleading;" but we are not precluded from examining that answer, and the sustaining of the demurrer thereto, for the purpose suggested *infra*. We are mindful of the consequences of defendant answering over, after demurrer sustained, (*Francisco v. Benepe*, 6 Mont. 243, 11 Pac. Rep. 637,) and we, at this time, recur to that ruling, and review the same, not as if an appeal had been taken therefrom to this court, but for the purpose of ascertaining whether the court in such decision, together with his latter reversal of his position, in the same case, did not deprive defendant of a substantial right, and exclude him from his day in court. If that be true, defendant has a remedy. *Ubi jus, ibi remedium*. If the contract be valid, defendant certainly has the right to recoup his damages. If the contract be void, defendant has the right to plead it in bar. But the court below changed front as often as defendant aligned himself with the court's last evolution. It was impossible for the defendant to

keep pace with the movements of the court, who finally left him a judgment debtor, after having twice declared that he had a good defense, but each time when the court had placed defendant in a position where he could not avail himself of such defense. For the defendant's disasters, thus resulting, there must be a remedy. We find it as follows: A party in an action is bound by his pleadings. He is also bound by the rulings of the court which he obtains upon his own motion, and is estopped from claiming such ruling as error. 2 Herm. Estop. § 823, and note. A party is bound by his theory and presentation of his case. "A party cannot get relief on one basis, and then seek a new chance to litigate, on the suggestion that he has a defense, which he did not see fit to rely on before." *Beam v. Macomber*, 35 Mich. 457. See, also, *Belanger v. Hersey*, 90 Ill. 73; *Sweezy v. Stetson*, 67 Iowa, 481, 25 N. W. Rep. 741. "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." *Railway Co. v. McCarthy*, 96 U. S. 267. See, also, *Dreyfous v. Adams*, 48 Cal. 131; *Long v. Fox*, 100 Ill. 43; *McQueen v. Gamble*, 33 Mich. 344; *Callaway v. Johnson*, 51 Mo. 33; *Edwards' Appeal*, 105 Pa. St. 103.

When the plaintiffs in the case at bar had procured the ruling of the court that the contract was void, they placed their theory of the case upon record. Might they then, "upon after-thoughts, new suggestions, and new aspects of the case, change their position of the case from that on which they deliberately chose originally to present it to the court?" and especially after defendant had accepted the construction of the contract, demanded by plaintiffs, and held by the court. Plaintiffs were estopped by the position they had assumed, and into which they had forced defendant, when, to change that position, in the time and in the manner that it was changed, deprived defendant of all defense whatsoever. The decision of the court holding the contract valid was made after the testimony was closed and the case argued and submitted, and submitted on pleadings which forbade evidence in recoupment. If the court had made his reformed ruling before the close of the case, defendant could have obtained leave to amend himself back to his original position, and obtain a continuance on the ground of surprise, if necessary, to enable him to obtain and produce his evidence of damages. It would seem that the action of the court was accident and surprise, against which no ordinary prudence could have guarded. We are of opinion that plaintiffs were estopped from asserting that the contract was valid, or of receiving the benefit of the ruling of the court to that effect, when such ruling came at the time, in the

manner, and under the circumstances that it did, and to the total deprivation to the defendant of his defense to the action. Therefore the latter ruling of the court, although correct by construing the contract, under the circumstances described, and entailing the results that it did, and taken with the former position assumed by the court, and depriving defendant of a substantial right, was error.

We make no reflection upon the distinguished judge who tried the cause. His reformation of his first opinion is a credit as well to his eminent and conceded ability as to his known sense of justice and probity. His action complained of was more in the nature of a misfortune, which happened to be fatal to the defendant.

Respondent urges that the statement on motion for a new trial cannot be considered, as it was not settled by the judge who tried the case, but by his successor in office. It is not necessary to consider this objection, as the data for our conclusion are all found in the judgment roll, and the appeal is from the judgment, as well as the order denying the motion. We cannot leave this case without animadverting upon the record as it is presented. This court has heretofore had occasion to remind counsel that the preparation of a record is their duty, and it is not for them to leave the supreme court to grope through a disorderly mass of immaterial matter to ascertain that which counsel relies upon. *Upton v. Larkin*, 7 Mont. 462, 17 Pac. Rep. 728; *Raymond v. Thexton*, 7 Mont. 305, 17 Pac. Rep. 258; *Fant v. Tandy*, 7 Mont. 443, 17 Pac. Rep. 560; *Sherman v. Higgins*, 7 Mont. 479, 17 Pac. Rep. 561. In the record in this case, the complaint, second amended complaint, replication, judgment, notice of motion, and specification of errors all appear twice in full, instead of being once inserted, and afterwards noticed by appropriate reference. Where reference is made, pages are omitted. It is difficult to refer to page —. The matter is not presented in that orderly, systematic, chronological method that presents to the court an intelligent view of the case at a reading. When we do arrive at the gist of the matter, it is after such labor as caused the learned compilers of the Institutes of Justinian to say, in the dedication of that work, "*et opus desperatum, quasi per medium profundum cuntes celesti favore ad implevimus.*" The judgment is reversed, and the cause remanded for a new trial.

BLAKE, C. J., and HARWOOD, J., concur.

(9 Mont. 179)

STATE v. WILLIAMS.

(Supreme Court of Montana. Jan. 29, 1890.)

RAPE—INDICTMENT.

Under Comp. Laws Mont. p. 509, § 46, defining rape as "an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under" certain circumstances, it is not necessary to allege that the female was not defendant's wife.

Appeal from district court, Custer county.
W. A. Burleigh and Henri J. Haskell,
 Atty. Gen., for the State. *Jas. H. Garlock,*
 for respondent.

DE WITT, J. The defendant was indicted in the district court of Custer county, May 13, 1889, for the crime of rape. The charging portion of the indictment is as follows: "That E. J. Williams, with force and arms, in and upon one Mary Williams, then and there being a female child under the age of fifteen years, to-wit, of the age of thirteen years, feloniously, violently, and unlawfully did make an assault, and her, the said Mary Williams, then and there feloniously did ravish, and carnally know, contrary to the form of the statute." etc. The law of the then territory on which the indictment was found is, as far as relates to the question upon appeal, as follows: "Sec. 46. Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances: (a) Where the female is under the age of fifteen years." Comp. Laws, § 46, p. 509. "Sec. 47. The essential guilt of rape consists in the outrage to the person and feelings of the female." Id. p. 510. On the trial, the defendant objected to the sufficiency of the indictment, on the ground that it did not aver that the female was "not the wife of the perpetrator" of the alleged rape. The objection was by the court sustained, and the defendant discharged. The territory reserved the question of law by exception, which appears in the record, and appealed to this court.

One question only is presented, viz., is it required that the indictment should contain the negative allegation, "not the wife of the perpetrator?" We have to determine whether the negative matter mentioned in the statute is of such character that it may be deemed an exception, and not necessarily to be pleaded, or whether it be an essential element of definition, requiring allegation and proof by the prosecutor. The rules, as laid down by the authorities, are clear; but the application is sometimes attended with difficulty. 1 Bish. Crim. Prac. § 385. The rule is anciently stated as follows: "Where an exception is incorporated in the body of the clause, he who pleads the clause ought also to plead the exception; but, when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause, and leave the adversary to show the proviso." *Jones v. Axen*, 1 *Ld. Raym.* 119, cited in *U. S. v. Cook* 17 *Wall.* 177. And, again: "If there be an exception in the enacting clause, the party pleading must show that his adversary is not within the exception; but, if there be an exception in a subsequent clause or subsequent statute, that is matter of defense, and is to be shown by the other party." *Com. v. Hart*, 11 *Cush.* 134. See, also, 1 *Bish. Crim. Prac.* § 378. So many apparent exceptions to the rule have been made, and so many applications of the

same that are in conflict with the exact letter, but not the spirit, thereof, that the rule may be well stated as in *Territory v. Burns*, 6 *Mont.* 74, 9 *Pac. Rep.* 492: "When an exception is stated in the statute, it is not necessary to negative such exception, unless it is a constituent part of the definition of the offense. The exception must be a constituent or ingredient of the offense declared by the statute, in order to require that it should be negated by the indictment." It makes no difference in what part of the statute the exception may appear,—whether in what is commonly called the "enacting clause," or not. The criterion which determines the necessity to negative such exception is that it be a constituent or ingredient of the offense; in other words, that such exception is necessary to its complete definition. See, also, *Territory v. Jaspar*, 7 *Mont.* 1, 14 *Pac. Rep.* 647.

In *Territory v. Burns*, supra, defendant was indicted for carrying concealed weapons. A separate section of the act defining the offense provided that the act should not apply to peace-officers in the discharge of their official duties. It was held that the indictment need not plead the exception.

In *State v. Robey*, 8 *Nev.* 312, the question was presented whether an indictment charging an assault with a deadly weapon, with intent to inflict bodily injury, should contain the words "committed without considerable provocation," or "where the circumstances of the assault show an abandoned and malignant heart." It was held that these allegations were not essential to the indictment, although they are as thoroughly imbedded in the enacting clause as are the words which the defendant in the case at bar claims should have been found in the indictment against him. In the case of *Com. v. Fogerty*, 8 *Gray*, 491, the court says: "Nor was it necessary to allege that the prosecutrix was not the wife of defendant. Such an averment has never been deemed essential in indictments for rape, either in this country or in England. The precedents contain no such allegation." See authorities cited in that case. But in Massachusetts the allegation in question may be placed in the indictment, so that, if the proof of rape fails, a conviction can be sustained under the statutes of that state for fornication or adultery.

The statute of California upon rape, as charged in this indictment, is literally the same as that of Montana. In *People v. Estrada*, 53 *Cal.* 600, the indictment was for an assault with intent to commit rape. The court say that it is not necessary to allege that the assaulted person was not the wife of the defendant. This case, however, sheds no light upon the principle, as no reasons are given for the decision. It certainly appears that the negative matter in the statute under consideration is incorporated in the enacting clause. But, as to the offense of rape, the weight of authority is that it need not be alleged in the indictment that the female is

not the wife of the perpetrator. In so holding, there seems to be a departure from the rules as to pleading negative averments. The reason for the apparent departure can only be upon the ground that the negative matter is not an ingredient or constituent of the crime. The essential element of the offense is the outrage to the person and feelings of the female, and not that it is committed against one female rather than another. The offense would exist in an act of sexual intercourse committed with any female, under any of the circumstances set forth in the subdivisions of section 46, with the exception, not of a class of females, but of a single individual, viz., the wife of the perpetrator. The authorities hold that this exception is in the nature of matter of defense; this, presumably, from the nature of the offense, and the exception. We shall therefore hold the indictment good. The judgment of the lower court is reversed, and the case is remanded for further proceedings in accordance with the views herein expressed.

We concur: BLAKE, C. J., and HARWOOD, J.

(9 Mont. 285)

GAGE v. MARYATT.

(Supreme Court of Montana. Feb. 4, 1890.)

JUSTICES OF THE PEACE—PROCEDURE—WAIVER OF IRREGULARITIES—APPEAL.

1. Irregularities in a summons issued from a justice's court, in not fully apprising defendant of the nature of the action, or of the relief that will be demanded in case of default, are waived by appealing after default, though defendant appear specially in the appellate court to move to dismiss the action.

2. Trial on appeal from a justice's court being, by Code Civil Proc. Mont. § 826, *de novo* on the papers filed in the justice's court, judgment by default must be affirmed, on appeal, where the complaint was sufficient, and no motion was made to set aside the default, or for other relief, in the justice's court.

Appeal from district court, Gallatin county. *J. L. Staats*, for appellant. *Luce & Luce*, for respondent.

BLAKE, C. J. This action was commenced in the justice's court of Gallatin county by Gage, to recover from Maryatt the sum of \$15, and for the return of a bull, or \$85, its value. These matters are stated in the summons, and also the following notification: "That, if you fail to appear and answer said complaint, as above required, the said plaintiff will take a judgment by default against you for the sum of one hundred dollars, if a delivery cannot be had, and costs of suit." The summons was served personally upon Maryatt, who did not appear, and his default was entered. Afterwards, witnesses were called and testified, and judgment was entered according to the prayer of the complaint. Maryatt then appealed to the district court, and appeared specially, and moved to dismiss the case for these reasons: That the justice's court had no jurisdiction of the person of the defendant, because the summons "does

not state the nature of action sufficiently explicit to apprise defendant thereof," and also that the summons "does not comply with the statute providing for notice to apprise defendant what judgment plaintiff will take if default is entered in said action." The court overruled the motion, and affirmed the judgment of the justice's court; and from this action Maryatt appealed.

We do not intend to determine all the questions relating to the summons which have been raised by the appellant, but can say that the defendant was apprised, in general terms, of the nature of the claim of the plaintiff against him, and there was a partial compliance with the Code of Civil Procedure, § 742. But the irregularities in the summons were waived by Maryatt when he voluntarily appealed the case to the district court. In *Lowe v. Stringham*, 14 Wis. 244, Mr. Justice PAINE says: "The object of an appeal, in such cases, is to try the case anew in the appellate court, on its merits, and not to review errors of the justice. The taking of such an appeal is equivalent to an appearance, and gives the appellate court jurisdiction over the person, whether the service of the process before the justice was sufficient for that purpose or not." In *Fee v. Iron Co.*, 18 Ohio St. 564, the court says: "The service in the present case is not shown to be in conformity to the Code. * * * The common pleas, therefore, did not, by the return upon the summons, acquire jurisdiction over the defendant. But the corporation, by appearing in court, and causing notice of its intention to appeal from the judgment to be entered upon the record, thereby appeared in the action, and submitted itself to the jurisdiction of the court, and cannot now be permitted, on error, to allege a want of jurisdiction in the court." *Marsden v. Soper*, 11 Ohio St. 503; *Barnum v. Fitzpatrick*, 11 Wis. 81; *Blackwood v. Jones*, 27 Wis. 498; *Perry v. McKinzie*, 4 Tex. 154; *Malone v. Clark*, 2 Hill, 658. The court rightfully overruled the motion to dismiss the action. The appellant, having appeared generally in taking his appeal, could not subsequently appear specially, for the purpose of making the motion of dismissal.

The Code of Civil Procedure provides that "all appeals from justices' courts shall be tried anew in the district court, on the papers filed in the justice's court." Section 826. In *Martin v. District Court*, 18 Nev. 90, Mr. Justice BEATTY says: "All the district court can do, in a case appealed from a justice's court, is to try it anew, (Comp. Laws, par. 1643;) and, if no sort of issue has been made or tried in the justice's court, there is nothing to be tried anew." *People v. County Court*, 10 Cal. 19; *Funkenstein v. Elgutter*, 11 Cal. 328; *Rickey v. Superior Court*, 59 Cal. 661. The authorities are uniform in holding that the appellant should have appeared and answered in the justice's court, or moved to set aside the default, or sought other appropriate relief. In this way the is-

sues could have been settled, and upon an appeal there could be a new trial. When, however, the case was within the jurisdiction of the district court, the appellant made no effort to procure an adjustment of his rights by seeking any redress, but placed that tribunal in this position, that it must affirm or reverse the judgment of the justice's court. The complaint is not technically correct, but it is sufficient for the court in which it was originally filed, and where great liberality is allowed in formal matters. The court below was therefore compelled to affirm the judgment of the justice's court. It is therefore adjudged that the judgment be affirmed, with costs.

HARWOOD and DE WITT, JJ., concur.

(14 Colo. 371)

LEWIS v. BOARD OF COMMISSIONERS.

(*Supreme Court of Colorado*. Feb. 28, 1890.)

GARNISHMENT—ASSIGNMENT.

Defendant in attachment, who was working for a county under a contract, gave to the county clerk the following order: "You are hereby directed to deliver to J. all warrants issued by the board of county commissioners to me for and on account of [the work being done,] to be held by said J. as collateral security for a note of even date hereto attached." The clerk accepted the order by writing across the face, "Accepted, this 7th day of June, A. D. 1883." Held, that the claim against the county was so assigned as to be beyond the reach of a garnishment.

Commissioners' decision. Appeal from district court, La Plata county.

Action by A. R. Lewis against the board of county commissioners of San Miguel county, to recover money alleged to have been fraudulently transferred by defendant after service of garnishee process. Judgment for defendant, and plaintiff appeals.

Russell & McCloskey, for appellant. *W. H. Gabbert*, for appellee.

RICHMOND, C. December 17, 1883, appellant, plaintiff below, obtained a judgment in the county court of La Plata county, Colo., against A. Mitchell, for the sum of \$1,059.35 and costs. On the same day, in the same court, M. J. McClosky obtained judgment against said Mitchell for the sum of \$260.10, which judgment McClosky assigned to plaintiff. In these original actions, affidavit and bond in attachment were filed, and copy of attachment writs served upon defendant herein, with a notice that all debts owing by said board of county commissioners of said San Miguel county to Mitchell, and all other personal property in its possession or control belonging to defendant, Mitchell, were attached. Interrogatories were submitted to the county clerk of said county, and, in behalf of said board, he answered denying any indebtedness, as well as the custody and control of any property or effects of said Mitchell, by the said board of county commissioners, or said county of San Miguel. These answers were filed in said causes, and were not traversed, nor was any action taken concerning the dis-

charge of the garnishees. Plaintiff brings this suit, alleging that the defendant was indebted to Mitchell in certain sums of money; and that county warrants belonging to Mitchell were held by the county at the time of the service of the garnishee process to an amount largely in excess of his demand; and that defendant, after service of process, fraudulently transferred the sum of \$3,219 to Miners' & Merchants' Bank of Ouray. Defendant specifically denies the allegations in the complaint, and by a separate defense denies that at the time of the service of the process, or at any time since, the said board, or said county of San Miguel, were or are indebted to Mitchell, or had or have had control of any property or moneys belonging to Mitchell; that said Mitchell had, before service of the process, transferred by an order all warrants coming to him, by virtue of certain contracts made with the board of county commissioners of San Miguel county, to J. M. Jardine, cashier of the Miners' & Merchants' Bank of Ouray. In this same defense they set up the fact that answers were filed to interrogatories submitted in the original proceedings denying any liability or responsibility as garnishees. To this defense a general demurrer was interposed, and overruled. The contention of defendant is that the answers filed in the original cause were final and conclusive, they not having been traversed, and that plaintiff is therefore precluded from maintaining this action. Plaintiff takes the opposite view. The cause must be affirmed upon its merits; therefore it is not essential that we should determine this question.

It will be observed that the demurrer in this case is general. "The demurrer may be made to the whole petition, or to the statement of any of the causes of action embodied in it, but, if made to the whole pleading, it will be overruled, if any of the statements are held to be good; and if to the first, second, and third paragraphs of an answer, or either of them, it is a joint demurrer, and will be overruled if any of the paragraphs are good." Bliss, Code Pl. § 411. In the defense demurred to, defendants distinctly and positively deny that they were at the time of the service of the process, or since that time, in any manner indebted to Mitchell, or that they held or controlled any effects belonging to him. This defense was a perfect defense, and, if established by proof, necessarily defeated the plaintiff's right of recovery; therefore the demurrer was properly overruled. The record in this case discloses the following facts: That original actions were commenced December 17, 1883; judgments were obtained February 18, 1884; garnishee process was served upon the board of county commissioners of San Miguel county, January 14, 1884. That Mitchell had a contract with said board of county commissioners to transcribe certain county records; and, being in need of money for the purpose of paying help, procured a loan from

the Miners' & Merchants' Bank of Ouray County, and on June 4, 1883, for the purpose of securing payment of said loan, gave the following order to Charles F. Painter, county clerk and recorder, San Miguel county, Colo.: "You are hereby directed to deliver to J. M. Jardine, cashier Miners' & Merchants' Bank of Ouray, all warrants issued by the board of county commissioners to me for and on account of transcribing the records of said San Miguel Co., to be by said J. M. Jardine, cashier of said bank, held as collateral security for a note of even date hereto attached. [Signed] A. MITCHELL." This order was received by the county clerk on the 7th day of June, 1883, and duly presented to the board of county commissioners, and, for and on behalf of the board of county commissioners of the county of San Miguel, the county clerk accepted the order by writing across its face as follows: "Accepted this 7th day of June, A. D. 1883. CHAS. F. PAINTER, Clerk and Recorder of San Miguel county, Colo.;" and returned the same to Jardine. That on or about the 1st of February, 1884, Painter, clerk and recorder of said county, at the special instance and request of plaintiffs, A. R. Lewis and M. J. McClosky, made and subscribed answers as garnishees in the causes, and set out this order and acceptance in each answer. In fact, gave an entire history of the transaction. Painter testified that at the time of the service of the garnishment process, and at no time since, has the county of San Miguel, or the board of county commissioners, been indebted to Mitchell, or had or controlled any property belonging to him. He admits that there were some San Miguel county warrants in his possession, as clerk of the board of county commissioners, drawn in the name of Mitchell, but says they were covered by the assignment or order to deliver to Jardine. That the amount of these warrants was \$5,000. Three thousand dollars were delivered upon the order of Jardine to the San Miguel Valley Bank. One warrant, for \$2,000, was canceled. That the total amount paid on account of Mitchell was \$4,719. Five hundred dollars was delivered July 7, 1883; \$1,000 August 23, 1883; and the balance, \$3,219, was delivered February 5, 1884, in San Miguel county warrants. He explains the cancellation of the \$2,000 warrant by stating that that warrant had been issued under a mistake as to amount due Mitchell; that a final settlement was had, and a new warrant in lieu of the \$2,000 was issued for the amount of \$219; that the final settlement between Mitchell and the board of county commissioners was made January 25, 1884. Certain it is that after giving the order, and it having been accepted by the clerk in behalf of the board of county commissioners, Mitchell had no further interest or relation with the warrants issued by the county, save and except in the way of an adjustment of the sum due him under his contract, and for any sum of money that he might be expecting to realize

from the warrants, he would have to look to Jardine or the bank. Jardine, undoubtedly, was entitled to receive the warrants from the county under the order, and to hold them as collateral security for the amount of Mitchell's indebtedness to the bank; and had he or the bank been garnished, as he might have been in the original proceeding at the instance of the plaintiff, it is probable he would have intervened and detailed fully the amount of his claim, by way of a lien on the warrants thus delivered to him, and the garnishees would have secured any balance. The board of county commissioners of San Miguel county cannot be held as garnishees, as the rule undoubtedly is that "the property validly assigned cannot be reached by garnishment, since it no longer belongs to the assignor. * * * The assignee, if summoned as garnishee, may unequivocally answer that he has nothing of the defendants in his possession." Wapl. Attachm. 209. "Either defendant's property in the hands of a third person, or debt due him by such third person, may be equitably assigned so as to be beyond the reach of garnishment." Id. 211. The above doctrine, it seems to me, is peculiarly applicable to the transactions here shown by the evidence. The evidence shows that the board of county commissioners was advised of the assignment, and the action taken by their clerk in the premises at their next regular meeting; and thereupon, for the purpose of aiding Mitchell in procuring funds from Jardine with which to prosecute the work of transcribing the records under the contract with the county, anticipated payment to Mitchell, and ordered a warrant drawn in his favor for \$500, which warrant was promptly forwarded to Jardine in pursuance of the assignment theretofore given by Mitchell, and accepted by the clerk for the board. In fact, the board appears to have affirmatively indorsed all of the actions taken by their clerk, and therefore his action must be accepted as the action of the board. It cannot be claimed that Mitchell, in the face of this order, would have a right of action against the county, while the order existed and was in full force and effect; and, certainly, the attaching creditor could acquire no right of action for moneys due Mitchell, when Mitchell himself was not in a position to enforce a similar claim. "If the defendant [in an attachment suit] has authorized the payment of what is due to him to a third person, and the garnishee has agreed so to pay, and the assignee has assented, garnishment by the creditor of the defendant will not hold." Id. 212, and cases cited. I am satisfied that substantial justice has been done by the findings and judgment entered. Judgment should be affirmed.

REED and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

(14 Colo. 138)

HALLACK *et al.* v. STOCKDALE *et al.*

(Supreme Court of Colorado. Feb. 28, 1890.)

APPEAL—WEIGHT OF EVIDENCE.

Where the questions in a case are purely of fact, the supreme court will not interfere with the verdict of the jury, where there is evidence to support it.

Commissioners' decision. Appeal from district court, Arapahoe county.

Decker & Youley, for appellants. *Browne & Putnam*, for appellees.

REED, C. This was an action of trespass for cutting timber, in which treble damage was claimed, under section 2468, p. 738, Gen. St. Appellees, plaintiffs below, were the owners of about 1,420 acres of land in Park county, covered more or less with timber, and alleged in their complaint that the defendants, without leave of plaintiffs, and without lawful authority, entered upon the land, cut and carried away 2,500 timber trees of the value of \$3,000,—praying judgment for \$9,000. The answer was specific denial of all the allegations in the complaint. The case was tried to a jury, and verdict found for the plaintiffs, and judgment for \$2,856 against the defendants Erastus F. and Charles Hallack. Morris was not served, and did not defend, and no judgment was taken against him.

There are several errors assigned. The first to tenth, both inclusive, and the twelfth are upon the alleged admission of improper testimony to prove the appellants' connection and their relation with Morris, and their consequent liability to the plaintiffs for the alleged injuries. These supposed errors are neither argued nor discussed in the argument for appellants, and may be regarded as having been waived.

Neither upon the trial nor in argument was the question raised whether the case was one, if made, that entitled plaintiffs to treble damages, under the statute. That it was within the intention and purview of the statute appears to have been conceded. In the opening paragraph of their argument, counsel for appellants say: "The facts are that John Morris was running a saw-mill near the appellees' land, and had cut from 2,800 to 3,000 trees from their lands, and had sawed them into lumber, and a great portion of the lumber had been shipped to Erastus F. Hallack by Morris." They also say, on page 2 of their argument: "There were no exceptions on the trial to the instructions of the court to the jury by either party; and we are of the opinion that the instructions stated the law clearly and correctly, and, if the jury had heeded them, there would have been a verdict for the appellants." The facts conceded in the first paragraph, and the admission of the correctness of the instructions of the court as to the law covering the case, greatly simplifies the examination; and, under the remaining errors assigned, the controversy is narrowed to two questions: *First*. Was the jury warranted, under the evidence, in find-

ing the relations existing between appellants and Morris such as to render appellants liable for the destruction and conversion of the timber? *Second*. Were the damages excessive?—both purely questions of fact.

It must be conceded that the testimony was contradictory; much of it vague and undeterminate; but there was testimony upon which the verdict, both as to the liability of appellants and amount of damage, might properly be predicated. It cannot be said there was not evidence to support it, nor can it be said that the verdict was greatly against preponderating evidence. It is a well-settled rule of this court, as well as of all courts of appellate jurisdiction, and a cardinal principle, that the jury is the final and only tribunal to determine questions of fact, and that where facts are so found the finding will not be disturbed by the appellate court, unless misinstructed by the court, or the verdict is so palpably incorrect as to show bias, prejudice, or a wanton disregard of the duties and obligations of jurors; and this rule is well established in, and sustained by, reason. Jurors, before whom witnesses are brought, and the judge of the trial court, being confronted with the witnesses, have opportunities of judging, from their personal appearance, and manner of giving their testimony, of their credibility, which the appellate court cannot have. It is the experience of every trial judge and lawyer that the weight of evidence does not depend upon the number of witnesses testifying to a particular fact, but upon the character and disinterestedness of the party. In many cases the testimony of several characterless witnesses, evidently employed for the occasion, or swearing in their own interest, might be overcome by the testimony of one disinterested man of known probity and integrity, and these discriminations are peculiarly within the province of the jury, who may, from their opportunities and the attending circumstances, utterly disregard testimony that might, when incorporated into the record unimpeached, be considered by the appellate court as controlling. Another cogent reason for the strict adherence of appellate courts to the rule above laid down is the fact that the trial judge, having the same opportunities for observation as the jury, can determine whether the jury are honestly and conscientiously performing their duty; and, if he is of the opinion that they are not, and that the verdict was the result of bias and prejudice, and made in disregard of duty, he can at once set it aside, and order a new trial. Where, as in this case, the questions are purely of fact, and the jury being the only tribunal for their determination, appellate courts will not interfere, where there is evidence to support the verdict.

In this case there was evidence to warrant the findings, both as to the liability of appellants and the amount of damage. The verdict in the case was for the amount before stated. There is nothing to show whether the jury found it as actual or triple damage.

The court very properly required counsel to stipulate that it should be taken as treble damages, under the statute, or, in other words, that the sum should be taken as full satisfaction. If it had been taken as the amount of actual damage, it might have been considered excessive if trebled, which it is conceded plaintiffs might recover. Taken as triple damage, it must be, under the evidence, regarded as moderate, and fully warranted. The judgment should be affirmed.

RICHMOND and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

(14 Colo. 188)

McQUOWN v. CAVANAUGH.

(Supreme Court of Colorado. Feb. 28, 1890.)

MASTER AND SERVANT—CONTRACT—RECORD ON APPEAL.

1. In an action for work and labor performed, it appeared, that plaintiff was in the employ of one M., who had agreed to pay him \$3.50 per day; that M. made an assignment, and his wife, the defendant, purchased the stock at the sheriff's sale, and continued the business in her name, with her husband as her agent. Plaintiff continued to labor for her, charging the same price per day for such labor, which was paid. Subsequently a receiver was appointed, and thereafter defendant resumed business, and plaintiff continued in her employ, claiming the same rate per day, but defendant only allowed \$3 per day, claiming that the contract with her husband was not binding on her. *Held*, that plaintiff was properly allowed to testify to the contract with defendant's husband, made prior to the time that she succeeded to the business.

2. In construing a charge to the jury, the entire charge must be considered, and where appellant does not embrace within the transcript the entire charge given, the supreme court cannot determine whether or not the jury were misled by the charge to which exception is taken.

Commissioners' decision. Appeal from Arapahoe county court.

J. W. Horner, for appellant. *J. W. Mulahay*, for appellee.

RICHMOND, C. In this action plaintiff below and appellee here sought to recover, for work and labor performed, a balance due, amounting to \$95.37. It appears from the record that the plaintiff was in the employ of George L. McQuown, and that McQuown had agreed to pay him the sum of \$3.50 per day; that he worked for McQuown until September 21, 1884, when McQuown made an assignment, and the appellant, Lowena McQuown, wife of George L. McQuown, purchased at sheriff's sale the stock, and continued the business in her name, with George L. McQuown as her agent; that plaintiff continued to labor for Mrs. McQuown, charging the same price per day for such labor, which was paid. Subsequently a receiver was appointed, and there was a balance due plaintiff, which the receiver was authorized to pay; that plaintiff charged in his bill for his labor, \$3.50 per day, and George L. McQuown approved and certified the account, which was paid, that thereafter Mrs. McQuown resumed busi-

ness, and plaintiff continued in her employ for some length of time, claiming the same rate per day, but defendant only allowed \$3 per day. It is contended by appellant that the contract with George L. McQuown, of \$3.50 per day, was not binding upon her, and that plaintiff's services were only reasonably worth the sum of \$3 per day. Several witnesses testify, in behalf of defendant, to the effect that the usual rate of wages for such labor is \$3 per day. The cause was tried to the jury, and verdict in favor of the plaintiff, assessing his damages at \$95.37.

But two propositions are submitted or discussed by appellant. First, that the court erred in permitting the plaintiff to testify to the contract with George L. McQuown made prior to the time that Mrs. McQuown succeeded to the business. We do not think this proposition tenable, for the reason that it is admitted that George L. McQuown was acting as the agent of Mrs. McQuown, and continued the employment of plaintiff, and continued to pay plaintiff the same rate per day he had previously contracted to pay; and at no time did McQuown, while so acting as agent, directly or indirectly intimate to plaintiff a change in the terms of the contract. On the contrary, his act as agent, in continuing payment under the contract, was the act of his principal, Mrs. McQuown; thus rendering the testimony relative to the original contract admissible to show the terms of his employment, after she succeeded to the business.

The second and last assignment of error is to the instruction of the court, and is as follows: "If you find from the evidence that payments were made to the plaintiff at the rate of \$3.50 per day for work that he did for her after she took charge of the business, this will be testimony tending to establish an employment by her at the rate of \$3.50 per day." It appears from the record that the instructions of the court were six in number, but the remaining instructions are not embraced in the transcript or abstract of record. The ground of the objection is that, by the instruction above recited, the court singled out and gave undue prominence to certain facts, ignoring other facts proved, of equal importance. The rule of this court is that, "in construing a charge to the jury, each instruction is to be considered in connection with the entire charge, and if, considering the charge as a whole, this [supreme] court is satisfied the jury were not improperly advised as to any material point in the case, and that, reading each instruction in connection with the others, they were not misleading, the judgment will not be reversed on the ground of erroneous charge." *Finerty v. Fritz*, 6 Colo. 136. This case has been followed by a number of others in this court,¹ and it will be readily seen that, inasmuch as appellant did not embrace within the transcript or abstract the entire instructions given by the

¹ See *Coleman v. Davis*, 21 Pac. Rep. 1018; *Dozenback v. Raymer*, 23 Pac. Rep. 737; *Simonton v. Rohm*, ante, 86.

court to the jury, we are unable to construe the charge as a whole, and determine whether or not the jury could have been misled by the foregoing instructions, even were it objectionable,—a matter we do not pass upon. There being sufficient evidence to support the verdict, the judgment should be affirmed.

REED and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

(14 Colo. 207)

HURD v. PEOPLE.

(Supreme Court of Colorado. Feb. 28, 1890.)

CONTEMPT—DISOBEDIENCE TO DECREE APPEALED FROM.

Where an appeal has been taken by a receiver from a decree dissolving a temporary injunction, and ordering him to deliver over possession of the property to the persons entitled there to under the decree, and the bond filed as required by Laws Colo. 1885, p. 354, § 23, to effect a *superseas*, the court is ousted of all authority to enforce the decree, and the receiver is not in contempt for declining to execute it.

Commissioners' decision. Error to district court, El Paso county.

L. C. Rockwoell, for plaintiff in error. *Atty. Gen. Theo. H. Thomas* and *Alvin Marsh*, for the People.

REED, C. This was a proceeding before the Honorable WILLIAM HARRISON, judge of the district court of El Paso county, against the plaintiff in error for an alleged contempt of court. On November 2, 1885, plaintiff in error was appointed receiver in a certain proceeding in equity concerning mines and mining property in the county of Park, wherein George C. Bates and Mary Barker Bates were plaintiffs, and Alfred H. Wilson, Randall W. Wilson, and the Woodmass of Alston Mining Company were defendants. By the order of appointment he was to have the sole and exclusive possession of a mining claim and of other property in controversy, work the property, and transact all the necessary business, which he did from the date that he qualified until the 26th day of June, 1886, when the litigation was ended in the court. At that time he had in his hands, as receiver, the proceeds of the mine, amounting to over \$19,000. On the last-named date a decree was entered as follows: "The temporary injunction heretofore issued is dissolved, and the receiver is ordered and required to surrender and return to defendants Alfred H. and Randall W. Wilson, or their authorized agent, full, quiet, peaceable, and undisturbed possession of the premises mentioned in the pleadings, and also all books, maps, documents, and other personal property in his possession as receiver; the possession of said mine to be yielded to Wilsons on the 8th day of July, 1886, at 12 o'clock high noon of that day; and on the same day that the receiver pay to defendants, Wilsons, out of the moneys now in his hands, the sum of \$16,000, the remainder to be left

in his hands, amounting to some \$3,400, to be kept as a fund for the payment of the expenses of said receivership; that the receiver report to this court on July 16, 1886, in what manner he shall have executed this order; that this cause shall stand continued for the purpose of retaining jurisdiction of the receiver, and for the purpose of hearing and acting upon his final report, and that in all other respects this cause shall stand dismissed." On the 6th of July, two days before the date fixed in the decree for the surrender of the property and the payment of the money by the receiver, an appeal was perfected to this court, and bond filed in the sum of \$16,000. Of the amount in his hands, the receiver paid over to the defendants \$8,000, and, by the advice of counsel for plaintiffs, refused to pay over the other \$8,000, and deliver the possession of the property to the defendants. Upon the 2d day of September, 1886, plaintiff in error was cited before the honorable judge in chambers, in vacation, to answer to a charge of contempt for failing to pay over the remaining \$8,000 in money, and deliver the possession of the property, was found guilty, and fined \$100. He then sued out this writ of error to have the proceeding reviewed in this court.

The question presented to be determined is, had the district court jurisdiction after the appeal was perfected? In the suit of *Bates v. Wilson et al.*, in which plaintiff in error was appointed receiver, the question in controversy was whether plaintiffs were joint owners with the defendants in the property, the interest claimed by plaintiffs being one-half, and naturally or incidentally involved were the questions of right of possession and joint occupancy of the plaintiffs, and the right to share in the money in the hands of the receiver. By the decree it was ordered that the plaintiffs take nothing, and that the suit be dismissed, except that jurisdiction be retained for the receiver to perform the decree, and have his accounts passed. To perform the decree the receiver was to deliver complete possession, and pay over to defendants all moneys in his hands, save the sum thought necessary to pay the expenses of the receivership. The decree was entire, and from the decree the appeal was taken. The appeal in this case was taken under and controlled by the statute of 1885. See Sess. Laws, p. 350, § 2, which statute has since been repealed. The decree, although, as above stated, entire, was dual in character, but was all covered by the appeal; subdivision 2 of the section above cited being that an appeal will lie from "a final order made in any special proceedings affecting a substantial right therein, or made in a summary application in an action after judgment." A wide distinction is made in proceedings where the supposed contempt is willful and contumacious, or growing out of some matter incidental to or ancillary, as in cases of this kind, where the supposed contempt grew out of the refusal to obey an or-

der which was, or reasonably might have been, considered by the receiver and his counsel as a process in the execution of the decree from which the appeal was taken. If the appeal and the filing of the bond operated as a *supersedeas*, then it of necessity stayed all process and proceedings to carry into effect the decree from which the appeal was taken. That the taking of the appeal, filing of bond, as in this case conditioned, to cover the entire case from which an appeal will lie, operates as a *supersedeas*, cannot be successfully questioned. The conditions of the bond were such as were required to make the appeal a *supersedeas*, as required by statute. Sess. Laws 1885, § 23, p. 354. It also appears from the record that the bond was approved, and that the clerk issued the written order commanding the stay of proceedings, as required in the latter part of the section above cited. In this case the appeal-bond was executed and filed for the express purpose, and immediately operated as a stay and *supersedeas*, under the statute. See *Daniels v. Miller*, 8 Colo. 542, 9 Pac. Rep. 18. Under the New York Code, which is very similar to ours, in *Howe v. Searing*, 6 Bosw. 684, *WOODRUFF, J.*, said: "By the express terms * * * of the Code, the perfecting of an appeal * * * by giving the undertaking mentioned * * * shall stay all proceedings in the court below upon the judgment appealed from. If, therefore, this motion is a proceeding 'upon the judgment,' the motion is improperly and irregularly made; for as to all such proceedings the plaintiff's hands are tied, and if an attachment and a commitment thereunder for disobeying the judgment appealed from, while the appeal is pending, are 'proceedings upon the judgment,' then the motion therefor cannot be granted, for not only the action of the plaintiff, but the action of the court therein, is stayed pending the appeal." It also appears from the record that the appeal was perfected, the bond filed, and the *supersedeas* effective two days before the receiver was ordered by the decree to perform the acts the failure to perform which was punished as contempt. The practice in chancery, before the modification by statute, did not allow an appeal from an order granting or dissolving an injunction. *Hart v. Mayor*, 3 Paige, 380; *Graves v. Maguire*, 6 Paige, 379. By our statute, (Sess. Laws 1885, subd. 3, § 2, p. 350,) an appeal will lie "when an order grants or refuses, continues or modifies, a provisional remedy, or grants, refuses, dissolves, or refuses to dissolve, an injunction." The decree being general,—an entirety,—the appeal lay from, and the stay by *supersedeas* reached, every part of the decree appealed from. In *Graves v. Maguire*, supra, it is said: "The effect of an appeal, after the proper steps have been taken to render it a stay of proceedings upon the order or decree appealed from, is to leave the proceedings in the same situation as they were at the time of perfecting such appeal."

Such being the effect, the acts required of the receiver to deliver the possession, pay over the money, etc., were acts in the process of the execution of the decree, and were forbidden by the *supersedeas* as incidental to the decree. The district court by the appeal was ousted of all authority to enforce by itself, or its agent, the receiver, any branch or portion of the decree; and the decree, having been appealed from, was, until reviewed in this court, as inoperative as though it had never been entered,—the effect of the appeal being, as has been shown, to maintain the *status* of affairs in exactly the same condition as they were at the time of perfecting the appeal. The right and power of the district court to punish as for a contempt the disobedience of its officer for failing to enforce the decree, presupposes and involves the existence in the court of the right to enforce any and every part of the decree. The appeal was taken and the bond given to prevent the delivery of the possession and payment of the money, as much as to review the decision of the court in regard to the rights of the parties. Had the receiver delivered the money and the possession of the property, and this court had found the money to belong to plaintiffs, and had found them co-owners in the property, and entitled to joint possession, it might have been impossible to recover the money; and in property of this kind, where the value is only in the ores contained, the mine might have been depleted and the freehold destroyed; and the plaintiff would have been compelled to stand by without remedy, and see the whole subject-matter of the controversy destroyed during the long time pending the appeal, and, if in the end successful, obtaining, at great expense, a barren victory. We are aware that proceedings for contempt are not considered proceedings in the action, but are special proceedings, as regulated by the Code. The right to punish for contempt is inherent in every court, and necessary to a due administration of the law; but the court, by reason of the appeal and *supersedeas*, being without authority to enforce its decree, the receiver was not in contempt for declining to execute it. The judgment of the district court should be reversed, and the proceeding dismissed.

RICHMOND and PATTISON, CC., concur.

(14 Colo. 317)

STOCKING v. MOREY.

(*Supreme Court of Colorado*. Feb. 28, 1890.)

TRIAL BY COURT—MOTION FOR NEW TRIAL—BILL OF EXCEPTIONS.

Where a trial is had to the court, and its findings announced, an undetermined motion for a new trial operates to reserve the case, and continue the jurisdiction beyond the term for the purpose of disposing of the motion and settling a bill of exceptions.

Appeal from district court, Arapahoe county.

Motion to strike out part of bill of exceptions. This case was tried at the April,

1889, term of said court, on the 26th day of April, 1889, and taken under advisement, and on May 3, 1889, the court found for the plaintiff. May 8, 1889, at the same term, defendant filed his motion for a new trial. No bill of exceptions was filed at the April term, 1889, of said court, nor was any order entered at that time fixing the time for filing bill of exceptions. At the September term, 1889, of said court, and on the 12th day of October, 1889, the same judge presiding, the motion for a new trial was denied; and judgment was entered in favor of plaintiff, and against defendant. And on the same day defendant was allowed an appeal to the supreme court, and 30 days given for an appeal-bond, and also the following order entered: "And time, and until thirty days from this date, is allowed said defendant in which to prepare and tender to the judge of this court his bill of the exceptions by him reserved herein, which, when signed and sealed by the said judge, shall be filed herein as of this date." November 7, 1889, the time for bond and bill of exceptions under the foregoing order was extended, the court allowing defendant 15 days' additional time. The bill of exceptions herein was tendered to the judge, November 26, 1889, and on that day signed and sealed by him. This bill of exceptions contains, not only the exception reversed to the ruling of the court in overruling the motion for a new trial, and the exception to the judgment, which said exceptions were taken at the September term, but also all proceedings occurring upon the trial of said cause at the preceding April term.

*Trowbridge & Hinckley, for appellant.
Teller & Orahood, for appellee.*

HAYT, J., (*after stating the facts as above.*) We are asked upon this motion to strike from the bill of exceptions filed herein all that portion relating to the proceedings had in the court below at the April term thereof, or, in case the court should be of the opinion that this ought not to be done, then appellee seeks to have all the proceedings had at such term stricken out, save and except only the evidence. The position of appellee is substantially this: That, to make the proceedings had at the April term a part of the record, appellant should either have tendered a bill of exceptions containing the same to the judge for his authentication during that term, or procured an order from the court at that term, giving additional time in which to present the same. In support of this position, our attention is called to section 385 of the Civil Code, in which it is provided that where either party excepts to any ruling, decision, or opinion of the court, and shall reduce such exception or exceptions to writing, it shall be the duty of the judge to allow, sign, and seal the same at any time during the term of court at which such exceptions are taken, or at any time thereafter to be fixed by the court. Had the motion for a new trial been determined and a final judgment pro-

nounced at the April term, and had the court at the following term made the order in reference to the bill of exceptions, appellee's objections would have been well taken, but such are not the facts. No ruling upon the motion for a new trial was made until the subsequent term, and final judgment was reserved by the court until after such ruling should be made. Under the circumstances, we can see no good reason for holding that the bill of exceptions presented within the time allowed by the court for the same, at the September term, was not presented in apt time to preserve the entire record, while cogent reasons exist for the opposite conclusion. Had the motion for a new trial been sustained, appellant would have had no occasion for this bill of exceptions; and to say that he must put his client to the expense and himself to the labor of preparing a bill that might never be used, would, in our judgment, accomplish no good purpose. And to require him, pending a decision upon such motion, to petition the court for an order extending the time in which to present such bill, would be unreasonable. In *Gomer v. Chaffe*, 5 Colo. 383, the provision of our Code requiring that the motion for a new trial, and the decision thereon, shall be made and had at the same term the findings were made or the verdict rendered, has been declared by this court to be directory merely, so far as the action of the court is required to be performed within a specified time. This decision recognizes the power of the court to continue the motion to a subsequent term for determination. The court may be delayed, in announcing its ruling upon the motion for a new trial, one month or six months; and to require a litigant to anticipate, in his application for time within which to prepare and present a bill of exceptions, the date upon which the court will finally pass upon such motion, would be unwise. Neither do we believe that the framers of our Code ever intended, when a cause is tried at one term and a motion for a new trial is made and then continued until the next term, that a bill of exceptions should be filed preserving a record of the trial, and a subsequent bill to preserve the proceedings upon the motion for a new trial. *Henze v. Railroad Co.*, 71 Mo. 638.

The case of *Railway Co. v. Twombly*, 2 Colo. 559, cited in support of the motion to strike, was decided prior to the adoption of the Code; and without questioning the correctness of the decision in that case, under the practice as it then existed, we are of the opinion that the conclusion reached in the case of *Gomer v. Chaffe*, supra, is more in harmony with the liberal construction enjoined by the Code. Formerly it was quite important to have the bill of exceptions presented promptly upon the happening of the matters excepted to, in order that the trial judge might determine the correctness thereof while the facts were yet fresh in the mind of the court; but with the introduction to the court-room of official stenographers, who

are required to take down in full all such matter as may properly be made a part of the record in this manner, the principal reason for the strict construction given statutes like this one under consideration, when such means of preserving a record of the proceedings was unknown, no longer exists. The facts in the case last cited were quite similar to those presented in the case at bar, and the opinion is authority for saying that where a trial is had to the court, and its findings announced, an undetermined motion for a new trial operated to reserve the case and continue the jurisdiction beyond the term, for the purpose of disposing of the motion and the settling of the bill of exceptions. We are of opinion that the proceedings had upon the trial at the April term of the district court are properly made a part of the record by the bill of exceptions presented within the time fixed by the court at the time of overruling the motion for a new trial and entering final judgment in the cause, although this was at a subsequent term. The motion to strike out is overruled.

(14 Colo. 383)

BAUR v. BEALL *et al.*

(Supreme Court of Colorado. Feb. 28. 1890.)

SALE—STATUTE OF FRAUDS—EXAMINATION OF WITNESS BY THE COURT—EVIDENCE.

1. B., who had a stock of goods in a store which he had rented, executed a bill of sale of the goods to plaintiff, and delivered the key of the store, which plaintiff kept for an hour or two, and returned to B. and made B. his agent to dispose of the goods. B. disposed of all the goods except a few articles which he stored in the cellar of the building, which at that time was rented to another person. Afterwards, defendant, to whom B. was indebted, procured an attachment against B., and caused the goods stored in the cellar to be sold under the execution. *Held*, that the jury was warranted in finding that the sale was not accompanied by immediate delivery, and followed by an actual and continued possession, as required by Gen. St. Colo. p. 509, § 14, which makes every sale of goods and chattels by a vendor in possession void as against the creditors of the vendor unless the sale "be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, of the things sold."

2. The active participation of the court in the examination of a party who testifies in his own behalf cannot be relied on as error unless it be shown that the party was actually prejudiced by it.

3. The record of a proceeding in the court of a justice of the peace, which is properly authenticated and proved, is admissible in evidence, in an action against a constable, to show justification by establishing the judgment, and the awarding of the writs under which the constable acted, and under which he justified.

Commissioners' decision. Error to district court, Arapahoe county.

Action by Otto F. Baur against John Beall and another to recover a soda fountain and fixtures. Gen. St. Colo. p. 509, § 14, provides that "every sale made by a vendor of goods and chattels in his possession, or under his control, as every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned,

shall be presumed to be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and this presumption shall be conclusive."

S. Slessinger, for plaintiff in error.

REED, C. An action of replevin to recover one marble soda fountain, and appurtenances belonging to the same. One Albert R. Baur, having been engaged in business at Colorado Springs as a confectioner, and being indebted to his brother, plaintiff in error, who resided in Denver, to secure such indebtedness, executed a chattel mortgage to plaintiff in error. After having been in business some time, and being unsuccessful, he wrote plaintiff in error, informing him of his want of success; and plaintiff went down. An interview was had, and it was concluded best that A. R. Baur sell his stock and fixtures to plaintiff in error in payment of his indebtedness, and quit the business. A bill of sale of the entire stock and fixtures was executed and delivered, and the key of the store—a rented building—was delivered to plaintiff, who, it appears, carried it for an hour or two, then returned it to A. R. Baur, whom he made his agent to sell out the stock and fixtures, and close up the business, which, according to the evidence, he proceeded to do. The entire thing being sold out, or in some manner disposed of, prior to December 18, 1883, except the articles in controversy in this suit, they were stored by A. R. Baur in the cellar of the building formerly occupied by him, but then rerented to another party. A. R. Baur, being considerably indebted to defendant Weir for the rent of the building where the business had been carried on, Weir commenced suit before a justice of the peace, procured an attachment, and caused it to be levied upon the goods or chattels in suit, obtained judgment, and caused the goods to be sold under an execution. The other defendant, John Beall, was the constable who served the writs and made the sale. The suit was tried to a jury on February 11, 1886, resulting in a verdict for defendants on which judgment was afterwards entered. The facts in the case were very simple. There was no great conflict of testimony. The only question to be determined was whether the goods sold were immediately delivered, and there had been an actual and continued change of possession as required by statute. There are several errors assigned that may properly be consolidated into the following, for the purposes of this review: That the court participated to an unwarrantable extent in the examination of the plaintiff on his direct and cross-examination as a witness in his own behalf.

The record does show a great deal of active participation in the questioning, but this can hardly be relied upon as error unless it be shown that plaintiff was actually prejudiced by it. The circumstances may have rendered it necessary upon that trial—of which we

have no means of judging—in order to arrive at the facts.

Next, it is assigned for error, that the files and records of the proceeding in the court of the justice of the peace were improperly admitted in evidence. It appears that they were properly authenticated, and properly proved, and, being so, were clearly admissible in justification, establishing the judgment, and the awarding of the writs under which the constable acted, and under which he justified.

The other assignments necessary to be noticed were the refusal of the court to instruct the jury as prayed by the plaintiff, and the instruction given to the jury on his own motion. The first instruction prayed by the counsel of plaintiff was correct, and was substantially given in the second paragraph of the charge by the court. The remaining instructions prayed were incorrect, and very properly refused. The charge given to the jury, taken as a whole, fairly states the law, and cannot be considered erroneous. The principal question was one of fact. It was fairly submitted to the jury, who found that the sale of the chattels in controversy was not accompanied by immediate delivery, and followed by an actual and continued possession, as required by section 14 of the statute of frauds. Gen. St. p. 509. The jury was warranted in so finding from the evidence. The necessity of clear, unequivocal, and unmistakable change of possession, and retention of such possession by the vendee, has been properly, fully, and clearly asserted by this court. *Cook v. Mann*, 6 Colo. 21; *Wilcox v. Jackson*, 7 Colo. 521, 4 Pac. Rep. 966; *Herr v. Mercantile Co.*, 22 Pac. Rep. 770. The judgment should be affirmed.

PATTISON and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

(14 Colo. 191)

SILVER CORD COMBINATION MINING Co. v. McDONALD.

(Supreme Court of Colorado. Feb. 28, 1890.)

MASTER AND SERVANT—NEGLIGENCE.

1. Defendant was a corporation engaged in working a mine through an incline. Iron rails were laid along the incline over which the company drew its cars. Along the incline, on one side, was a passage way over which was constructed a plank walk. About 700 feet down the incline was a station called "No. 2." It was a rule of the company that after "tally," which was expected to occur at 5.23 p. m., the cars should cease to run up and down the incline, so as to give the miners, who were allowed seven minutes to reach the surface after tally, the right of way up the incline. An air-pipe extended from the surface to station No. 2, and the foreman at the top, at 5.23 p. m., rapped on this air-pipe, or was supposed to do so. This was called "tally." It was in evidence, however, that the foreman had instructed the man at station No. 2 that, when this signal was not given from the top, he was to tally the men anyhow at 5.23 p. m. Plaintiff, on the day of the injury, was passing up the incline, and was met by a car going down. In his excitement, he attempted to jump across the track to a place, as he thought, of greater safety, and in

so doing received the injuries for which he brought suit. It appeared that when plaintiff began the ascent the signal had not been given from the top, but the man at station No. 2 had given the tally at the regular time. Held, that the rule as to the signal from the top should have been strictly enforced, and allowing the man at station No. 2 to give the tally in violation of the rule was negligence on the part of the company, for which plaintiff was entitled to recover.

2. Defendant, through its negligence, having put plaintiff in a position of danger, could not complain that he did not exercise cool presence of mind in his endeavor to escape therefrom.

Commissioners' decision. Appeal from district court, Lake county.

Clinton Reed, for appellant. Taylor & Ashton, for appellee.

RICHMOND, C. Appellee, plaintiff below, brought this action to recover damages for injuries alleged to have been sustained by him while in the employ of the defendant company. The cause was tried to a jury, and verdict rendered in favor of plaintiff for the sum of \$2,250. Motion for a new trial overruled. Appeal prayed and allowed. The assignment of errors are to instructions given and refused, and in rendering judgment for plaintiff upon the verdict, and that damages are excessive.

The facts, in substance, are that appellant was a corporation engaged in mining at Leadville, employing upwards of 100 men, who worked the mine through an incline about 835 feet in length. Iron rails were laid along the incline, over which the company drew its cars. Along this incline, on one side, was a passage way over which was constructed a plank walk. About 700 feet down the incline was a station called "No. 2." It was a rule of the company that after "tally," which was expected to occur at 23 minutes past 5 o'clock, the cars should cease to run up and down the incline. Miners were allowed 7 minutes to reach the surface after tally. An air-pipe extended from the surface to station No. 2, and the man at the top, or foreman, at 23 minutes past 5 o'clock, rapped on this air-pipe, or was supposed to do so. This was called "tally." The foreman, who had charge of the mine, and who, as the evidence shows, had authority to hire and discharge men, instructed the man at station No. 2, Thomas McNicholas, that when this signal was not given from the top he was to tally the men, anyhow, at 23 minutes past 5 o'clock. On the day the injuries were received, plaintiff, in passing up the incline, was met by a car going down, and in the excitement attempted to jump across the track to a place, as he thought, of greater safety, and in so doing received the injuries for which he seeks to recover damages in this action.

It is contended by appellant that the rule of the company was that none of the employees engaged in the mine should attempt the ascent until tally had been given by rapping on the pipe; that this rule was absolute; and that on the day the injuries were received the signal had not been given; therefore the plaintiff, in attempting the ascent of the in-

cline, was violating the rule of the company,—consequently, was guilty of contributory negligence. On the other hand, the plaintiff contends that the rule was not absolute, in fact, was frequently violated by the defendant, and that the injuries were the result of its negligence in sending a car down the incline during the seven minutes allowed to the miners to reach the surface, and that on the day the injuries were received the man (Thomas McNicholas) stationed at station No. 2 gave the tally to the men before they attempted to ascend the incline. The defense relied upon by appellant is that there was contributory negligence on the part of plaintiff in violating the rule of the company. It is insisted in the argument of counsel for appellant that no testimony appears, showing that a tally had been given before plaintiff, with others, attempted to ascend the incline. This position assumed in the argument is not supported by the record furnished by appellant. Some dispute arose between counsel for the respective parties as to the testimony of Thomas McNicholas, a witness sworn on behalf of defendant; and, in order that this court might be fully informed of what McNicholas did swear to, appellant furnished a complete abstract of this testimony. From that it appears that McNicholas testified as follows: "*Question.* Now, what do you know? Explain to the jury about quitting time of the men, and about the rules of the company,—when they should quit, and what signal was given them to quit. *Answer.* The men had orders that they should have seven minutes—that is, from twenty-three minutes after five—to go from No. 2 station, where I was stationed, to the top, before the whistle blew. They had a signal on top,—that the engineer on top would rap at twenty-three minutes after five, and if he did not the top man there would rap on the air-pipe. I think it was seven minutes for tally. If that was not rapped,—the foreman of the mine told me that, when that was not rapped in time, as long as I had my watch, and knowed the time, to tally the men, and let them go to the top. *Q.* How was it on this day that the accident happened? *A.* This day, I do not think the pipe was rapped at the regular time. If there were any men there at that time, I tallied them. I do not think there was many there. *Q.* And then, when you were waiting there for the drop to come down, to send another to the surface, had the tally commenced to run,—that is, the seven minutes? Was it tally at that time? *A.* It was. *Cross-Examination.* *Q.* You say you gave the tally to some of the men there that night? *A.* I gave the tally to all of them that was there. *Q.* You gave to all that were there? *A.* Yes, sir; I do not remember whether the plaintiff was there or not. *Q.* Now, did you notify any of them that there was a train going down the incline at the time they started up, or at the time they were starting up? *A.* I believe not. *Q.* Did you ever tally the men before the time

for tally came? *A.* No, sir. *Q.* And then the men that you tallied this evening were started at the proper time, were they? *A.* Yes, sir." This witness gave further testimony to the same import; but it is unnecessary for us to quote more, as sufficient appears from the above to show that plaintiff was in the incline, on his way to the surface, under the rule of the company, as understood by this witness. Several witnesses testify in behalf of plaintiff, and support the testimony of McNicholas as to the time, etc. Plaintiff testified that "the regulations of the company was that we were allowed seven minutes to come out; that they were supposed to be on top at 5:30. They would sometimes tap on the pipe when it was time for us to come up. They did not do it always. The time I was hurt, I was about 200 or 250 feet from the mouth of the incline. It was twenty-three minutes past five when we started up the incline."

It may be true, as claimed by the attorney for appellant, that the rule was that tally should not be given until the signal was rapped by some person on the surface of the mine. Yet it is equally true that the company did not at all times observe the rule. At least, it can consistently be claimed that ample evidence appears in the record to warrant the belief that this rule was not strictly adhered to. Undoubtedly the company sought to adopt proper rules and regulations concerning the time when the miners should have a right of way through the incline. Having adopted them, it should have conformed to them; and, failing to do so, it must be held responsible for the consequences resulting from a departure, unless contributory negligence on the part of plaintiff is established. *Railroad Co. v. George*, 19 Ill. 510. Besides, under the circumstances as detailed by all of the witnesses in the case, we think such a rule as is here contended was in force by appellant should have been strictly enforced. No departure from it should have been tolerated. It was necessary to the welfare of the miners. McNicholas, at station No. 2, could not possibly know when the cars would be sent down the incline by the engineer at the top; and allowing him to give the tally, in violation of the rule, without such knowledge, was subjecting the miners to an extraordinary risk, and was an act of negligence on the part of the company. In general, questions of negligence and contributory negligence are questions of fact, to be determined by the jury from the evidence and circumstances of the case, under suitable instructions. They cannot ordinarily be decided by the court. Hence, it was the province of the jury to pass upon those questions in this case. *Railway Co. v. Ward*, 4 Colo. 30; 2 *Thomp. Trials*, § 1681; *Railway Co. v. Harper*, 26 Ill. App. 621.

Counsel for appellant urges that plaintiff, in attempting to cross the track at the time the car was descending the incline, was guilty of contributory negligence, and there-

fore cannot recover. This question was fairly submitted to the jury by an instruction, and resolved by them favorably to plaintiff. Similar positions and circumstances have several times been presented for judicial investigation as involving the question of contributory negligence, and, it must be admitted, have been variously construed. But the rule which commends itself to our approbation, as resting on sound principles of humanity, is to the effect that "a party giving another a reasonable cause for alarm cannot complain that the person so alarmed has not exercised cool presence of mind, and thereby find protection from responsibility for damages resulting from the alarm, when he is guilty of negligence or violation of law contributing to the injury." *Coal Co. v. Healer*, 84 Ill. 126; *Collins v. Davidson*, 19 Fed. Rep. 83.

It is urged that the court erred in refusing to give the eleventh and twelfth instructions asked for by appellant. The eleventh instruction was fully covered by the fifth and eighth instructions given; and, indeed, we are inclined to the opinion that the language used by the court was decidedly more favorable to the defendant than that embraced in the eleventh instruction as asked, and, under the rule laid down in *McKee v. Mining Co.*, 8 Colo. 392, 8 Pac. Rep. 561, it was not error to refuse to give it. In refusing to give the twelfth instruction as asked, there was no error, for the reason that there was no testimony offered on the part of defendant tending to prove that the injuries for which recovery was sought occurred through the negligence of a servant of the defendant; nor was such a claim, so far as the record discloses, interposed during the trial of the cause. The defendant relied at the trial, as in this court, upon the ground of plaintiff's contributory negligence, as its defense.

It is also contended that the court erred in instructing the jury that it is not negligence to commit an error under the influence of fear produced by the appearance of sudden danger, and also that there was error in instructing to the effect that if the defendant, through its negligence, put the plaintiff in a position of immediate danger, real or apparent, and that plaintiff, through a sudden impulse of fear, attempted to escape the danger, and in so doing actually received the injury he was attempting to escape, then he may recover. We cannot agree that these objections are well taken. On the contrary, we think the instructions substantially correct, under the evidence and circumstances of the case. *Coal Co. v. Healer*, supra. As to the question of damages, the jury were fairly and properly instructed. Ample testimony appears to show that the injuries of plaintiff were permanent; and it is utterly impossible for us to say, under the circumstances, that plaintiff, thus permanently injured, was not entitled to the amount mentioned in the verdict of the jury. True it is that it was a question between the physicians

who testified on the part of plaintiff and defendant, as to whether the injuries received were of a permanent character. But it is fair to assume that the jury found that the injuries were of that character, and upon such finding based the amount of damages. The witnesses were before them, and apparently without any interest, directly or indirectly, in the result of the cause. Each were equally entitled to credit; and, in this case, "when the doctors disagree," we think it was for the jury to decide. The instructions of the court were full, and in keeping with the doctrine as announced in *Wells v. Coe*, 9 Colo. 159, 11 Pac. Rep. 50. We are therefore unable to escape the conclusion that the cause was fairly and impartially tried, the jury correctly instructed upon the law of the case, and that the evidence is sufficient to support the verdict. The judgment should be affirmed.

PATTISON, C. C., and REED, C., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

(83 Cal. 274)

CARTER v. MCQUADE. (No. 13,434.)

(*Supreme Court of California*. Feb. 23, 1890.)

HUSBAND AND WIFE—DIVISION OF PROPERTY.

Civil Code Cal. § 153, provides that a husband or wife may enter into any engagement or transaction with the other, respecting property, which they might if unmarried; and sections 166 and 168 provide that the wife may file an inventory of her separate property in the county recorder's office, and that the filing shall be notice and *prima facie* evidence of her title. *Held*, that a division of community property between a husband and wife on their separation, followed by the record of an inventory of the wife's separate property, including her share of the divided property, gives the wife priority therein over a creditor of the husband who had both actual and constructive notice of the division before bringing suit, though there had been no immediate delivery of the divided property to the wife, followed by an actual and continued change of possession.

Commissioners' decision. Department 2. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

I. M. Kallach, for appellant. F. D. & G. W. Nicol, for respondent.

BELCHER, C. C. This is an action to recover the possession or value of certain personal property. The plaintiff had judgment, and from that judgment, and an order denying a new trial, the defendant appeals. The material facts of the case, as shown by the record, are as follows: In December, 1887, the plaintiff, Anna L. Carter, and Jacob E. Carter, were husband and wife, and were residing on a tract of land in Tuolumne county. On the 22d day of that month they entered into a written agreement, by which he agreed to give her "a bill of sale and peaceful possession" of certain described personal property, and in consideration thereof she agreed to relinquish all claims against any property,

real or personal, belonging to him, or which he might thereafter acquire, and also to relinquish all claims against him for the future support of herself and their children. It was then stipulated in the agreement "that the children now belonging to the family shall, at their own pleasure, visit either party to this instrument, and be welcome, and that either party to this instrument shall have the privilege to visit the children at any time or place they may be located, and no insinuations be offered by either party to the other to mar the pleasure of such visit." In pursuance of this agreement, Carter executed and delivered to his wife a bill of sale of the property agreed upon, reciting therein that it was made for and in consideration of \$512.10, "to me paid in hand by Mrs. Anna I. Carter;" and further reciting, after the *habendum* clause: "And I do, for myself and legal representatives, agree with said party of the second part, and her legal representatives, to warrant and defend the sale of the aforementioned property unto the said party of the second part, and her legal representatives, against all and every person whatever." Before making the agreement and bill of sale, the parties had all of their personal property appraised and divided into supposed equal parts, and it was one of these parts that he transferred to her. Shortly after the papers were signed Carter went away to Merced county, where he afterwards made his home. He also took away his part of the property. Mrs. Carter remained at her old home, in Tuolumne county, and kept there her five children and her part of the property. Carter occasionally went back to his old home. Several times he stopped over night, and one night he slept with his wife. On March 6th he made to her a new bill of sale for 30 head of hogs, more or less. In April following the above transactions plaintiff made out, signed, and acknowledged, in proper form, a full and complete inventory of her separate personal property, including that transferred to her as above, and caused the same to be recorded in the office of the recorder of the county in which she resided. In May, 1888, one Horsley commenced an action against Carter in a justice's court in Merced county, and, having obtained judgment, he filed an abstract thereof in the office of the county clerk, and had the same docketed in the judgment docket of the superior court. He then took out an execution, and placed the same in the hands of the defendant, who was the sheriff of Tuolumne county, with directions that he levy it on the property described in the complaint. The defendant levied the execution as directed, and advertised the property for sale. At the time of the levy plaintiff notified defendant that the property was hers, and before the sale she served on him a written notice that the property was her separate property, and a demand that he release and surrender the same to her. Defendant refused to comply with this demand, and thereupon this action was commenced. By

his answer the defendant denied that the plaintiff was the owner or entitled to the possession of the property described in the complaint or any part thereof, and he alleged that it was all the community property of Carter and his wife.

1. There is no pretense that the transfer to plaintiff was made with any intent to hinder, delay, or defraud any creditor or creditors of the transferrer, nor could such a pretense be sustained. Carter was a witness for defendant, and, after stating that he was the husband of plaintiff, said: "On December 22d I entered with her into an agreement of separation and division of property. The property described in the agreement has never been removed from the ranch to my knowledge. * * * My intention in leaving these things was to enable my wife to support herself and family, and for that purpose I made a bill of sale." Horsley was also a witness for defendant, and testified: "I talked with Mr. Carter about the suit. He told me his wife had violated the agreement in regard to this division of property, and that he couldn't get anything towards paying his debts. He told me he thought this property was subject to his debts, and I had better look out for my claim. I then commenced suit. On the same day I commenced suit I obtained judgment. Mr. Carter was there, and admitted service. He knew that I got judgment. As soon as I got judgment I issued execution. Mr. Carter told me that his wife had violated the agreement, and the property in her possession was subject to his debts. * * * He told me about the division between himself and wife, and I knew it when I gave instructions to the sheriff to levy on this property. Since that time Carter has continued to trade right along with me."

It is, however, claimed for appellant that there was no immediate delivery, followed by an actual and continued change of possession, of the property transferred, and that the transfer was therefore fraudulent and void, as against a creditor of the husband. In this state either husband or wife may enter into any engagement or transaction with the other, respecting property, which they might if unmarried. Civil Code, § 158. A husband may convey real or personal property to his wife, and, whether the property conveyed be his separate property or community property, the presumption is that it thereby becomes, and is thereafter to be treated, as her separate property. *Burkett v. Burkett*, 78 Cal. 310, 20 Pac. Rep. 715; *Taylor v. Opperman*, 79 Cal. 468, 21 Pac. Rep. 869. And, when a wife has separate personal property, the statute provides that she may file an inventory thereof in the office of the recorder of the county in which she resides, and the filing of the inventory is declared to be notice and *prima facie* evidence of her title. Civil Code, §§ 165, 166. It does not appear when the debt to Horsley was contracted. So far as we can see, it may have been after the

transfer to plaintiff. Nor does it appear that he could not just as well have collected his debt out of property belonging to the debtor. But, however this may be, it is clear that before commencing his suit he had actual and constructive notice of the plaintiff's title and possession, and we think that title and possession sufficient for all the purposes of this action. See *Morgan v. Ball*, 81 Cal. 93, 22 Pac. Rep. 331.

2. The new trial was also asked on the ground of newly-discovered evidence. We have carefully read the affidavits submitted, and find nothing in them which would have justified the trial court in granting the motion. Looking at the whole case, we see no prejudicial error, and we therefore advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(83 Cal. 303)

In re DISBARMENT OF LUCE *et al.* (No. 20,534.)

(Supreme Court of California. March 1, 1890.)

DISBARMENT OF ATTORNEYS—CONSPIRACY TO DEFRAUD—EVIDENCE.

1. In disbarment proceedings against a firm of lawyers of many years' service at the bar, and of good reputation, it appeared that one of the partners had loaned an insolvent \$1,000, and had taken as security jewelry worth \$850 or \$700, but which the insolvent had represented to be worth more than twice as much. On learning of the overvaluation, some months afterwards, this partner insisted on a settlement of his claim, and it was agreed at the office of the firm that he should keep the jewelry as payment of \$500 on the debt, and that the insolvent should deliver in addition other jewelry out of his stock, at 50 cents on the dollar, at the insolvent's valuation, in payment of the balance, amounting to \$327. Held that, as both the insolvent and the partner testified that this was a *bona fide* transaction, the supreme court would not assume that a contemplated assignment by the insolvent was known to the partner, and that he entered into the arrangement for the purpose of aiding the insolvent in defrauding his creditors.

2. Immediately after the arrangement had been made, the insolvent asked for another member of the firm. On his arrival, the insolvent informed the two partners that he was unable to pay his debts; that he wished to make an assignment, but not to his principal creditor; and that he desired to retain the partners to draw the necessary papers, and act for him in any proceeding that the principal creditor might institute. After some talk, the partners agreed to accept \$2,500 worth of jewelry out of the insolvent's stock, at his valuation, as a retainer, and as payment of the \$327 still due one of the partners. Held that, it appearing that the actual value of the jewelry was only \$766, the court could not say that the retainer was so large as to render the parties liable to a charge of fraudulent conspiracy, or that for accepting it the partners were liable to be disbarred.

3. Evidence that the assignee had asked the partners whether he could go on with the business, keeping an account of sales; that they told him that they would not object, but that he must consult other counsel; and that the partners were general counsel in an action against themselves, the insolvent and the assignee,—does not support a charge that the partners acted as counsel, not only for the insolvent, but also for the assignee.

4. Evidence that at the time of their retainer the insolvent told the partners that a clerk in his store had not drawn her wages for two years; that he had just paid her off by giving her \$1,800 worth of goods; and that the partners told him that he had a right to do so if the debt was *bona fide*,—does not support a charge that the goods were delivered to the clerk on the advice of the partners, with the intent to defraud creditors.

5. The fact that the insolvent used the back of one of the business cards of the partners in drawing an order directing a bank to deliver pledged goods to one of his friends, is not proof that the order was given on the advice of the partners for the purpose of defrauding creditors out of the difference between the value of the goods and the amount for which they were pledged.

6. When the partners accepted the retainer, they had in their hands for collection a claim of \$80 against the insolvent. This fact was known to only one of the partners, who testified that it had escaped his memory on accepting the retainer; that it did not occur to him until after receiving the confidences of the insolvent; and that he had subsequently advised the person who sent the claim of what he had done, intending to make the claim good in case of dissatisfaction. Held that, as there must be a union of act and intent, the acceptance of the retainer while having this claim against the insolvent was not such unprofessional conduct as justified disbarment.

7. A few days after taking possession of the insolvent's store the assignee took an account of stock, and afterwards brought the book containing the account to the partners, to enable them to make out the inventory required by law. They then discovered that the assignee had used the same book that had been used by the insolvent some six months before for the purpose of taking an inventory, a copy of which had been sent to his creditors. They called the assignee's attention to the fact, and in his presence, and with his consent, one of them cut out the old inventory, intending to use it as protection to the insolvent if the correctness of the copy should ever be assailed. The book—a kind generally used for writing memoranda in pencil—contained nothing except these two inventories. Held that, as the book was not a book of record, and as the leaves were not destroyed, but promptly produced when called for, this transaction was not a violation by the partners of their oaths, or their duties as attorneys.

8. Where there is nothing to connect the senior member of the firm with any of the alleged frauds of the insolvent, or with the transactions of his partners, except that they used the firm name in the conduct of the business, the charges of unprofessional conduct, as against him, will be dismissed.

In bank. Disbarment proceedings.

Rothchild & Ach, for petitioner. *Bicknell & Denis* and *Chapman & Hendrick*, for respondents.

Fox, J. This is an application made and filed by August Heilbronner for the disbarment of the above-named defendants, composing the law firm of Luce, McDonald & Torrance, attorneys at San Diego. The record is very voluminous, consisting of some 800 pages of testimony and about 300 pages of printed argument. A careful examination of the entire matter reveals the fact that the proceeding is one of many instituted, under both the civil and the criminal law, in the course of a bitter contest between Heilbronner, a creditor, and K. C. Naylor, of San Diego, an insolvent debtor. Very much of the evidence introduced, and of the argument made, has no relation to this case, except as by it, it is attempted to show that Naylor was guilty of divers frauds or at-

tempted frauds to avoid a just settlement with his creditors, and that these defendants, his attorneys, were cognizant of, and active participators in, those attempted frauds. Naylor is not on trial in this proceeding, and there would be a manifest impropriety in our discussing the question of his guilt or innocence at this time. The very nature of the case requires that we should refer to some of his transactions, but it will be understood that in doing so it is merely for the purpose of illustrating the fact and the legal effect, as to them, of the connection of these defendants with those transactions.

And here we may as well dispose in the outset of one of the defendants. The alleged wrongs complained of, so far as it is claimed that there were any wrongs on the part of these defendants, commenced early in January, 1889. The firm of Luce, McDonald & Torrance was formed December 1, 1888. The defendant Luce was the senior partner and the head of that firm, but he had never been the counsel of Naylor; and there is nothing in all the evidence offered in this case to connect him in any manner with the frauds, if any, attempted by Naylor; nor is there anything to connect him with the transactions of his partners which are claimed to have been fraudulent, except that they used the firm name in the conduct of the legal business growing out of the Naylor assignment. It is not shown that he even had knowledge of the character or extent of that business, or upon what terms, or for what consideration, it was being conducted. Under these circumstances, we dismiss at once, and without further discussion, these charges, so far as they relate to the defendant M. A. Luce.

As preliminary to a consideration of the points separately which are made against the defendants McDonald and Torrance, it may be proper to say that it appears that they are both lawyers of many years' service at the bar. McDonald had been a resident of San Diego about two years, and Torrance a little over one year, when the firm of Luce, McDonald & Torrance was formed. Both have borne a good reputation as attorneys, and as men of integrity and honor, since their residence in San Diego. Both came to this state from Kansas and are proven to have borne an enviable reputation as lawyers and men in that state for many years before they came to California; Mr. Torrance resigning the position of district judge, which he had filled with distinction for nearly two terms, in order to come here, and having once been nominated for judge of the supreme court, but subsequently declared ineligible because of the fact that he held the position of district judge at the time. These facts are stated preliminarily, because these defendants, in this proceeding, which is *quasi* criminal in its nature, are entitled to the benefit, not only of the presumption, but of such proof as is made, of good character and reputation, in the consideration of the weight to be given to their own testimony, as well

as to such other evidence as may tend to either create or leave a doubt as to the fact or intent of their acts.

A few other facts of general application may be stated: K. C. Naylor was engaged in the jewelry business at San Diego, and, as early as June, 1888, became heavily embarrassed, and pressed for money to meet his obligations. In that month, he took an account of stock, and made an inventory, making the original entries thereof in a book such as is sometimes called a "tickler,"—a sort of memoranda book usually used for writing memoranda in pencil,—which had never been used before, and was never afterwards used by him. From the entries made in this book, an inventory of the stock, showing stock and fixtures on hand to the amount of \$25,675.38, was made up and sent to the creditors in San Francisco, with a view to securing forbearance. This was done in June, 1888. In January, 1889, Naylor was indebted about \$15,000, and of this something over \$12,000 was in the form of a promissory note held by the complainant Heilbronner, and represented all the then known eastern and San Francisco claims against him. On the 9th of January, 1889, Heilbronner appeared in San Diego, and threatened immediately to attach, unless Naylor would either pay him at once \$8,000, or give him approved security for his entire debt, or make to him (Heilbronner) an assignment of all his property for the benefit of his creditors. Naylor could not pay the money, but he made a statement in writing to Heilbronner to the effect that his assets were equal to \$20,000, and that he did not owe to exceed \$500, exclusive of the amount due to him, (Heilbronner,) and, upon some promise, either to find security, or make the assignment requested, (the testimony being conflicting as to just what the promise was, but that being immaterial,) induced Heilbronner to give him a few days' further time; and the latter then left the city. The further facts necessary to be stated in this connection will be stated as we consider the separate points or charges made against these defendants.

1. On the 10th day of May, 1888, Torrance had loaned to Naylor \$1,000 in money, and received from Naylor, as collateral security for the repayment of the same, goods from the store which Naylor represented as being worth \$1,414.28, at the cost price to him. About the middle of November, the money being past due, and only a small payment having been made thereon, and that out of the proceeds of the sale of some of the goods so deposited, which had been returned to Naylor, at his request, for that purpose. Torrance took the goods to an expert, and had them examined and appraised. The amount then remaining in his hands, at the price at which they had been deposited, was \$1,373.85. The expert placed their wholesale value at \$650 to \$700, but at the same time said that the selling value of the goods in San Diego would be considerably less than

the wholesale value he had placed upon them. Shortly after ascertaining the real value of the goods, Torrance informed Naylor that he had had the goods valued by an expert, who had placed a value on them of less than 50 cents on the dollar of Naylor's valuation, and insisted on Naylor paying the note, telling him that if he did not have the money he must pay in goods, or in some way raise the money. Naylor replied that he had a man in view from whom he expected to get the money; and thereafter Torrance saw Naylor many times and pressed him for the money. On the 10th of January, 1889, Torrance saw Naylor, and insisted that the matter must be settled at once. If he did not have the money, he must satisfy the claim with jewelry. Naylor then paid him \$100, and asked for further time, which Torrance refused to give. Naylor then said that he would see him the next day, and close the matter up by paying him in goods. On the morning of the 11th, Naylor called at the office of Torrance to settle the matter, when Torrance told him, as he had done before, that the goods he had were worth less than 50 cents on the dollar of the price Naylor had placed on them; that he had no use for them himself, and he would not be willing to take them for more than \$500. There was then due on the note \$827. It was then agreed between them that Torrance should keep the goods he had in hand as payment on the note to the extent of \$500, and that Naylor should deliver, in addition thereto, goods, at 50 cents on the dollar of Naylor's valuation, sufficient to pay the balance of the note, \$327. There is a little uncertainty as to whether this occurred on the 10th or 11th of January, but we conceive that point to be immaterial. Complainant contends that this arrangement was made in contemplation of assignment by Naylor, and for the purpose of defrauding his creditors, and that Torrance knew of the contemplated assignment, and entered into the arrangement for the purpose of aiding and assisting in the contemplated fraud; that the transaction was not *bona fide*, but for the fraudulent purpose aforesaid, and with a secret understanding that at the proper time Naylor would be allowed to pay off the debt, and have return of the goods. And he insists that we must assume, from the nature of the transaction, that both Naylor and Torrance swore falsely when they testified that at the time of this transaction Torrance and his firm were wholly ignorant of what had transpired between Heilbronner and Naylor on the 9th, and of the fact that Naylor contemplated any proceedings in the nature of assignment or insolvency. Whatever may have been in the mind of Naylor, we see no reason for disbelieving his testimony, or that of Torrance, on the question of knowledge on the part of Torrance of contemplation of assignment at the time of this transaction. Nor is there anything in the evidence to support the proposition that he acted with any intent to facilitate the commission of a fraud

on the part of Naylor as against his creditors, or in the expectation of ever returning the goods, or ever receiving his money otherwise than by their sale. There is nothing in the evidence to show that the goods were worth more than the price at which he took them. On the contrary, subsequent events show that he allowed for them all that, if not more than, they are really worth; and, even if Naylor did intend at the time to make an assignment, as he subsequently attempted to do, he had a right to pay off this or any other creditor, if he desired so to do. Civil Code, §§ 3432, 3451. And the creditor accepting payment, either in money or chattels, even with a knowledge of such intent, if he did it *bona fide*, receiving only his just due, and if paid in chattels at their fair value, and without intent to return them to the debtor, was not guilty of fraud in the transaction. This we find from the evidence to be the fact, in reference to this transaction, so far as the defendant Torrance was concerned; and his conduct in this transaction furnishes no ground for disbarment, as claimed by the complainant. The evidence is too voluminous to be here given in detail. In some instances it is conflicting, and in many counsel draw inferences in direct conflict with the sworn testimony, assuming that it is false, even though not contradicted. Time and space will not justify us in any lengthy discussion of such conflicts as arise, or of the inferences drawn by counsel on either side. It is a case where we are to find the facts; and in the further discussion of the case we shall content ourselves with a statement of the facts as we find the truth to be from the evidence, and the inferences which we think we are entitled to draw therefrom.

2. Immediately after the settlement noted in point 1, Naylor asked for Mr. McDonald, whom he had occasionally consulted in legal matters before the formation of the partnership. Mr. McDonald was called from another room to the one occupied by Torrance, and there and then Naylor related to the two—McDonald and Torrance—what had transpired between himself and Heilbronner on the 9th, and Heilbronner's threat to attach if his demands were not complied with. He followed up the statement by declaring that he was unable to raise the money or furnish the security demanded, and stated that he was willing to make an assignment, but would not make one to Heilbronner, as he did not believe that he would treat the other creditors fairly, and said that he owed some \$2,500 or \$3,000 beside what was due to Heilbronner; that he anticipated trouble with Heilbronner, if he assigned to anybody else, and he desired to retain them to prepare the necessary papers, and act for him in such future proceedings as Heilbronner might institute in the premises. We do not pretend to give the exact language of the statement, but the substance and legal effect of it. McDonald advised him, instead of making an assignment, to file a petition in insolvency;

but this he refused to do. They then told him that they could not afford to take hold of the matter for any fee that he would be willing to pay, and that he had better get other counsel; but he insisted upon their acting for him, and wanted them to name their fee. They said they would not accept the retainer for less than \$1,000, which he thought was too much; also, said that he had no money to pay them, and would have to pay them in goods. To this they demurred, and told him that they would not accept goods from his stock at more than 50 cents on the dollar of what he claimed to be his cost price. With this he went away, saying that he would think the matter over, and see them again. At a later hour, either the same day or the next morning, he returned, and said that he would turn over to them goods from his store to the amount of \$2,500 at his cost price in full for their services in his behalf, and of the balance of \$327 still due Torrance. This proposition was accepted, and subsequently, and before the assignment, carried out. It is claimed that this was done with a secret understanding, as in the other case, that the goods should ultimately be returned to Naylor, and the money paid instead, but there is no evidence to support such a contention; and, as before, subsequent events show that the goods were not worth over 50 cents on the dollar of the price fixed on them by Naylor, and were not in fact worth the amount of money for which they were received. This retainer being accepted, McDonald dictated to a stenographer a form of assignment to be made by Naylor to one J. T. Fisher, the nominee of Naylor for that position. After this assignment had been written out, it was ascertained that Fisher was absent from the city, and it was uncertain when he would return. Thereupon other names were discussed between Naylor and his counsel, and one or two other persons consulted about accepting the position of assignee before they found one to accept. At last J. D. Hanbury, whose name was suggested by Torrance, was seen and consented to act; and his name was substituted for that of Fisher in the paper, and it was duly executed. The expert who had examined the other goods also examined those delivered under this arrangement, and testified that the wholesale value of the goods on the day they were delivered was \$1,533.92, if new, but that, in their shop-worn condition, they could not have been sold in San Diego at that time for more than 50 per cent. of the value, say \$766.96. It is claimed that the charging and acceptance of so large a fee, and taking therefor out of the stock of an insolvent debtor so large a quantity of goods, is such evidence of fraud, and of aiding and assisting a fraudulent debtor in cheating, or in an attempt to cheat and defraud, his creditors, as not only justifies, but demands, the disbarment of the attorneys who did it. As to the nominal amount of the fee, we confess it would seem to be large for the mere work of preparing the assignment papers, but this

was not the only service which they took the risk of having to perform under that retainer; and future developments justify the opinion which they then entertained, that it was not the only service they would be compelled to perform. While, at Naylor's price, the quantity of goods taken was large, at its salable value, it was small, compared to the amount for which it was accepted. It was not in excess of the balance due Torrance for money loaned, and of a reasonable fee for the service which might reasonably be anticipated in any case of assignment of such a business and such assets. Since attorneys' fees are peculiarly a matter of agreement between the parties, it can hardly be said that the amount actually realized here was such as to render the parties liable to the charge of fraudulent conspiracy, or the attorneys who accepted it liable to disbarment for having accepted it. There is nothing in the evidence to justify the inference that the goods were to be returned at some future time, and the money accepted in lieu thereof, although it is apparent that this is the only way in which the money value for which they were received can ever be realized by the attorneys. In fact, they offered to return them for \$600, which was declined.

3. It is charged that the defendants acted as counsel, not only for Naylor, but also for Hanbury, the assignee. The evidence does not sustain this charge. Before the assignment, Torrance saw Hanbury, and asked him if he would accept the position of assignee, and explained to him the nature of the duties and responsibilities which he would have to assume; and after his appointment he asked the defendants if he could keep the store open, and go on with the business, keeping account of the sales, and the work done. They told him that they would not object to such a course, but at the same time told him that he must procure, and advise with, other counsel; and he did so. Afterwards, when a civil action was brought against Naylor, Hanbury, these defendants, and others who had received goods, to set aside the assignment, and recover the goods that had been transferred, these attorneys were general counsel in the case, in support of the *bona fides* of their client; but it does not appear that they acted as counsel for the assignee in the conduct of his business as such.

4. At the time of their retainer, Naylor told the defendants that Mrs. Dow, a clerk in his store, had been at work there for two years at \$75 per month; that she was his affianced wife, and had been anxious to make the business a success, and had not drawn any part of her salary, and that he had just paid her off, by giving her goods to the amount of \$1,800 from the store, and asked them if he had the right so to do. They told him, if it was a *bona fide* debt, he had the right so to do. It is claimed that these goods were not delivered to Mrs. Dow until after the advice was given; that it was done under the advice of attorneys; that they knew it was not a *bona fide* debt, and the advice was given

by the counsel with the intent to cheat and defraud the creditors of Naylor. The evidence does not support this claim. Defendants and Naylor all testify that when consulted about the matter the information given to defendants was that the goods had already been delivered to Mrs. Dow, and we think the preponderance of the evidence as to the fact of delivery to her is in favor of the truth of that statement. Defendants knew that she was a clerk in the store, and they had no knowledge as to the *bona fides* of her claim, except the statement made to them at the time of the consultation.

5. It is claimed that other goods besides the amount above mentioned, of the value of some \$2,000 or \$2,500, were given to and secreted by Mrs. Dow, and never afterwards found, and that these were given to her, under the advice of the defendants, for the purpose of secreting them, and ultimately securing to Naylor the benefit of them. Whatever may be the fact as to the delivery of these goods, or the intent with which they were delivered, the evidence fails to show that these defendants had any knowledge of the transaction whatever, or any connection with it, as advisers or otherwise.

6. It is claimed that, at the time of their retainer, Naylor was indebted to a local bank, and as security therefor had pledged to the bank goods to an amount largely exceeding the indebtedness; that pending the preparation of the assignment an order was given to a friend of Naylor directing the bank to deliver to said friend the goods so pledged upon his paying the amount for which they were held; that this was done, under the advice of the defendants, for the purpose of securing to Naylor the benefit of the difference between the value of the goods and the amount of the indebtedness for which the same were pledged, in fraud of the rights of creditors. The only ground upon which to base this claim is that the order is written upon the back of one of the business cards of the defendants, and therefore, presumptively, in their office. All the defendants deny any knowledge of the transaction whatever, and there is no evidence to show that they had any such knowledge, or were consulted on the subject.

7. At the time of accepting this retainer the defendants had in their hands for collection a claim of \$80.96 against Naylor, in favor of Ingraham & Co., of San Francisco, which had been handed to Mr. McDonald by an attorney of San Francisco, in connection with some other business, and upon which McDonald had before that time made demand upon Naylor. It appears from uncontradicted evidence that no other member of the firm had any knowledge of the fact of this claim being in its hands at that time, and that at the moment of accepting the business of Naylor the fact had escaped the memory of McDonald. It did, however, occur to him, before the assignment was complete, and he tried to make Naylor pay the claim, but without success. He felt that it was putting him

in an embarrassing position, but he had already received the confidences of Naylor and his retainer, and could not then refuse to proceed. He had received no retainer on account of the claim, nor any instructions except to use his best judgment. He had known for months that a suit against Naylor was likely to precipitate insolvency, and concluded that, after all, the next best thing to collection was an assignment for the benefit of creditors, out of which he then supposed 75 or 80 per cent. would be realized. He subsequently advised the San Francisco attorney by letter of what had been done, and of the connection his firm with the assignment proceedings, not claiming for his firm any benefit of his oversight, but putting it in the strongest light against themselves, intending, as he testifies, if the attorney was not satisfied, to make that claim good themselves. He further said that the attorney had never expressed any dissatisfaction with the course pursued, and still continued to send his business to the firm. The acceptance of this retainer while they had that claim in hand is charged as one of the acts of unprofessional conduct for which the defendants should be disbarred. The charge is not made or prosecuted by any person interested in the collection of the claim, nor is any such person called as a witness in support thereof. The facts, as above stated, are shown by the sworn testimony, and uncontradicted. To support the charge there must be shown a union or joint operation of act and intent, and we do not think that the evidence upon this charge is sufficient to support a finding of guilty.

8. In communicating to his counsel the condition of his affairs at or after the time of their retainer, Naylor told them of the inventory which had been made in June, 1888, and sent to his creditors in San Francisco. They asked him if he knew that it was correct, when he said that he supposed so, but was not sure, as it had been written out by one Adams, who took it to San Francisco, and he had never compared it with the original memorandum. They then asked him for the original memorandum, but he said he did not know where it was, as it was entered in some old book which had been used for no other purpose, and he did not then know where it was. A few days after the assignee went into possession, he had the clerk take an account of stock, and, when finished, took it to the office of the defendants, at their request, to allow them to use it in making up the inventory which the assignor, Naylor, was required by law to make and file in the office of the county clerk. Upon examining it, they found that the pencil entries of this account of stock were made in the same "tickler" which Naylor had used for a like purpose in the June before. There were no other entries in the book; and these two memoranda were in different parts of the book, having no relation with each other. Indeed, the assignee did not know what the other entries were about. After using the new en-

tries in this book for the preparation of the inventory to be verified and filed by the assignor, the assignee came for the book, to deliver it to his own counsel. His attention was then called to the other entries, and it was explained to him what they were; and Torrance told him that they desired to keep that part of the book for the protection of their client, if any question was ever raised as to the accuracy of the inventory which had been sent to San Francisco in June. Hanbury, the assignee, said that he had no use for it, (which was true,) and that they might do what they pleased with it, but he wanted his own account of stock to hand to his counsel. Thereupon, in his presence and with his consent, Torrance cut out the leaves covering the memorandum of the account of stock taken in June, 1888, and laid them away, returning the balance of the book to Hanbury. This transaction is presented as the most serious of the offenses committed by these defendants,—one amounting to a public offense, for which they were liable to public prosecution, and for which they ought to be disbarred. We do not so consider it. The book had no value as an asset in the hands of the assignee. It was not one of the books of account of the business and property which passed by the assignment, and was not a book which passed or belonged to the assignee. As the assignee found it, it contained no entry or record of value or interest to him or to the creditors. In fact, it was unintelligible to them, and useful only to Naylor. To him it might or might not become useful, not only as a means of verifying the accuracy of an inventory which had not been written out by himself, but which had been transmitted to his creditors, but also as a means of tracing goods which had in the mean time been disposed of by Adams, the man who made up the June inventory from this memorandum, and with whom no accounting had yet been had. It was not an "invoice book," or a book of record, public or private. It was a mere private memorandum, was not taken to be destroyed, and was not destroyed; but the severed leaves were preserved, and, when called for, were promptly produced, offered in evidence, and filed as an exhibit in this cause. There has been no attempt made to use them for any fraudulent purpose, and the evidence fails to show that they were taken or removed for any such purpose, or with any such intent. There is some evidence tending to show that the fact of their removal was attempted to be used as a means of extorting a large sum of money from these defendants, in default of the payment of which this proceeding would be prosecuted; but the only connection of these defendants with that attempt was a refusal to yield to the demand. For this refusal they are not punishable at the hands of this court; and we do not think that the removal of these leaves from the covers between which they were found, and the subsequent preser-

vation and use that was made of them, constitutes a violation of their oaths, or of their duties as attorneys and counselors.

9. It is further charged that the defendants corruptly attempted to induce Mr. Hunsaker, local counsel of creditors of Naylor at San Diego, to withdraw from the prosecution of the action brought to set aside the assignment and for other relief against Naylor and others. The evidence fails to sustain the charge.

Some other, and, to our minds, minor, points, are made against the professional conduct of defendants, but those noted are all that are material to be discussed here. Our conclusion from the entire evidence is that the defendants are not guilty of unprofessional conduct, to-wit, the violation of their oaths, and of their duties as attorneys and counselors; and it is ordered and adjudged that this proceeding be dismissed, and that defendants have judgment for their costs against the complainant.

We concur: SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.; MCFARLAND, J.

(88 Cal. 194)

STANTON v. FRENCH, Constable.
(No. 18,186.)

(Supreme Court of California. Feb. 25, 1890.)

EXEMPTIONS—JOINT OWNERS—REMEDIES—
WAIVER.

1. The interest of one joint owner of property may be sold on execution against her, though the property is exempt as to the other joint owner.

2. In an action by the other joint owner for the value of such property sold on execution, instructions that acceptance by plaintiff of the balance of the proceeds of the sale, after the judgment is satisfied, is a ratification of the sale, are properly refused.

3. In order to recover attorney's fees, plaintiff need not show that he has paid them.

4. Where a man's wife is in the habit of transacting business for him, and of receiving and paying out money for him with his consent, payment to her in his presence, without objection from him, is a payment to him.

5. One who is engaged in delivering bread to the customers of his wife, who owns the bread and business, and collects and receives the proceeds of sale, is not a peddler, within the meaning of Code Civil Proc. § 690, subd. 6, exempting from sale on execution certain property of a peddler by means of which he earns his living.

6. In an action for the value of property sold under execution, and which plaintiff claims was exempt under such provision, a charge that it is necessary for plaintiff to prove that the property sued for was the only property of the kind owned by plaintiff is properly refused.

7. A notice of claim of exemption from execution, signed by two persons, is sufficient as a claim for either separately.

8. Failure to claim property levied on as exempt, within a reasonable time thereafter, is a waiver of the exemption.

Department 2. Appeal from superior court, Merced county; C. H. MARKS, Judge.

Action by John Stanton against H. W. French, constable, for the value of certain property sold by defendant under execution against plaintiff and his wife, Mary, and which plaintiff claimed was exempt from ex-

ecution, under Code Civil Proc. Cal. § 690, subd. 6, which exempts, *inter alia*, certain property habitually used by a peddler in earning his living. Defendant asked the following instructions:

"(3) If you find from the evidence that the property mentioned in the complaint was the property of plaintiff on the 25th day of January, 1887; and that he at that time, and prior thereto, was a peddler of bread, and habitually earned his living by the use of said property; and that defendant, as constable, levied on and took the same into his possession under a writ of attachment issued out of the justice court of No. two township, in the suit of Joseph Spinney against John Stanton and Mary Stanton, and that subsequently a judgment was recovered in said action by said Spinney against said John Stanton and Mary Stanton, and an execution was issued out of said court thereon, and placed in the hands of defendant, as constable, for levy; and that defendant, as constable, levied on and took into his possession, and sold, said property, as such constable, to satisfy said execution; and that he realized from such sale more than enough to satisfy said execution and costs and expenses of sale; and that he, as constable, paid said balance to said John Stanton and Mary Stanton, and they accepted and received said balance of the proceeds of the sale of said property, knowing that it was the balance of the proceeds of said sale,—then such acceptance of said balance was a ratification of the sale made by defendant, as such constable, and plaintiff cannot recover in this action.

"(4) If you find from the evidence that plaintiff and Mary Stanton jointly claimed the property, mentioned in the complaint of defendant as theirs, and exempt from execution, and defendant, after paying the judgment in the case of Spinney against John Stanton and Mary Stanton out of the proceeds of the sale of the property, and paid the balance of such proceeds over to plaintiff and said Mary Stanton, or to either or both of them, with the knowledge and consent of the other, and such balance was so accepted and received, then it was a ratification of the sale by defendant, and plaintiff cannot recover in this action.

"(5) If you find from the evidence that the property mentioned in the complaint was owned by plaintiff and Mary Stanton jointly, then, notwithstanding, plaintiff might have been a peddler of bread, habitually earning his living by the use of said property, defendant would have the right to levy upon and sell the interest of Mary Stanton to satisfy a judgment against her, and such sale would pass a valid title to all of her interest in the property, and plaintiff cannot recover such interest in this suit.

"(6) While the law exempts certain property of a judgment debtor from execution and forced sale, such exemption is a personal privilege which may be waived by the debtor,

and a failure to claim the property as exempt, when levied on to satisfy a judgment against him within a reasonable time thereafter, is a waiver of the exemption right, and the officer selling exempt property without such claim of exemption is not liable for the value thereof.

"(7) The burden of proving every material allegation of the complaint is on plaintiff, and, if he fails to prove the material allegations of his complaint by a preponderance of evidence, you should find for defendant.

"(8) If you find from the evidence that Mary Stanton, plaintiff's wife, was at and prior to February 11, 1887, in the habit of transacting business for plaintiff; that she was in the habit of receiving and paying out money for him with his consent,—then the payment of any balance from the proceeds of the sales of the property mentioned in the complaint to said Mary Stanton, in the plaintiff's presence and without any objection from him, was a payment to him.

"(9) If you find from the evidence in this case that defendant, after satisfying the judgment in the case of Joseph Spinney against John Stanton and Mary Stanton, paid the balance derived from the sale of the property sued for in this action to plaintiff, and he accepted and received it, knowing it was such balance, or if any one in his presence received it for him, with his consent, then he ratified the sale made by defendant, as constable, and waived his right to claim the property as exempt."

"(11) It is necessary, in order to entitle plaintiff to recover in this action, that he prove that the property sued for was the only property of that kind and character owned by plaintiff at the time it was taken possession of by defendant.

"(12) If you believe from the evidence in this case that plaintiff was simply engaged in delivering bread to the customers of Mary Stanton, and that she owned the bread and business, and collected and received the proceeds of the sale of this bread, then he was not a peddler, under subdivision 6 of section 690 of the Code of Civil Procedure, and is not entitled to the exemption of the property mentioned in the complaint.

"(13) In a suit of this character, plaintiff cannot recover attorney's fees unless he shows that he has paid attorney's fees, and if he fails to prove that he has paid such fees he cannot recover them in this action."

The court refused to give each and all of said instructions, and defendant excepted. The court then, at the request of plaintiff, instructed the jury as follows: "A notice of claim of exemption from execution, signed by two persons, is sufficient as a claim for either separately." To the giving of said instruction defendant excepted. Verdict for plaintiff, and defendant appeals.

J. K. Law, for appellant. *Frank H. Farrar and Breckinridge & Peck*, for respondent.

McFARLAND, J. This action was brought to recover the value of two horses and a wagon and harness. They were taken by defendant, as constable, under an execution against plaintiff and his wife, and sold. Plaintiff claimed the property as exempt from execution under subdivision 6, § 690, Code Civil Proc.; the claim being that, as a peddler, he habitually used it to earn a living. (There was also in the complaint an item for the value of a certain "bread-box," which was afterwards withdrawn.) Plaintiff recovered judgment, and defendant appeals from the judgment, and from an order denying a new trial.

The judgment will have to be reversed for the refusal of the court to give certain instructions asked by appellant. Counsel for respondent contends that the record does not show that other instructions were not given by the court, either on its own motion or at the request of one of the parties; and that, in the absence of such showing, it must be presumed that other instructions, covering the matters contained in appellant's rejected requests were given. But, unfortunately for this contention, the record does show affirmatively that there were no such other instructions. It is true that at the beginning of the statement, on motion for a new trial, we find it stated that "the following among other proceedings were had and taken;" but the statement afterwards shows that defendant asked the court to give 13 instructions, marked, respectively, from 1 to 13; that the court refused to give those marked from 8 to 13, inclusive; that the court then gave a certain instruction asked by plaintiff; and that "the only other instructions given to the jury were numbered 1 and 2, asked for by defendant, and are as follows." As respondent had an opportunity to propose amendments to the statement, he should have seen to it that if there were other instructions they were put into it.

Instruction No. 7, asked by appellant and refused by the court, that "the burden of proving every material allegation of the complaint is on plaintiff, and if he fails to prove the material allegations of his complaint by a preponderance of evidence you should find for defendant," is so much of a truism that, perhaps, the refusal or neglect of the court to give it should not, of itself, work a reversal of the judgment. But the instructions asked by defendant, numbered 5, 6, 8, and 12, were correct and pertinent, and should have been given. The other instructions asked by defendant were properly refused. The instruction given at request of plaintiff was correct. We think that the document marked "Exhibit A" was a sufficient notification to the constable of a claim of exemption, and that it was not invalid because signed also by plaintiff's wife. Neither do we think that the receipt by the wife of \$13, surplus of the proceeds of the sale after satisfaction of the execution, as proved in the case, was a waiver of exemption. We see no other material

errors in the record, but, for the reasons above given, the judgment must be reversed. Judgment and order reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

(83 Cal. 361)

MCALLISTER v. HAMLIN, Auditor. (No. 13,545.)

(Supreme Court of California. Feb. 27, 1890.)

STENOGRAPHERS—COMPENSATION—CONSTITUTIONAL LAW.

1. Pen. Code Cal. § 869, subd. 6, providing that the compensation of a reporter for taking the testimony of witnesses before an examining magistrate "shall be fixed by the magistrate before whom the examination is had, and shall not exceed that now allowed reporters in the superior courts of this state, and shall be paid out of the treasury of the county * * * in which the examination is had, on the certificate and order of the said magistrate," refers to Code Civil Proc. Cal. § 274, which declares that the official reporter shall receive as compensation for his services "a sum, to be fixed by the court, not exceeding \$10, per day," and is not affected by the unconstitutional amendment (Deer. Code Civil Proc. 70) making the compensation of stenographers in the superior courts to depend on a salary to be fixed by the judge.

2. Such section (869) is not a delegation of legislative power, and is constitutional.

3. It is the duty of the county auditor to draw a warrant for such compensation on the county treasurer, on the certificate and order of the magistrate, without allowance of the claim by the board of supervisors under Pol. Code Cal. § 4048, subd. 12, or the county government act of March 14, 1888, requiring such board to "examine, settle, and allow all accounts legally chargeable against the county, except salaries of officers, and order warrants to be drawn on the county treasurer therefor."

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Anderson, Fitzgerald & Anderson and J. M. Damron, for appellant. *Del Valle & Munday and Hutton & Swanwick*, for respondent.

FOOTE, C. This action is for a writ of mandate to compel Mr. E. W. Hamlin, the auditor for the county of Los Angeles, to draw a warrant on the treasurer of that county for the sum of \$34.40, the same being the amount of compensation allowed the petitioner, and respondent here, for services rendered as a short-hand reporter, under an appointment made by a justice of the peace of that county, in taking down in short-hand the testimony of witnesses examined before the justice of the peace as a committing magistrate, in a criminal action where the state of California was plaintiff and one J. J. Hedges was defendant. The court below granted the writ as prayed. From the judgment rendered in the premises this appeal is taken.

The point to be determined seems to be in what way, and at what rate, a short-hand reporter performing such services is to be paid. The petitioner's contention is that the method of his compensation, after being appointed to act, is fixed by section 869 of the Penal

Code, subd. 6, which is: "The reporter's compensation shall be fixed by the magistrate before whom the examination is had, and shall not exceed that now allowed reporters in the superior courts of this state, and shall be paid out of the treasury of the county, or the city and county, in which the examination is had, on the certificate and order of the said magistrate." Here the proper certificate and order were made. The legislative intent, to be gathered from the language of the statute, was that short-hand reporters appointed to perform such services as this were to be paid out of the county, or city and county treasury, by the magistrate, exercising a sound discretion in fixing the compensation for the services, after they were rendered; but such fixing to be within a certain prescribed limit, that is not to "exceed that now allowed reporters in the superior courts of this state." There is no question raised but what the auditor must draw the warrant, if the magistrate had the power to fix the compensation, and allow it, under the subdivision of the section, *supra*, without any action by the board of supervisors. This law went into effect on the 14th day of March, 1885. At that date, section 274 of the Code of Civil Procedure upon that subject ran thus: "The official reporter shall receive, as compensation for his services in civil actions and proceedings, for taking notes, a sum, to be fixed by the court, or a judge thereof, not exceeding \$10 per day, and for transcription a sum, to be in like manner fixed, not exceeding 20 cents per hundred words: provided, that * * * in criminal cases, when the testimony has been taken down or transcribed upon the order of the court, the fees of the reporter shall be certified by the court, and paid out of the treasury of the county, or city and county, in which the case is tried, upon the order of the court." So that, if no valid amendment to that section existed up to the time of the allowance made for the services rendered in this matter, such section would have limited the exercise of the discretion of the magistrate, and he could not have made an order for compensation exceeding \$10 per day for taking notes, and for transcription a sum not exceeding 20 cents per 100 words. On the 21st day of March, 1885, the legislature amended section 274, *supra*, (Deer. Code Civil Proc. 70,) and made the compensation for short-hand reporters in the superior courts to depend upon a salary to be fixed "by the judge, by an order duly entered on the minutes of the court, which salary shall be paid out of the treasury of the county in the same manner and at the same time, as the salaries of county officers. * * *" It then appears that after the 21st of March, 1885, the legislature intended that the compensation of short-hand reporters in superior courts, instead of being on the basis of fees to be fixed by the judge, who could not exceed the limit fixed by the legislature, should be by a salary to be fixed by the judge, by an order duly entered on the minutes of the

court, to be paid out of the county treasury as the salaries of other county officers are paid; providing, also, that the salary should be graded on the basis of the population of the various counties. In *Smith v. Strother*, 68 Cal. 194, 8 Pac. Rep. 852, it was held that this method of compensation for short-hand reporters was unconstitutional; that the legislative act attempted to throw upon the judicial branch of the state government a legislative function. If the legislative intent was, as we think, in enacting subdivision 6 of section 869 of the Penal Code, on the 14th of March, 1885, that the compensation for such services as are here involved was to be fixed on the basis established by section 274, Code Civil Proc., as it stood then, at the time when subdivision 6 became a law, on the 14th of March, 1885, and the unconstitutional act of March 21, 1885, (section 274, Deer. Code Civil Proc.,) not being then in existence, was not intended to be referred to, when, in the section and subdivision first mentioned, the words, "not to exceed that now allowed reporters in the superior courts of this state," were used, it must be plain that the method of compensation and the amount are fixed by section 274, Code Civil Proc., before the amendment of March 21, 1885. If, however, it is to be gathered from all the acts, taken together, that the legislature intended subdivision 6 of section 869 of the Penal Code to be governed by the provisions of the act afterwards held unconstitutional, it is equally certain when that act was declared unconstitutional for the reasons assigned by the appellate court, heretofore referred to, that section 274, Code Civil Proc., as it stood before the passage of the unconstitutional act amendatory of it, remained the law; for "no repeal by implication can result from a provision in a subsequent statute, when that provision is itself devoid of constitutional force." *End. Interp. St. § 192.* Hence the petitioner had a right to his compensation as fixed by the magistrate, acting within the bounds of the legislative authority.

But it is urged, further, that the respondent was not entitled to have the auditor draw the warrant on the mere certificate and order of the magistrate; that the auditor could not be compelled to draw the warrant until the board of supervisors of the county had allowed the claim. The reason assigned in support of this contention is that the county government act (subdivision 12 of section 4046 of the Political Code) provides for the allowance of such demands as are here under consideration. The language of that subdivision, defining one of the powers of the board of supervisors, is: "To examine, settle, and allow all accounts legally chargeable against the county, except salaries of officers, and order warrants to be drawn on the county treasurer therefor." The county government act of March 14, 1883, contained the same provision exactly; and it was in force at the date of the decision of the appellate court in *Ex parte Reis*, 64 Cal. 233. From the

opinion delivered in that case, it will be seen that it was held it could not have been the legislative intent that a board of supervisors was to supervise a court with reference to matters confided to its judicial discretion by the legislature. We conclude, therefore, with reference to this matter, that it was not the legislative understanding that the subdivision and section, supra, of the county government act, was in conflict with subdivision 6 of section 869 of the Penal Code, where the last-mentioned declares that such a demand as here discussed "shall be paid out of the treasury of the county, or city and county, in which the examination is had, on the certificate and order of said magistrate." And no mention is made, or hint given, that any action is necessary on the part of the board of supervisors. Nor is it apparent that the legislature intended, when it enacted subdivision 6 of section 869 of the Penal Code, that its provisions should be of no avail, so far as the power given the magistrate was concerned, by reason of the subdivision and section above referred to in the county government act. The legislature did not intend, when it passed the section of the Penal Code, that, notwithstanding it authorized the fixing, by the exercise of judicial discretion by the magistrate, of the reporter's compensation, nevertheless it was left with the board of supervisors, in their discretion, as a superior supervising body, to unfix what had been confided by the legislature to the judicial tribunal. With this understanding, the county government act, and the section of the Penal Code, can both stand, and not conflict in any way. The demands and accounts to be allowed by the board of supervisors are not those which the legislature has expressly authorized the judicial branch of the government to certify to, and order paid out of the treasury of the county, or that of the city and county. No such supervisory power over the courts of the state was ever intended to be lodged with the board of supervisors by the county government act. "To the judge of the proper court the statute commits the discretion of making the orders for such payments. Where such a discretion is by law conferred upon a specific officer, such officer must exercise that discretion personally. * * * And, when properly exercised, the board of supervisors is not required to supervise the action of the court." *Society v. Reis*, 71 Cal. 634, 12 Pac. Rep. 796, and authorities there cited.

We therefore conclude that the function to be performed by the magistrate in such a matter is not legislative, but judicial; that the law under which he is authorized to act is not unconstitutional; and that the county auditor should draw the warrant on the treasury without any supervision by the board of supervisors of the properly performed judicial action of the magistrate. We therefore advise that the judgment be affirmed.

We concur: BELCHER, CC.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(83 Cal. 101)

CUCAMONGA FRUIT-LAND CO. v. MOIR.
(No. 13,055.)

(Supreme Court of California. Feb. 1, 1890.)

SCHOOL LANDS — INDEMNITY SELECTIONS — DESCRIPTION.

1. Act Cong. March 1, 1877, (19 St. at Large, 267,) known as the "Booth Act," and relating to indemnity school selections in California, provides, in section 2, "that, where indemnity school selections have been made and certified to said state, and said selection shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth or thirty-sixth section, in lieu of which the selection was made, shall, upon being excluded from such final survey, be disposed of as other public lands of the United States." Held, that the listment to the state of section 22, township 1 S., R. 7 W., S. B. M., in lieu of section 16, township 13 S., R. 3 W., S. B. M., which was only partly within a private grant, was within the above provision, and was thereby confirmed, and that its subsequent cancellation as to the W. $\frac{1}{4}$ of the section by the secretary of the interior, was void. *McFarland and Paterson, JJ.*, dissenting.

2. An application for the purchase of such land under Act Cal. March 28, 1863, § 53, (St. Cal. 1867-68, p. 522,) which does not describe the land, in an affidavit, by legal subdivisions, as therein required, is invalid, though the land is properly described in the unsworn application. (By a divided court.)

3. As such land did not become the property of the state until confirmed by the Booth act, in 1877, the application is not cured by Act Cal. March 24, 1870, § 1, (St. 1869-70, p. 352,) nor by Act Cal. March 27, 1872, (St. 1871-72, p. 587,) both of which refer only to applications for the purchase of land belonging to the state. (By a divided court.)

4. Neither a certificate of purchase issued on such application, nor a United States patent issued after the passage of the Booth act, confers any title to the land, even as against one in mere naked possession.

In bank. On rehearing. For former report, see 22 Pac. Rep. 55.

H. T. Hazard and Chapman & Hendrick, for appellant. *Curtis & Otis and J. C. Lynch*, for respondent.

THORNTON, J. Ejectment. Judgment for plaintiff. Appeal by defendant from judgment and order denying his motion for a new trial. The land in controversy is the W. $\frac{1}{4}$ of section 22, of township 1 S., range 7 W., S. B. M. The plaintiff claimed under a patent of the United States for this land issued to one Marsicano, bearing date March 20, 1856, and a deed from Marsicano to it conveying this land, bearing date the 15th of December, 1886. The documents above mentioned were introduced in evidence by plaintiff, and it then rested.

This land was listed to the state of California on the 1st of July, 1870. On the 11th of December, 1885, the commissioner of the general land-office of the United States canceled this listing to the state for the reasons stated in his letter, which appears in the record. The reasons stated in this letter are

as follows: The whole of section 22, above mentioned, had been listed to the state of California on the date above mentioned in lieu of section 16, township 18 S., range 3 W., S. B. M., but a part only of this sixteenth section, viz., 343.13 acres, was within a private grant. The remainder of the said sixteenth section, viz., 296.87 acres, was surveyed in its proper place, according to the official plat of the township which had been filed on the 20th of October, 1875; that, as to this latter amount, (296.87 acres,) the selection was invalid, and the same was accordingly on that day canceled as to the W. $\frac{1}{4}$ of said section 22, under the provisions of section 2 of the act of congress of March 1, 1877.

It was stipulated that Frank Moir, the defendant, made an application to the state of California to purchase the W. $\frac{1}{4}$ of section 22, above mentioned; that this application bore date the 16th of February, 1883, and was filed in the office of the surveyor general of California on the 15th of March, 1883; that, at the time Moir made this application to purchase, he had filed his declaration of intention to become a citizen of the United States, was a resident of the state of California, and was of lawful age. It was further stipulated that Moir and another person were both living on this land, and claiming adversely to each other, at the time he (Moir) made his application to purchase. Moir's application, and his affidavit accompanying it, appear in the record. Moir claimed title under this application, which, and the accompanying papers, were put in evidence. The defendant also put in evidence the application of John Mullan to the state of California to purchase the whole of section 22, dated the 12th of January, 1869, and filed in the office of the surveyor general of this state on the 15th of the same month, and the accompanying affidavit. He also introduced in evidence the approval of Mullan's application, bearing date the 21st day of August, 1869. A certificate of purchase, issued to Mullan by the surveyor general of this state, dated 30th of October, 1869, is in the record; but, as it relates to a different tract of land from that in suit here, it need not be further noticed. It was stipulated that Mullan assigned his certificate of purchase for the land in controversy to Marsicano, the grantor of plaintiff, on the 20th day of October, 1881; that he executed to Marsicano a conveyance of the same land in the fall of 1884; and that plaintiff, prior to the commencement of this action, had succeeded to whatever title Mullan took by his certificate of purchase, and held it when this action was begun. It was further stipulated that the defendant was in the possession of the land in suit at the time this action was commenced, and was living on the land, claiming it adversely to the plaintiff.

Defendant contends that the patent to Marsicano, issued in 1886, is void, *ab initio*, and that he had a right to show this on his

mere possession as defendant. This contention is based on the admitted fact that the land had been listed to the state of California, in lieu of a sixteenth section, on the 1st day of July, 1870, which listment had been confirmed by the act of congress of March 1, 1877, commonly known as the "Booth Act," (19 St. at Large, 267,) relating to indemnity school selections in the state of California. By the second section of this act, it is provided "that, where indemnity school selections have been made and certified to said state, [of California,] and said selection shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth or thirty-sixth section, in lieu of which the selection was made, shall, upon being excluded from such final survey, be disposed of as other public lands of the United States." We are of opinion that the listment to the state made in July, 1870, came within the above provision quoted from section 2 of the act of congress of 1877, and was confirmed by it. It having been so confirmed, the title passed to the state of California on such confirmation. It follows that the cancellation of the listment by the secretary of the interior made in 1885 was without authority; that when the patent to Marsicano was issued, in 1886, the United States had no title, and such patent was void. The plaintiff took no title to the land in controversy under the patent above mentioned.

The plaintiff also contends that he acquired title to this land by virtue of the application of John Mullan to purchase it from the state in 1869, and a certificate of purchase thereafter issued to Mullen in October, 1869. Mullan's application was made under the act of 28th March, 1868. St. 1867-68, §§ 53-58, p. 522. This section (53) requires that, in making application to purchase such lands as are mentioned in Mullan's application, he shall describe the same in an affidavit by legal subdivisions. The affidavit of Mullan contained no description such as is required by the statute, and in fact no description whatever. This, according to the decision in *Hildebrand v. Stewart*, 41 Cal. 387, is fatal to the application. In that case, as in this, the affidavit failed to describe the land by legal subdivision or otherwise, though the land was properly described in both cases in an unsworn paper accompanying the affidavit, and styled the "application." The court held the application invalid and nugatory. It was there said by SPRAGUE, J.: "The legislature has thought proper to require the above facts to be embodied in an affidavit of the applicant; and it is not for the court to determine that the same items may as well be embodied in a statement of the applicant not verified by his oath, or to sanction a different form or mode of proceeding in the purchase of these lands from that prescribed by the legislative department."

The application of Mullan must, then, be held to have been in its beginning void.

It is argued by plaintiff that the application was cured by the first section of the act of March 24, 1870. St. 1869-70, p. 352. But this section refers only to applications made for the purchase of lands belonging to the state; and, as we have seen, when Mullan's application was made to purchase, in 1869, the land sought to be purchased did not belong to the state, and did not become the property of the state until confirmed by the act of congress of March 1, 1877, above referred to. Nor is Mullen's application cured by the act of March 27, 1872, (St. 1871-72, p. 587,) for the reason that the land did not belong to the state when the act of 1872 was passed. For the reasons above given, the listment to the state of 1870 was void, and the land did not belong to the state until after the passage of the Booth act, in 1877. *Rowell v. Perkins*, 56 Cal. 226, is referred to as sustaining plaintiff's contention that the application of Mullan was cured by the act of 1872. But in that case, although the application was made in July, 1869, and the listment made to the state in July, 1870, still the court rested its ruling on the fact that the land belonged to the state when the act of March, 1872, was passed. After stating that the act of 1872 is very broad and comprehensive, the opinion proceeds thus: "It validates every application to purchase lands 'from the state' where payment has been made, in whole or in part, to the treasurer of the proper county. When the act of 1872 was passed, the state owned the land, and by that act disposed of it." The opinion then proceeds to declare that the act of 1872 validated an application, though the state did not own the land when the application was made. But it was not held in the case cited, nor has it ever been held, that it validated an application to purchase land not owned by the state when the curative act was passed. It could not have intended, by the act of 1872, to pass any title or right to land which the state did not own before the act of 1872 was passed.

No title could have passed to the land in controversy by the certificate of purchase to Mullan which appears in the record, for the reason above stated, that it had reference to a different parcel of land. A certificate of purchase to Mullan for the land in controversy, admitting that it is shown by the record that he had such certificate, was void for the defect in the application above pointed out, which defect has never been cured. The plaintiff derived no title, either by the patent to Marsicano or by Mullan's certificate to purchase. Each document was issued without authority of law, and is void against defendant; conceding that he showed no title except naked possession. *Sutton v. Fassett*, 51 Cal. 12; *Pratt v. Crane*, 58 Cal. 533; *Kile v. Tubbs*, 59 Cal. 192; *Railroad Co. v. McCusker*, 67 Cal. 67, 7 Pac. Rep. 122; *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228,

and cases there cited. The judgment and order are reversed, and cause remanded for a new trial. So ordered.

BEATTY, C. J., I concur in the judgment.

We concur: WORKS, J.; SHARPSTEIN, J.

FOX, J. I concur in the judgment.

McFARLAND, J. I dissent.

PATERSON, J. I dissent. The plaintiff has purchased and paid for the title of the United States, and also that of the state; yet it is held that the defendant, although he has never connected himself with either of the paramount sources of title, and does not possess the necessary qualifications to purchase the lands in controversy, may prevail in an action of ejectment. The misfortune of the plaintiff seems to be, according to the theory of defendant and the decision of the majority, that when the United States sold it had no title, and when the state sold it had no title to convey; and, therefore, while the game of shuttlecock and battledoor for this land was going on between the officers of the land departments of the two governments, the plaintiff and its grantors gambled their money in vain. I venture to say that if the grantors had been individuals, instead of governments, there would be no question that a grant, bargain, and sale deed would convey to their grantees the title held by the grantors at the time of the grant, and that afterwards acquired, and that, as against an intruder,—one who did not have even a contract of purchase and sale from either,—the grantees would prevail in ejectment. For this reason, and for other reasons stated in the former decision of this court, affirming the decision of the court below, (22 Pac. Rep. 55,) I am unable to agree with the majority of the court in their final conclusion.

(Feb. 4, 1890.)

BEATTY, C. J. Three justices of the court concurred in the opinion filed in this case, and three dissented. I concurred in the judgment only. At the time of expressing this qualified concurrence, it did not occur to me that the result was to leave it uncertain what particular points had been decided. To relieve this uncertainty, I take occasion now to say that I concur in that part of Justice THORNTON's opinion relating to the claim of plaintiff based on the United States patent to Marsicano. As to the claim based upon Mullan's application to purchase from the state, I express no opinion, because the record does not show to my satisfaction that Mullan ever received a certificate of purchase covering the demanded premises, and the points discussed are not involved.

(83 Cal. 187)

CARTER *et al.* v. BACIGALUPL (No. 13,463.)
(*Supreme Court of California*. Feb. 24, 1890.)

MINES AND MINING—DESCRIPTION OF CLAIM—
ABANDONMENT.

1. A notice of the location of a mining claim, which recites that the locator claims 1,500 feet of

the lode or vein, together with 800 feet on each side thereof, to-wit, "commencing at a young black oak tree, about 400 feet northerly of an old cross-cut or drift in the ravine; thence running south-easterly 1,500 feet, to a black oak tree near a small ravine on the north side of T. creek,"—sufficiently describes the property, as it will be presumed that T. creek is a well-known natural monument.

2. Rev. St. U. S. § 2324, does not require a notice of a mining claim to be either posted or recorded, but intrusts that matter to local regulation, subject to the condition that, when a notice is required to be recorded, it shall contain, *inter alia*, a description of the property. *Held*, that where the local rules require that a notice shall be posted and recorded, and in reference to the notice to be posted repeat the requirements of the statute, the recording of a notice as it is posted is sufficient, provided that the posted notice itself sufficiently complies with the rules.

3. Civil Code Cal. § 1092, provides that an estate in land may be granted by specifying the name of the county and state wherein it is situated, together with a description thereof, or, if it has a descriptive name, it may be thereby described. *Held*, that where a mining claim has a descriptive name, which is known and described in the mining records, a description thereby in a deed of the claim, which recites that it is 1,500 feet in length by 800 feet in width on each side of the vein, and more fully described in the record of quartz mines, is sufficient.

4. An objection to a mining claim, on the ground that the land was not open to location when it was made, is without merit, where the prior locator testifies that he had abandoned his claim when the new one was made.

5. Nor can a deed of the claim be objected to on the ground that it is a conveyance of the old abandoned location, and not of the new one, where the deed merely refers to the old location for a description of the property.

Commissioners' decision. Department 2. Appeal from superior court, Tuolumne county; C. V. GOTTSCHALK, Judge.

Action by George B. Carter and others against Luigi Bacigalupi, to determine the right to a mining claim. Civil Code Cal. § 1092, provides that an estate in land may be granted by specifying the county and state wherein it is situated, together with a description thereof, or, if it has a descriptive name, it may be described by the same. From a judgment for defendant, plaintiffs appeal.

Frank W. Street, for appellants. *F. D. & G. W. Nicol*, for respondent.

HAYNE, C. This was an action to determine the right to a mining claim. The defendant had judgment, and the plaintiffs appeal. The main points made for the plaintiffs relate to the sufficiency of the location of the defendant's grantor, and the sufficiency of the transfer to the defendant.

1. It was conceded at the trial that the plaintiffs' locations were properly made and maintained, if the ground was open to location. The defense was that the ground was not open to location, because the defendant had a prior, valid, and subsisting claim; and the question is whether he had such a claim. The provision of the federal statute of May 10, 1872, in relation to the matter, is as follows: "Sec. 2324. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the

location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground, so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim." And then follows a requirement as to the amount of work which shall be done. This statute does not require that a notice shall be recorded. *Thompson v. Spray*, 72 Cal. 533, 14 Pac. Rep. 182; *Souter v. Maguire*, 78 Cal. 544, 21 Pac. Rep. 183. Nor does it require that a notice shall be posted on the claim. It leaves those matters to the regulation of the local laws. The local laws generally require that a notice shall be posted, and, even in the absence of such a requirement, it would be a very proper aid to the description. But the statute does not require it. The local regulations of the Tuolumne mining district, adopted in October, 1872, contain the following provisions: "Sec. 3. Mining claims hereafter located in said district, upon veins or lodes of quartz, or other rock, or veins of metal, or its ores, shall be located in the following manner, to-wit: By posting thereon two notices, written or printed upon paper, or some metallic or other substance, each to be posted in such manner as to expose to view the full contents of the notice, one of which shall be posted in a conspicuous place at each end of the claim. Said notices shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim. Said notice may be in the following form, to-wit: 'Notice is hereby given that the undersigned have taken up _____ hundred feet of this vein or lode, and that the claim so taken up is described as follows, (here insert description.) Dated _____ day of _____, 187-. A. B., Locators. C. D.'" "Sec. 6. All claims hereafter located in said district, the notice of location of which shall not be filed for record with the mining recorder within thirty days from the date of such notice of location, shall be regarded as abandoned, and shall be open to location by any party in the same manner as though no location thereon had ever been made." The notice of location of the defendant's grantor was as follows: "The undersigned hereby gives notice that he claims fifteen hundred (1,500) feet of this quartz lode or vein, together with three hundred feet on each side of the vein. Said claim is described as follows, to-wit: Commencing at a young black oak tree, about four hundred feet northerly of an old cross-cut or drift in the ravine; thence running south-easterly fifteen hundred (1,500) feet, to a black oak tree near a small ravine on the north side of Turnback creek, and having this notice in

duplicate posted on a black oak tree at each extremity of said claim. This claim is designated as the Sunny South Claim; and is located and will be held and worked in accordance with the act of congress in the premises. FRANCIS CADEMARTORI, CHEROKEE, December 30, 1875. Recorded at request of H. Crepin, December 30, 1875."

This notice, as will be observed, is in the form prescribed by the local regulation above quoted. Two objections, however, are made to it:

(a) It is said that it contains no sufficient description of the property, and that, consequently, neither the posting nor the recording was sufficient. But we think that the description was sufficient. If the center line be sufficiently described, it is enough to state that the claim is for a certain number of feet on each side of it. The notice does not say 300 feet on each side of any one point of the line, but of the whole line,—that is to say, on each side of each of the succession of points which constitute the line; and the result is a tract inclosed within side lines parallel to the center line, and 300 feet from it and end lines at right angles to it. It is argued, however, that the center line is not sufficiently described. But if either end of the line may be located, the other may be found. Now, Turnback creek must, in the absence of evidence to the contrary, be held to be a known natural monument. In the case of *Hammer v. Mining Co.*, 130 U. S. 299, 9 Sup. Ct. Rep. 548, the starting point was located with reference to "Vaughn's Little Jennie mine." This was held to be sufficient, and the court, per FIELD, J., said: "The Little Jennie mine will be presumed to be a well-known natural object or permanent monument until the contrary appears." All that has to be done by one seeking information, therefore, is to go to Turnback creek, and follow it up until he comes to a black oak tree, near a small ravine on its north side, which tree has the above notice posted upon it, and which is 1,500 feet north-westerly from another black oak tree, which latter tree is a young one, and is 400 feet northerly of an old cross-cut or drift in the ravine, and has a copy of the above notice posted upon it. Looking at the description as it appears in the record, we cannot say that it is not amply sufficient. For all we can say to the contrary, those two trees may be the only black oak trees on the whole creek. If any latent circumstances existed which renders it impossible to locate the line, it should have been proved by the party attacking the notice.

(b) It is said that neither as posted or recorded does the notice state that the claim is within the Tuolumne mining district, or even in Tuolumne county, or the state of California. This is, in effect, saying that the claim is not sufficiently described. So far as the posting is concerned, the objection is manifestly untenable. The notice was posted upon the vein or lode itself, and stated that

it was for a specified portion of this vein or lode. That identified and fixed the lode, and it was not necessary to go on and give the geography of the locality. We also think that the record was sufficient. Under the rules of this district, the record is sufficient if it is the same as that posted, provided the latter is sufficient. As above stated, the statute does not require a notice to be either posted or recorded. It leaves those matters to local regulations, subject, however, to the provision that, when a notice is required to be recorded, it shall contain a description of the property and certain other matters. The language of the statute is repeated in section 3 of the local rules above quoted in reference to the notice to be posted. Consequently the notice as posted must comply with the requirements of the statute in relation to recorded notices. And the provision of the local rules in relation to recording merely requires that the notice posted shall be recorded. It says that all claims thereafter located will be regarded as abandoned, unless "the notices of location" shall be filed for record within 30 days from "the date of such notice of location." This language can only refer to the notice of location previously spoken of in the rules. Hence it must be held that under these rules, if the notice as posted is sufficient, it is sufficient as recorded. This is not necessarily the case in all districts. In some no notice is required to be posted, and it may be that in others less is required for the posting than for the recording. But in the Tuolumne district the notice posted is to be recorded, and if one is sufficient the other is. And here the notice posted was sufficient. It is true that, as recorded, it lacks the specific application which resulted from being affixed to the claim itself. But, aside from this, the notice posted contains, as we have seen, a sufficient description of the claim. And the phrase, "this vein or lode," must be held to be the vein or lode of which a portion is subsequently described in the notice. The notion that, where the part of the vein or lode which is claimed is sufficiently described in the recorded notice, the phrase, "this vein or lode," is not sufficient, unless accompanied with the information that the vein or lode in question is within a particular district, county, or state, is one that might arise in the mind of a lawyer, but would not be apt to occur to a miner. It certainly did not occur to the miners who adopted the rules of this district, for they prescribed the form of notice to be posted, (which was followed by defendant's grantor,) and then provided that the notice posted should be recorded. In construing notices like this, it must be remembered that, as a rule, miners are unacquainted with legal forms and requirements, and are frequently out of the reach of assistance; and in view of this it has been wisely held that their proceedings are to be regarded with indulgence, and liberally construed. In this case we think that the notice was sufficient, both as posted and recorded.

2. The description in the deed from Cademartori to the defendant was sufficient. It conveyed "all that certain mining claim situated near Cherokee, Tuolumne county, state of California, and being the Sunny South claim, being 1,500 feet in length by 300 feet in width on each side of the vein, and more fully described in volume 1, page 118, of Record of Quartz mines." The claim conveyed had a descriptive name, which was known, and was described in the mining records. This was sufficient. Civil Code, § 1092. The parol evidence in aid of the description was admissible, (*Thompson v. Mining Co.*, ante, 130, filed January 9, 1890,) though the description, under the circumstances shown in this case, was probably sufficient without it.

3. There is no merit in the point that the ground was not open to location when the defendant's grantor located it. The person who made the prior location testified that he had abandoned it at the time of the location of the defendant's grantor. Nor is there anything in the point that the deed to the defendant was of the old abandoned location, and not of the new one. It referred to the old one merely for a description of the property, and conveyed whatever right the grantor had. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: **BELOHER, C. C.; VANOLIEF, C.**

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(83 Cal. 149)

PEOPLE *ex rel.* KERN COUNTY v. BAKER,
Treasurer.¹ (No. 13,542.)

(*Supreme Court of California.* Feb. 24, 1890.)

COUNTY BONDS—ELECTION.

The county government act of Kern county, Cal. (section 37,) provides that "the supervisors can only contract a bonded indebtedness other than such as is authorized by section 26 of this act, as follows: They shall by order specify the particular purpose for which the indebtedness is to be created, and the amount of bonds which they propose to issue, and shall further provide for submitting the question of the issue of said bonds to the qualified electors of the county at the next general election, or at a special election to be called by the board for that purpose." *Held*, that an order for an election to determine whether bonds of a specified amount and kind shall be issued for several distinct purposes, but which fails to state the amount of bonds to be issued for each specific purpose, is void.

Commissioners' decision. In bank. Application for writ of mandate.

Alvin Fay, Dist. Atty., for petitioner.
Haggin, Van Ness & Dibble, for relator.

FOOTE, C. This is an application upon the part of the county of Kern for a writ of mandate against the treasurer of that county for the issuance of certain bonds. The county is represented by the district attorney and associate counsel. The respondent appears in person, and files his request for a submission

in this language: "The brief on behalf of the relator fully and fairly states the objections which have been made by counsel, whose advice I have availed myself of. I therefore desire to submit this cause upon such statement without further argument." The matter stands in the appellate court upon the petition of the relator, and the alternative writ of mandate issued by order of the chief justice, ordering the respondent to show cause, etc.

It is a matter of regret that an official so tenacious for the proper legal performance of his duty should have relegated the court to the relator's brief for argument to refute the relator's contentions. But we will endeavor to determine what should be done in the premises with the lights before us. The relator, in the only brief that has been filed by either side in the case, and the fairness of whose statements seems to be conceded by the respondent, says, at page 25: "The only question which has seemed to us open to argument, or entitled to consideration, is the construction of the clause in section 37 which requires that the supervisors 'shall by order specify the particular purpose or purposes for which the indebtedness is to be created.' " The section (37) of the county government act, under which the power is claimed on the part of the board of supervisors to contract a bonded indebtedness, is in this language: "The supervisors can only contract a bonded indebtedness, other than such as is authorized by section 26 of this act, as follows: They shall by order specify the particular purpose for which the indebtedness is to be created, and the amount of bonds which they propose to issue, and shall further provide for submitting the question of the issue of said bonds to the qualified electors of the county at the next general election, or at a special election to be called by the board for that purpose. If a special election, none but qualified voters of the county shall be permitted to vote thereat; and it shall be held as nearly as possible in conformity with the general election law of this state. Notice shall be given of such election by publication in some newspaper or newspapers published in the county for four weeks prior thereto; if there be no newspaper so published, then by posting notices for the same time in each election precinct in the county, and at the court-house door. The ballots shall be printed, 'For the issue of bonds,' or 'Against the issue of bonds.' If two-thirds of the electors of the county, voting at such election, shall vote in favor of issuing bonds, and not otherwise, the board may proceed to issue the amount of bonds specified, in the manner provided in this act for funding the floating indebtedness of the county; and all the provisions of this act relating to the issue and payment of bonds in the latter case shall apply to bonds issued under this section, except that such bonds shall not run for more than twenty years; and the board shall levy the tax necessary to create a sinking fund for the payment of the principal of said bonds, in each and every year after

¹ For opinion on rehearing, see post, 1112.

their issue, until finally paid. The revenue derived from the sale of said bonds shall be applied to the purpose or purposes specified in the order of the board, and no other. Should there be any surplus, it shall be applied towards the payment of said bonds."

We think that the requirements of the statute were not complied with. The order of the board of supervisors was that a special election should be held, at which should be submitting to the people "the question of the issue of the bonds of said county, to the amount of \$250,000, in sums of not less than \$100 nor more than \$1,000 each, having not more than twenty years to run, and bearing interest at the rate of 6 per cent. per annum, payable semi-annually; for the purpose of constructing, grading, repairing, and maintaining bridges and public highways within the county, and for the purpose of erecting and maintaining a county jail and poor-house and hospital within the county." That is, the vote is to be taken for the purpose of determining whether bonds of the above amount and kind are to be issued for several distinct purposes; but it is not stated how many bonds, or of what denomination, for each specific purpose, are to be issued on the vote of the people at the special election. No one can ascertain from that order how many bonds are to be issued by the vote of the people for the purpose of constructing, grading, repairing, and maintaining bridges and public highways within the county, or how many for the purpose of erecting and maintaining a county jail and a poor-house and a hospital within the county. This, we think, was essential under the law. The voters should know that the board had determined and declared how many bonds for each specific purpose were to be issued before being called on to vote. It was not intended by that section that the board of supervisors might in such an order lump several specific schemes of bonded indebtedness in one amount, or that the voter should vote such bonds into existence for the board to distribute in their discretion. There is nothing in the order from which to determine what specific bonds, or their amount, are to be issued or created for any specific purpose. For these reasons, we think the order was of no effect; that the mandate prayed for should be denied, and the petition dismissed.

We concur: BELCHER, C.C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the mandate prayed for is denied, and the petition is dismissed.

(83 Cal. 203)

DOE v. SANGER *et al.* (No. 13,202.)

(Supreme Court of California, Feb. 25, 1890.)

MINING CLAIMS—LOCATION—RIGHT TO FOLLOW DIP.

1. The provision of Rev. St. U. S. § 2320, in reference to the location of mining claims, that "the end lines of each claim shall be parallel with each other," is merely directory, and a claim located substantially in compliance with that section, and

containing no more area than it authorizes, is not vitiated, even so far as to affect the right given by section 2322 to follow a vein beyond the side lines, by the fact that one of the end lines diverges.

2. In an action for damages for taking out ore within the surface lines of plaintiff's mining claim, which adjoined defendants' claim, evidence that less than a year after the original location of defendants' claim, and before the act complained of was committed, defendants rectified their lines by an official survey, so as to make them parallel, and applied for a patent on the official survey, is admissible to overcome any defect in the original location on account of the lines not having been made parallel.

Department 2. Appeal from superior court, San Bernardino county; HENRY M. WILLIS, Judge.

Harris & Gregg, for appellants. *Charles J. Perkins* and *H. C. Rolfe*, for respondent.

McFARLAND, J. Plaintiff brought this action to recover damages for the alleged excavating, carrying away, and converting to their own use by defendants of large quantities of silver-bearing ore belonging to plaintiff. The verdict and judgment were for plaintiff, and defendants appeal from the judgment and from an order denying their motion for a new trial. There is one main question in the case which we will examine first, as the others are of comparatively little importance. Plaintiff is the owner of a ledge or lode location and mining claim known as the "Oriental." (A portion of this claim was sometimes called "Oriental No. 2," and another portion called "Oriental No. 7;" but, for present purposes, it is sufficient to call the whole the "Oriental.") Adjoining the Oriental, and lying to the north of it, is another ledge or lode location and mining claim owned by defendants, and called the "Silver King." The southerly side line of the Silver King is the northerly side line of the Oriental. (At one stage of the trial there seemed to be a question as to whether or not there was a small vacant strip between the two locations; but that question cuts a very little figure in the case, and we assume at present that the southerly line of the Silver King and the northerly line of the Oriental were identical.) The defendants, in working the Silver King at various depths beneath the surface, drifted across the common line of the two mines, and took out ore within the surface lines of the Oriental, and it was for the value of this ore so taken that this action was brought.

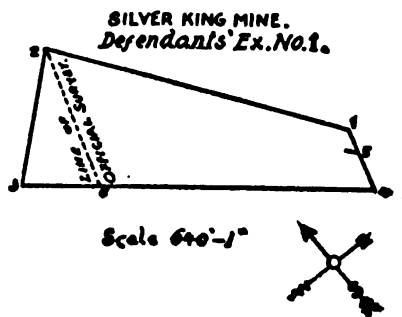
The defendants averred as a defense, and offered evidence to sustain it, that there is a vein or lode of silver-bearing ore, the top or apex of which is within the surface lines of the Silver King, extended downward vertically; that said vein, in its downward course, departs so far from a perpendicular as to extend outside the vertical southerly side line of the surface location of the Silver King, and to enter under the surface lines of the Oriental; and that whatever ore defendants may have taken within the side line of the Oriental was taken in the exercise of their right to follow the dip of the said vein, the apex of

which was within the surface lines of said Silver King. The court below ruled out this defense, and kept it away from the jury, for the reason—and for the sole reason—that in the original location of the Silver King the end lines were not parallel. There is no pretense, as we understand it, that the location was not sufficient, or that it did not comply with mining customs and the laws of congress, in every other respect. Neither is there any claim that the location was of more surface ground than the law allows. As a matter of fact, it was less than 1,500 feet along the ledge, and considerably less than 600 feet in width. And it cannot be contended that the location was of such a shape that the end lines could not be readily distinguished from the side lines. It had only four lines,—two longer ones; running with and on either side of the course of the vein, and two shorter ones, running across it. It was evidently intended to be in the usual shape of a quartz location,—that is, a rectangular figure, with greater length than breadth; but T. C. Warden, who discovered and located the mine in April, 1881, failed to get the end lines parallel. The divergence from a parallel was about 250 feet; that is, for instance, the southerly end of the westerly end line should have been about 250 feet further east, in order to have been exactly parallel with the easterly end line. Moreover, defendants offered to prove that in March, 1882, less than a year after the original location by Warden, their west end line was "drawn in" so as to make it parallel with the east end line; that since then they were in the peaceable possession of the mining claim within the lines as they were after said west end line had been so made parallel; that the ore which they took from within the surface lines of the Oriental was part of the vein which had its apex within the surface lines of the Silver King after said west end line had been so made parallel; and that said ore was taken out after the said change of said west end line. The plaintiff objected to the offered evidence, and to any similar evidence, "on the ground that by reason of the surface form and shape of the Silver King claim, as testified to by said Warden, defendants have no rights, under the laws of the United States, or otherwise, to follow the lode in its downward course [beyond] the lines of the Silver King claim, and under the other claims; the end lines of such location testified to by said Warden not being parallel, but divergent." The court sustained the objection, in these words: "The objection to any proof of justification or otherwise, under the location by Mr. Warden, as shown by map No. 1, of defendants to take subterraneous ore from within the vertical side lines of the Oriental No. 2 and the Oriental No. 7 mining claims, extended downward, is sustained." Defendants excepted. And so the court held that the location of the Silver King made by Warden in April, 1881, was totally invalid and void, so far as any right under it is claimed

to pursue a vein outside its vertical side lines, because its end lines were not parallel, and that such invalidity was not overcome by the said rectification of the west end line in March, 1882. The same ruling was made at many other stages of the trial, and the only matters submitted to the jury concerned the entry of defendants within the lines of plaintiff's ground, and the amount and value of the ore extracted; and in making these rulings we think that the court below erred.

For another purpose evidence was admitted which showed that at the time—in March, 1882—when the west end line was made parallel with the east end line, as aforesaid, the owners of the Silver King had made application for an official survey of their mine preparatory to applying for a United States patent; that J. C. Dunlap, a mining engineer and surveyor, at the request of the United States surveyor general, had made such survey, and that finding the end lines not parallel he ran a new west end line, commencing at the north-west corner of the original Warden location, and drawing it in easterly to the original southerly side line so as to make the two end lines parallel, as before stated; that in doing so he kept along and within the original lines, so as to make the surface ground less, and not more, than the original; and that he placed permanent monuments on the new south-west corner, and on the end line. There was also evidence admitted tending to show that from that time the new line run by Dunlap was recognized as the west end line, although there was also some evidence tending to show that some of the owners of the mine were, at first, dissatisfied with that line. But in 1885 an application for a United States patent was made, based on said survey made by Dunlap. None of this evidence, however, was allowed to be considered as a justification of defendant in following their vein outside of their side line. The defendants also offered to amend their answer so as to aver and prove that on July 20, 1887, less than one month after the commencement of this action, defendants made mineral entry and purchase of the Silver King, according to said Dunlap survey in the United States land-office of the district where the claim is situated. This offer was denied by the court.

The following diagram shows the shape of the Silver King surface ground:



The four outside lines are those originally made by Warden. The dotted line shows the alteration of the west end line made by Dunlap, who followed all the other lines made by Warden. The points at which defendants drifted under the Oriental are near the center of the southerly line of the Silver King.

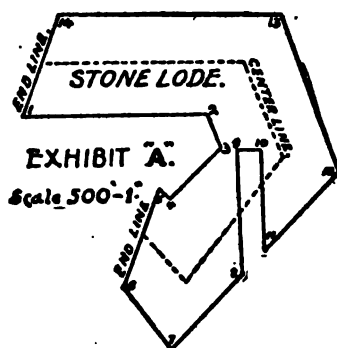
The theory of respondent, upon which the case was tried in the court below, is based on the last line of section 2320 of the Revised Statutes of the United States, which is as follows: "The end lines of each claim shall be parallel with each other;" and his position is that, as the end lines of the Silver King, as originally located, were not parallel, therefore its owners could not follow a vein beyond the vertical side lines of the location. We do not understand respondent to contend that such a location as that of the Silver King is void for all purposes. Indeed, we understand his counsel to admit that it is good for all purposes, except only for the purpose of going under ground outside of the surface lines. But—if the question were important here—it would be difficult to logically maintain that distinction. Section 2320, which provides for the parallel end lines, does not give the right to follow a vein beyond the surface lines. It does not provide that if the end lines are parallel the vein may be followed, and if they are not then the vein may not be followed. It deals merely with locations generally,—with locations for all purposes. But section 2322, which does give the right to so follow a vein, (and which is little more than a declaration of a previous mining custom,) says nothing about parallel lines. If, therefore, the provision of section 2320 about end lines is to receive the strict, literal, narrow, mandatory construction contended for by respondent, it is difficult to see why a location like that of the Silver King is not totally void for all purposes or for any purpose.

But we do not think such a construction of section 2320 is admissible in any view, or for any purpose. It would include absolute mathematical parallelism, for, if the divergence of a few feet in a distance of 600 feet would not vitiate a location, why should any reasonable divergence, which does not materially change the figure of the location from that of a parallelogram? The intention of the statute was to make the valuable property rights of lode miners to depend upon things more substantial and important than the mere trick of a perfectly correct measurement of surface ground, or a mathematically accurate survey. A substantial compliance with section 2320 is all that is required. In the *Eureka Case*, 4 Sawy. 302, Mr. Justice FIELD says: "In the second place, the provision of the statute of 1872, [the same as section 2320, Rev. St.,] requiring the lines of each claim to be parallel to each other, is merely directory, and no consequence is attached to a deviation from its direction." But section 2322, which gives the right to follow veins beyond surface lines, does con-

tain some provisions about that right which are important. By that section a vein can be followed outside of the side lines only, and not outside of the end lines. And so a surface location might be made in such an irregular and many-sided shape as to destroy the right to go beyond the surface lines. That consequence, however, would not be because the end lines were not exactly parallel, but because it would be difficult, if not impossible, to tell which were side lines and which were end lines. In the *Flagstaff Case*, 98 U. S. 467, in *Elgin M. & S. Co. v. Iron Silver Min. Co.*, 14 Fed. Rep. 377, and in other decisions, it has been held that the provisions of the federal statutes relating to lode claims were passed with the understanding, founded upon the general practice of miners, that the surface locations of such claims will be made lengthwise along the general direction of the lode or vein in the general form of a parallelogram, with the side lines along the lode, and the end lines across it. But suppose that a surface location should be made, for instance in the shape of an octagon, (and such was nearly the shape of the location in the case reported in 118 U. S. Rep. 196, 6 Sup. Ct. Rep. 1177, hereinafter mentioned.) In such a case there would be no end lines and no side lines, and if the locator could go outside his lines in one direction he could do so in eight directions, and encroach upon his neighbors from every point of the compass. If, however, a location is made in substantial compliance with the intent of the statute,—that is, where there are two side lines running along the course of the vein, and two shorter end lines running across it, so that the two sets of lines are distinct and apparent,—such a location is not void, but gives the right to follow a vein laterally, although the original end lines may not be exactly parallel, or although they may differ from a true parallel as much as they did in the case of the Silver King. In the case at bar it is not pretended by respondent that the place in the Oriental where the ore in question was taken by appellants was not "between vertical planes drawn downward" through the end lines of the Silver King, and "continued in their own direction," or that such would have been the fact if said end lines had been perfectly parallel, or that he was injured in any way on account of said end lines not being parallel, or that the situation and state of facts between the two claims, so far as this issue involved is concerned, would not have been just the same if said end lines had been exactly parallel. What he contends for is the mere technical advantage of denying appellants' right of working their lode in the usual way on account of the said manner in which the end lines of the Silver King were originally located. His counsel argue as if the right of a quartz or lode miner to follow his vein laterally is a piece of extraordinary legislative grace and favoritism, different from the usual dominion which men have over their property, and therefore to be

contracted and circumscribed in every direction by strict construction. But this is a mistaken view of the subject. That which a lode miner locates, that which he seeks to secure, that which constitutes his valuable property in the mine, is the lode itself, and the right to mine it wherever it may go under ground between the end points of his location. This right was not given, in the first instance, by the act of congress. Of course, as the United States government owned the land, and the right to mine was a mere license from that government, congress might have greatly changed that right, or might have withdrawn the license entirely. But it did not do so. The statutes of congress upon the subject, except so far as they provided for patents, were little more than mere formal legislative declarations of what had before rested in unwritten consent. They followed mainly the customs which miners exercising the license had established among themselves, and which fixed the character and incidents of mining property. And one of the inherent and most valuable qualities of property in a lode mine, as fixed by those customs, was the right to mine the lode to indefinite depths, although it might so far depart from a perpendicular in its downward course as to extend outside the vertical side lines of the surface location.

Counsel for respondent, in support of their main contention, cite the case of *Iron Silver Min. Co. v. Elgin M. & S. Co.*, 118 U. S. Rep. 196, 6 Sup. Ct. Rep. 1177. The language of the opinion of the court in that case must be considered with reference to the facts of the case, and the points which were before the court for decision. The question involved was the right of the defendants therein, who were the owners of a lode location called the "Stone Claim," to follow a vein, the apex of which was within the surface lines of said claim, into an adjoining claim owned by plaintiffs, called the "Gilt-Edge Claim." When defendants offered evidence to prove their right to follow their vein into the Gilt-Edge ground, the plaintiffs objected, because, "by reason of the surface form or shape of the Stone claim, its owners had no right" to follow, etc., and because "no part of the Gilt-Edge claim or the mineral or lode within it was within vertical planes drawn downward through the end lines of the Stone claim, and continued indefinitely in their own direction." Pages 202, 203, 118 U. S., and 1181, 6 Sup. Ct. Rep. The objection there was not that the end lines of the Stone claim were out of parallel, and as a matter of fact what were claimed to be the end lines were parallel. The objection rested on the general "form or shape" of the Stone surface location, and on the fact that the disputed ore in the Gilt-Edge was not within vertical planes drawn through the end lines of the Stone claim. The objection was very properly sustained, as a glance at the Stone surface location will at once show. The following is a diagram of that location, copied from page 203 of the report:



Here is a surface location with nearly a dozen exterior lines; with no distinguishable side lines or end lines; made in extreme violation of the usages and principles of location recognized by the statutes; and which, if it gave any right to follow a vein at all, would give the right to follow veins in nearly a dozen different directions. The lines which are designated as end lines are not end lines at all. The one designated as the south end line—from the figure 6 to the figure 5—would, if extended, run through the center of the location; and, as stated in the opinion, the ore taken from the Gilt-Edge was not within planes drawn through the asserted end lines. As was said by the learned judge of the circuit court who tried the case: "With superficial attention to the letter of the law, and in utter ignorance and disregard of its principles, the two lines were made in equal length, and parallel with each other, but so arranged that they can never perform the office assigned to them in the law." It is true that in the opinion of the supreme court of the United States rendered in this case the language of the statute about end lines being parallel is restated; but the meaning of that language, as applied to a case like the one at bar, different entirely in its facts from the one then before the court, was not given, and was not before the court. And it may be noticed that the opinion of the court was delivered by the same learned justice who said in the *Eureka Case* that the said provision was only directory. A comparison of the two diagrams above given, of the *Silver King* and the *Stone*, will clearly show the difference between the two, and that the principle upon which the *Stone Case* was decided does not apply at all to the case at bar. Of course, where end lines diverge to any considerable extent from a perfect parallel they might, when extended in their own direction, include, on one side at least, greater length of ledge outside the side lines than within them; and in such case, if the owner undertook to mine outside ore on or near the diverging end line, some difficulty might arise. And it was, no doubt, the purpose of section 2320 to prevent a party from claiming more outside his lines than within them. But no such question arises in this case.

Moreover, we think that defendants should have been allowed to show, as a part of their

defense, that in March, 1882,—less than a year after the original location,—they rectified their west end line, by means of an official survey, so as to make it parallel with the east line; and that in 1885 they applied for a patent upon that official survey, provided that no injury was done thereby to plaintiff. And it is difficult to see how there could have been any such injury; because by such rectification defendants had less ground within their surface lines, and the vertical end lines extended in their own direction over plaintiff's claim included less of the ledge, than they did before, although both before and after the rectification they included the place where the disputed ore was taken out. Is it possible that a prospector, discovering a lode mine on a wild and rugged mountain side, and locating it in substantial compliance with mining customs and congressional laws, must inevitably lose what may be the most valuable part of his discovery simply because he failed, in the first instance, to run his end lines on a perfect parallel? Such a locator has the right, and perhaps it is his duty, to make such change as is necessary to parallel his end lines, the next day, or the next month, or within any reasonable time, if such change interferes with the substantial property rights of no other person. Any different rule would be a disgrace to justice, and an impeachment of the common sense of law-makers. For the foregoing reasons the judgment must be reversed; and, in looking again over the transcript, we see no other points made by appellants which seem to need special mention, or that will create any difficulty, if there shall be another trial of the case. The judgment and order are reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.
Hearing in bank denied.

(33 Cal. 264)

YOSEMITE STAGE & TURNPIKE CO. v.
DUNN, Comptroller. (No. 13,357.)

(Supreme Court of California. Feb. 28, 1890.)

GIFT BY STATE—PURCHASE OF ROAD—FRANCHISE.

13 U. S. St. at Large, 325, provides "that there shall be, and is hereby, granted to the state of California the cleft or gorge in the granite peak of the Sierra Nevada mountains, situated in the county of Mariposa, in the state aforesaid, * * * with the stipulation, nevertheless, that the said state shall accept this grant upon the express condition that the premises shall be held for public use, resort, and recreation; shall be inalienable for all time, but leases not exceeding ten years may be granted for portions of said premises. All incomes derived from leases of privileges to be expended in the preservation and improvement of the property, or the roads leading thereto; * * * the premises to be managed by the governor of the state, with eight other commissioners to be appointed by the executive." The second section of the act, on like terms and conditions, grants the land, not to exceed four sections, embracing what is known as the "Mariposa Big Tree Grant." Held, that roads laid out in the grant are not subject to the general road law of the state, which provides that when a franchise for a road has expired the road becomes a free public highway, and the purchase by the state, under an act of the legislature, of the interest of one holding an unexpired lease

of a road made after the expiration of a prior lease for 10 years, is not a gift of the purchase price, within the meaning of Const. Cal. art. 4, § 31, which provides that the legislature shall have no "power to make any gift, or authorize the making of any gift, of any public money or thing of value, to any individual, municipal, or other corporation, whatever." PATERSON, J., dissenting.

Commissioners' decision. In bank. Application for writ of mandate.

Lloyd & Wood, for petitioner. Geo. A. Johnson, Atty. Gen., for respondent.

FOOTE, C. This is an application for a writ of mandate to compel the comptroller of the state to draw his warrant upon the state treasurer for the sum of \$8,000 in favor of the petitioner. The comptroller refuses to draw the warrant, because, as he alleges, the legislature had no power, under the constitution, to pass the law by virtue of which the petitioner claims the right to draw the \$8,000 from the treasury. It is contended by the counsel for the respondent that the money voted to the petitioner by the act in question is a gift, and, as such, is inhibited by article 4, § 31, of the state constitution. The portion of the constitution under consideration is: "Sec. 31. The legislature shall have no power; * * * nor shall it have power to make any gift, or authorize the making of any gift, of any public money or thing of value, to any individual, municipal or other corporation, whatever." The Civil Code, § 1146, says: "A gift is a transfer of personal property made voluntarily, and without consideration." To be a gift, this voluntary transfer must be gratuitous,—a handing over to the donee something for nothing. Upon the face of the act of the legislature upon which the petitioner's contention is made, it appears that the legislature appropriated \$8,000 to purchase from the "Yosemite Stage & Turnpike Company its road," running from the line of the grant to the floor of the valley, by Inspiration and Artists' points, a distance of eight miles, and known as the "Yosemite and Wawona Road." Acts 1889, p. 142. It is clear, therefore, that, so far as the legislature was concerned, its intention was to purchase a road in which it believed the petitioners had an interest at least worth purchasing, and that no gratuitous donation was intended to be made.

Was one in fact made? The agreed facts in the case are: "(1) That heretofore, and on the 1st day of January, 1875, the commissioners to manage the Yosemite Valley & Mariposa Big Tree Grove made and entered into a contract and agreement with Washburn, Chapman & Co., hereto attached, and made part hereof, marked 'Exhibit A.' (2) That said Washburn, Chapman & Co. complied with their part of said contract or agreement, and fully performed the same, and constructed the road therein mentioned, and expended thereon the sum of \$16,000, or thereabout, and collected and received the tolls therein mentioned. (3) That the petitioner, the Yosemite Stage & Turnpike Com-

pany, has succeeded, by assignments and conveyances from Washburn, Chapman & Co., to all and every their rights and privileges under the lease and contract aforesaid; and said Washburn, Chapman & Co., and Yosemite Stage & Turnpike Company, have at all times since its completion been in the possession of said road, and using the same, in accordance with the terms of the several leases or contracts herein set forth. (4) That on December 17, 1885, and before the expiration of the aforesaid lease, the commissioners to manage the Yosemite Valley & Mariposa Big Tree Grove passed a resolution extending the terms of said lease, a copy whereof is hereto attached, marked 'Exhibit B;' and on June 6, 1888, said commissioners made and entered into the contract or lease hereto attached, marked 'Exhibit C.' (5) That said Yosemite Stage & Turnpike Company fully performed its part of said contracts or agreements, and is now in possession and use of said road therein mentioned, and has heretofore maintained, and is now maintaining, the same. (6) That after the passage of the act of the legislature in the petition mentioned, said Yosemite Stage & Turnpike Company made, executed, and tendered its deed for said road, and its release of said contract, to the State of California, in due form of law, and the board of examiners of said state thereupon accepted said tender, and audited, allowed, and ordered paid to said Yosemite Stage & Turnpike Company the sum of money appropriated by said act. (7) That, upon demand being made thereafter, said John P. Dunn, comptroller of the state of California, refused to draw the warrant mentioned in said act."

It is contended by the counsel for the respondent that the petitioner had no right or interest whatever in the road attempted to be purchased and paid for by the legislature; that, having nothing to sell, or which could be bought from them, the voting to them of \$8,000 by legislative act was a gift pure and simple, and nothing else. The first point which he makes in support of his contention is that, as the first 10-year lease expired in 1885, the turnpike road in possession of the lessees at once became, by operation of section 2619 of the Political Code, a free public highway. We do not think this view of the matter is correct, as no portion of the Yosemite grant is subject to the general road laws of the state. The act of congress under which the land included in the grant was made to the state of California is in this language: "That there shall be, and is hereby, granted to the state of California the cleft or gorge in the granite peak of the Sierra Nevada mountains situated in the county of Mariposa, in the state aforesaid, * * * with the stipulation, nevertheless, that the said state shall accept this grant upon the express conditions that the premises shall be held for public use, resort, and recreation; shall be inalienable for all time; but leases not exceeding ten years may be granted for

portions of said premises. All incomes derived from leases of privileges to be expended in the preservation and improvement of the property, or the roads leading thereto; * * * the premises to be managed by the governor of the state, with eight other commissioners, to be appointed by the executive of California, and who shall receive no compensation for their services." 13 U. S. St. at Large, 325. The second section of the act, on the like terms and conditions, grants the land, not to exceed four sections, embracing what is known as the "Mariposa Big Tree Grant." Thus it will be seen that by the terms of that act the grant was made to the state of California, to be put to a specific public use, and no other. It was to be managed by a board of commissioners, to whom were given certain defined and specific powers, to be exercised consistently with the conditions named in the grant. The roads laid out within the grant, being under the charge and supervision of the board of commissioners, were not to be managed as by a board of supervisors of a county, or a county and city; and the board of commissioners is not controlled by the state laws applicable to boards of supervisors. Hence the argument made for the respondent, that the commissioners "could not abandon the free public highways in the grant to any corporation," is without force; for the commissioners are expressly given the power, by the act of congress, to lease portions of the premises or grant for a period of time not exceeding 10 years; and they are not confined by the act to the leasing of portions for any specific purpose named in the act. The power to lease portions of the premises for a period not exceeding 10 years is a general one, so far as the purpose of the lease is concerned. The roads laid out in the grant by authority of the commissioners are not subject to the jurisdiction of boards of supervisors. They are the property of the state, and subject to the jurisdiction and control of a particular body, viz., the board of commissioners, whose action is controlled by the provisions of the act of congress authorizing their appointment. The state could not, under the terms of the act of congress, making the grant for a special public use, commit its management to any other body than the board of commissioners. *Ashburner v. California*, 103 U. S. 575, 578, 579. If the commissioners are authorized to lease portions of the grant, and are not limited as to what use the leased premises may be allowed by them to be put, it is not perceived but what they had the power to make the leases in controversy. If they possessed this power, then it appears to us that the legislature might very well, if it desired, to do so, in the interests of the state, buy out the interests of the petitioners under an unexpired lease, and that the purchase money voted for that purpose was not a gift. It appears, therefore, that the prayer of the petitioners should be granted; and we advise that a peremptory writ of mandate issue, commanding

the respondent to issue the warrant for \$8,000, as prayed for.

We concur: BELCHER, C.C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the prayer of the petitioner is granted; and ordered a peremptory writ of mandate be issued, commanding the respondent to issue the warrant for \$8,000, as prayed for.

FOX, J. I concur in the order for the writ. There was no provision in the original lease that the road should revert to the state at the expiration of the term, or ever, but there was a provision that the state, or the board of commissioners, might become the purchaser thereof whenever it should so elect. The state or board did not purchase during the term, but permitted the petitioners to remain in possession for the time being, and subsequently made to them a second lease for 10 years. The board of commissioners, on behalf of the state, is now buying out the road, as it was originally provided it might do. I think they have the right to make the purchase. Of the policy of doing it, this court is not the judge.

SHARPSTEIN, J. I concur in the opinion of Mr. Justice FOX.

PATERSON, J. I dissent.

(87 Cal. 109)

JONES v. DUCHOW. (No. 13,219.)

(Supreme Court of California. Feb. 28, 1890.)

LIBEL—EVIDENCE—RES GESTÆ—IMPEACHMENT OF WITNESS.

1. In an action for libel, in publishing that plaintiff had been compelled to leave his former place of residence to escape punishment by a mob, a letter, not under oath, written and signed by reputable citizens of the place, four months before the alleged departure of plaintiff, giving him a good character, is neither admissible as part of the *res gestæ*, nor to contradict a witness for defendant, who testifies that plaintiff was, at the time of his departure, denounced by all good citizens.

2. Under Code Civil Proc. Cal. § 2051, providing that a witness cannot be impeached by evidence of particular wrongful acts, it is improper to ask a witness, on cross-examination, whether he is not the person who was arrested for beating a woman of the town, and who appeared, pleaded guilty, and paid a fine therefor.

Commissioners' decision. Department 2. Appeal from superior court, Tuolumne county; C. V. GOTTSCHALK, Judge.

F. D. & G. W. Nichel, F. W. Street, and E. A. Rodgers, for appellant. James Budd and I. M. Kalloch, for respondent.

FOOTE, C. This is an action for libel. The plaintiff, Jones, recovered, under the verdict of a jury, a judgment for \$2,500, from which and an order refusing a new trial the defendant appeals. One of the grounds of the alleged libel was that the defendant had published of the plaintiff that he had been compelled to leave his former place of resi-

dence between two days, in order to prevent a mob from riding him out of town on a rail. The defendant admitted the publication of this matter, and justified it on the ground of its truth. On the trial, Mr. Gift, a witness for the defendant, had testified, among other things, that he had denounced the character of the plaintiff, Jones, at Hollister, his former place of residence, in this state, "as any other good citizen used to and did," on account of divers acts of Jones at that place. The plaintiff then proposed to introduce in evidence before the jury a letter or certificate of good character for himself, signed by Judge Breen and others, who are admitted to be good citizens of Hollister. This was objected to by defendant's counsel, on the ground that it was irrelevant and incompetent for any purpose. It was admitted in evidence by the court as "legitimate cross-examination." The witness then further gave evidence which went to show that the time when this "denunciation" occurred was about July, 1883. The certificate was dated March 2, 1883. It is couched in the following language: "Superior Judge's Chambers, San Benito County, Cal., Hollister, March 2, 1883. The bearer of this, Mr. W. G. Jones, contemplates removing from this place with the view of establishing himself in business in Washington Territory. I take pleasure in commending him to all with whom he may meet in business or social relations. Mr. Jones has for some time past conducted the Hollister Democrat (newspaper) at this place, as the editor and proprietor. I have been well acquainted with him during all of said time, and I bear willing testimony to his uniformly good and correct business habits. He will, I am satisfied, be a gain to any community where he may locate. JAMES F. BREEN, Judge of the Superior Court of San Benito county, Cal. WM. T. BROWN, Ex-Sheriff. I concur in the above. T. S. HAWKINS, President Bank of Hollister. W. C. LANG, Cattle-Dealer." The letter was admitted in evidence, against the defendant's objection, as heretofore stated. The respondent argues that it was admissible to contradict the statement of Gift, inasmuch as it was part of the *res gestæ*; that it was contemporaneous with and illustrative of the thing done, of which Gift spoke, in alluding to the denunciation of Jones by all good citizens at Hollister, at a time when he (Gift) went there to look after a female relative. The letter is in itself merely a certificate of good character for Jones in March, 1883. The state of feeling as to Jones, of which Gift spoke, appears to have been in July, 1883, some months after the letter was given to him. The certificate of Judge Breen and others on March 2, 1883, was not contemporaneous with the main fact under consideration, which was the denunciation of Jones by all good citizens at Hollister, in July, 1883, the time when Gift went there for a purpose heretofore stated, nor was the certificate illustrative of the condition of public

sentiment relative to Jones in July. It was therefore inadmissible, as part of the *res gesta*, to contradict Gift's statement. The effect of its admission would be to prove on a trial good character for Jones at Hollister by the *ex parte* written statement of witnesses, not under oath or affirmation, and not in the presence and subject to the examination of all the parties to the action who chose to attend. Section 1846, Code Civil Proc. The letter was not the testimony of a witness, taken either by affidavit, deposition, or by oral examination. Section 2002, Code Civil Proc. It is clear that it was not admissible to prove good character for the plaintiff, by contradicting what Gift had said of Jones being generally denounced at Hollister in July, 1883. *People v. Eckman*, 72 Cal. 584, 14 Pac. Rep. 359.

It is further claimed, as error by the appellant, that the court below overruled his objection to a question asked by plaintiff's counsel of the witness Bradford, which was in this language: "Are you the W. F. Bradford who was arrested on the 29th day of January for beating, bruising, and battering one Maud Evans, a woman of the town, and appeared in Judge COOPER's court and pleaded guilty, and paid a fine therefor?" The objection was made on the ground that it did not tend to impeach the witness, that the record was the best evidence. The witness was compelled to answer, "I am." The court stated that the witness had testified to a very material matter, and the only basis for demanding the answer of the witness must have been to impeach his testimony. We think the ground of objection was specific and clear enough to show that the objector had in mind and invoked the rule which does not permit a witness to be impeached by evidence of particular wrongful acts theretofore done by him. It was not proposed to show by his examination or by the record of his conviction that he had been convicted of a felony. "A witness cannot be impeached by evidence of particular wrongful acts, nor is it proper to question the witness with reference to such matters." Code Civil Proc. § 2051; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. Rep. 26, 131, and authorities there cited. These comprise the main points of objection, as shown by the reply brief of the appellant, and we advise that the judgment and order be reversed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

(83 Cal. 388)

In re ROSENHEIM et al. (No. 20,635.)

(Supreme Court of California. March 6, 1890.)

CRIMINAL LAW—EXCESSIVE PENALTY—HABEAS CORPUS.

1. Pen. Code Cal. § 1205, which provides that a judgment that defendant "pay a fine" may also direct that he be imprisoned until the fine be satis-

fied, does not apply to those cases in which the court has imposed a term of imprisonment and also a fine, but it applies only to those cases in which the fine stands alone as a punishment. *People v. Righetti*, 4 Pac. Rep. 1185, overruled. *BEATTY*, C. J., dissenting.

2. As the statute (Pen. Code Cal. § 182) defining and fixing the punishment for criminal conspiracy makes no distinction as to the penalties to be imposed on conviction of the various classes of conspiracy enumerated therein, the court may inflict the maximum penalty—one year's imprisonment and a fine of \$1,000—on persons convicted of a conspiracy to obtain money by false pretenses; nor can it be said, as a matter of law, that an additional penalty of imprisonment in the county jail at the rate of one day for every dollar of the fine, in case of its non-payment, makes the punishment excessive or cruel, within Const. Cal. art. 1, § 6.

3. On *habeas corpus*, an objection that the complaint under which petitioners were convicted does not state a cause of action will not be considered, where the complaint is not made a part of the petition, nor referred to in the return, and where no offer was made, on the submission of the matter, to make the complaint a part of the record.

In bank. On *habeas corpus*.

George A. Knight, for petitioners. *Geo. A. Johnson*, Atty. Gen., for the People.

PATERSON, J. The petitioners are before us on a writ of *habeas corpus*. They were convicted in the police court of the city and county of San Francisco, December 10, 1888, of the crime of conspiracy, and sentenced, respectively, to serve a term of one year in the county jail, and to pay a fine each of \$1,000, and, in default of payment thereof at the expiration of the one-year term of imprisonment, to be confined in said jail until the fine be paid at the rate of one day for every dollar thereof.

The first point made by counsel for petitioners is that the complaint under which they were prosecuted and convicted does not state facts sufficient to constitute a cause of action, and the judgment is therefore void. This point cannot be considered, because the complaint is not before us. It is not made a part of the petition, it is not referred to in the return, no objection was made to the sufficiency of the return, and no offer was made at the time the matter was submitted to make the complaint a part of the record for our consideration.

The next point urged against the validity of the judgment is that the court below abused its discretion, and imposed a fine which is excessive, within the meaning of article 1, § 6, of the constitution. The court imposed the maximum penalty allowed by law. It is contended that the punishment for this offense—conspiracy to obtain money by false pretenses—was never intended to be as great as that inflicted upon those found guilty of conspiracy to murder. Yet the court has in this case visited upon the petitioners a penalty as great as could have been imposed upon them if they had been charged with and found guilty of conspiracy to murder. It is sufficient to say, in answer to this suggestion, that the court acted within the powers conferred upon it by the statute, and the statute itself makes no distinction—gives no direc-

tion—as to the penalties to be imposed in cases of conviction of the various offenses enumerated in the statute. It cannot be said, as a matter of law, that four years' imprisonment, upon conviction of the crime charged, is excessive, or that the punishment is cruel, within the meaning of article 1, § 6, supra.

The petitioners claim that, having served the one-year term of imprisonment imposed by the judgment, they cannot now be imprisoned for failure to pay the fine of \$1,000. They contend that section 1205 of the Penal Code does not apply to cases in which the judgment is for a fine, coupled with a sentence of imprisonment, but applies only to cases in which a fine stands alone as the punishment. In *People v. Righetti*, 66 Cal. 184, 4 Pac. Rep. 1068, 1185, the court in department held that said section does apply to cases of fine, whether the fine be coupled with a sentence of imprisonment, or stand alone as the only punishment. In *Re Neustadt*, ante, 124, we took occasion to express a doubt as to the correctness of the decision in that case, but, the question not being directly involved, no decision was made in relation to it. In *Re Walleigh*, ante, 190, Justice McFARLAND expressed a doubt as to whether a defendant could be imprisoned in a county jail beyond the maximum term of imprisonment prescribed by the statute as a punishment for the offense of which he has been convicted, and gave his reasons therefor. Upon a further consideration of the question we are led to believe, and so decide, that section 1205 is inapplicable to cases in which the court has imposed a term of imprisonment and also a fine. That section provides that "a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of imprisonment, and which must not exceed one day for every dollar of the fine." There is nothing in the letter of this statute, we think, which indicates an intention to make it applicable to cases in which the court itself fixes a term of imprisonment absolute, and then imposes a fine. Section 1214 of the Penal Code provides that, "if the judgment is for a fine alone, execution may be issued thereon as on a judgment in a civil action." Section 1215 provides that if the judgment is for imprisonment the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment is complied with, and, if the judgment is for "fine and imprisonment until it [the fine] be paid, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment is complied with." The provisions of the sections are in the disjunctive, "if the judgment is for imprisonment, or a fine and imprisonment until it is paid," etc.

Here cases of fine, cases of imprisonment, and cases of fine and imprisonment until the fine is paid are provided for; but the Code nowhere expressly provides for imprisonment, and fine coupled with imprisonment,

until the fine be paid, after the expiration of the fixed term of imprisonment. The provisions of sections 1214 and 1215, supra, were not considered by the court in *People v. Righetti*, but they strengthen the theory that the legislature did not intend section 1205 to apply to judgments for both imprisonment and fine. If those who framed and adopted section 1205 had intended it to apply to judgments that the defendant be imprisoned for a certain term fixed by the court, and pay a fine, it would have been easy to have so declared. In other sections in the same title the distinction between judgments of fine alone and imprisonment until it be paid, and judgments for both fine and imprisonment, is carefully preserved. "A judgment that the defendant pay a fine may also direct," etc., says section 1205. The judgment before us is not, correctly speaking and fully expressing it, a judgment that the defendant pay a fine; it is a judgment that he be imprisoned, and that he pay a fine. Within the letter of the statute, therefore, there is no authority for its application to cases of this kind, and it is only by judicial grafting upon legislation that the section can be made to support the additional penalty imposed by this judgment. While it is true the rule of the common law that penal statutes are to be strictly construed has been abrogated by the Code, which provides that "all its provisions are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice," it is also true that the defendant is entitled to the benefit of every reasonable doubt, whether it arises out of a question of fact, or as to the true interpretation of words, or the construction of language used in a statute, and we think the least that can be admitted fairly by those who claim the application of section 1205 to judgments of this kind is that the intention of the legislature to make it applicable to such cases is not clearly and with certainty expressed in the language used. The construction we place upon it brings it in harmony with other provisions of the same title which prescribe the manner in which penal judgments shall be executed, and is consistent with the "fair import of its terms" and the object of the Code. The legislature fixes in all cases the maximum term, and in some cases the minimum term of imprisonment to be imposed by the court, and never intended, we think, to authorize the court, under the guise of a fine, and the collection thereof, to extend the maximum term of imprisonment, as was done in this case, to a term several times greater than the term fixed by the statute. Of course the legislature might, if it saw fit to do so, provide for the collection by imprisonment of all fines, whether the judgment be one of fine alone, or one of both fine and imprisonment. But has the legislature so provided? We think it has not, and unless it has clearly conferred upon the court authority therefor it is our duty to hold that the additional penalty cannot be imposed, and that

the judgment to that extent is void. It is ordered that the petitioners be discharged from custody.

We concur: MCFARLAND, J.; WORKS, J.; SHARPSTEIN, J.; FOX, J.

I dissent: BEATTY, C. J.

In re COLLINS. (No. 20,652.)

(*Supreme Court of California.* March 7, 1890.)

In chambers. On habeas corpus.

Spencer & McEnerney, for petitioner. Geo. A. Johnson, Atty. Gen., for the People.

BEATTY, C. J. The petitioner was convicted in the superior court of San Francisco of "assault with a deadly weapon," and sentenced to be imprisoned one year in the county jail, and also to pay a fine of \$360, or, in default of such payment, to be further imprisoned until the fine should be satisfied at the rate of a dollar a day. He has been imprisoned a full year, and was, at the date of the issuance of the writ, detained in satisfaction of the unpaid fine. Under the authority of *In re Rosenheim*, ante, 372, (just decided by the court,) I am bound to order his discharge, notwithstanding my dissent from the prevailing opinion in that case. Ordered that the prisoner be discharged.

(83 Cal. 163)

DE NOON v. MORRISON *et al.* (No. 13,435.)

(*Supreme Court of California.* Feb. 22, 1890.)

MINING CLAIMS—ANNUAL EXPENDITURES.

Act Cong. 1872 (Rev. St. U. S. § 2324) provides that, on each mining claim thereafter located, there shall be annually expended in labor or improvement \$100, but where such claims are "held in common" the expenditure may be made upon any one claim. In an action to recover possession of a mine, plaintiff proved location and transfer of the claim to herself, and performance of the requisite assessment work down to 1888. She proved that she was in possession of, and had made improvements on, an adjoining mine, in 1888, amounting to \$306. Her title to this adjoining mine was not questioned. *Held*, that under Code Civil Proc. Cal. § 1963, subds. 11, 12, making proof of possession and improvement presumptive of ownership, plaintiff showed that the two claims were held in common.

Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Thomas S. Ford, for appellants. Fred Searls and Cross & Denson, for respondent.

FOX, J. Action to recover the possession of the Gordon placer mine, in Nevada county. Trial by jury. Verdict and judgment for plaintiff. Motion for new trial made and denied, and defendants appeal from both the judgment and order.

One of the grounds of motion for new trial was that the evidence was insufficient to justify the verdict. This point is incidentally discussed on the appeal, but it is difficult to determine whether appellants still rely upon that ground or not. We have, however, examined the evidence, and find that there is some evidence to support the verdict upon every issue of fact involved in the case. Under the well-established rule of this court, the verdict will not, therefore, be disturbed on that ground.

Defendants claim the mining ground under a relocation, authorized, as they claim, by a failure of plaintiff to do the required assessment work for the year 1888. No work was done within the lines of the Gordon claim in that year; but the plaintiff claimed to be the owner, and was in possession, of two or more adjoining mining claims, of which the Gordon was one. Of this claim she proved regular location and transfer to herself, and performance of the requisite assessment work down to and including the year 1887, and also that the \$500 of work necessary to procure a patent for the Gordon claim had been done prior to 1888. She also claimed to be the owner, and was in possession, of the Morton placer mining claim,—a claim adjoining the Gordon on the east. In 1888, she expended \$306 in running a tunnel on the Morton claim in close proximity to the line of the Gordon. It was claimed that this tunnel was run for the benefit of both mines, and proved that it would tend to develop both. Defendants, however, claim that, at the time the work was done, its purpose was to complete the work necessary to entitle the plaintiff to a patent of the Morton, and not for the benefit of the Gordon, in any sense. That is a question of fact submitted to the jury, and their verdict upon that question will not be disturbed. As a matter of law, the plaintiff had the right to do the work necessary for the protection of both claims on one of them; both being held by her in common. This question seems to be settled by the decision of the supreme court of the United States in *Smelting Co. v. Kemp*, 104 U. S. 654, 655, where the court, speaking through Justice Field, says: "The statute of 1872 provides that, on each claim subsequently located, until a patent is issued for it, there shall be annually expended, in labor or improvements, \$100, and on claims previously located an annual expenditure of \$10 for each 100 feet in length along the vein; but, where such claims are 'held in common,' the expenditure may be made upon any one claim. * * * Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed, or the improvements are made, for its development,—that is, to facilitate the extraction of the metals it may contain,—though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the *débris* or waste material."

But appellants claim that plaintiff is not entitled to have part of the expenditure made on the Morton in 1888 credited to the assessment work of the Gordon, for the reason that she did not prove that she was the owner of the Morton, and consequently there was a failure of proof to show that the two claims

were "held in common." It is true that plaintiff did not attempt to prove the location and record title of the Morton claim. She was not called upon to do it. Her title to that claim was not in dispute. She did prove actual possession and improvement of the same. From that the law presumes that she was the owner. Code Civil Proc. § 1963, subds. 11, 12. Such, also, has been the uniform ruling of this court in a line of decisions running through and found in nearly every volume of the reports, from the fourth to the present time. That presumption, of course, may be rebutted, in a proper case; but in this case there was no attempt to rebut this presumption of law. The case of *Jackson v. Roby*, 109 U. S. 444, 3 Sup. Ct. Rep. 301, cited by appellant, is not in point. There it was shown and held that the particular work claimed as development was not such, and was not of a character to develop the claim. None of the other cases cited by appellant are in conflict with the conclusion here reached.

It is also insisted by appellants that the court erred in refusing to give the fifth instruction asked by defendants. That instruction was to the effect that, even if plaintiff had expended \$500 in work on the Gordon claim prior to 1888, she was not thereby excused from the necessity of doing the \$100 of assessment work in 1888, to prevent the claim from being subject to relocation. It was not error to refuse this instruction, for the reason that the court had already instructed the jury, (1) of its own motion, that, under the laws of congress, the party holding the claim must make an annual expenditure of \$100 on each claim; and, " * * * if you shall find that the plaintiff did not make the expenditures on the Gordon claim in 1888, your verdict will necessarily be for the defendants in this case;" (2) at the request of defendants: "On each claim located since May 10, 1872, not less than \$100 worth of labor must be performed, or improvements made, each year; and upon failure to do so the claim is open to relocation in the same manner as if no location was ever made." Either of these instructions was less confusing, and more favorable to defendants, than the one refused. Judgment and order affirmed.

We concur: PATERSON, J.; WORKS, J.

(82 Cal. 155)

DURGIN v. McNALLY et al. (No. 13,135.)
(Supreme Court of California. March 1, 1890.)

APPEAL—REHEARING.

Under Const. Cal. art. 6, § 2, which provides that, after a judgment in a cause has been pronounced by a department of the supreme court, an order for rehearing before the court in bank "must be made within 30 days after such judgment," a petition for rehearing which does not reach the court in bank until 31 days after judgment has been pronounced by the department will be denied, though the petition was filed in the department within the 30 days.

In bank. On petition for rehearing. See ante, 133.

Action by plaintiff, Durgin, against defendants, Neal, McNally, and Young, for injury to plaintiff's merchandise caused by defendants' alleged negligence in flooding a cellar wherein the same were stored. The case was dismissed as against Neal, but a judgment was obtained against the other two defendants. They appealed, and the judgment was reversed. Const. Cal. art. 6, § 2, provides: "The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the court to be heard and decided by the court in bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within 30 days after such judgment."

BEATTY, C. J. The petition for a rehearing in this case must be denied, irrespective of its merits, for the reason that, although filed in Los Angeles before the expiration of the 30 days after the judgment of the department was pronounced, it did not reach the hands of the court until one day after the expiration of the 30 days within which the order for a rehearing in bank must be made, if made at all. Const. art. 6, § 2.

(82 Cal. 153)

In re BOWMAN. (No. 13,393.)

(Supreme Court of California. Feb. 22, 1890.)

INSOLVENCY—EXEMPTIONS.

Where a petitioner in insolvency claims certain posts as exempt as fire-wood, in good faith, the fact that he thereafter sells them, their value being small, is no ground for reversing an order of discharge.

Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

W. P. Sowden and *G. D. Buckley*, for appellants. *P. F. Simonds*, for respondent.

PATERSON, J. This is an appeal by certain creditors of the insolvent debtor, Bowman, from a judgment granting him a discharge in insolvency, and from an order denying their motion for a new trial of the issues raised by their opposition to his petition for a discharge. The first point made by appellants is that the petitioner falsely claimed that he was a teamster, and thereby secured property to which he was not entitled, he being at the time the petition was filed a blacksmith. The petition alleges that petitioner had, "since the 1st day of January, 1885, been engaged in the business of teaming," and the opposition filed by the creditors admitted that he was a teamster. At the trial counsel for the creditors proposed to amend the opposition so as to aver that Bowman was a blacksmith, and counsel for insolvent stated he had no objections to such an amendment; but no such amendment

was made. It is unnecessary, therefore, to review the evidence bearing upon the question whether Bowman was a teamster or a blacksmith. A finding of the court was unnecessary, because not within the issues. It is claimed, also, that Bowman fraudulently claimed certain property as exempt which was not exempt; that he did not include in his schedule 141 posts, 1 wagon-sheet, and a pair of 6-horse lines. The court found that the posts referred to were a part of his firewood, actually provided for his family use, and that the assignee never claimed them as part of the assets. The evidence shows that they had been put in his wood-shed "as a part of his firewood, actually provided for family use, prior to his contemplating becoming insolvent; that the sheriff, upon taking possession of insolvent's property, allowed him to keep said wagon-sheet and 6-horse lines and firewood as property exempt from execution. All of said property was included in his petition, schedule, and inventory, as property exempt from execution." After he filed his petition, Bowman sold the posts for \$9.87. It is not shown whether he turned the proceeds over to the assignee; but, assuming that he did not, the property having been claimed in good faith as exempt, there being no fraudulent intent or concealment, and the value of the property being small, the order should not be reversed. *Smith v. His Creditors*, 59 Cal. 268. The insolvent, being a teamster, was entitled to the wagon-sheet and lines as property exempt. The evidence showed that the "6-horse lines were useful and convenient to use with two horses," and there is nothing to show that Bowman had other lines or another wagon-sheet. The findings of the court on every issue were in favor of the petitioner, and it is sufficient to say, without reviewing the evidence in detail, that they are all supported by material and competent evidence. Judgment and order affirmed.

We concur: FOX, J.; WORKS, J.

(83 Cal. 440)

MECHANICS' BUILDING & LOAN ASSOCIATION v. KING. (No. 13,449.)

(*Supreme Court of California*. March 12, 1890.)

HOMESTEAD—LIENS ON—CLAIMS AGAINST DECEDENTS.

1. Civil Code Cal. § 1265, provides that, if the selection of a homestead was made by a married person from the community property, the land, on the death of either spouse, vests in the survivor, subject to no other liability than such as exists, or has been created, under the provisions of the title on "Homesteads." Code Civil Proc. § 1474, provides that, if the homestead was selected from the community property, it vests, on the death of the husband or wife, absolutely in the survivor, and subject to no debt or liability contracted by the husband and wife, or either of them, previous to, or at the time of, the death of such husband or wife, except as provided in the title on "Homesteads." *Held*, that land owned by a husband and wife as community property, and which had been laid off to them as a homestead, vested on the death of the husband in the wife, not merely as community

property, but as still retaining its character of a homestead, and that it was protected to the wife in the same manner that it had been to the family before the death of the husband.

2. Under Code Civil Proc. Cal. § 1475, which requires all claims secured by liens or incumbrances on the homestead of a person deceased to be presented and allowed as prescribed for other claims against the estate, a mortgage executed by a husband and wife on a homestead owned by them as community property cannot be foreclosed after the death of the husband without presenting the claim for allowance against the estate of the decedent within the time prescribed by law.

3. Code Civil Proc. Cal. § 1500, provides that "an action may be brought by any holder of a mortgage or lien, to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint." Section 1475 provides that, "if there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate." *Held*, that section 1475 relates only to mortgages on homesteads, and does not affect liens on other property, and that a lien on building and loan stock may be foreclosed though the claim was not presented against the estate of the deceased mortgagor within the time prescribed by law for the presentation of claims.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

Action by the Mechanics' Building & Loan Association against Josephine M. King to foreclose a mortgage. Civil Code Cal. § 1265, provides that, if the selection of a homestead was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists, or has been created, under the provisions of the title on "Homesteads." Code Civil Proc. § 1474, provides that, if the homestead was selected from the community property, it vests, on the death of the husband or wife, absolutely in the survivor, and subject to no debt or liability contracted by the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except as provided in the title on "Homesteads."

D. E. Alexander, for appellant. Grove L. Johnson, and Albert M. Johnson, for respondent.

BELCHER, C. C. The plaintiff, a corporation, commenced this action on the 24th day of October, 1888, against Josephine M. King, in her individual capacity, and as executrix of the last will and testament of Manuel J. King, to foreclose a mortgage on certain real property, and a lien on five shares of plaintiff's capital stock. The court below refused to grant a decree of foreclosure, and the plaintiff appealed. The case comes here on the judgment roll.

The facts found by the court are, in substance, as follows: In March, 1877, Manuel J. King and Josephine M. King were husband and wife. They owned and resided upon certain community property, and on the 14th day of that month jointly executed, acknowledged, and filed a declaration of homestead thereon. From that time until the death of

the husband the premises continued to be their homestead. On the 2d day of February, 1885, they made their joint promissory note to the plaintiff for \$1,000, payable two years after date; and, to secure payment of the note, they on the same day executed to the plaintiff a mortgage on their homestead property. At that time they were subscribers to and owned five shares of the plaintiff's capital stock, and this stock they also pledged to plaintiff as further security for the payment of their note. The stock pledged was to be paid for in installments of \$1 per share per month; and the plaintiff's by-laws provided "that, if any stockholder shall neglect or refuse to pay his monthly installments of interest, he shall pay a fine of 5 per cent. per month upon the amount of the delinquency." At the time of the trial, installments upon the stock amounting to \$180 had been paid, and there were unpaid installments amounting, with the fines for delinquency, to \$167.45. In December, 1885, Manuel J. King died, leaving a will, which was thereafter admitted to probate. Josephine M. King was duly appointed the executrix of the will, and gave due and legal notice to the creditors of the decedent to present their claims against the estate to her as such executrix. The claim on which this action is based was never presented to the executrix for allowance or rejection, and the time allowed by law for such presentation had expired when the action was commenced. On the 4th day of May, 1888, the property described in the declaration of homestead and mortgage was by the court set apart for the use of the family of the deceased; and on the 8th day of October following, the estate was settled, and the whole thereof was distributed to the said executrix, in trust for herself and children, according to the terms of the will, but no order was ever made or entered formally discharging the executrix. From these facts the court concluded that the \$180 paid as installments upon the stock should be treated as a payment upon the principal of the note in suit; and the sum was so credited, without any judgment or order for the sale or other disposition of the stock. The court also concluded that, by reason of the failure of the plaintiff to present its claim against the estate of decedent, its mortgage lien was extinguished, and it was entitled only to a personal judgment against the respondent, which was accordingly entered. The appellant contends that it was entitled to a decree foreclosing its mortgage on the real property, and its lien on the personal property, and that the court erred in refusing to grant the relief sought.

1. It is true, as claimed, that the title to the mortgaged premises vested absolutely in the respondent on the death of her husband. But, as said in *Re Ackerman*, 80 Cal. 209, 22 Pac. Rep. 141, "so much of it as was at the time impressed with the character of homestead went to the survivor, not merely as community property, but as a homestead, subject to no other liability than such as ex-

isted, or had been created, under the provisions of the title on homesteads. Civil Code, § 1265. It was protected to the survivor of the family in the same manner that it had been to the whole family, and was still a homestead. See, also, Code Civil Proc. §§ 1474, 1475. The death of one of the spouses did not alter in any way the estate, or character of the homestead." In *Camp v. Grider*, 62 Cal. 20, where a husband died, leaving a homestead incumbered by a mortgage which was executed by himself and wife, it was held that the mortgage could not be foreclosed unless the claim was presented for allowance against the estate of the decedent. The result was reached by reading together sections 1475 and 1500 of the Code of Civil Procedure. And in *Bollinger v. Manning*, 79 Cal. 7, 21 Pac. Rep. 375, this decision was approved and followed. In *Camp v. Grider* the note was not signed by the wife; but, if it had been, we think the result would have been the same. The court said: "The purpose of the legislature in providing, by section 1475, that, if there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate, was undoubtedly to preserve the homestead, if possible." And in *Bollinger v. Manning*, where it was claimed that section 1475 was not applicable to the case, because there were no assets, other than the mortgaged premises, out of which the note and mortgage could be paid, it was held that the section did apply, and, there having been no presentation, that the mortgage could not be foreclosed. The court said: "The provision of the section is general, that claims secured by liens or incumbrances on the homestead, selected and recorded prior to the death of the decedent, must be presented and allowed as other claims against the estate. * * * As well might any mortgagee claim, under section 1500, that he could maintain his action without presenting his claim, and without waiving all recourse against the other property of the estate, if he could show that there was no other property belonging to the estate." As the plaintiff's claim was not presented, the court was right, we think, in holding that it was not entitled to a decree foreclosing its mortgage.

2. As to the five shares of stock, section 1500, Code Civil Proc., provides that "an action may be brought by any holder of a mortgage or lien, to enforce the same, against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint." The plaintiff had a valid lien on the stock, and made the waiver required. Section 1475, *Id.*, and the rule declared in *Camp v. Grider*, relate only to mortgages on homesteads, and do not affect mortgages or liens on other property. Under these circumstances, we are unable to see why the plaintiff was not entitled to have its lien foreclosed, and the stock sold. It may be that it would suffer no

great detriment from the course adopted by the court below. Still, we think it was entitled to claim and insist, as it does now, upon its legal rights. We therefore advise that the judgment be reversed, and the cause remanded, with directions to enter judgment against the defendant for the amount due on the note, without crediting thereon the \$180, and a decree foreclosing the plaintiff's lien on the five shares of stock, and directing a sale thereof, and the application of the net proceeds arising from such sale in payment of the said judgment.

We concur: HAYNE, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to enter judgment against the defendant for the amount due on the note, without crediting thereon the \$180, and a decree foreclosing the plaintiff's lien on the five shares of stock, and directing a sale thereof, and the application of the net proceeds arising from such sale in payment of the said judgment.

(83 Cal. 453)

PEOPLE *ex rel.* TRAVERS *v.* FREESE. (No. 13,433.)

(Supreme Court of California. March 20, 1890.)

REMOVAL OF OFFICERS.

Pol. Code Cal. § 368, provides for the appointment of pilot commissioners "by the governor, with the consent of the senate." Section 369 provides that their term of office shall be "during the governor's pleasure." Section 2440 provides that these commissioners are to be appointed "by the governor, by and with the advice of the senate." And section 2442 provides that they shall "hold their offices during the pleasure of the power appointing them, not exceeding four years from the date of their commissions." *Held*, that a commissioner cannot be removed by the governor without the consent of the senate. Fox, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Geo. A. Johnson, Atty. Gen., *Geo. N. Williams*, and *John N. E. Wilson*, for appellant. *Stanly, Stoney & Hayes*, for respondent.

McFARLAND, J. This is an appeal from a judgment of the superior court of the city and county of San Francisco in favor of respondent, in a proceeding in the nature of *quo warranto*, which was instituted to test the right to the office of member of the board of pilot commissioners for the ports of San Francisco, Mare Island, and Benicia. The respondent, Freese, was appointed to said office by the then governor of the state, in January, 1887, was confirmed by the senate, and, having duly qualified, entered upon the discharge of the duties of the office. Between March 1, 1887, and March 18, 1889, and while the legislature was in session, the present governor nominated the appellant to the senate for the said office, but the senate failed to concur in the said nomination. On March 18, 1889, while the legislature was not in session,—and it has not been in session since,—

the present governor attempted to appoint the appellant to the office, and issued to him a commission which shows that he was appointed "*vice* A. C. Freese, removed."

If the question presented here were an open one, it might fairly be said to be a debatable question. The provisions of the Code upon the subject are conflicting, and it is somewhat difficult to reconcile them. Whether the occupant of the office holds it during the pleasure of the governor; whether the governor, of his own motion, can remove him at any time by appointing another in his place; or whether he can so appoint and remove only with the consent of the senate,—these are questions which could be well argued on either side of the controversy. Either side could, no doubt, be strongly stated. But we decline to again enter upon the discussion of these questions. They were thoroughly discussed, and, after mature consideration and consultation, were determined by a majority of this court adversely to the contention of appellant in *People v. Freese*, 76 Cal. 633, 18 Pac. Rep. 812, a case precisely like the one at bar. We see no good reason why the rule of *stare decisis* should not govern this case; and, looking ahead, we see good reasons why it should. It is not a matter of much importance who should temporarily have the office struggled for here; but it is a matter of considerable importance, in order to avoid uncertainty and disorder in the future, that those exercising power in the premises may have a settled rule to go by. We therefore adhere to the judgment and opinion in the said case of *People v. Freese*. The judgment appealed from is affirmed.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

FOX, J. I dissent. I do not think there is any substantial conflict in the provisions of the different parts of the Code bearing upon the question. But, if there is, the legislature, in the Code itself, has prescribed the rule by which such conflict must be settled, and by which it must be determined which provision must prevail. Pol. Code, §§ 4481-4483. Acting upon that rule, the questions stated in the prevailing opinion must be resolved by the provisions of chapter 3, tit. 1, pt. 3, of the Political Code. The office contended for here is one of those included in the section of this chapter giving the number and designation of the civil executive officers of the state. Section 343. Sections 368 and 369 are also a part of the same chapter. The former provides that this officer shall be "appointed by the governor, with the consent of the senate," and the latter provides that his term of office shall be "during the governor's pleasure." The provisions of the Code which are claimed to be in conflict with these are found in title 6 of this part,—a title on an entirely different subject-matter, and into which it was not necessary to interject anything on the subject of

the appointment or tenure of these officers. There we find, in section 2440, that these commissioners are to be appointed "by the governor, by and with the advice of the senate," and in section 2442, that they shall "hold their offices during the pleasure of the power appointing them, not exceeding four years from the date of their commissions." While there is a slight difference in phraseology, there is none in legal effect; but, if there was, the first, and not the last, must prevail, according to the rule prescribed by the Code itself.

I fully agree that it is more important that there should be a settled and established rule for the guidance of those exercising the power of appointment and removal than it is that the office should for the time being be awarded to any particular person. But it seems to me that we had such a settled and established rule, and that such a rule was for the first and only time unsettled by the decision of this court in the case of *People v. Freese*, 76 Cal. 633, 18 Pac. Rep. 812, now cited and relied upon as *stare decisis*. Under language more favorable to the contention of respondent than that used in either of the provisions of our Code, it has been settled in the United States for more than 100 years, by both legislative and judicial construction, that the power of removal was vested in the executive alone. See *Marshall's Life of Washington*, 196; *Sergeant's Const. Law*, 372, 373; *Ex parte Hennen*, 13 Pet. 230; *U. S. v. Avery*, Dady, 204-215; *McElraith v. U. S.*, 12 Ct. Cl. 201; *Com. v. Bussier*, 5 Serg. & R. 451. In this state, as early as *People v. Hill*, 7 Cal. 97, it was held that the power to remove is incident to the power to appoint, and that the only way in which this power of removal can be limited is by first fixing the duration or term of office. It cannot be questioned that the power of appointment is in the governor. The senate may approve or not, but it cannot appoint. The only time in the history of the state, so far as I have been able to discover, where the power of the governor to remove an appointee of the executive, even though the appointment had been confirmed by the senate, when there was no fixed term of office, has been questioned, was in the case of *People v. Freese*, supra. I do not, therefore, think that we ought to accept, upon the principle of *stare decisis*, a decision which unsettles a rule of construction and of practice, in both the nation and the state, as old as the government itself.

I am not unmindful of the fact that several cases are cited in the opinion referred to, claimed to be in support of the rule there announced; but every case so cited, except one, was in relation to an office to which there was a fixed term attached. The exception was in the case of a local office, where it was held that the governor had never been vested with power to appoint. Not one of them is a case where the officer held, as here, "at the governor's pleasure," or "at the pleasure of the appointing power."

PEOPLE ex rel. ELDRIDGES v. BULGER. (No. 13,427.) (*Supreme Court of California*. March 20, 1890.)

In bank. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Geo. A. Johnson, Atty. Gen., and Page & Eells, for appellant. Stanly, Stoney & Hayes, for respondent.

PER CURIAM. On the authority of *People v. Freese*, ante, 378, (No. 13,433,) this day decided, it is ordered that the judgment appealed from in this case be, and the same is hereby, affirmed.

Fox, J., dissenting.

(83 Cal. 322)

In re STEVENS' ESTATE. (No. 13,381.)

(*Supreme Court of California*. Feb. 28, 1890.)

GIFTS—EVIDENCE—WIDOW'S ALLOWANCE—WILLS—OMITTED CHILDREN—ADOPTION.

1. After the death of an employe of a railroad company, the latter paid money to the widow and executrix on a voucher reading: "To Mrs. A. J. S., Dr.: For amount allowed, which would equal the salary of the late A. J. S. for the months of," etc., and indorsed: "For allowance." Held, that the money did not belong to deceased's estate, but was a gift to his widow, and it was immaterial that she did not know that it was a gift.

2. Code Civil Proc. § 1484, provides that the widow of a decedent is entitled to a reasonable provision for her support, to be allowed by the superior court or a judge thereof. Section 963, subd. 3, makes the order of allowance appealable. Held, that, where all the facts are before the court when the order is made, it is final, and, no appeal being taken, cannot thereafter be changed in amount.

3. The fact that the widow hired out rooms in a rented house in which she lived, does not show that the order of allowance was unreasonable.

4. Under Civil Code Cal. § 1307, providing that, "when any testator omits to provide in his will for any of his children, * * * unless it appears that such omission was intentional, such child * * * must have the same share in the estate of the testator as if he had died intestate," the declarations of a testator are not admissible to show that his children were intentionally omitted from his will. *Garraud's Case*, 85 Cal. 339, followed.

5. Where a will leaves all of testator's property to his wife, with a request that she invest a certain sum for a designated grandson, and does not in any way refer to or mention a certain child of testator's, it does not show on its face that the omission of such child was intentional.

6. As the legislature has full power over the adoption of children, Civil Code Cal. div. 1, pt. 3, tit. 2, c. 2, authorizing county judges to perform the ceremony of adoption, is not an unconstitutional interference with the judicial power.

In bank. Appeal from superior court, Sacramento county.

S. C. Denson and C. H. Oatman, for appellant. Catlin & Blanchard, for respondent.

THORNTON, J. Appeal by executrix, Lydia M. Stevens, from a judgment settling her accounts as executrix of the above-named decedent. The appellant is the widow of the testator. The testator died on the 11th of February, 1888, and she was appointed and qualified as executrix of the last will of the testator on the 17th of March following. The testator was for many years prior to his death in the employment of the Southern Pacific Company, as its general master mechanic, at a salary of \$500 per month. He had drawn his salary for the month of Jan-

uary, 1888, and his full salary for the month of February was paid in the usual mode, without any deduction on account of his death, on the 11th day of that month. On the 17th of June, 1888, the sum of \$1,000 was paid Mrs. Stevens by the company. On application of May S. Hubbard, Mrs. Stevens was charged with this sum as part of the estate of her testator. This is assigned here as error. On consideration of the evidence, we are of the opinion that the point is well taken. It was paid to Mrs. Stevens on a voucher, of which the following is a copy: "Southern Pacific Company, San Francisco, June 7, 1888. To Mrs. A. J. Stevens, Dr.: For amount allowed which would equal the salary of the late A. J. Stevens, Esq., for the months of March and April, 1888, two months, at \$500, \$1,000. San Francisco, June 11, 1888. Received from Southern Pacific Company \$1,000 in full for above account. [Signed] MRS. A. J. STEVENS." There are several indorsements on this paper. Among others, these: "Name, Mrs. A. J. Stevens." "For allowance." The language of the voucher indicates unmistakably an allowance by the company. There was no obligation on the company to pay it. It was clearly a gift by the company. The allowance is clearly to Mrs. Stevens. The language used is, "To Mrs. A. J. Stevens, Dr.;" not to Mrs. Stevens, executrix, or as executrix of her deceased husband. It does not purport to be for salary. The amount is fixed by the salary which the testator would have earned had his services continued during the months named in the voucher. The salary is referred to for the sole purpose of fixing the amount. We see nothing in the other evidence changing this purport of the voucher. It is all consistent with the fact that the allowance or gift was made to Mrs. Stevens personally, and this we think the evidence clearly shows. It was intended by the company as a grateful recognition of the services of one who had served it long and faithfully, to whom its representatives had no doubt been strongly attached, and was with great propriety made to the one of all the world who most felt his loss. It makes no difference that Mrs. Stevens did not know whether it was a gift to her or not. It was all the more gracefully done in that the fact that it was a gift was veiled from her. It was made to her in the mode employed, that she might feel no embarrassment in accepting it. It thus shocked no feeling of the recipient, and the gift was enhanced in her estimation when she regarded it as a tribute to the worth of one who had for long been to her the cherished object of honorable pride and devoted affection. The intent of the donor to make a gift to Mrs. Stevens is that the most to be regarded, within the rule, *cujus est dare, ejus est disponere*. The giver of a gift has the right to regulate its disposal, (Broom, Leg. Max. 464;) *a fortiori*, he has a right to designate the donee. Of the intent of the donor here, we think there can

be no doubt. We think the court erred in charging Mrs. Stevens with this sum.

In fixing the allowance to the widow, the sum of \$200 a month for 12 months was designated. It appears from the bill of exceptions that Mrs. Stevens lived in a hired house, for which she paid the monthly rent of \$55, and that she had, during the period for which this allowance was made, rented out rooms in the house, for which she received the sum of \$300. With this last sum she was charged as executrix by the court below. It is urged that this charge was erroneous, and we are of that opinion. The widow is entitled to a reasonable provision for her support, to be allowed by the superior court or a judge thereof. Code Civil Proc. § 1464. In making this allowance the court must take into consideration all the circumstances bearing upon the reasonableness of the amount to be allowed. No doubt this was done in this case. The court is not restricted in making this allowance to a bare support of the widow. Regard should be had, and no doubt was had, to the mode in which she lived during the life-time of her husband. Such regard should be had in a case like this, when it appeared without doubt that the estate was amply sufficient to pay the amount allowed. We say no doubt this was done when the court originally determined what the allowance should be. It appears, further, from this bill of exceptions, that on the hearing at which this allowance was made, the court, among other things, heard and considered evidence to the effect that the rental of the house which was being paid by the executrix was the same paid by the deceased husband in his life-time, and that the rooms were rented by the executrix during the time she was receiving this allowance. The court, having considered all these facts, made the order of allowance. Why should not this order be held final, unless facts, not disclosed to the court when the order was made, subsequently are brought to the attention of the court? The order is appealable, (Code Civil Proc. § 963, subd. 8,) and we are of opinion it should be regarded as final. On an appeal from the order of allowance, all these facts could have been brought to the attention of this court, the ruling reviewed, and the error, if any, corrected. The time for appeal was allowed to pass, and under such circumstances the power of the court over its order is at an end. The court below cannot sit as an appellate court to review its own orders. It may be that, if it had appeared that the court below had been imposed on by a studied withholding of material facts bearing on the subject-matter of inquiry, the court might deal with the order, and change it so as to make it conformable to what would have been a fair determination on the facts withheld being made to appear. But there is no such case before us. All the facts on which the court acted were before it when it first acted. Under these circumstances, we think the

charge which involved a change in the order should not have been made. We add, nor do these facts show that the order of allowance when originally made was not reasonable. It was none the less reasonable because the widow elected to deprive herself of comforts or conveniences to which she was entitled, and, in the exercise of a judicious and commendable frugality, have incremented her income by hiring to others some of her income. This does not show, or tend to show, that the court below in its order of allowance lent any countenance to a needless waste of the estate then in the course of administration.

There is also an appeal in this case from the judgment distributing one-fourth of the estate to Mrs. May S. Hubbard. Mrs. Hubbard's claim is based on the fact that she was unintentionally omitted from the will of her father, the decedent above named. The will, which was olographic, is as follows: "Considering the uncertainty of life, being of sound mind, and enjoying good health, I make this my will. I will to my wife, Lydia M. Stevens, all of my property, of every kind and nature; also all moneys that may become due at my death, as insurance policies held by me in any life insurance company or association. She is to collect, for her sole use and benefit, all moneys that may become due at the time of my death, or that may become due thereafter. I request, however, that she will set aside, and cause to be invested in some good and safe interest-paying securities, one thousand dollars (\$1,000) for the benefit of my grandson, William A. Stevens, both principal and interest accumulations to be paid to him when he shall have arrived at the age of twenty-one years; but in this matter my wife may use her own judgment. I appoint my wife, Lydia M. Stevens, sole executrix of my estate, to act without bonds. ANDREW JACKSON STEVENS. SACRAMENTO, September 22, 1885."

At the time the will became operative by the death of the testator, in February, 1888, the following section of the statutory law of the state was in force. The section referred to is embodied in the Civil Code, and numbered therein 1307: "When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section." Mrs. Stevens offered to show, by the declarations of the testator made contemporaneously with the writing and execution of his will, that his children were intentionally omitted. The argument that the intent of the testator is apparent on the face of the will; that the will clearly discloses his intent to leave his entire estate to his wife, and thus displaces any intent to leave it to any one else; and that those declarations are consistent with the intent dis-

closed by the words of the will, and do not alter or add to the will in any respect,—has great weight. It does seem to be illogical to declare that the intent of the testator must be declared in the will, and still that you cannot show any fact or declaration consistent with and supporting that intent. But this court in April, 1868, (see *In re Garraud*, 35 Cal. 339,) held that such declarations were inadmissible under a statute then in existence, substantially the same, in fact, almost identical in words, with the one in operation when the will involved in this case was executed. The precise question made here has not arisen in this state since the case of *Garraud's Estate* was decided. It has been accepted as a sound and correct exposition of the law ever since it was decided, as is apparent from *In re Utz*, 43 Cal. 201; *Bush v. Lindsey*, 44 Cal. 121; *In re Wardell*, 57 Cal. 484. *Pearson v. Pearson*, 46 Cal. 609, was on another section of the statute. The case of *Wilson v. Fosket*, 6 Metc. 400, is much relied on by counsel for appellant. That case was commented on in the case in 35 Cal., and shown, as clearly appears, to have been decided on a statute very different from the statute in this state; as was *Whittemore v. Russell*, decided by the supreme court of Maine, and reported in 14 Atl. Rep. 197. This last case seems to have been rested very much on the authority of *Wilson v. Fosket*. In line with the decision in *Garraud's Estate* are *Bradley v. Bradley*, 24 Mo. 311; *Pounds v. Dale*, 48 Mo. 270; and *Chace v. Chace*, 6 R. I. 407. Each of these cases, just cited, refers to and comments on *Wilson v. Fosket*, as rested upon the peculiar language of the Massachusetts statute. The decision of this court in *Garraud's Case* has stood too long without challenge to be overruled without very strong reasons. It is sustained by very powerful reasoning in the able opinion of Justice CROCKETT. We think it our duty to follow it, and, in accordance with the rule there declared, we must hold that the court below did not err in excluding the offered declarations of the testator.

It is further argued that the will itself shows on its face that the omission of Mrs. Hubbard in the will was intentional. As to this contention we think that the significance of the decision of this court in *Garraud's Estate* is that it must appear on the face of the will, and it must there appear from words which indicate such intent directly, or by implication equally as strong. Any other rule would lead to guesses or to inferences merely conjectural, which would be too unsubstantial to base a judgment on. We do not think that we can say with any reasonable certainty that the words used in the will indicate that Mrs. Hubbard was in the mind of the testator when he wrote his will, and that he intentionally omitted to mention her. We think that the correct rule is that the words of the will must show, as above pointed out, that the testator had the person

omitted in his mind, and, having her so in his mind, had omitted to make any mention of her. The rule here laid down is plain and simple, and we think in accordance with the statute, as interpreted in the Garraud Case. It is an easy matter to put the question beyond a doubt by naming the children or grandchildren in the will, with a nominal legacy or none at all, from which it will clearly appear that these persons are in the mind of the testator, and therefore the omission to leave them anything must have been intentional. We are of opinion that the court below did not err in holding that the will itself did not show on its face that the omission of Mrs. Hubbard was intentional. We add that we have examined the cases cited by counsel on the point just discussed, and make no further allusion to them, for the reason that on questions of mere construction one case, unless in all respects similar to the case under discussion, cannot be regarded as an authority. None of the cases cited are similar to the case here.

Another point remains to be considered. In 1878, Andrew D. Billings, son of May S. Billings, (the May S. Hubbard a party to this case,) and her then husband, A. D. Billings, was, with all the forms of law required by division 1, pt. 3, tit. 2, c. 2, Civil Code, adopted by the testator and his wife as their child. The adoption was made before Hon. R. C. CLARK, county judge of Sacramento county. It is here contended that the statute under which this adoption was made is unconstitutional. It is said that the adoption of the child was a judicial act, and therefore must be done by a court, and cannot by the constitution be done by a judge, as was the case here. The adoption of children is purely a matter of statute, pertaining to the legislature, with which a judge or a court has nothing to do, unless the power is conferred on them by statute. The matter of adoption belongs to the legislature, and not to the judicial department of the government. We know of no rule of law which ever enabled any person or tribunal, whether notary public, clerk of a court, judge, or court, to perform the ceremony of adopting a child, unless such authority was conferred by a legislature. As the legislature has full power over this matter, it may invest any person or officer or court with the power of receiving, witnessing, and declaring the adoption. It may prescribe what that ceremony shall be, and before whom it is to be celebrated. It may make the ceremony so simple that its celebration only requires the consent in writing of the parents of the child, and the acceptance of such consent by the person desiring to adopt, and filing such paper with a public officer. These rules are so evident that it is unnecessary to refer to any authority to sustain them. The authorities on the subject are abundant. See *Abney v. De Loach*, (Ala.) 4 South. Rep. 757; *Succession of Vollmer*, 4 South. Rep. 254.

The case of *Water Co. v. Vallejo*, 48 Cal. 70,

related to the exercise of the right of eminent domain, which can only be exercised through the medium of a court. The exercise of the right of eminent domain has always been had by means of courts invested with judicial power. It has never been exercised otherwise in England, or any of the states of the American Union, that we are aware of. The exercise of this power may be regulated and restricted by the legislature, but its exercise is to be had through the judicial tribunals of the country. The case referred to, involving in its very essence the exercise of the judicial power vested in courts by the constitution, is no authority in this case, where no judicial power is called for, and the whole matter is intrusted by a valid law to a designated officer or person. *Weber v. Santa Clara Co.*, 59 Cal. 265; *Trahern v. San Joaquin Co.*, Id. 320. It may be and is true that the county judge in this case must have exercised judgment, and was authorized by the statute to employ his judgment. This may be so, and in such case the act is one of judgment, and in that sense judicial; but this does not make it any part of the judicial power spoken of in the constitution, and by it vested in courts. The distinction is pointed out in *People v. Board of Education*, 54 Cal. 377. It may be conceded that the legislature could have made this adoption a judicial case, and the jurisdiction over it conferred on a court. It may be further conceded that then the exercise of the power by the court would have been an exercise of the judicial power vested in it by the organic law. But the legislature has been careful here to place this jurisdiction in a person designated as "county judge," and has not conferred it on a court. The legislature has done all in its power to signify that it was not dealing with any matter pertaining to the judicial power, or the judicial department, by investing a county judge with jurisdiction over the matter. The court below erred in holding the statute in regard to adoption unconstitutional and void. A. D. Billings was legally adopted by Mr. and Mrs. Stevens, and has all the rights springing from such adoption. The judgment or decree of the court below is reversed, and the cause remanded, to be proceeded with in accordance with the views expressed in this opinion. So ordered.

We concur: MCFARLAND, J.; SHARPESTEIN, J.

Hearing in bank denied.

(82 Cal. 635)

WHITBY v. ROWELL et al. (No. 13,398.)

(Supreme Court of California. Feb. 23, 1890.)

APPEAL—REHEARING.

The failure of the court, on appeal, to notice and pass on points in the record to which counsel have neglected to call their attention, is no ground for a rehearing.

In bank. Petition for rehearing. For former report, see ante, 40.

PER CURIAM. In their petition for a rehearing of this cause counsel for appellant

complain that the department in its decision has failed to notice several points arising upon the record. This may be so, but it is certainly true that the department noticed and decided—correctly, as we think—the only point which was mentioned in the appellant's brief. If parties appealing to this court do not take the trouble to call attention to the points upon which they rely, they cannot reasonably expect us to search the record in order to find them, or to order rehearings for the purpose of considering them by piecemeal. The case of *City of Los Angeles v. Signoret*, 50 Cal. 298, was not referred to in the opinion; but there is a clear distinction, we think, between that case and this case, and between that case and *Emeric v. Tams*, 6 Cal. 156, referred to in the opinion. Rehearing denied.

(83 Cal. 420)

GOLDTREE et al. v. THOMPSON et al. (No. 18,539.)

(*Supreme Court of California.* March 10, 1890.)

APPEAL—PARTY AGGRIEVED.

In a suit, by the trustees under a will, to determine whether the children of certain parties named therein take the *corpus* of the estate, or only the income, an order allowing a fee to the attorney and guardian *ad litem* of minor defendants, to whom the *corpus* of the estate is awarded, does not concern the trustees, and they have no right of appeal under Code Civil Proc. Cal. § 883, providing that "any party aggrieved may appeal."

In bank. Appeal from superior court, San Luis Obispo county; *V. A. GREGG*, Judge.

J. M. Wilcoxon and *W. H. Spencer*, for appellants. *Wm. Shipsey* and *Graves, Turner & Graves*, for respondents.

PATERSON, J. The plaintiffs are trustees under the will of Jonathan Thompson, deceased. After the property had been distributed to the trustees by a decree of the proper court, they commenced this action to obtain, for their direction, a construction of certain clauses of the will. The defendants are the legatees and devisees named in the will. The question upon which the trustees were in doubt was whether the children of certain parties named in the will were entitled to take the *corpus* of the property which was left in trust, or only the revenue thereof. The case came to this court on appeal from the judgment of the court below, and that judgment was affirmed. 79 Cal. 613, 22 Pac. Rep. 50. Several of those to whom the *corpus* of the estate was awarded were minors; and they were represented in the superior and supreme courts by William Shipsey, Esq., guardian *ad litem*, appointed by the superior court. On the return of the *remittitur* to the court below, notice was served upon the plaintiffs and their attorneys, and all defendants not named as minors and their attorneys, that the minor defendants would move the court for an order allowing the guardian *ad litem* and attorney of the minor defendants a reasonable compensation for his serv-

ices. After a hearing upon the motion, the court made an order allowing said William Shipsey the sum of \$250, and directing the amount to be paid by the trustees, plaintiffs herein, out of any funds in their hands belonging to the estate. From this order the trustees have appealed. Respondent has moved, on several grounds, to dismiss the appeal.

Section 938, Code Civil Proc. provides that "any party aggrieved may appeal." Are the plaintiffs aggrieved by the order of the court allowing the attorney and guardian *ad litem* for the minor heirs a fee for his services? Executors, administrators, receivers, and trustees are, in their official capacity, indifferent persons, as between the real parties in interest. They are appointed by the court or by will, and act on behalf of all the parties who claim any interest in the estate. The funds which come into their hands are held in *custodia legis*, to be distributed by the court to those who show themselves entitled to them; and it is their duty to distribute the money coming into their hands as the court shall direct. The trustees herein cannot litigate the claims of one heir against those of another; and it is immaterial to them whether certain devisees take the *corpus* of the residuary estate, or only the income thereof. They have no concern in the question as to who shall bear the costs of litigation, and are not, therefore, aggrieved parties, we think, within the meaning of section 938, *supra*. *Adams v. Woods*, 8 Cal. 315; *Bates v. Ryberg*, 40 Cal. 465; *Estate of Wright*, 49 Cal. 550; *Rosenberg v. Frank*, 58 Cal. 420; *Roach v. Coffey*, 78 Cal. 282, 14 Pac. Rep. 840. Appeal dismissed.

We concur: **BEATTY, C. J.**; **SHARPSTEIN, J.**; **FOX, J.**; **McFARLAND, J.**; **THORNTON, J.**

(3 Cal. Unrep. 244)

SMITH et al. v. PHENIX INS. CO. (No. 18,514.)

(*Supreme Court of California.* March 10, 1890.)

INSURANCE—CONDITIONS OF POLICY—CHANGE OF TITLE AND POSSESSION.

1. To put a lessee in possession of insured property under a contract that he shall buy the property on the termination of the lease, or, at his option, at any time during its continuance, is a breach of a condition of the policy that it shall become void if any change takes place in the title or possession.

2. Notice to the insurance company, before destruction of the property by fire, of the lease and change of possession, but not of the agreement to convey contained in the lease, cannot affect the company's right to afterwards insist on the enforcement of such stipulation.

PATERSON, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; **WALTER VAN DYKE**, Judge.

Van Ness & Roche, for appellant. *Barclay, Wilson & Carpenter*, for respondents.

WORKS, J. This was an action on a policy of fire insurance. Trial by the court, and finding and judgment for the plaintiffs. The

defendant appeals from the judgment, and the case comes up on the judgment roll. The policy sued on contained the following clause: "If the interest of the assured in the property be other than an absolute fee-simple title, or if any other person or persons have any interest whatever in the property described, whether it be real estate or personal property, or if the building insured or containing the property insured by this policy stands on leased ground, or if there be a mortgage or other incumbrance thereon, it must be so represented to the company, and so expressed in the written part of this policy; otherwise the policy shall be void. When the property shall be sold or incumbered or otherwise disposed of, written notices shall be given to the company of such sale or incumbrance or disposal, and its assent thereto indorsed thereon; otherwise this insurance on said property shall immediately terminate. * * * If the property be sold or transferred, (in whole or in part,) or upon the commencement of foreclosure proceedings against or a sale under a deed of trust, or the existence of a judgment lien upon, or the issue or levy of an execution against, any kind of property herein described, or if the property be assigned under any bankrupt or insolvent law, or any change takes place in the title or possession, (except in case of succession by reason of the death of the assured,) whether by legal process or judicial decree, or voluntary transfer, assignment, or conveyance, or if the title or possession shall be changed from any cause whatsoever, * * * then there shall be no liability whatever under this policy for any loss or damage resulting from fire or fires, whether such loss or damage be immediate or remote." Subsequent to the issuance of the policy, the assured leased the property to one Jerome D. Stewart for the term of five years, and the lease also contained an agreement between the respondent and said Stewart for the sale of said property, as follows: "It is further agreed that said party of the second part may, at any time during the said term of five years, purchase said hotel, lots, and premises for the sum of \$25,000 cash, and likewise purchase said carpets, gas fixtures, and range at cost price. It is further agreed that said party of the second part will purchase said hotel, lots, and premises on or before five years from this date for the sum of \$25,000, together with the said carpets, gas fixtures, and range at their cost price." It was further agreed that the said Stewart should pay one-half of the insurance on the property. Stewart took possession under this lease.

It will be observed that the policy is rendered void if at the time of the issuance thereof any other person or persons have any interest whatever in the property. So if, "after the policy takes effect, the property be sold or transferred, * * * or any change takes place in the title or possession, * * * or the title or possession shall be changed from any cause whatsoever." The

sole question in the case is whether the contract above mentioned, and the change of possession thereunder, was within these prohibitions, and worked a forfeiture of the policy. These forfeiture clauses in the policy should be strictly construed, and, where the prohibition is against a sale or alienation or conveyance of the property, an agreement to sell is not within its terms. *Hitchcock v. Insurance Co.*, 26 N. Y. 68; *Jackson v. Insurance Co.*, 23 Pick. 418; *Gingrich v. Foltz*, 19 Pa. St. 38; *Masters v. Insurance Co.*, 11 Barb. 624; *Orrell v. Insurance Co.*, 13 Gray, 431; *Trumbull v. Insurance Co.*, 12 Ohio, 305; *Hill v. Protection Co.*, 59 Pa. St. 474; *Insurance Co. v. Kelly*, 32 Md. 421. And it has been held that, so long as the assured retains an insurable interest in the property, he is entitled to recover to the extent of such interest. *Stetson v. Insurance Co.*, 4 Mass. 330; 3 Kent, Comm. 262; *Trumbull v. Insurance Co.*, supra.

But the question before us is not whether there had been a sale, alienation, or conveyance of the property, or whether the assured had an insurable interest at the time of the loss, but whether "any change" had taken place in the title or possession. About this it seems to us that there can be no doubt. The agreement between the parties gave the vendee the option to buy at any time during the five years for which his lease ran, and absolutely bound him to buy and pay the purchase money at the end of that time. This gave him an equitable title in the land. *De Rutte v. Muldrow*, 16 Cal. 505-512; *Hall v. Center*, 40 Cal. 63; *Dowd v. Clarke*, 54 Cal. 48; *Pelton v. Insurance Co.*, 77 N. Y. 605; *Davidson v. Insurance Co.*, (Iowa,) 32 N. W. Rep. 514; *Germond v. Insurance Co.*, 2 Hun, 540; *Ramsey v. Insurance Co.*, 2 Fed. Rep. 429; 2 Amer. Law Reg. (N. S.) 488; *Moore v. Burrows*, 34 Barb. 173.

If an attempt had been made to recover the possession of the property during the term for any violation of the terms of the lease, he could have defeated such recovery by exercising his option to buy. He was entitled, under his agreement, to continue in the possession of the property either before or at the end of his tenancy by paying the purchase money, and upon such payment he would have been entitled to a conveyance. Having bound himself absolutely and unconditionally to purchase and pay for the property at the end of his tenancy, he would have been bound to purchase and make such payment, notwithstanding the destruction of the building by fire. *Davidson v. Insurance Co.*, supra; *McKechnie v. Sterling*, 48 Barb. 330. His only right would have been to look to the respondent for the insurance if it had been paid. It has been held that in such cases the insurance recovered belongs, in equity, to the vendee, and that the vendor holds it in trust for him. *Reed v. Lukens*, 44 Pa. St. 200. Therefore there was not only a change in the title, but a very important and material one, which took away from the respondent, in a

great measure, the incentive every one has to preserve his property and prevent its loss by fire. In some of the cases it is held that such a contract constitutes a sale of the property, where, as in this case, nothing is to be done on the part of the vendor but to execute the deed. *Davidson v. Insurance Co.*, supra. In this case the court said: "The precise language of that portion of the policy which is alleged to have been violated is in these words: 'In case any such property shall be sold, conveyed, or incumbered * * * without the written consent of this company is obtained, * * * this policy shall immediately thereafter be null and void.' It is manifest from the above that the policy contemplated that there might be a sale without a conveyance. The provision is the same as if the word 'or' had been expressed between the words 'sold' and 'conveyed,' and as if the policy read: 'In case any such property shall be sold or conveyed,' etc. In either case the policy would be void. We come, then, to the question as to whether, where one party binds himself unconditionally to pay a certain price for a piece of real estate, and takes possession under the contract, and the other party binds himself to convey the real estate upon the payments being made, and nothing remains to be done but for the party taking possession to make the payments, and for the other to make the deed, such contract constitutes a sale of the real estate, within the meaning of the policy. In answer to this question we have to say that we think it does. Lint was the real owner of the house that was burned. The loss was his loss. The plaintiff lost nothing, unless he needed the house for security. If Lint is responsible, or the property without the house is sufficient security for the balance of the purchase money, the plaintiff's claim can be collected, and he will have all that he would have had if the house had not been burned. If he is allowed to collect the insurance and the purchase money both, he will profit by the destruction of the property. That the insured shall not by his own voluntary act come to have an interest in the destruction of the insured property is forbidden, not only by public policy, but by all the maxims of insurance, and is precisely what this defendant attempted to guard against."

It is uniformly held that a vendee in possession under an agreement to purchase real estate is in equity the owner of the property, subject to the payment of the purchase money; and the vendor a trustee, with the right to hold the legal title until payment thereof, and then to convey to the vendee. *Baldwin v. Pool*, 74 Ill. 97; *Roberts v. Wilkinson*, 34 Mich. 138; *Derr v. Dellinger*, 75 N. C. 300; *King v. Ruckman*, 21 N. J. Eq. 599; *Holbrook v. Betton*, 5 Fla. 99. And such an interest will be regarded as an absolute interest, where the assured has represented his interest to be such. *Hough v. Insurance Co.*, 29 Conn. 10; *Insurance Co. v. Wilgus*, 88

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Pa. St. 107; *Insurance Co. v. Dyches*, 56 Tex. 565; *Insurance Co. v. Crockett*, 7 Lea, 725. The respondent could not have conveyed the property to another, even if the agreement could be construed as one not, in terms, binding him to convey. If the contract left the purchase at the option of Stewart, the respondent could not convey away the property until the time for exercising such option had expired. *Kerr v. Day*, 14 Pa. St. 112. In this case the purchase was not left to the option of the vendee. He had the option to buy at any time before the expiration of the term, but was bound absolutely to purchase at the end of his term. We think it is clear, therefore, that there was such a change of title here as to avoid the policy. The fact that the agreement to convey was coupled with a lease of the property, under which alone the vendee might have taken possession, does not seem to us to be at all material. The equitable title passed, and he was as much in possession under the agreement to convey as under the lease. The court found that the appellant had notice before the loss that Stewart was in possession of the property under the lease, but that it had no knowledge of the fact that the agreement to convey was contained in such lease. We do not think that such notice to the company could affect its right to insist upon the enforcement of the express provisions of its contract, or constituted a waiver of such right. Judgment reversed, with instructions to the court below to render judgment on the findings in favor of the defendant.

We concur: BEATTY, C. J.; FOX, J.; SHARPSTEIN, J.

I dissent: PATERSON, J.

THORNTON, J. I concur in the judgment, on the ground that there was a change of possession by the lessee's (Stewart's) taking possession under the lease, and when this change took place all liability under the policy sued on was, by its terms, at an end.

SMITH v. AMERICAN FIRE INS. CO. (No. 13,513.)

SAME v. PENNSYLVANIA FIRE INS. CO. (No. 13,515.)

(*Supreme Court of California*. March 10, 1890.)

In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, JUDGE.

WORKS, J. This is an action to recover on a policy of fire insurance, and is the same in all respects as *Smith v. Insurance Co.* ante, 383, (opinion filed this day;) and upon the authority of that case the judgment is reversed, with instructions to the court below to render judgment on the findings in favor of the defendant.

We concur: BEATTY, C. J.; FOX, J.; SHARPSTEIN, J.

THORNTON, J. I concur in the judgment herein for the reasons expressed in my concurring opinion in *Smith v. Insurance Co.*, ante, 383, (No. 13,514.)

(83 Cal. 279)

WILHOIT *et al.* v. TUBBS. (No. 13,185.)

(Supreme Court of California. Feb. 28, 1890.)

ADVERSE POSSESSION.

From the time a person obtains a patent from the state, the statute of limitations will run in favor of one in possession, and claiming adversely, against the patentee, and all claiming under him.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

J. B. Hall and J. M. Kile, for appellants. James H. Budd, for respondent.

GIBSON, C. This was an action of ejectment, brought by the executors of Joseph Kile, deceased, to recover the possession and the rents, issues, and profit of two parcels of land in the county of San Joaquin, being the S. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 11, in township 4 N., of range 5 E., M. D. M., containing 80 acres, and a portion of the S. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of the same section, containing 5 acres, together with damages for the withholding thereof. Plea, general denial, and affirmative defenses of adverse possession, with and without color of title, and a former adjudication as to the five-acre tract. Judgment for defendant, from which plaintiffs appeal upon the judgment roll, which contains a bill of exceptions.

The township lines, including the land in controversy, were surveyed and established, under the authority of the United States, in June, 1853; and, by the same authority, the subdivisional survey of the township was made in April, 1864. The field and descriptive notes, together with a plat of said survey, were approved and certified by the United States surveyor general for the state of California on June 30, 1864. The township plat was prepared in triplicate; one of which, together with a transcript of the field and descriptive notes, properly certified, was forwarded by the surveyor general to the general land-office of the United States. One was retained in the office of the surveyor general, and the other was filed in the United States district land-office at Stockton, July 1, 1864, which was then the proper office. Upon the approved plat, the greater part of the land of township 4, including all of section 11, was colored green, and upon the face of this portion the words "Swamp and overflowed lands" were written, and the lands so designated were excluded from the estimated aggregate area of "public lands," and included within that of "swamp and overflowed lands," as shown by the marginal table of acres forming a part of said plat. In June, 1865, the plat which was on file in the Stockton land-office was withdrawn therefrom by the surveyor general in compliance with an order of the commissioner of the general land-office. Thereafter, on February 20, 1868, a true copy of the plat then on file in the general land-office, together with a marginal table of areas, and certificate of approval thereon, as above mentioned, was made and certi-

fied to as a correct copy by the commissioner, and was also certified to by the surveyor general, and in the same month filed in the United States land-office at Sacramento within the Sacramento land-district, to which the township in question had been transferred. The copy was the same, in all respects, as the plat which was withdrawn from the land-office at Stockton, except as to the certificate of the commissioner.

In September, 1860, one John Thompson purchased from the state, as swamp and overflowed lands, the S. W. $\frac{1}{4}$ of section 11, and in the month of November following paid the state in full therefor, and received from the register of the state land-office a certificate of purchase. The subdivisional survey, made for the purpose of segregating the land so purchased by Thompson, was made by the county surveyor of San Joaquin county, whose plat and field-notes of such survey were approved, and first recorded by him in his office, and were then approved by the surveyor general of the state, who transmitted a copy of such approved plat and field-notes to the register of the state land-office. Thompson afterwards assigned his certificate of purchase to Joseph Kile and R. B. Thompson, who, upon the presentation and surrender thereof, received from the state a patent for the land described in the certificate. On September 21, 1863, R. B. Thompson, for a valuable consideration, conveyed all his interest in the land described in the patent to Joseph Kile. Joseph Kile, in August, 1864, made an application to purchase, and on December 30th of the same year did purchase, from the state, as swamp and overflowed land, the S. E. $\frac{1}{4}$ of section 11, and on August 5, 1865, received a patent from the state for the same. The subdivisional survey of the land so purchased was made and recorded in the same way as that in the case of John Thompson. The surveyor-general, in May and June, 1867, and in May, 1870, by notices in writing, notified the United States general land-office that the state claimed the land in controversy, under the act of congress of July 23, 1866, above referred to, as the state had selected and sold the same as swamp land to *bona fide* purchasers prior to the passage of said act. In January, 1862, the defendant, Tubbs, then being possessed of all the qualifications requisite to enable him to acquire title to land as a pre-emptor, made an actual settlement upon the S. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 11. He erected a dwelling-house thereon, in which he and his family resided; and he in person, with his family, have ever since occupied and cultivated the land. On July 10, 1862, his declaration of intention to preempt the same was received and filed by the register of the United States land-office. At the time of defendant's entry and declaration of intention to purchase, as stated, he had knowledge of the prior state survey and sale of the S. W. $\frac{1}{4}$ by the state to John Thompson as swamp and overflowed land. On May 7, 1873, the defendant made final proof of his

pre-emption entry for the S. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 11. May 8, 1873, the defendant made an original homestead entry, under the laws of the United States, of the S. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 11; and on November 18 of the same year he commuted the same to a cash entry, and on the 1st of October, 1879, received a patent for each tract from the United States. No other homestead or pre-emption entries, or settlement of, for, or upon the lands in controversy, excepting the entries and settlement of the defendant, were ever made.

Except as to defendant's claim of title by prescription, an identical state of facts, as far as the 5 acres in controversy here are concerned, appeared in the case of *Tubbs v. Wilhoit*, 78 Cal. 61, 14 Pac. Rep. 361; and, as to the 80-acre tract involved here, the facts are very similar to those of that case, except as to the claim of title by prescription. That was an action of ejectment, in which the plaintiff relied upon a patent of the United States issued upon a commuted homestead entry made on May 8, 1873, on which date whatever right the plaintiff thereby acquired attached; and, in support of his patent, he claimed that the land described in his patent was, on September 28, 1850, the date of the swamp-land act, dry land. The defendants, who were the executors of one Joseph Kile, relied upon a patent for the same tract, as swamp and overflowed land, issued to their testator by the state of California on the 5th day of August, 1865, upon an application to purchase the same made to the proper state authorities in August, 1864, and claimed, in support of such patent, that the tract was swamp and overflowed land on the date of the swamp-land act, and had been conclusively established to be such before the plaintiff had acquired any right to the land. This court, following the case of *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985, held that, under the acts of congress of September 28, 1850, known as the "Swamp-Land Act," and of July 23, 1866, entitled "An act to quiet land titles in California," "the plat of the survey of the township, including the lot in controversy, approved by the United States surveyor general for California, was conclusive between the state and the United States, and vested the title in the state of California as of the 28th of September, 1850, the date of the passage of the swamp-land act." It further appears from the findings in this case, as it did in *Tubbs v. Wilhoit*, that in 1874 a hearing was ordered by the commissioner of the general land-office as to whether the land in controversy was dry, or swamp and overflowed, which hearing resulted in a determination to the effect that it was public, and not swamp and overflowed, land. "But," as was said in the case last referred to, "the order for a hearing was made after the title had vested in the state, and therefore the decision of the federal land department, that the land was not swamp and overflowed, was of no validity whatever." The alterations made

in December, 1870, upon the plat of the survey of said township 4, in changing the segregation line between the swamp and public lands, as shown on the plat on file in the office of the United States surveyor general, so as to make it appear therefrom that the S. $\frac{1}{4}$ of the S. $\frac{1}{4}$ of section 11 was public, and not swamp and overflowed, land, and also the same alterations made upon the plat of the same township in the office of the register of the Stockton land-district, all of which were made pursuant to instructions received from the United States general land-office, as shown by another finding in this case, were of no effect, for the reason last quoted. It is, therefore, clear that, as the title to all the land involved here had passed from the United States to the state of California as early as September 28, 1850, the date of the swamp-land act, the several patents subsequently issued by the United States to Tubbs, the respondent here, upon his pre-emption and commuted homestead entries, did not convey anything, as there was nothing for them to operate upon.

But the court also found, upon the issue tendered by the respondent by his plea of adverse possession and the statute of limitations, that he (the defendant, Tubbs) had, ever since his entry upon the land, on or about January 1, 1862, been in the open, notorious, and exclusive possession and occupation of the S. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 11, containing 80 acres, claiming the same adversely to Kile, his predecessors in interest, and all others; and ever since October, 1879, such adverse possession has been continuous, and he has based it upon a claim of title, exclusive of other right, upon the patent to the land issued to him by the United States; and he has, since the date first mentioned, paid all taxes levied or assessed upon the above-described land, and was on the 23d of May, 1884, the time of the death of Kile, and ever since has been, the owner of the land by a title by prescription, and entitled to the possession, and rents, issues, and profits, of the land. And, as to the five acres, which consist of a portion of the S. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 11, the court found that he (defendant, Tubbs) has been in the open, notorious, continuous, and exclusive possession and occupation thereof since May 8, 1873, claiming the same adversely to Kile, his predecessors in interest, and all others, and has ever since October, 1879, maintained such adverse possession, upon a claim of title, exclusive of other right, based upon the patent issued to him by the United States; and since May, 1873, he has paid all taxes levied or assessed on the S. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 11, and was on May 23, 1884, the date of the death of Kile, and ever since has been, the owner of the said five acres by a title by prescription, and entitled to the rents, issues, and profits of the said five acres. Another finding is that Joseph Kile died on May 23, 1884, and was not on the day before, nor at any time thereafter, the owner of either tract of land in controversy, or entitled to the rents, issues, and profits thereof; nor since

his death have the plaintiffs, as his executors, been entitled to the possession of said land, or the rents, issues, and profits thereof.

Now, as to the title by prescription, the appellants contend that it cannot prevail, because their testator claimed both tracts in dispute by title derived from the state, through the patents issued therefor, as swamp and overflowed lands; and, as respondent claimed adversely to him, and his predecessors in interest, including the state, to avail himself of a plea in bar against the state, and her successors in interest, he should have pleaded section 315 of the Code of Civil Procedure, or the similar provision of the statute of limitations of 1850, c. 2, § 3, as they were and are the only laws under which the defendant could acquire a prescriptive title. It may be conceded that, if section 315, *supra*, is the only limitation that applies in this case, as the defendant failed to plead it, or the facts necessary to bring himself within its terms, he cannot derive any benefit from it. We are of the opinion, however, that neither section 315 nor 316, Code Civil Proc., also relied upon by appellant, applies in this case. Hence, the case of *Railroad Co. v. Slight*, 1 N. Y. Supp. 554, in which similar provisions of the laws of New York were applied, cited by appellants, is not in point. It is quite clear that a state, as a sovereign, is not precluded from exercising the prerogative as such, with regard to her property, except in so far as she has expressly restricted herself in her legislative enactments. Such a restriction is found in section 315, *supra*, which reads as follows: "The people of this state will not sue any person for, or in respect to, any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless (1) such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or (2) the people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of ten years." See *People v. Center*, 66 Cal. 551, 5 Pac. Rep. 263, and 6 Pac. Rep. 481; and *People v. Clarke*, 9 N. Y. 349, therein cited; also *Weber v. Commissioners*, 18 Wall. 57, in which the same provision of the statute of limitations of 1850, of this state, is commented upon. Section 316, Code Civil Proc., next referred to, is also the same as section 4, c. 2, of the statute of limitations of 1850, except the word "shall," in section 4 of the latter statute, has been changed to the word "can" in section 316. By the terms of section 316, patentees or grantees of the state are precluded from maintaining an action respecting the real property granted unless the same might have been maintained by the people, as specified in section 315, in case the patent had not been issued, or the grant made. Or, in other words, if the right of the people to maintain such an action is barred at the time the patent is issued, or the grant made, the

right of the patentee or grantee is also barred. If, however, when the state patent is issued, or its grant made, not more than 5 of the 10-year limit prescribed in section 315 has run, the patentee or grantee can maintain an action to recover the property, or the mesne profits thereof, at any time within the period of 5 years, as provided in sections 318, 319, and 321, and subdivision 2, § 336, Code Civil Proc. All of these sections, together with sections 323-325 of the same Code, defining the different kinds of adverse possession, were set up by defendant, in his answer, in bar of appellants' right to maintain this action for the recovery of the premises involved, or the mesne profits thereof. We apprehend that the distinction between sections 315 and 316, and the other sections mentioned, is that, as the state cannot be disseised of its lands by the adverse occupancy of another, (Civil Code, § 1006.) a mere assertion by it of ownership by legislative enactment or otherwise, as well by a judicial proceeding, as indicated in *Weber v. Commissioners*, *supra*, will prevent the time specified in section 315 from running, and ripening into a presumptive title in favor of the adverse occupant; while, under the other sections, between individuals, nothing short of an actual re-entry upon, or the commencement of an action to recover the possession of, the property of which he has been disseised under an adverse claim, will avail the true owner in preventing the adverse occupant from acquiring a title by prescription, except an acknowledgment of the true title by the adverse occupant.

As the title of the United States to the swamp lands within this state, of which the land involved here was a part, passed to this state on the passage, and by virtue, of the act of congress of September 28, 1850, it follows that, when the state subsequently sold the several tracts in dispute,—one, the 80-acre tract, to the predecessors of Kile, and the other, embracing the five acres, to Kile himself,—upon their several applications made to purchase the same as swamp lands under the act of April 21, 1858, and the amendments thereto of April 18, 1859, and afterwards issued its patents for such tracts on the 26th of June, 1862, and on the 5th day of August, 1865, respectively, the state parted with all its title to the several tracts so patented, and the statute of limitations commenced to run on those dates, respectively, in favor of the defendant against all persons claiming title under such patents. *O'Connor v. Fogle*, 63 Cal. 9; *Reed v. Ybarra*, 50 Cal. 465; *Irrigation Co. v. Jansen*, 66 Cal. 300, 5 Pac. Rep. 486; *Henshaw v. Bissell*, 18 Wall. 255.

This action was not commenced until the 14th day of December, 1887; and the respondent, having maintained his adverse possession from the 26th of June, 1862, the time when the state's patent to the 80-acre tract was issued, until the 23d day of May, 1884, the date of the death of Kile, a period of nearly

22 years, and thence to the commencement of this action, and paid all the taxes levied or assessed thereon, had, nearly 17 years before the last-mentioned date, acquired a prescriptive title to the tract, which extinguished the legal title Kile had acquired from the state. Civil Code, § 1007. So, too, as to the 5-acre tract. The respondent initiated his adverse possession of, and claim of title to, it, on the 8th of May, 1873, the date of his homestead entry, and maintained the same, and paid all taxes levied or assessed upon the land up to the commencement of this action, and thereby acquired a prescriptive title to it, sufficient against Kile, six years before the latter's death.

There is a finding to the effect that, in a certain action in which the appellants' testator, Kile, and one Reese B. Thompson, were plaintiffs, and the respondent here was defendant, involving the title to the 5-acre tract in question here, judgment was rendered in favor of the defendant on April 25, 1866, and was subsequently, on appeal therefrom to this court, affirmed, and that the same still remains in force, but the conclusion we have reached regarding the prescriptive title acquired by the respondent to the same land renders it unnecessary to consider its effect. The record does not disclose any error, and we therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Hearing in bank denied.

(33 Cal. 363)

BEWICK *et al.* v. MUIR *et al.* (No. 12,437.)

(Supreme Court of California. March 1, 1890.)

MINES AND MINING—LIENS—FORECLOSURE—SUMMONS—VOLUNTARY CONVEYANCES.

1. A summons showing that the action is to recover money, and to foreclose liens, contains "a statement of the nature of the action in general terms," within Code Civil Proc. Cal. § 407, subd. 2, though it does not show the nature of the liens, or for what, or on what, they are claimed.

2. In an action to foreclose liens on a mine, allegations that plaintiff performed labor, etc.; that defendant promised to pay therefor at a fixed price; and that the sum due was unpaid,—were denied. *Held*, that findings that the labor was performed, and that on a certain day, before action brought, there was due for said work and labor a certain amount, were not sufficient to sustain a judgment for a lien against a mortgage. It was necessary to find that there was a promise to pay at a given rate, and that the amount was due and unpaid when the action was begun.

3. The complaint alleged that a certain mortgage, antedating plaintiffs' liens, was without consideration, and in fraud of plaintiffs. *Held*, that a mere finding that the mortgage was without consideration would not support a decree adjudging plaintiffs' liens prior thereto, under section 8442, Civil Code, providing that mere want of consideration shall not be proof of fraud.

4. The term "mining claim," as used in section 1183, giving a lien on a mining claim to persons performing labor, etc., applies to a mine, the title to which has been acquired in fee, as well as to a mining claim in its technical sense.

5. The fact that the owner held under a Spanish grant will not prevent the attaching of a lien, if the land is in fact mineral land.

6. There can be no lien for materials furnished unless they were used in the work done.

In bank. Appeal from superior court, Placer county; B. F. MYRES, Judge.

R. Percy Wright, for appellants. C. A. & F. P. Tuttle, Naphtaly, Friedenrich & Ackerman, and Gray & Haven, for respondents.

SHARPSTEIN, J. This was an action to foreclose a number of liens upon a mine for labor and materials, under the act of 1880. There were 45 plaintiffs, each claiming a separate lien. Judgment was given for the plaintiffs, and two of the defendants appealed.

1. The summons is sufficient. It states the nature of the action in general terms, and this is all the statute¹ requires. It is apparent from the statements of the summons that the action in which it was issued was to recover money, and to foreclose liens. This is the general nature of the action. It is unnecessary to state whether the right to the money sought to be recovered accrued from work and labor, or from goods sold and delivered, or to state the kind of lien, or on what property the lien attached. All these things appear in the complaint on file, of which filing he is notified by the summons; and, if he is not notified, he is bound in law to know it. He is bound to know that a complaint has been filed, for otherwise a summons could not issue. It makes no difference that a copy of the complaint is not served on the party moving. The above is in accordance with the *dictum* in Lyman v. Milton, 44 Cal. 631. The summons states what the statute requires, and all that is needful. The cases decided in Lyman v. Milton, *supra*, as also Ward v. Ward, 59 Cal. 141, were different from this; and, as said above, there is a compliance with the *dictum* in the former case, and with the statute. Why require that to be inserted in the summons which must appear in the complaint? Our practice is cumbersome enough without its being made more so by judicial decision. We cannot understand how it can be said that the summons does not contain "a statement of the nature of the action in general terms." The Code of Civil Procedure provides, which is equivalent to a command to all of the courts of the state, that all its provisions are to be liberally construed, with a view to effect its objects, and to promote justice. Code Civil Proc. § 4. The objects of the requirements of the statute as to what the summons shall contain are carried out by serving it with a general statement, which is specialized in the complaint; and it is injustice to turn a party out of court, or reverse a judgment, on a view of the summons merely technical, when the summons points to the complaint where the particular statement is

¹ Code Civil Proc. Cal. § 407, subd. 2.

made; and, if a copy of the complaint is not served on the moving party, he knows where to find it. When the motion was made at the bar of the court, the complaint was, no doubt, within reach, or it could have been procured in a moment. *King v. Blood*, 41 Cal. 316, is precisely in point, and treats the question as it is here, as a perusal will at once show. The court did right in denying the motion.

2. The findings are insufficient to support the judgment against the appellant Trumbo. In each count, it was alleged that the plaintiff performed labor, etc.; that the defendant promised to pay therefor at a fixed rate; and that the sum due therefor was unpaid. These allegations were denied in each case; and the findings are simply of the performance of the labor, and that on a certain day, before the commencement of the action, "there was due for said work and labor an unpaid balance of \$——," naming it. A finding that a certain sum was "due and unpaid" at a day anterior to the beginning of the action was not a finding of a promise to pay at a fixed rate, or any rate, or that any amount was due and unpaid at the commencement of the action. The money thus due and unpaid might have been paid before the day last mentioned; and the court cannot say, as matter of law, that any amount was due when suit was commenced. The precise question in issue should be found, as also that a sum of money was due and unpaid on the day the action was brought. These issues are material. As to the latter, as showing its materiality, it may be observed that plaintiff could only have a lien for the money which was due and unpaid on the day he began his suit.

3. The appellant Trumbo was alleged to claim a lien upon the property by virtue of a mortgage which appears to have been made before most of the plaintiffs' liens attached. The complaint alleged that this mortgage was without consideration, "and in fraud of the plaintiffs." The question as to the priority of this mortgage over the plaintiffs' liens was a material one. The court found that it was without consideration, but made no finding as to fraud. The decree was that the property should be sold, and the proceeds applied first to the payment of the plaintiffs' claims. In this there was error. Assuming, for the purposes of the opinion, that the bare statement of the mortgage was "in fraud of the plaintiffs," is a sufficient averment that it was made for the purpose of hindering, delaying, or defrauding creditors, the court should have found upon the question of fraud. Those of the plaintiffs whose liens were subsequent in point of time to the mortgage could attack it only upon the ground that it was made to hinder, delay, or defraud creditors. The mere fact that it was without consideration is not the equivalent to this. Civil Code, § 3442. It was error, therefore, to decree that all the plaintiffs should be first paid out of the proceeds of sale, in the absence of a finding of fraud.

4. The appellants make certain points which turn upon the meaning of the term "mining claim," as used in the statute. See Code Civil Proc. § 1183, as enacted in 1880. It is said that it appears that the owners of the mine had obtained a patent therefor, and that therefore it was not a "mining claim," properly so called; and that the term "mining ground," used in the findings is not the equivalent to "mining claim." We think that, for the purposes of the law, it makes no difference whether the owners had obtained a patent or not. If this is not so, it would follow that a laborer upon a mine for which a patent had issued from the government has no lien. This is not the meaning of the law. The words "mining claim," as used in the law, have no reference to the different stages in the acquisition of the government title. In our opinion, it includes all mines, whether the title is inchoate, as in the case of a mining claim in its strict sense, or perfect, as in the case of a fee-simple title.

It may not make any difference if the title to the mine had passed under a Spanish grant. The decision in *Williams v. Association*, 66 Cal. 193, 5 Pac. Rep. 85, is not in conflict with this. Although there are some expressions in the opinion in that case which seem to countenance the opposite view, we think that what was decided was merely that the adjacent land, which the defendant held under a Spanish grant, was not mineral land, or appurtenant thereto. Such land was, therefore, not a mine or a mining claim in any sense, and consequently was not liable as such. If it shall turn out that some of the land involved here was of that character, then it is not liable. But its inclusion in the notice of lien does not vitiate it, if any part of it was a mine. The court can adjust the rights of the parties by its decree. *Malone v. Mining Co.*, 76 Cal. 583, 18 Pac. Rep. 772. We think also that the phrase "mining ground," used in the findings, is sufficient to designate and include the property upon which liens were claimed.

There should be a finding that the materials furnished had been used in the work done. If not used, there can be no lien by the material-man against the owner. *Silvester v. Mine Co.*, 80 Cal. 510, 22 Pac. Rep. 217.

The judgment is reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; THORNTON, J.; MCFARLAND, J.; FOX, J.; PATERSON, J.

(83 Cal. 373)

Bewick et al. v. Muir et al. (No. 12,390.)
(Supreme Court of California. March 1, 1890.)

In bank. Appeal from superior court, Placer county; B. F. MYRES, Judge.

Naphtaly, Friedenrich & Ackerman, for appellants. C. A. & F. P. Tuttle, for respondents.

SHARPSTEIN, J. The general features of this case are the same as in No. 12,437, ante, 339, (which has just been decided.) One of the defendants

Susman, who was alleged in the complaint to have some interest in or claim upon the property which was subject to the interest of the plaintiffs, filed an answer in which he averred that he had a mortgage which had priority over the plaintiffs' claims, and that he had commenced a suit to foreclose said mortgage, joining all the plaintiffs herein as defendants therein, and that said suit was then pending; and he annexed a copy of his complaint in such suit, and prayed for judgment as in said complaint. He also denied that the sums claimed by the plaintiffs were unpaid. As has been stated in the companion case, the findings are insufficient upon the issue of payment, which issue arises upon the answer of this appellant. Upon a retrial the decree in the foreclosure suit, if one has been obtained, as seems to be conceded, can be set up by supplemental answer, and the question as to its effect tried and determined. The judgment is therefore reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; McFARLAND, J.; FATHERSON, J.; THORNTON, J.

(83 Cal. 374)

PEOPLE v. CLINE. (No. 20,585.)

(Supreme Court of California. March 3, 1890.)

CRIMINAL LAW—PLEA—LARCENY—EVIDENCE—INSTRUCTIONS—APPEALABLE ORDERS.

1. Where the record shows nothing to the contrary, it will be presumed that defendant was present when the plea of not guilty was entered for him by his counsel.

2. Defendant, having testified that he bought the horse, which he was alleged to have stolen, from one R., was asked, on cross-examination: "Where is R. now, do you know?" "When did you last hear from him?" "Have you made any effort to procure his attendance?" Held proper questions, as his ability or expectation to have R. corroborate his statement might throw some light on its truth.

3. Evidence that R. had stolen other horses in the neighborhood, about the same time that the horse in controversy was stolen, was properly excluded as irrelevant and immaterial.

4. The court properly refused to instruct that "the fact that the defendant did not produce R. as a witness is not to be considered by the jury as a circumstance of guilt," as it was a circumstance which the jury had a right to consider.

5. An instruction that "the testimony of R., if he had been called as a witness to prove that he had sold the horse to the defendant, would have been entitled to no more weight than the defendant's, all other things being equal," was properly denied, because it related to the weight to be attached to evidence.

6. An instruction that "the possession, or even recent possession, of stolen property, is not alone sufficient evidence to find the possessor guilty of the crime of having stolen the property, unless there is some other evidence in the case tending, with this fact of possession, to establish his guilt," was not prejudicial to defendant.

7. An order denying a motion in arrest of judgment is not appealable.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

W. D. Grady, for appellant. Atty. Gen. Geo. A. Johnson, for the People.

FOOTE, C. The defendant was tried and convicted of grand larceny. From the judgment rendered in the premises, an order overruling his motion in arrest of judgment, and an order refusing him a new trial, he appeals. The order denying the motion in arrest of judgment is not appealable. *People v. Majors*, 65 Cal. 100, 3 Pac. Rep. 401.

It is claimed that the record does not disclose the fact that the defendant personally pleaded not guilty to the information filed against him; that for this reason it does not appear that the court below had jurisdiction to try him. The record shows that the defendant was arraigned, and asked for further time in which to plead. A demurrer was then filed by his counsel, and overruled by the court. "Whereupon W. D. Grady, of counsel for defendant, in open court pleads not guilty of the offense charged in the information for and on behalf of the defendant, J. G. Cline." There is nothing, therefore, in the record which goes to show that the defendant was not present when (after due arraignment theretofore had) his counsel entered the plea of not guilty. In *People v. Huff*, 72 Cal. 118, 13 Pac. Rep. 168, it was contended that the judgment should be reversed, because at "a view" had by the jury of the premises where the crime was committed it did not affirmatively appear that the "sworn officer" in charge of the jury was the sheriff, "or that the place where the offense was charged to have been committed was shown to the jury by a person appointed by the court for that purpose, or that the defendant's counsel and the judge of the court were present." But the appellate court, in refuting the argument made in that behalf, said: "The settled rule is that error is not to be presumed, but must affirmatively appear in the record, and all omissions and uncertainties in a bill of exceptions are to be construed against the party presenting it. * * * It will be presumed, therefore, in the absence of a showing to the contrary, that the sworn officer who accompanied the jury was the sheriff or his deputy; that the place which the jury were sent out to view was properly shown to them by a person appointed by the court for that purpose; and that, if need be, the counsel and judge were present." We think it clear that in this case it must be presumed that the defendant was present when the plea of not guilty was entered for him by his counsel. He was in no worse condition than if upon his arraignment, which was properly had, he had stood mute, when the court could have ordered his plea of not guilty to be entered for him. All the charges of the information against him were thus put in issue, he was present at the trial, and testified in his own behalf, and none of his rights suffered any prejudice by reason of the plea thus entered.

The defendant, in his effort to account as to how he honestly came by the property, had testified that he bought the horse he was alleged to have stolen from one Robles. The prosecution, on cross-examination, asked him: "Where is Robles now, do you know?" "When did you last hear from him?" "Have you made any effort to procure his attendance?" These questions were objected to, but the objection was overruled. We do not perceive any force in the objection. It was competent to show, as a circumstance in the case, the probability or improbability of the

defendant's statement, by making it evident whether or not he could have had, or expected to have had, Robles to testify in corroboration of defendant's statement. Thus some light might be shed upon the matter as to whether the defendant was telling the truth, or the contrary, about his getting the horse innocently from Robles.

It is further claimed that the court erred in not allowing the witness Strivens to state in evidence that Robles had been arrested by him for stealing other horses in the immediate neighborhood where the horse in controversy was stolen, and about the same time as that of the last theft, and that Robles was placed under arrest and taken to a justice's court on charge of stealing said other horses. How the fact that Robles about the same time had stolen other horses could affect the defendant's alleged theft of the horse here involved, or could be pertinent or material to the issues here made and tried, we cannot perceive. All the evidence of that kind which was offered to be proven by Strivens or Hensley was properly prevented by the court from going to the jury.

It is further assigned for error that the court refused this instruction requested by the defendant, viz.: "The fact that the defendant did not produce Guadalupe Robles as a witness is not to be considered by the jury as a circumstance of guilt." The instruction had no application to the instance of a defendant neglecting or refusing to testify, which the statute says is not to prejudice him. Section 1323, Pen. Code. The fact that Robles, from whom the defendant claimed to have bought the horse alleged to have been stolen, was not present to testify as a witness in the defendant's behalf was a circumstance which the jury could consider, as a matter of evidence, in determining the probable truth or falsity of the defendant's statement as to how he came by the horse. But the instruction, in the form asked for, virtually assumed to take away the consideration of this circumstance from the jury, in determining the guilt or innocence of the defendant, which was improper. While it is true that the fact of Robles not being present would not prove the defendant to be guilty as charged, it was nevertheless a circumstance which the jury might consider. In addition, the language of the instruction, as asked, is somewhat inaccurate, and might have misled the jury.

It is also claimed that the court erred in refusing this instruction: "The testimony of Robles, if he had been called as a witness to prove that he had sold the horse to the defendant, would have been entitled to no more weight than the defendant's, all other things being equal." This was an instruction as to the weight to be attached to evidence, and was properly refused.

The court below is also complained of for granting of its own motion this instruction: "The possession, or even recent possession, of stolen property, is not alone sufficient evi-

dence to find the possessor guilty of the crime of having stolen the property, unless there is some other evidence in the case tending, with this fact of possession, to establish his guilt." We do not perceive any impropriety in the instruction. It directed the jury that they could not convict the defendant on the evidence alone of the recent possession of the property alleged to have been stolen; that they must have some other evidence before them in addition to such possession, tending, at least, to show the defendant's guilt, before they could convict him of the crime charged against him. This was an instruction of caution, was in the defendant's favor, did not prejudice him in any way, and was in entire harmony with the other instruction given. We perceive no prejudicial error in the record, and advise that the appeal from the order denying the motion in arrest of judgment be dismissed, and the judgment and order refusing a new trial be affirmed.

I concur: HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal from the order denying the motion in arrest of judgment is dismissed, and the judgment and order refusing a new trial are affirmed.

(83 Cal. 415)

In re COOK'S ESTATE. (No. 13,396.)

(Supreme Court of California. March 10, 1890.)

DIVORCE—RENDITION OF JUDGMENT—DEATH OF PLAINTIFF.

A judgment of divorce, entered in the minutes, takes effect from its rendition, and may be entered *nunc pro tunc* after plaintiff's death, on motion of her second husband, whether the failure to enter it before was due to plaintiff's own neglect, or to that of her attorneys, or of the clerk of the court. Following *In re Cook's Estate*, 19 Pac. Rep. 431.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. CORREY, Judge.

Eugene M. Deuprey and *Alfred Clarke*, (Geo. W. Chamberlain, of counsel,) for Theodore T. Cook. *James M. Seawell* and *Henry C. McPike*, for William E. Miller, assignee of William W. Richards.

PATERSON, J. This is an appeal from a decree of distribution. The case has been in this court before. 77 Cal. 220, 17 Pac. Rep. 923, 19 Pac. Rep. 431. The question to be determined is whether Theodore T. Cook or William W. Richards is the surviving husband of Emma Cook, deceased. Each claims that he is entitled to one-half of her estate by virtue of such relation. Cook was married to the deceased, December 26, 1873. Richards, believing that she had been divorced from Cook on April 23, 1880, was married to her in due form of law, on May 30, 1880, and thereafter lived and cohabited with her as her husband until her death, November 30, 1883. At the former hearing of the contest the court below

decided in favor of Cook, holding that, as the decree of divorce had not been actually entered, he had never been divorced from Emma. On appeal we reversed the decree, and remanded the cause for a new trial. On the last trial the court below admitted the judgment roll in Cook v. Cook in evidence, held that the parties were divorced in that action, adjudged Richards to be the surviving husband, and entered a decree distributing one-half of the estate to his assignee, Miller. From this decree Cook has appealed. In the former opinion it was said: "Of course, we have no commendation for the neglect of the clerk to enter the judgment in Cook v. Cook immediately after it was pronounced, or for the failure of the attorney for the plaintiff in that action to see that the judgment was then entered. But many of the most perplexing questions presented here arise out of the want of care or the want of capacity of attorneys and other officers of the courts. It is the duty of the court, however, to protect the rights of litigants even against the incapacity of their agents, except where such incapacity has placed those rights beyond the reach of legal justice." Acting upon the theory that the neglect of the clerk without fault of Emma Cook was the basis upon which the court rested its decision, counsel for Cook, against the objection of respondent, proved at the last trial, and the court found, "that after the rendition of said decree in Cook v. Cook the attorney for said Emma Cook in said action notified her that she was not and would not be divorced from said Theodore T. Cook until said divorce was entered; and that, in order to have said decree entered, it was necessary for her to pay the fees of the clerk of said court for entering said decree, amounting to the sum of \$4, but that said Emma Cook wholly neglected to pay said fee; that the failure to enter said decree of divorce was wholly the fault of said Emma Cook, and not the fault of the court, or any of its officers, or her attorneys." It is said that without the judgment which was entered *nunc pro tunc* there would have been no evidence of a decree of divorce, and that the validity of the order for a decree *nunc pro tunc* rested upon the fact that it was the fault of Emma Cook's attorneys, or of the clerk, and not any fault of her own, which led to the delay in the entry of the decree. Therefore, it being made to appear that the failure to enter the decree until after the death of Emma was due to her own neglect in her lifetime, it is claimed the decree *nunc pro tunc* is invalid, and should have been excluded.

There are two answers to this contention of appellant:

1. We do not think that the court in the former appeal placed its decision upon the ground that the failure to enter the decree was due to the fault of the attorneys of Emma, or to the clerk, or that it considered the question as to whose fault caused the delay at all material. An examination of the opinion rendered by Mr. Justice McFARLAND

will show that the decision went upon the grounds that the record in Cook v. Cook established the fact that a judgment of divorce had been rendered by the court on April 23, 1880, and entered in the minutes; that, thus entered in the minutes, it was as valid and binding as if had been written and signed by the court, and, being so, took effect at the time of its rendition; that, the judgment having been rendered in the life-time of Emma, there was no error in entering it after her death, it being the duty of the clerk to enter the judgment at any time after its rendition upon payment of fees, and the entry being but the evidence of the judgment already in operation and effect. These being the grounds of the decision, we are bound to hold that the distinction sought to be made by appellant between the facts of the case as they appeared on the former trial and in this record is an immaterial one, and therefore, under the rule as to the law of the case, the judgment should be affirmed.

2. If it be true that the court could not enter a decree *nunc pro tunc* unless the delay was caused by the fault of an officer of the court, the question remains, where and how is the cause of the delay to be determined? It must be done in the court in which the entry is to be made. In this matter it appears that the court which rendered the decree heard evidence and ordered a decree entered *nunc pro tunc*. If proof of the fact that Emma Cook was not in fault was required, we must presume that such proof was offered. In other words, so long as the decree stands it is conclusive as to all matter of evidence necessary to its validity. But it is claimed that the decree as entered is void on its face because made on application of Richards, a stranger to the record and without notice. These contentions were urged upon the court on the former hearing. If they, or either of them, had been deemed sound, the judgment would not have been reversed; if the decree was void, it would have been declared to be inadmissible evidence. Judgment and order affirmed.

We concur: BEATTY, C. J.; FOX, J.

(83 Cal. 423)

In re HILLIARD'S ESTATE. (No. 13,476.)

(Supreme Court of California. March 10, 1890.)

EXECUTORS AND ADMINISTRATORS—ACCOUNTING—INTEREST.

1. Where, on final accounting of executors, evidence is admitted, without objection, as to the contents of letters which were not produced, acknowledging the payment of two contested items, and one of the executors testifies that he actually paid the same, the items are sufficiently vouched, in the absence of contradictory evidence, to warrant the court in allowing them.

2. Though there is no evidence that the executors derived any benefit from the use of money belonging to the estate, they are chargeable with legal interest, with annual rests, after a year from the time of their appointment, where it appears that the administration might have been closed within that time, and the only excuse offered for the delay was the negligence of the executors' at-

torney, who died six or seven years before the commencement of the present suit; that until about two years before that time they supposed the estate was all settled, but never inquired about it; that they did not succeed in loaning the money on satisfactory security the first two or three years; and that since then they did not try to do so, but one of them kept it separate in his safe for three or four years, and used it whenever he needed or wanted it, but had never put it out at interest.

Commissioners' decision. Department 1. Appeal from superior court, Amador county; C. B. ARMSTRONG, Judge.

E. C. Farnsworth and John F. Ellison, for appellant. *D. B. Spagnoli and C. H. Lindley*, for respondents.

VANCLIEF, C. Chester Hilliard died testate in Amador county in April, 1879, leaving real and personal property of the value of about \$2,355, which he devised and bequeathed to his two minor sons, Albert and George Hilliard. The will appointed Samuel W. Bright and Martin Dotta executors, without requiring them to give bond or security for the performance of their duties, and authorized them to sell and convey all the property of the estate, and convert it into money, without any order of court, and, after paying the lawful debts of his estate, to invest the residue of the money for the benefit of his said sons. The will also nominated and appointed the same persons—Bright and Dotta—guardians of the persons and estates of his said minor sons, without requiring any bond or security for the performance of their duties as such. The will was proved, and Bright and Dotta were appointed executors, May 12, 1879. Within one year after their appointment the executors sold all the property, and paid all the debts, of the estate, but appear to have reported to the probate court no account thereof, nor of any of their transactions in regard to the estate, until, in obedience to an order of that court, they filed their final account on the 15th day of July, 1889; whereby it appeared that they had received in cash from the estate \$2,355.43, of which they had disbursed \$1,764.85, leaving in their hands \$590.58. A portion of the disbursements was for the support and care of the minor sons; among them, four items of \$150 each, paid, respectively, November 3, 1879, November 3, 1880, November 16, 1881, January 22, 1883, to Mrs. J. D. Oaks. On July 29th, after the filing of this final account, A. C. Hilliard, one of said sons, being then over 21 years of age, filed in the probate court his written objections to the following items charged in the account: The item of \$150 charged as having been paid Mrs. Oaks on November 16, 1881, and to the item of \$150 charged as paid Mrs. Oaks, January 22, 1883,—on the ground that neither of these items had been paid. He further claims that the executors should be charged with interest on all money received by them from May 15, 1880, for the reason that 12 months was a reasonable time within which to settle the estate, and that no reason existed why the estate should not have been set-

tled and distributed within that period. The issues thus raised were regularly tried, and the court overruled the objections of A. C. Hilliard, and approved and allowed the final account of the executors in all respects as rendered by them. From the order approving and allowing the final account of the executors, A. C. Hilliard appeals upon a bill of exceptions.

1. As to the two items of \$150 each, charged as paid to Mrs. Oaks, the bill of exceptions states that "there were no vouchers produced, and none filed, but satisfactory evidence was introduced before the court, by said executors, showing and proving that all said items were paid by said executors." Immediately following this the bill of exceptions proceeds: "In further support of said account, S. W. Bright, one of said executors, was sworn, and testified in substance as follows, to-wit: '* * * There were two minor sons of said deceased, and they remained on the ranch of said deceased about ten months after the death of said deceased. We were appointed the guardians of said minors by the will of deceased. About ten months after the death of said deceased I took said minors to their aunt, Mrs. J. D. Oaks, in Tehama county, Cal., according to the request of said Chester Hilliard in his lifetime, and agreed to pay her \$150 a year for the support and maintenance of both said minors, and told her I thought I could do so for three or four years. I paid her \$150 in advance, November 3, 1879. On November 3, 1880, I paid her \$150. On November 16, 1881, I paid her \$150. On January 22, 1883, I paid her \$150. I think Mrs. Oaks died just before this last sum was paid, and this last sum was paid to her husband. I received letters every time the money was paid, acknowledging the receipt of the same, but do not know where those letters are now. Some of the money paid to the Oaks I advanced from my own money.'" There appears to have been no objection or exception to the testimony of the witness as to the contents of the letters from Oaks acknowledging the receipt of the money, on the ground that the proof of the loss of those letters was insufficient, nor upon any other ground; therefore it does not appear that the court erred in holding that the items of payment objected to were sufficiently vouched. The contents of those letters, acknowledging the receipt of payment, supplemented by the testimony of the executor that he actually made the payments, constituted sufficient vouchers, in the absence of any counter-evidence, to justify the court in allowing them as proper charges. Estate of Rose, 63 Cal. 349; In re Moore, 72 Cal. 344, 13 Pac. Rep. 880.

2. It is contended by appellant that the executors should be charged with legal interest, with annual rests, on the money of the estate in their hands, for the reasons that they delayed the settlement of the estate and the distribution of money for an unreasonable length of time, and during that time

they had mingled the money with their own, and used it in their business. Mr. Bright, one of the executors, testified that the administration might have been closed within one year from the date of the appointment of the executors; and the only excuses offered for not having closed it within that time are that their attorney was negligent, and did not proceed with the business as they had requested him to do; that their attorney died six or seven years before the trial of this matter; that until about two years before this trial they supposed the estate was all settled, as they had paid all the debts of the estate, contracted by their testator, within a year after their appointment, but never inquired into it, and never asked their attorney about it. As to the use of the money, he testified that they had tried during the first two or three years to loan the money, but could not get the kind of security they wanted; that the money had been kept separate in his safe most of the time, but they had not tried to loan it since January 22, 1883; that whenever he (witness) needed or wanted the money he used it, but was always ready to pay it over when necessary, but they had never put it out at interest, and that for three or four years he kept the money separate from his own. It is stated in the bill of exceptions that "no evidence was introduced showing that the executors derived any benefit by the use of such money."

It appears by the account rendered that the executors charged themselves with interest on money of the estate \$75 a year for each of the three years,—1880-81-82,—amounting to \$225. Mr. Bright testified that these charges were for interest on deferred payments for real estate sold by the executors. I think the court should have charged the executors with legal interest on all the money for the time it remained in their hands after May 15, 1880, with annual rests. All the money appears to have been received by the executors before May 12, 1880, except \$930, purchase money for real estate, upon which they have charged themselves with interest for three years, at \$75 a year, ending November 8, 1882. This interest should not be recharged. With this exception the final account rendered by the executors furnishes all the data necessary for the computation of the interest by the rule above indicated. The delay of the settlement and distribution of the estate after May 15, 1880, was unreasonable, and not sufficiently excused by the alleged negligence of the attorney for the executors, as it appears by the testimony of Mr. Bright that he "never inquired into it, and never asked Mr. Porter [his attorney] about it." Mr. Bright testified that "whenever he needed or wanted the money he used it," though he thinks he kept it in his safe separate from his own money three or four years, but never tried to loan or invest it, as directed by the will, after January, 1883. A fair construction of all this is that he kept the money to be used by himself whenever he

wanted or needed it, and that he so used it. It makes no difference that there was no evidence "showing that executors derived any benefit by the use of such money." It is enough that they kept it for their own use, and used it whenever they had use for it. The law requires executors and guardians to account not only for all profits they realize from the use of the money intrusted to them, but also for both principal and interest, in case of loss by their unauthorized use of such money. *In re Estate of Stott*, 52 Cal. 403; *Estate of Clark*, 53 Cal. 355.

I think the cause should be remanded, with directions to the lower court to modify the order appealed from by charging the executors with interest in accordance with this opinion.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the cause is remanded, with directions to the court below to modify the order appealed from by charging the executors with interest in accordance with this opinion.

(83 Cal. 460)

In re SPENCER. (No. 20,632.)

(*Supreme Court of California.* March 24, 1890.)

ALIMONY—HABEAS CORPUS.

1. Though, in a technical sense, there can be no alimony where the relation of husband and wife has ceased to exist, yet, as Civil Code Cal. § 4, requires the Code to be liberally construed, with a view to effect its object and to promote justice, a permanent future allowance to a divorced wife will not be defeated because granted under the misnomer of "permanent alimony," where it is a lawful grant under Civil Code, § 189, which provides that where a divorce is granted for an offense of the husband the court may compel him to make such suitable allowance to the wife for her support for life, or for a shorter period, as it may deem just, having regard to the circumstances of the parties, respectively, which allowance may be modified from time to time by the court.

2. Under a writ of *habeas corpus*, the court can only inquire into the jurisdiction, but not into the correctness of the findings on which the conviction is based.

PATERSON, J., dissenting.

In bank. Application for discharge on *habeas corpus*. For former report, see ante, 37.

Jordan & Bull, for petitioner. *Dorn & Dorn*, for respondent.

Fox, J. This is an application for discharge upon *habeas corpus*. The return to the writ shows that the respondent is imprisoned under an order of the superior court of the city and county of San Francisco, made upon conviction for contempt, in refusing to obey an order of the court theretofore made, requiring him "to pay the sum of twenty-five dollars per month as alimony" to Josephine M. Spencer, his former wife. From the return and records introduced, it appears that on August 25, 1884, in the suit of Thomas M. Spencer, plaintiff, v. Josephine M. Spencer, defendant, a decree of divorce was granted

to the defendant, upon her cross-complaint; the custody of a minor child was awarded to her; the household goods and personal property at the residence occupied by her was set apart to her; and it was further decreed that the plaintiff should pay to the defendant, "as permanent alimony, the sum of \$50 per month on the 1st day of September, 1884, and on the first day of each and every month thereafter." On May 13, 1887, on the motion of plaintiff, this decree was modified, and the amount of alimony so fixed reduced to \$25 per month. In December, 1888, petitioner having failed for some time to make payment, he was cited to appear before the court, and show cause why he should not be punished for contempt. On the return-day of that citation, the defendant, this petitioner, was examined under oath touching his ability to pay the moneys so required of him, and his reasons for not paying the same; and the court found that there was then due and unpaid the sum of \$225; that demand therefor had been made; that he had been and was abundantly able to pay the same; and that he had permanent and lucrative employment. Upon these findings, the court adjudged him guilty of contempt, and ordered that he be committed to the custody of the sheriff, and confined in the county jail until he obeyed the said order, and paid the said sum of \$225 so found due and unpaid under said decree, or until discharged according to law.

These proceedings seem to have been regular, and in accordance with the provisions of title 5, pt. 3, Code Civil Proc. And the order of imprisonment was in accordance with the provisions of section 1219, a part of that title; the court having found that the party convicted was able to make the payment required of him, and consequently that it was in his power to perform the act required. It is insisted here, however, that the court erred in this finding; that there was no evidence to support it. That is a matter into which we cannot inquire upon this writ. Under the writ, the court can only inquire into the jurisdiction to find, not into the correctness of the findings upon which the conviction is based.

The only remaining inquiry is whether the judgment or order which the petitioner is found guilty of having disobeyed was a lawful judgment or order. Upon this point it is insisted that in divorce proceedings, when the court reaches its final judgment, and grants a decree of divorce under our statutes dissolving the bonds of matrimony, it has no jurisdiction or power to decree the payment of permanent, or, indeed, any future, alimony; that the only provision on the subject of "alimony" is that found in section 137, Civil Code, and relates entirely to what may be done *pendente lite*; that alimony grows out of that obligation of support which arises from the relation of husband and wife, and proceeds only from husband to wife; that the moment the decree of divorce is granted the

relation of husband and wife has ceased. There is then no husband, no wife, and hence there can be no alimony. It is true that "alimony," in its strict technical sense, proceeds only from husband to wife, and that, where the relation of husband and wife does not exist, strictly speaking, there can be no alimony. It is true, also, that the legislature has used the term only in its strict legal sense, and has therefore used the word "alimony" only when prescribing the provision which the court might make for the support of the wife *pendente lite*. But the courts have not always been as careful in their use of the word. They have frequently used it as a mere name for another and different allowance, made, and authorized to be made, under section 139, Civil Code. It was manifestly so used in this case, and has been so used in many others. By that section it is provided: "Where a divorce is granted for an offense of the husband, the court may compel him to * * * make such suitable allowance to the wife for her support, during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties, respectively; and the court may from time to time modify its orders in these respects." That is exactly what the court did in this case, falling, however, into the quite common error of calling the allowance "permanent alimony." If such an allowance is lawfully made, the simple misnomer of it would not justify a court, even upon appeal, much less under this writ, in setting it aside. If it was excessive, or if the court erred in determining that it was a case in which such an allowance is authorized by law, the error was one to be corrected on appeal, not one to be set aside as for want of jurisdiction to make it. Under the Code, which must "be liberally construed with a view to effect its object, and to promote justice," (section 4,) the court will look at the substance of the thing, and not defeat its object merely because somebody has misnamed it. Alimony rests upon the obligation of the husband to support the wife. Allowance for future support has been held to be in consideration of, and as a substitute for, her interest in the community property, or her right of dower or inheritance in the property of the husband; but, under our Code, it is something more, and something which the legislature had a right to authorize, and the court to grant,—compensation for a wrong done to her. It will be observed that this allowance cannot be made when the divorce is granted for the offense of the wife,—only when it is for an offense of the husband; so expressly provided by the statute, and so held in *Everett v. Everett*, 52 Cal. 383. It proceeds upon the theory that the husband entered upon an obligation which, among other things, bound him to support the wife during the period of their joint lives, and gave to her a right to share in the fruits and accumulations of his skill; that by his own wrong he has forced her to sever the relation which enabled

her to enforce this obligation, and for the wrong which thus deprived her of the benefit of the obligation he must make her compensation. The court is to fix the measure of that compensation by "having regard to the circumstances of the parties, respectively;" those circumstances furnishing the best means for determining the extent of her loss. As these circumstances may differ at different times, "the court may from time to time modify its orders in that respect." This allowance may be entirely independent of the property then *in esse*. It is the duty of the court, at the time of dissolving the marriage, to make proper division of the community property (sections 146, 147;) and, as we understand the law, it may, under section 139, in its discretion, compel the husband, in addition, to make what it deems suitable allowance for the future support of the wife during life, or for a shorter period, having reference to their circumstances, etc. This by way of compensation for the deprivation growing out of his own wrong. In fixing this compensation or allowance, the court may regard the earnings of the husband, or his ability to earn money, (*Eidenmuller v. Eidenmuller*, 37 Cal. 364,) and may subsequently reduce the amount, (*Id.*), or increase it, (*Ex parte Cottrell*, 59 Cal. 417,) as in its opinion the changed circumstances of the parties shall warrant, and may enforce compliance with the order by imprisonment for contempt, (*Ex parte Perkins*, 18 Cal. 60; *Ex parte Cottrell*, *supra*;) and the husband may purge himself of contempt by showing that he is unable to obey the order, and that his inability to pay the sum directed has not been occasioned by his own act, for the purpose of avoiding payment, (*Galland v. Galland*, 44 Cal. 475; *Ex parte Cottrell*, *supra*; *In re Wilson*, 75 Cal. 580, 17 Pac. Rep. 698.)

The question of whether or not disobedience of the order for the payment of this allowance is contempt which may be punished by imprisonment, so ably discussed by counsel for petitioner, is no longer an open one in this state, as will be seen by the cases above cited, and perhaps others. The order for such allowance, or any subsequent order made in modification thereof, is subject to review upon appeal, (*Eidenmuller v. Eidenmuller*, 37 Cal. 364;) but, until reversed, it must be obeyed, or the party must purge himself of contempt by showing his inability to pay it, and that the inability is not occasioned by his own act, for the purpose of avoiding payment.

The remaining questions presented in this case were fully considered in *In re Wilson*, 75 Cal. 580, 17 Pac. Rep. 698, and we see no reason to depart from the conclusion there reached. Let the writ be dismissed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.

PATERSON, J., (*dissenting*.) For the reasons given by me when this matter was be-

fore me in chambers, I dissent. *In re Spencer*, ante, 37. I do not believe that the legislature intended to provide that the immediate daily earnings of a man, having a wife and child dependent upon him for support, should be taken to support the wife of another, because he may have had, at some prior period of his life, the fortune or misfortune to be her husband; yet to that extent the exigencies of the conclusion reached by my learned associates carry us. It is a construction which seems to me to be at variance with the entire scope and spirit of the law governing the subject of personal relations. Such a law, if it exist, should be repealed, or the right to an absolute divorce and privilege of remarriage be abolished. The case of *Eidenmuller v. Eidenmuller* was based upon statutes entirely different from the provisions of our Code. At that time, divorces were granted from bed and board, and there was no provision like that of section 141, Civil Code, viz., that "in executing the five preceding sections, the court must resort—*First*, to the community property; then, *second*, to the separate property of the husband." The meaning of these provisions I attempted to point out in the opinion above referred to.

In view of the construction given to the provisions of the Code by the majority, a word as to the policy—impolicy, rather—of such a law may not be out of place, as a suggestion to the legislative department; not, however, in an attempt to show that the construction adopted by the court is erroneous. The law encourages the marriage of persons competent to assume the marriage relation, and fosters its continuance. All contracts and conditions in restraint of marriage are void, being against public policy. In this state, divorce is absolute. There is no such thing as divorce from bed and board, under the law as it now exists. When a marriage is dissolved, each party is relieved from all the obligations of the bond. From the time of the dissolution, they are single persons; and their acts are, as between themselves, the acts of strangers. No obligations or duties are due from one to the other. They are free to marry again. Indeed, as stated above, the law encourages them in the assumption of marital rights and obligations. Perhaps one good effect of the court's construction will be to discourage them in the future. Recognizing the fact that the marriage relation, in some instances, should no longer exist, six different grounds are prescribed, upon any one of which, in a proper case, the relation may be dissolved. In certain cases, penalties are fixed to be imposed upon the guilty party; but they all relate to the property, separate and community. No personal penalty is provided, such as imprisonment, or forfeiture of, or limitation upon, the privilege of remarriage. Under these provisions, a divorced man marries a second or third time. The divorced wife does the same thing. The man upon whom devolves the duty of supporting his family is dependent

upon his daily earnings to perform this duty. The woman, who has by the decree of divorce been released from all duties towards him, demands that his earnings, or a portion of them, shall be devoted to her support, and his lawful wife and their children must take what is left. If he refuse to take the bread from them, and give it to her, who owes him no duty, he may be thrown into jail, and be thus deprived of the power to support any of them. Such a law as this—a law which permits and encourages a man to assume the responsibilities of husband and father, and imposes at the same time such inconsistent conditions, and such unequal and inequitable burdens—ought not to blister the pages of our statute-books. Either absolute divorce should be denied, and the privilege of remarriage be abolished, or it should be provided—as I believe our laws, under proper construction, do now provide—that only the property, separate and community, in existence at the time the marriage is dissolved, may be taken for the support of the divorced wife. It is an anomalous condition of domestic affairs which requires a man who has been permitted and encouraged to assume new marital duties and obligations, to support a legal relict, who is not only matrimonially dead to him, but is perhaps married to another, who is unable or unwilling to support her.

The leading opinion does not discuss the question whether or not the subject before us can be tested properly on *habeas corpus*. I deem it unnecessary, therefore, to investigate or consider that matter.

(3 Wyo. 375)

UNION PAC. RY. CO. v. JARVI.

(Supreme Court of Wyoming. Feb. 5, 1890.)

INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

Rev. St. Wyo. § 2553, subd. 6, provides that in civil cases, "before the argument of the case is begun, the court shall give such instructions upon the law to the jury as may be necessary." Subdivision 7 provides that, "when either party asks special instructions to be given to the jury, the court shall either give such instructions as required, or positively refuse to do so, or give the instructions with modifications." In an action by an employe against his employer for personal injuries, there was evidence to sustain the allegations of the answer that plaintiff knew of the danger, and that it was unnecessary for him to go to the place where the danger existed, and where the accident occurred. The only instructions on the subject of contributory negligence were in regard to plaintiff's going to the place of the accident contrary to the rules of his employer. Held, that the question of contributory negligence, independent of any rule of the company, should have been submitted to the jury, under proper instructions, though the instruction requested did not state the law accurately. SAUFLEY, J., dissenting.

Error to district court, Albany county; M. J. SAUFLEY, Judge.

Corlett, Lacy & Riner, for plaintiff in error. Mahoney, Arnehan & Smyth, for defendant in error.

CORN, J. The defendant in error brought suit against the plaintiff in error, alleging that on January 15, 1886, the defendant in

the court below was the owner and operator of a certain coal mine; that plaintiff below was in the employ of defendant as a miner of coal therein; that in his occupation as miner it was necessary for plaintiff to frequently enter and pass through a part of what was known as the "Main Slope" of said mine; that, while so engaged in passing through a portion of the main slope, a large rock fell from the roof upon plaintiff's leg, and so injured it that it became necessary that it be amputated; that at the time, and prior thereto, the said rock was loose, insufficiently supported, and dangerously insecure in its place in the roof; that it was the duty of the defendant to keep said main slope in good repair, and not to allow said rock to become insecure, and to furnish plaintiff with a safe place in which to perform his work as such employe; that the defendant, well knowing its condition, negligently and carelessly failed to perform its duty; and that plaintiff had no knowledge of its dangerous condition, and no reason to anticipate it, and that he was free from negligence in respect to the cause of his injuries.

The defendant answered by a general denial, and also set up in a second defense that plaintiff, at the time of the accident, was negligently at a place in the mine at a distance from the place where, by his employment, he was required to be, and a more dangerous place, without the order of defendant, and without its knowledge or consent; that, although knowing that at that time and place there were great and unusual hazards of the kind which caused his injuries, the plaintiff was not exercising reasonable or ordinary care to protect himself; and that such failure of plaintiff to exercise ordinary care contributed to the injuries.

The evidence tended to show that plaintiff was in the habit of going from his working place to the junction of the main slope and the slope or entry leading to his working place, for the purpose of obtaining cars to remove his coal; that this was a specially dangerous point, owing to the frequent falling of masses of rock, and was known to be so by said miners; that the main slope itself was dangerous, and was so known to be by the miners; that these places were also known by the superintendent and mining boss to be dangerous, but there was also evidence tending to show that the junction where the accident occurred, by blasting out the "bastard rock," had recently been made as safe as it could be reasonably made. There were "drivers" whose duty it was to remove the cars of coal, and return empty cars to the miners, placing them near to their working places, and at a point between the working and the junction, so that it would not be necessary for the miners to go to the dangerous place. There is evidence tending to show that there were enough drivers to furnish all the miners with all the cars they required, in this way, and that each miner, by waiting to have the cars brought to him, would obtain all the

cars he required. There was also evidence that certain of the drivers brought the cars to the junction, and required the miners to come there for them. While at this point, for the purpose of obtaining cars, this fall of rock occurred, and plaintiff was injured. There was evidence that a rule existed prohibiting the miners from going to this point, and also that the rule had fallen into disuse, or, at least, that it was not enforced or insisted upon, and was perhaps unknown to the plaintiff. There was a verdict for plaintiff of \$12,500, and defendant brings the case to this court.

There is a great number of errors assigned, only a part of which it will be necessary for us to consider in detail.

The plaintiff in error insists that the court erred in its charge to the jury, and also in refusing certain instructions requested by it. The charge of the court, in so far as it has reference to the negligence of the defendant or any contributory negligence of the plaintiff, was in full as follows: "The court charges you that when the plaintiff, Jarvi, entered the service of the defendant company, he took upon himself the risks of those dangers to his life or limb which the testimony may show are ordinarily incident to mining service. He likewise took upon himself the risks of such accidents or injuries as might befall him as a result of the negligence of a fellow-servant, of whom the mining boss, Rogers, in this case, was one. While the plaintiff is held in law to have assumed these risks, the defendant owed to him duties of protection and care. It was the duty of the defendant to provide for the plaintiff a working place which, under the circumstances and considering the situation, common prudence would pronounce reasonably safe, and to construct and maintain within its mines, at the proper places, such practicable appliances or artificial means as ordinary prudence and forethought would suggest as necessary for the safety of its miners. This being done, it is correspondingly the duty of the plaintiff, as one of the miners, to conform to any reasonable rules and requirements on the part of the company which were made with a view to the fuller safety of the employees. Instruction No. 1. That if you believe from the evidence in this case that the plaintiff received the injuries complained of by him; that they were caused either by the falling of a rock from the roof of the mine, or from its displacement from a portion between the coal and sandstone formations; that the superintendent of the mines either had notice that there were reasonable grounds to apprehend such falling or displacement, or, by exercising ordinarily careful inspection, could have ascertained that there was a reasonable probability of such falling or displacement; and that it was practicable to prevent it by artificial means or appliances,—then the finding must be for the plaintiff. This instruction, however, is not to be taken as the whole law of the case.

Its converse will be found in instruction No. 2, and its modification in instruction No. 3. Instruction No. 2. If the causes which operated to produce the falling or displacement of the stone were so hidden in their nature or character as that the defendant by its agent (in this case, the superintendent) could not, by the exercise of reasonable care and skill of inspection, have discovered them, you should find for the defendant; unless you further believe from the testimony that the superintendent had notice that such causes existed and would likely operate. Instruction No. 3. Although you may believe from the evidence that the defendant was negligent in the respects indicated in instruction No. 1, yet if you further believe from the evidence that the defendant had, prior to the injury of plaintiff, prescribed a rule the effect of which in part was a prohibition to plaintiff to go for his empty cars into that particular part of the mine where the accident occurred, and that notice of this rule was either given specifically to plaintiff in a way in which he fairly understood it, or was promulgated by the defendant in such a general public and plain way that the plaintiff had a fair opportunity to know it, that the plaintiff, having such notice of the rule or opportunity to know it, violated it, and that the accident would not have occurred if he had not violated it, then, in such case, the finding should be for the defendant upon the ground of plaintiff's contributory neglect; that is, that plaintiff contributed to his injury by his own neglect of proper caution. But upon this particular head you are further instructed, in modification of the preceding part of this instruction, that if you believe from the testimony that the defendant's superintendent, by a general license to the miners, encouraged them, or, knowing their habits, suffered them, without remonstrance, to habitually come into the straight slope for their empty cars, such license would operate to abolish or suspend the rule, and the plaintiff could not, under such circumstances, be held to have been guilty of contributory negligence."

This was the entire charge of the court affecting the question of negligence. Plaintiff in error requested the following instruction, which was refused by the court: "The plaintiff, as an employee in the mine, was required at all times while so employed to exercise due care and diligence for his own protection; in other words, the same measure and degree of care is required of the plaintiff as is required of the defendant company. There is, however, this one difference, that, even if you should find from the evidence that the defendant company failed to exercise ordinary care, and that such failure caused or contributed to the injury complained of, still, if you should find from the evidence that the plaintiff also failed to exercise ordinary care, and that such failure in any manner contributed to his injury, then you must find for the defendant company."

An examination of the charge of the court, as given to the jury, will show that they were instructed, as to contributory negligence, only as predicated upon a violation by the defendant in error of an alleged rule of the defendant company, requiring employees to remain off the main slope. If there was evidence before the jury tending to show that defendant in error was guilty of negligence in going into a place unnecessarily, which was more than ordinarily dangerous, and that he knew, or might by ordinary care have known, that it was more than ordinarily dangerous, and that such negligence directly contributed to the injury, it was proper that the jury should have been instructed upon that view of the case, even if the alleged negligence did not consist in violation of a rule of the company, and even if the company had no rule upon the subject. There was evidence that the place was dangerous, and known to be so; that it was a "bad place;" that it was so notorious, by reason of the frequent fall of rock there, that the mine-boss must have known it; that special pains had been taken to blast it out so as to make the roof safe, but that it remained dangerous, by reason of the frequent falling of rock from the sides, and that this was necessarily known to those who passed frequently about it; that the main slope is known by all miners to be dangerous, and that a "man-way" is provided for this reason, in order that miners may not be compelled to go upon the main slope; that it was not necessary for defendant in error to go there, for, if he remained at his working place, he would receive the same number of cars as if he went for them himself. The evidence upon these points was conflicting, and should have been submitted to the jury, under proper instructions.

But it is urged that the instruction requested does not state the law accurately, and, further, that, at most, it is but a non-direction, upon which error cannot be predicated." In support of this proposition, we are cited to Thompson on Trials, § 2341. "It is, then, a general rule of procedure, subject in this country to a few statutory innovations, that mere non-direction, partial or total, is not ground of new trial, unless specific instructions, good in point of law, and appropriate to the evidence, were requested and refused. A party cannot, by merely excepting to a charge, make it the foundation for an assignment of error that it is indefinite or incomplete. The rule rests upon the soundest foundations." In the first place, this is not a mere non-direction. In the latter part of instruction No. 3 of the charge of the court the jury are informed, in substance, that, in the absence of an enforced rule of the company prohibiting plaintiff from going to that place for his cars, the plaintiff could not be held to have been guilty of contributory negligence. The language apparently limits the defense of contributory negligence to the violation of an alleged rule. But the rule as

stated by Thompson, even if applicable to this case, is not the rule in this jurisdiction. Subdivision 6, § 2553, Rev. St. Wyo., provides that in civil cases, "before the argument of the case is begun, the court shall give such instructions upon the law to the jury as may be necessary;" and his duty to do this is not excused by the failure of counsel to request "specific instructions, good in point of law, and appropriate to the evidence;" for subdivision 7 of the same section provides: "When either party asks special instructions to be given to the jury, the court shall either give such instructions as required, or positively refuse to do so; or give the instructions with modifications." We think the question of contributory negligence, regardless of the existence of any rule of the defendant company, clearly arises upon the pleadings and the evidence in this case, and it should have been submitted to the jury, under proper instructions from the court, and the failure to do so was error, on account of which a new trial should have been granted. The judgment of the court below is reversed, and a new trial ordered.

VAN DEVANTER, C. J., concurring.

SAUFLEY, J., (*dissenting*.) I dissent because—*First*. The plea of contributory neglect is not broad enough to put in issue any neglect on the part of Jarvi, except such as may result from a violation of the rules of the company. It charges that the defendant was, at the time of receiving the injury, "fifty yards from the place where, by his employment, he was required to be, and in a place more dangerous than that required by his employment." By the word "employment," as here used, is meant "business" or "service." The very nature of this business required him, in the absence of any prohibitory rule, to be in the main slope as well as in the dip slope of the mines. That is to say, he was not a fixture or a post, to remain immovably at a designated point, unless he contracted to do so, or unless a rule of the company, which he fairly understood, circumscribed his locomotion within a given radius. Having been hired as a miner, his business—his employment—was to dig coal, load cars, and to do such other work as the custom in such places demands of employees in this service. Any limitation upon this must be by a rule or special direction. This record affirmatively shows that the defendant below rested his case on that rule,—a rule which it was contended forbade the plaintiff from going into the main slope for his empty cars; and at the same time, by its original answer and by the emphatic testimony of its own officers, repeated over and over, affirmed that the place was not simply not dangerous, but that it was a positively safe place. Having, both by their answer and by their own testimony, limited the neglect charged to the plaintiff to a violation of a rule, the instruction should have been no broader.

Second. I dissent because there is an utter

dearth of testimony to show that the plaintiff either knew, or had a reasonably fair opportunity to know, before or at the time of the injury, that the place in the main slope which some witnesses spoke of as an "unsafe place" was more than ordinarily dangerous. He is an untutored foreigner, who delivered his testimony through an interpreter. He had not been engaged in that part of the mine longer than two weeks. Other miners, who had been there months, and perhaps years, were of the opinion, from the fact that they had seen some rocks fall from the roof, that it was dangerous; but no one testified that such fact, or even opinions based on such fact, had been communicated to Jarvi.

Third. Even if the plea of contributory neglect be as broad as the majority of the court hold, and even if the roof of the main slope was extraordinarily dangerous, and Jarvi absolutely knew it, I dissent, because the testimony shows, beyond all doubt and without contradiction, that the injury did not occur within the main slope, nor was it caused by a stone or other substance falling from the roof of the main slope,—the place which is spoken of as the dangerous place. It occurred in the dip slope, near its point of junction with the main slope. At this point, a lump of fire-clay fell from its position between the wall of coal and the sandstone formation, striking plaintiff, and crushing his leg. I quote the record. Louis R. Myers was the superintendent of the mine. He was introduced by the defendant company. On page 91 appears this question and answer: "*Question.* What kind of stone was that that fell on Jarvi? *Answer.* Fire-clay. *Q.* That did not come from the roof? *A.* No." If it was fire-clay, it could not have come from the roof of the main slope; because, as is admitted by every witness, and as the prevailing opinion possibly shows, the fire-clay had all been blasted down to the sandstone in the roof of the main slope. Further, on page 95, appear additional questions and answers by this witness: "*Question.* You think that stone came from the south-east side? *Answer.* I know where it came from; it came from the left-hand side, going down in the dip slope. *Q.* From the left-hand side of the dip slope or the main slope? *A.* The left side of the dip slope. *Q.* You mean from the south side of the dip slope? *A.* Yes. *Q.* Which side of the main slope? *A.* It did not come from the main slope at all; it was on the dip slope." Rogers, the mining boss, testified on behalf of the defendant company. On page 103 these questions and answers appear: "*Question.* Did you see where the stone came from which hurt Jarvi? *Answer.* Yes, sir; it came from the point of this pillar. *Q.* Did it come from the roof? *A.* It came from the top of the coal. The road was going down that way to the dip slope, and it fell from the top of the coal. It did not come from the roof." There was no testimony in contradiction of this, but some witnesses, who did not witness the infliction of the injury, and

supposing that it occurred by the falling of stone from the roof, spoke of the supposed place as one believed by them to be a dangerous place. In view of the fact that the injury did not occur by any falling of stone from the roof of the main slope, of what relevancy is that portion of the prevailing opinion which assigns as a ground for reversal the fact "that the main slope is known by all miners to be dangerous, and that a manway is provided for that reason, in order that miners may not be compelled to go upon the main slope; that it was not necessary for the defendant in error to go there?" Suppose it was not necessary for him to go there, what avails such a declaration, if he was not injured there?

Fifth. I dissent further from the opinion of the court in the interpretation given of section 2553, Rev. St. By the fifth subdivision of that section each party is, at the close of the evidence, given the privilege of moving for special instructions before the court formally instructs the jury. In this case counsel for the plaintiff in error asked many instructions, intended, presumably, to cover their theory of the case. Not one of these so offered had any application to the doctrine of contributory neglect, except as it might have been inferred from the alleged violation of the rule prohibiting the miners from going into the main slope. The nearest approach to it, if it can be called an approach at all, is found in the refused instruction quoted in the opinion of Justice CORN. That instruction is so palpably erroneous that it needs only to be read to discern the error. It states to the jury some general propositions, a part of which is not the law of this case. By it the court is asked to say to the jury that the same degree of care is required of Jarvi that is required of the company. This is wholly misleading. It is true that Jarvi should, in his particular sphere, have exercised a reasonable care for his own safety, and the company should have in its particular department exercised a reasonable care to provide for the safety of the miners. But the two spheres or departments are entirely distinct, and the institution of a comparison between the diligence or care which should characterize the one with that which should characterize the other would be misleading and confusing to the jury. It is as faulty as an attempted parallelism between two individuals of different orders and genera,—as between a fowl and a quadruped. By the residue of the instruction, the court is asked to tell the jury that if plaintiff failed to exercise ordinary care, and that such failure contributed to the injury, they should find for the defendant. Ordinary care in respect to what? Under the generous scope of this instruction, the jury might have concluded that Jarvi failed to exercise ordinary care in respect to any of his duties as a miner, no matter how little in law such neglect affected his right of recovery, and found against him. The instruction was too vague

and general, even if it had embraced a correct principle, to be of any proper service to a jury. This instruction the court was bound to refuse. The question then remains, could it have been modified? If we are to stick to the letter of the statute, as Judge CORN's opinion would seem to indicate, the court's whole duty would have been at an end, if the court could neither grant it nor modify it. If by "modification" is meant refusing it outright, and writing another, which bore no resemblance to it either in phraseology or in law, then it might have been susceptible of modification; but such is not my understanding of the word. Briefly stated, my view is that when a party rests his case upon a particular line of prosecution or defense, and only requests that instructions be given in harmony with that line, and fails to invite the attention of the court to any other view or theory of the case which the testimony might possibly establish, the failure of the court to give, of its own motion, an instruction predicated on this unmentioned view, is a case of non-direction, which is not reversible error. I hold that the case of plaintiff in error falls within this principle. I do not see how the trial judge, after the defendant had planted itself upon the proposition that the place was not extraordinarily dangerous,—nay, not even ordinarily so,—could have conceived that this generalization of the law on care and diligence was intended to refer to the supposed neglect of Jarvi in going into a dangerous place, unless the judge had just simply guessed it. As this record fairly shows, it was beyond the range of reasonable conjecture.

(1 Wash. St. 214)

FREYTAG v. NORTHERN PAC. R. CO. *et al.*
(Supreme Court of Washington. March 8, 1890.)

VENDOR AND VENDEE—RIGHTS AND REMEDIES.

Where a person who claims a right to have a deed of land from a railroad company, contracts to convey a portion thereof, but afterwards abandons his claim by a compromise with the company, and the latter has notice of the contract of sale, the vendee, in an action to enforce his right against the company, must establish, by proper allegations of fact, his vendor's right to a deed; and an allegation that the vendor became entitled to the land, or to a decree for its conveyance, is insufficient, both as a mere conclusion of law, and in being contradicted by other portions of the complaint, which showed that he had merely an opportunity to buy it, or some other land, at an agreed price.

Appeal from district court, Ellensburg county.

Parsons, Cadwell & Bausman, for appellant. *Daniel Gaby*, for appellee B. E. Craig. *Mitchell, Ashton & Chapman*, for appellee the Northern Pac. R. Co.

STILES, J. In this case, separate general demurrers to the complaint were sustained, and the action was dismissed, in the court below. The appeal is on the part of the plaintiff, from that disposal of the case; he having declined to amend. The complaint, after

the formal part, was as follows: "*Par. Second.* That on or about the 3d day of September, 1884, the above-named defendant, B. E. Craig, made and entered into a certain contract in writing to and with the above-named plaintiff, a true copy of which is hereto attached, and marked 'Exhibit A,' and made a part hereof, by the terms of which contract the above-named defendant, B. E. Craig, for and in consideration of value received by him from the plaintiff, Charles Freytag, did agree to sell and convey, by good and sufficient warranty deed, that certain tract of land bounded and described as follows, to-wit: Beginning at a point 1,104 feet due east from the south-west corner of the north-west quarter of section one, in township seventeen north, range eighteen east; thence running due north sixteen rods; thence due east five rods; thence due south sixteen rods; thence due west five rods, to the place of beginning. That it was further provided in said contract that said deed should be made, executed, and delivered whenever the said B. E. Craig, defendant herein, shall have obtained title to said tract of land. *Par. Third.* That said defendant B. E. Craig did on or about the 23d day of June, 1888, become and was entitled to the title to said land so agreed to be sold by him to the plaintiff herein, and was entitled to have a decree of court establishing in him said title, and a conveyance of the title thereof from the defendant the Northern Pacific Railroad Company. *Par. Fourth.* That at that time, to-wit, June 23, 1888, there was a suit then pending between the defendant herein, B. E. Craig, as plaintiff, and the defendant the Northern Pacific Railroad Company as defendant, in which suit the plaintiff therein sought to obtain a decree of this court requiring the defendant the Northern Pacific Railroad Company to make, execute, and deliver to him a deed of conveyance of that certain tract of land described as follows, to-wit: The east half of the north-west quarter, and the south-west quarter of the north-west quarter, of section number one, in township seventeen (17) north, range eighteen (18) east, of which the tract herein mentioned, which said plaintiff had heretofore contracted and agreed to sell and convey to this plaintiff, was situated, and was a part thereof. *Par. Fifth.* That at the time of the contract hereinbefore referred to, and set out in this complaint as Exhibit A, to-wit, September 3, 1884, the said plaintiff was in possession of the property hereinafter described, and has at all times since said date been and remained in the sole, actual, peaceable, and quiet possession of said property. That he was in possession of said property on the 28th day of June, 1888, and has ever since said time so been in possession of said property. *Par. Sixth.* That on the 23d day of June, 1888, the said suit then pending between the said B. E. Craig and the Northern Pacific Railroad Company was settled and compromised by said parties, by the terms of which settle-

ment and compromise, which was in writing, and a true copy is hereto attached and marked 'Exhibit B,' and made a part hereof, the said B. E. Craig was to receive at a nominal figure one-half of all of said said tract of land which he then claimed to own, and the said Northern Pacific Railroad Company were to retain one-half. That selections were to be made by each of said parties, alternately. While by the terms of said contract there was a nominal sale to the said B. E. Craig of said lands to be selected by him, yet in truth and in fact said settlement and compromise was so made and entered into to prevent further litigation of the rights of said parties. *Par. Seventh.* That, at the time said settlement and compromise was so made and entered into by and between said parties, the said Northern Pacific Railroad Company had full, complete, and actual notice of the rights of this plaintiff; and they made said contract, and entered into said agreement, with a full knowledge of plaintiff's rights thereunder, and that they now hold the title to said land so agreed to be sold to this plaintiff by said B. E. Craig in trust for this plaintiff. *Par. Eighth.* That plaintiff has demanded of the said B. E. Craig that he make, execute, and deliver to him a good and sufficient warranty deed to said property so agreed to be conveyed as aforesaid, and that he include the same in his selection when the division of said land should be made by and between said B. E. Craig and the Northern Pacific Railroad Company in pursuance of the terms of said contract, herein referred to, and made a part hereof, as he has the right and power so to do, which he has refused to do, and still refused to do. That, in pursuance of said agreement and compromise so made and entered into by and between said B. E. Craig and the Northern Pacific R. R. Co., they have each so selected their portion of said land so divided between them, and that portion of land so agreed to be sold and conveyed to this plaintiff is not included in that portion selected by the said B. E. Craig. That it is included in that portion selected by the said Northern Pacific Railroad Co. *Par. Ninth.* That the plaintiff has made large improvements on said tract of land, and is now making his home thereon. That the actual value of said improvements is one thousand dollars. That the value of said land is fifteen hundred dollars. *Par. Tenth.* That plaintiff has been damaged by the refusal of the defendant to make said conveyance, as he had agreed to do, in the sum of five hundred dollars. Wherefore this plaintiff prays that he may have a decree requiring the said Northern Pacific Railroad Company to make, execute, and deliver to him a warranty deed to said property. That he may have and recover of and from the defendants the sum of one thousand dollars damages, and for such other and further relief as this court may deem equitable and just."

"Exhibit A. Know all men by these presents, that I, B. E. Craig, of Kittitas county,

Washington Territory, am held and jointly bound unto Charles Freytag, of the same county and territory, in the sum of five hundred dollars, lawful money of the United States, to be paid to the said Charles Freytag, his executors, administrators, or assigns, for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, and each of them, firmly, by these presents. Sealed with my seal. Dated at Ellensburg, Kittitas county, W. T., September 3rd, 1884. Now, the condition of this obligation is such that if the above-bounden B. E. Craig shall make, execute, and deliver unto the said Charles Freytag a good and sufficient conveyance, in fee-simple, with the usual covenants, of the following described tract of land, whenever said B. E. Craig shall himself obtain title to the same, which said tract of land is described as beginning 1,104 feet due east from the south-west corner of the north-west quarter of section one, in township seventeen (17) north, range eighteen (18) east; thence running due north sixteen rods; thence due east five rods; thence due south sixteen rods; thence due west five rods, to the place of beginning,—then this obligation to be void; otherwise, to remain in full force and effect."

Without passing upon the character or the validity of the bond which is the basis of this action, we shall, for the purposes of this decision, assume it to be one upon which, on the happening of the event specified, viz., the acquisition of title by Craig, a specific performance could be required.

The stipulation or settlement referred to in the complaint as "Exhibit B" recited that the Northern Pacific Railroad Company was the owner of 120 acres of land, including the tract in question, and was entitled to the immediate and quiet possession thereof; that Craig was in possession of the 120 acres, and "claims to have some right and claim thereto;" that the suit mentioned in the complaint was pending; and that to avoid further litigation the parties had agreed to settle and compromise the matter in controversy. It was then provided that Craig should forthwith dismiss his suit, and quit and surrender the premises to the railroad company, and relinquish to it "any and all claim, title, or estate thereto;" and that the railroad company would sell, and Craig would buy and pay for, one-half of the land, in the manner further set forth. That portion of the stipulation which provided for the disposition of the 120 acres was as follows: "Therefore, it is hereby agreed by and between the parties hereto that the said party of the first part shall within a reasonable time from this date survey and plat into town lots and blocks all of said land, and cause the same to be platted and filed in the auditor's office of Kittitas county, Washington Territory, said plat to be an addition to the city of Ellensburg, Washington Territory, that they will sell, and by these presents hereby agree, in consideration of the moneys hereinafter speci-

fied and agreed to be paid by the said party of the second part, to sell and convey, half of all the lots and blocks as shown by said survey and plat so made and filed, to the said party of the second part, his heirs, executors, or assigns, by good and sufficient warranty deed, for the sum of twenty-five dollars for each and every block, and twenty-five dollars for any part or portion of such block, which deed of conveyance will be given upon demand at the land-office of the Northern Pacific Railroad Company at Tacoma, Washington Territory, after said land is surveyed and platted, and the said amount hereinafter stated is paid to them. That they will divide on demand, within reasonable time after said plat is made and filed, said blocks and lots as follows: The said Brittain E. Craig, his heirs, executors, or assigns, may have the first selection of three blocks,—which selection so made shall embrace the buildings, reservoir, and orchard so far as practicable, as shown on said plat so made and filed. That the said party of the second part shall have the next selection of three blocks. Then the said party of the second part may select one block from the blocks unselected, and the party of the first part one. Thus alternately selecting, each one block, until all of said land so platted and recorded is selected. The selection to be made by each party taking the alternate block in the consecutive order of their numbers, and the block so selected by said Brittain E. Craig, his heirs, executors, and assigns, are the same that are to be conveyed as hereinbefore stated."

In so far as plaintiff's claim for damages was concerned, it was not sustained by any allegation of the complaint. The plaintiff was at the commencement of the action, and ever since the date of his bond, had been, in the possession of the premises; and, as against either of the defendants, without showing some special damage, his costs would be the limit of his money recovery.

But the main question, and that upon which the attention of both parties was fixed, was whether, under the facts stated, the railroad company, to which, by the method of selection provided in the stipulation for settlement, the tract in question was allotted, was bound to convey it to the plaintiff as the assignee of Craig. It had notice of the plaintiff's bond and possession, and of the claim of Craig to have a deed for the whole tract of 120 acres. Under the facts as they appear, was it bound, in making a compromise with Craig, to so shape the platting and selection of blocks that this tract would be covered by the selection of Craig, and the conveyance to him. Allowing the most liberal construction of the complaint and exhibits, and all reasonable intendments in favor of the pleadings, we are constrained to hold the negative. Craig had a suit pending against the railroad company in which he demanded a conveyance of the whole property; but whether he ever had a claim, of any description or degree, which he could have enforced at law or in

equity against any portion of the premises until the stipulation of June 23, 1888, was signed, is nowhere asserted, or even hinted, in this complaint. He may have had the very best claim, under circumstances or writings which would have compelled the railroad company to convey to him the whole tract, or this portion of it; or he may have been a mere trespasser, whose claim the court would have to entirely ignore. Under the former supposition, no compromise of the parties to the suit would have estopped the plaintiff here from asserting his rights, *pro tanto*, and having his title; but, on the other hand, if the latter were the true state of things, no one would have a right to complain if the railroad company, being under no obligation to Craig, should yet see fit to yield much or little of the controverted subject-matter in an arrangement whereby it bought its peace. The difficulty with the pleading is that it does not make the facts known on this, the vital point of the whole matter. Leaving out the third paragraph, the allegations of the complaint and the Exhibit B make it appear to the indulgent reader as though Craig, being in possession under a claim which was more than doubtful of being maintained, and which he was willing to wholly abandon for the privilege of purchasing half of the blocks in the manner and for the price specified, had made the stipulation admitting the title and right of possession to be in the railroad company, and agreeing to surrender his possession and doubtful claim. The facts may be otherwise, and the whole scheme put in operation by the stipulation may have been a mere collusive fraud between the parties to the settlement; but it does not so appear. And after the stipulation was executed, although it was then in Craig's power to select this particular tract, (and probably it was his duty to do so, under the plaintiff's demand; and he may be liable to the plaintiff beyond the penalty of the bond, in a proper action, for his failure to do so,) it does not appear that any obstacle to his doing so was interposed by the railroad company, or that it owed any duty to the plaintiff to compel Craig to include this tract among his selections; for notice to it of the existence of the bond, in the absence of obligation to Craig, imposed no duty upon it in the premises.

Plaintiff, however, relies upon his third paragraph as sufficient to remove these objections. Were this action one brought against Craig alone, for damages for his fraudulent refusal to select and obtain title to this tract under the stipulation, perhaps that paragraph, taken with the other matters alleged, might be sufficient, with the addition of allegations showing special damages. But as against the railroad company, which is the real defendant here, and which holds the title, in this form of action, we regard the paragraph as vitally insufficient. Viewing it from the stand-point of the litigation between Craig and the railroad company, it stands contradicted in its essential part; for, according to

the stipulation, and the allegations of other portions of the complaint, Craig never "became entitled" to the land, or to a decree for a conveyance of it, but had merely an option to buy it, or some other land, at an agreed price per block. And, on the other hand, viewing it as pure pleading, it is a mere conclusion of law, without a statement of any fact to sustain it. Here was the place and the opportunity, when the demurrers were sustained, for the plaintiff to amend by setting forth the facts which might support the conclusion that Craig became entitled to the land, and a conveyance thereof. If such facts existed, they should have been pleaded. If they did not exist, there was no cause of action.

In other words, and finally, if, at any time before the commencement of this action, Craig had an equitable right to enforce the execution of a deed for the 120-acre tract by the railroad company, and if, after assigning a portion of that right to the plaintiff, he abandoned the whole of it in a settlement and compromise with the company, the latter having notice of his partial assignment, we hold that the plaintiff, in an action to enforce his assigned *pro tanto* right, must take upon himself, as against the railroad company, the burden of establishing the right of Craig, by proper allegations showing the facts constituting that right, just as though no suit or controversy had ever existed between Craig and the railroad company.

Upon another point the complaint was defective. In order to put the railroad company in default, a demand upon it for a conveyance should have been alleged. Wat. Spec. Perf. § 97.

These omissions we consider to amply warrant the action of the court below, and its judgment is therefore affirmed.

ANDERS, C. J., HOYT and DUNBAR, JJ., concur.

(1 Wash. St. 86)

TERRITORY *ex rel.* KELLY v. STEWART
et al.

(Supreme Court of Washington. Feb. 18, 1890.)

CONSTITUTIONAL LAW—LEGISLATIVE POWERS—
MUNICIPAL CORPORATIONS.

Act Wash. T. Feb. 2, 1888, entitled an act "for the incorporation of towns and villages," which provides, in section 1, that a majority of the taxable inhabitants of any town or village may present a petition to the district judge setting forth the area desired to be included in such village, and praying to be incorporated, and that thereupon the judge shall make an order declaring such town or village duly incorporated, and designating its metes and bounds, is invalid, being a delegation of legislative functions to a judicial court. DUNBAR, J., dissenting.

Fremont Campbell, Pros. Atty., C. H. Hanford and Thos. Carroll, for relator. B. F. Jacobs, and Town & Likins, for respondents.

ANDERS, C. J. This action was brought in the district court of the second judicial

district of Washington Territory, holding terms at Tacoma, in and for Pierce county, to inquire and determine by what warrant or authority the appellees claim to exercise the powers of a board of trustees of the town of Puyallup, in that county, and to oust them from office as such board of trustees, and to dissolve said municipal corporation. The complaint states: "(1) That the above-named defendants, at a place called 'Puyallup,' in Pierce county, Wash. T., do now unlawfully act as a municipal corporation under the name and style of the 'Town of Puyallup,' without being legally incorporated as a board of trustees of said alleged municipal corporation. (2) That said defendants act as such corporation, and exercise the powers of such board of trustees, under color of authority conferred by an order made by the judge of this court, at chambers, in the city of Tacoma, Wash. T., on the 31st day of July, A. D. 1888, and entered upon record in this court. (3) That a certified copy of the record of said order, and of the proceedings in the matter relating to the alleged incorporation of said town of Puyallup, marked 'Exhibit A,' is hereto annexed for reference, and made a part of this complaint, and a correct plat, showing the boundaries of said alleged incorporated town of Puyallup, as defined in said order, and the location of the relator's farm, hereinafter mentioned, marked 'Exhibit B,' is hereto annexed for reference, and made a part of this complaint. (4) That said order is void, and of no effect; for the same was made by the judge, aforesaid, upon the *ex parte* application of John Beverly, Esq., without a hearing being granted to the relator, or to any of the inhabitants, or owners of property, within the boundaries of said alleged town of Puyallup, and without any notice being given of said application; and no opportunity was at any time given to the relator, or any other person whomsoever, to remonstrate against or oppose the incorporation of said town, or to question the validity or sufficiency of the petition upon which said order was made, or to make complaint as to the boundaries of said alleged town; and no legal or good evidence was produced before the judge upon which to base the findings of fact recited in said order; and power to make said order is not judicial, and not vested in said judge by law. (5) That the relator is the owner of real property situated within the boundaries of said alleged town, as defined by said order; and he and many others, owners of property situated within said alleged town, have not consented to the incorporation of said town, and are unwilling to have said town incorporated with boundaries including their said property, for that said property is partly improved and cultivated farming land, and no part thereof is platted into town lots and streets; and they are unwilling to consent to the laying out of, and extending streets across, their said land, or to taxation of said land, by such alleged municipal corporation." To this complaint the de-

defendants demurred for the alleged reason that the same did not state facts sufficient to constitute a cause of action. The district court sustained the demurrer, and caused judgment for costs to be entered against the plaintiff.

From this judgment plaintiff appeals to this court; and we are called upon to determine the question of the legal existence of the town of Puyallup, which also involves the validity of the act of the legislature approved February 2, 1888, entitled an act "for the incorporation of towns and villages," the first section of which, so far as is material to this case, is as follows: "Where a majority of the taxable inhabitants of any town or village within this territory present a petition to the judge of the district court, having jurisdiction of real actions in such county, setting forth the metes and bounds of such town or village, together with the adjacent bounds, in all not exceeding in area one square mile, which they desire to include therein, and praying that they may be incorporated, and police established for their local government, and the judge of the district court shall be satisfied that a majority of the taxable inhabitants of such town or village, as shown by the last assessment roll of said county, shall have signed such petition, such judge of the district court shall cause such petition to be entered in full on the records of such court, together with the names of the petitioners, and shall thereupon make and record an order declaring such town or village duly incorporated, designating in such order the metes and bounds thereof, and the name of such town or village, and thenceforward the inhabitants within such metes and bounds are a body politic and corporate."

The proceedings for incorporating the town were inaugurated by the presentation to the judge of the district court, by one John Beverly, of a petition signed by 63 persons therein, representing themselves to be a majority of the taxable inhabitants of the town of Puyallup, praying that they might be incorporated under the name of the "Town of Puyallup," and police established for their local government, and that trustees be appointed for the government of said town. The petition also specified and defined the metes and bounds of the proposed territory to be incorporated, and alleged the area thereof to be in all not exceeding one square mile. On the 31st day of July, 1888, the judge of the district court, at chambers, in the city of Tacoma, in Pierce county, in response to the prayer of the petition, made and entered of record an order declaring the town of Puyallup to be duly incorporated under and by virtue of the laws of Washington Territory, and in said order appointed defendants as a board of trustees of the town, in accordance with section 2 of the incorporation act.

It is admitted by the demurrer, and was conceded by counsel on the argument of this case, that the relator is the owner of real property situated within the boundaries of

the territory described in the petition, and defined by order of the court; that he did not consent to the incorporation of the town; that he was unwilling to have it incorporated with boundaries including his property; that his said real estate is partly improved and cultivated farming land, not platted into town lots and streets, and that he is unwilling to consent to the laying out of and extending streets across the same; that he is unwilling to submit to taxation of his land by said municipal corporation; that no notice of the presentation of the petition was given; and that the relator had no opportunity to be heard, or to remonstrate against, or oppose the incorporation of the town, or to question the validity of the order of the judge, or to make complaint as to the boundaries of the proposed municipal corporation.

The proceedings are assailed by appellant as not being in accordance with the law relating thereto. He objects that the petition is defective in not stating that the signers thereof were a majority of the taxable inhabitants of the town, according to the last assessment roll of the county, and that the order of the judge was made upon the certificate of the county assessor who is not empowered by any law to so certify; that there was no evidence before the judge or court to warrant the order; and that the order was made without jurisdiction of the subject-matter by the court. As the law requires that the petition to be presented to the judge shall be signed by a majority of the taxable inhabitants of the town or village to be incorporated, and that the judge shall be satisfied, in some way not specified by law, that a majority of the taxable inhabitants of the town or village, as shown by the last assessment roll of the county, shall have signed the petition, it is quite doubtful whether an omission to state in the petition that the petitioners are a majority of the taxable inhabitants as shown by the last assessment roll of the county, is not a matter substantially affecting the subsequent proceedings. But, however this may be, we are not disposed to hold the incorporation invalid on that account, but will assume that the law was substantially complied with.

We now come to the consideration of validity of the law itself. The object of the act of the legislature was the incorporation of towns and villages, as expressed in the title; and, as the meaning of the expression "towns and villages" is not defined by the law, we must presume that the words were intended to be used in their ordinary acceptation, as meaning an aggregation of houses and inhabitants more or less compact. The word "town" was originally from the Anglo-Saxon word "tun," an inclosure, and meant a collection of houses inclosed by a wall. And. Dict. Law, Tit. "Town." "The fundamental idea of a municipal corporation proper, both in England and in this country, is to invest compact or dense populations with the power of local self-government. Indeed, the necessity for such corpo-

rations springs from the existence of centers or agglomerations of population, having by reason of density and numbers, local or peculiar interests and wants, not common to adjoining, sparsely settled, or agricultural region. It is necessary to draw the line which separates the limits of the place and people to be incorporated. This is, with us, a legislative function." 1 Dill. Mun. Corp. (3d Ed.) § 183. In England, this power was formerly given by royal grant or charter, presumably at the request of the municipalities themselves, but in this country municipal corporations are purely the creatures of statutes. "They possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them, or other statutes applicable to them." Id. § 21.

It being conceded that the power to create municipal corporations is vested exclusively in the legislature, the question arises, can this power be delegated; and, if so, to whom, or to what agencies? Counsel on both sides agree that the legislature may delegate its functions in some measure; but they disagree as to the legislative power to carry the principle to the extent attempted in the act in question. On the one side, it is contended that the act approved February 2, 1888, does not in fact delegate legislative authority to the courts; that the statute, and not the court, determines the extent and nature of the powers of the corporation; that a statute may be valid, though its taking effect may depend on some subsequent event, and that the powers and duties of the courts in relation to the mode of organizing towns are judicial in their nature; that the legislature, and not the court, prescribes the powers, duties, and liabilities of the corporation,—and, on the other, it is urged that the law of congress conferring upon the territorial legislature the right to create municipal corporations does not permit the legislature to delegate such right to the courts or judges; that the law is mandatory upon the court, is against public policy, and authorizes the taking of property without due process of law, and without notice or opportunity to be heard; and that the including of farming land in incorporated towns is unreasonable and unjust. The incorporation of towns by general statutory law is a departure from original methods, and is of comparatively modern date; and it would naturally be expected that the procedure for their organization by this means would not be uniform throughout the different states of the Union. It would be practically impossible for the legislature, by a general law, to fix and define the boundaries of every municipal corporation that might be organized under it; and that question is therefore determined in some other way, designated by the general law of the particular jurisdiction. But the authority to incorporate, with us as in England, has been restricted to cases in which compact communities already exist who desire to assume a corporate character,

and have police established for their local government. Id. § 183. But, unless specially restrained by constitutional provisions, the legislature may delegate the power to determine the territorial limits of the municipal corporation, and thereby settle what property and persons will be subject to municipal control to appropriate local bodies or boards of officers. 1 Dill. Mun. Corp., supra; *People v. Bennett*, 29 Mich. 451. It would hardly seem probable that the legislature, while professing to pass a law for the incorporation of "towns and villages," really intended to include therein rural districts or farming lands not platted or laid out in lots or blocks, especially against the will of the owner of such property; and yet the statute, by its terms, covers and includes just such cases; and we do not feel at liberty to construe it otherwise.

We entirely agree with the learned judge who decided the case of *People v. Bennett*, when he says that "there are few, if any, acts of state, bearing upon individuals, more important than those which determine their liberty to be included in particular municipalities; and the cases are very rare in which they have not been allowed an opportunity of being heard in every step of the proceedings." And, where the individual has not expressly assented, or impliedly done so, by settling and remaining in a dense community needing corporate powers and privileges, it seems too plain for argument that he should at least be accorded a hearing before being compelled to subject himself or his property to the dominion of a municipality with whose interests he has nothing in common. This view of the law was adopted in the case of *People v. Bennett*, above cited. In the case of *Borough of Blooming Valley*, 56 Pa. St. 66, it was held that farming land might be included in the limits of a municipal corporation by consent of the owner, but not otherwise. And in *Borough of Little Meadows*, 28 Pa. St. 256, it was held that the community proposing to be incorporated was too sparse to be called a "village," within the meaning of the law. On the contrary, it has been held in New Hampshire, with equally good reason, that the selectmen of a town, in defining the boundaries of a village, could not exclude any part of it, but must include the whole within the village limits. *Osgood v. Clark*, 6 Fost. (N. H.) 307. Appellees contend, as before intimated, that a statute may be conditional, and its taking effect made to depend upon some subsequent event; and, to a certain extent, the principle is recognized by the courts. As an illustration, the legislature may enact a general statute for the formation of private corporations; and its taking effect, as to any particular corporation, may depend upon the assent of the parties interested. They may withhold their assent at pleasure, but cannot be forced to become incorporators. If they accept the terms and provisions of the law they are presumed to be benefited thereby; but, if they reject, they cannot be injured.

While a statute may be conditional, and only take effect upon the happening of a future event, we hold that the place where it is to operate, its "*situs*," must be fixed definitely by the legislature itself, or delegated to some body or agency capable of exercising legislative functions, and not left to the will or caprice of localities to determine whether it shall be applicable to their particular community or not. Local option laws have been sustained by some courts, but the place where they were to take effect has always been defined by law, and not left conditioned upon the discretion of the people of any and every locality in the state.

To sustain the position of appellees, counsel cite the case of *Burlington v. Leebrick*, 43 Iowa, 252. The question there was as to the power of the city of Burlington to enlarge its limits by extending its boundaries over contiguous territory; and the court held that the law authorizing a petition for the purpose by the city council, to be presented to, and acted upon by, the circuit judge, and issues to be found and tried as in other proceedings, was not invalid as an unwarranted delegation of legislative power, basing the opinion on the ground that the determination of the issues by the court was a judicial act,—a mere ascertaining of the condition upon which the law might take effect. But in delivering the opinion the court used the following language: "Nor is it proper to designate the thing to be accomplished by this statute as the creation of a corporation. A corporation is an artificial being clothed with certain powers. In the present case, such a corporation exists, known as the 'City of Burlington.' When the act sought in this petition is accomplished, no new corporation will have been created." From this language we might infer that, had the question before the court been that of the formation of a municipal corporation, the decision might have been different. In the case of *Kayser v. Trustees*, 16 Mo. 88, the incorporation of a town by the county court, in pursuance of a general statute, was upheld on the ground that the court acted judicially, and had no discretion, and no authority to vest any power in the corporation. And in the case of *Mayor, etc., v. Shelton*, 1 Head, 24, a law substantially like the one under consideration in this case was held valid and constitutional for the reason that no legislative power was delegated to or exercised by the court. This last decision, however, was under a constitution which provided, that "the legislature shall have power to grant such charters of incorporation as they may deem expedient for the public good." We do not feel bound by the decisions in these cases. If the court in either of the cases acted judicially in the matter before it, then, certainly, it should have had a right or "discretion" to exercise its judgment. If its action was not judicial, then, surely, it must have been a delegated legislative power which it exercised. Counsel for appellees also cite the case of *Blanchard v. Bissell*, 11 Ohio St. 96. The

controversy in that case was as to the validity of the statute in relation to the annexation of territory to cities; and it was claimed by Bissell, in a proceeding to enjoin the collection of certain taxes levied upon his property by the city council, that the order of the county commissioners for the annexation of the district embracing his property was void because it included his property with that of others, without his consent, and against his remonstrance. The court sustained the law on the ground that the county commissioners were properly clothed with power to do the acts objected to. Each party was entitled to a hearing under that statute, and the commissioners were empowered to order the annexation or not, as they might deem reasonable and proper. We agree with that decision; and, if our statutes were like the one upon which it was based, it would be stripped of its most objectionable features. In the late case of *People v. Fleming*, 16 Pac. Rep. 298, the supreme court of Colorado held that a law which provides, that when the inhabitants of any part of the county not embraced within the limits of any city or incorporated town desire to be organized into a city or incorporated town, they may apply by petition to the county court, and providing, also, for the manner of procedure in the organization of such contemplated town or city, was not in conflict with the constitution. The decision in that case seems to have been based upon the broad ground that the legislature, if not expressly prohibited by the constitution, may delegate the power to form municipal corporations to unorganized private individuals; in other words, to the people themselves. We cannot consent to follow the reasoning in that case, or to concur in the conclusion reached by the learned court. We think the better doctrine is that laid down by Judge Cooley in his work on *Constitutional Limitations*, (4th Ed.) 145, 146, which is as follows: "The prevailing doctrine in the courts appears to be that, except in those cases where, by the constitution, the people have not expressly reserved to themselves a power of decision, the function of legislation cannot be exercised by them even to the extent of accepting or rejecting a law which has been framed for their consideration." But we would not be understood as holding that the legislature could not delegate the power to put the machinery of municipal corporations in motion to courts which are not purely legal tribunals. The courts of quarter sessions of Pennsylvania, and the county courts of Oregon, and perhaps of other states, are vested with administrative, and, in a measure, representative, powers; and they are properly intrusted with the functions attempted by our late territorial legislature, by the law in question, to be imposed upon the district judge.

We hold that a judicial court cannot exercise legislative functions, and that the legislature cannot impose such power upon it. *People v. Bennett*, supra; *People v. Nevada*, 6 Cal. 143; *City of Galesburg v. Hawkinson*,

75 Ill. 153; *People v. Carpenter*, 24 N.Y. 89.

Owing to the importance of this case, we have given it all the consideration in our power, under the circumstances; and we have been greatly aided in our labors by the learning and diligence of counsel on both sides. And we are constrained to hold that the statute under which the town of Puyallup was organized is invalid, and cannot be sustained. The cause will therefore be remanded to the court below, with directions to overrule the demurrer, and to proceed in accordance with this opinion. And it is so ordered.

STILES, HOYT, and SCOTT, JJ., concurring.

DUNBAR, J. I concur in the result, because I do not think that the petition was sufficient; but I cannot concur in the opinion that the act of the legislature was unconstitutional.

(1 Wash. St. 46)

ANDREWS v. KING COUNTY *et al.*

(*Supreme Court of Washington*. Jan. 29, 1890.)

UNEQUAL TAXATION—INJUNCTION—PLEADING
FRAUD.

1. The action of an assessor in assessing mortgages, unaccompanied by other evidence of indebtedness, at their face value, and lands at from one-fourth to one-fifth only of their value, is in violation of Rev. St. U. S. § 1924, declaring that all taxes shall be equal and uniform, and no distinction shall be made in the assessment of different kinds of property, which shall be according to the value of the property; and an injunction will lie against such fraudulent and oppressive refusal to exercise his judgment on the part of the assessor.

2. Where a complaint alleges facts which, if true, would establish fraud as a conclusion of law, no specific allegation of fraud is necessary.

Appeal from district court, King county;
R. A. JONES, Judge.

Bill for injunction by Lyman B. Andrews against King county and William Cochrane, sheriff, to restrain the collection of an alleged excessive and unlawful tax. The court sustained a demurrer to the bill, and plaintiff appeals:

W. R. Andrews, for appellant. Stratton & Fenton, for appellees.

DUNBAR, J. In the investigation of this case there are three leading propositions to be considered, viz.: (1) In order to put in issue the question of fraud, is it necessary to allege in terms that defendants were guilty of fraud? (2) Conceding the allegations in the complaint to be true, are the facts there stated sufficient to establish a *prima facie* case of fraud? (3) Had plaintiff any other remedy than the one invoked?

So far as the first proposition is concerned, we are clearly of the opinion that, if the complaint alleges a state of facts which if proved to be true would establish fraud as a conclusion of law, it is a sufficient allegation of fraud; and that the declaration of the pleader that such acts were fraudulent is in no wise essential or necessary to put the question of fraud in issue.

In the other two propositions, which we will consider in some degree together, grave questions are presented,—questions the importance of which demand of the court painstaking investigation, and the rightful determination of which is not so important, in view of the amount of money involved in the particular case, as it is in view of the effect which such determination will have, both on the rights of the individual citizen, and upon the state in the determination of its laws. The principal contention of the plaintiff, and the one to which the court will address itself especially, (the determination of which will be conclusive in this case,) is that the assessor uniformly and persistently, intending to injure and oppress all persons holding mortgages, of which there was a large class in King county, and especially this plaintiff, and intending to relieve persons owning lands and other property in King county, outside of mortgages, of their just burden in maintaining the public revenue, assessed mortgages, which were unaccompanied by any other evidence of their indebtedness, at their par value, without any regard to the valuation placed by him upon the lands mortgaged to secure the payments of said demands, while he, at the same time, refused to assess lands in said King county at more than one-fourth their cash value, and refused to assess other property at more than from one-fifth to one-fourth of its cash value; and alleges the fact to be that he assessed plaintiff's mortgage at \$30,000, while he assessed the identical land pledged to the payment of the said demand of \$30,000 at only \$2,000, notwithstanding plaintiff's said mortgage was not accompanied by any other evidence of indebtedness, and that the plaintiff's remedy upon his said demand will be entirely exhausted by a foreclosure of said mortgage, and a sale of the lands, tenements, and hereditaments pledged to him therein; and that the action of the assessor in such alleged discrimination was indorsed and confirmed by the board of county commissioners of said King county while sitting as a board of equalization, which said action of the assessor and board of equalization plaintiff claims was in violation of section 1924 of the Revised Statutes of the United States, which declares that "all taxes shall be equal and uniform, and no distinctions shall be made in the assessments between different kinds of property, but the assessment shall be according to the value of the property." No doubt the essential idea of the statute is that each person shall pay a tax in proportion to the value of his property; and the fact that plaintiff's property is admitted to be assessed at its par value will not deprive him of the constitutional guaranty, if by the under-valuation of other property he is compelled to bear more than his just proportion of the burden of taxation. If A. is the owner of property of the value of \$1,000, which is assessed at \$1,000, and B. is the owner of property worth \$1,000, which is assessed at \$500, the practical result to A. is

the same as though B.'s property had been assessed at its full value of \$1,000, and A.'s property at an overvaluation, or at \$2,000. In either case, the resulting injury is the same. A. has been subjected to double the burden that B. has, while actually possessing the same amount of property. The just principle of taxation is equally violated in both cases, and the constitutional mandate that "all taxes shall be equal and uniform, and that the assessment shall be according to the value of the property," is equally ignored; and, when such an abuse of official discretion affects a large class of individuals, it will be subject to the law's revision.

In view of the inconvenience to the public which will arise from any derangement in the system of the collection of taxes, the law will not regard accidental omissions or minor mistakes. Nor will courts of equity interfere to correct errors in judgment as to valuation, because, as has been well said by Judge Cooley, "value is matter of opinion;" and, when the law has provided officers upon whom the duty is imposed to make the valuation, it is the opinion of those officers to which the interests of the parties are referred. But, according to the same learned author, "it is possible, however, that there may be circumstances under which the action of the officers will not be conclusive." Cooley, *Tax'n*, 218. And one of those circumstances is where the officer refuses to exercise his judgment, and, by an arbitrary and capricious exertion of official authority, seeks fraudulently to defeat the law, instead of enforcing it. In such a case the tax-payer will not be left completely at the mercy of the assessor.

In this case, if the averments of the complaint are true, and the assessor uniformly taxed mortgages at their par value, and land and other property at from one-fourth to one-fifth of its cash value, and, in accordance with such uniform rule of assessment adopted by him, assessed the plaintiff's mortgage, which was unaccompanied by any other evidence of indebtedness, at \$30,000, and the identical land mortgaged for the payment of the said \$30,000 at only \$2,000, the conclusion is inevitable that the honest judgment of the officer was not exercised; and that a rule or system of valuation was adopted by the assessor, and confirmed by the board of equalization, which was designed to discriminate unfairly against one class of tax-payers, and which was in plain contravention of the constitutional law which provides that "all taxes shall be uniform, and that the assessment shall be according to the value of the property." The principles involved in this case were passed upon by the supreme court of the United States in the case of *Cummings v. Bank*, 101 U. S. 153, which is a leading case, and must be regarded as settling the law there enunciated. In this case the Merchants' National Bank of Toledo filed its bill in equity to enjoin the treasurer from collecting a tax wrongfully assessed against its stockholders, alleging that in the valuation

of said shares they were estimated at a much larger sum in proportion to their real value than other property in the same city, county, and state. It is true that this decision was rendered under a statute of the state of Ohio providing for such a manner of assessment as was complained of, and providing expressly for an injunction against the collection of a tax illegally assessed. But, as expressive of the opinion of the court in rendering its decision, it says: "Independently of this statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally, and to violate a fundamental principle of the constitution, and when this rule is applied, not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power." The case at bar is a stronger one than the case which called forth that opinion, for in that case no actual fraud or capriciousness on the part of the officers, or intent to unjustly discriminate, was claimed; the assessment being made under the provisions of a statute the constitutionality of which was in question. And Mr. Chief Justice WARRE, in rendering a dissenting opinion, inferentially affirms the position taken by us when he says: "The valuation, as finally fixed by the proper officers or equalizing board under the law, is, in my opinion, conclusive when there has been no fraud. As it seems to me, this case comes within the operation of this principle."

In the *State Railroad Tax Cases*, 92 U. S. 575, cited by both plaintiff and defendant, and largely relied upon by defendant in the argument of this case, and, as stated by counsel for defendant, the case on which the court below decided this case adversely to plaintiff's interest, we can see no enunciation of the law which is not in harmony with the view taken by plaintiff in this case. There the contention of plaintiff was that the statute of Illinois, and the rule adopted by the board of equalization under the statute, was not in conformity with the principles of uniform taxation. The great point in this case, as stated by the attorney general, was the alleged unconstitutionality of the act creating the board of equalization, and it was not contended that the action of the board was not in accordance with the statute. Hence there was eliminated from this case any question of fraud by the officers in refusing to exercise their discretion, and the rule prescribed by the board in this case was for the very purpose of ascertaining the fair cash value of the capital stock and franchise of the railroad companies. If there was an error, it was simply an error of judgment; in fact, it can be readily gathered from the opinion of the court that it did not think there had been even an error of judgment, either by the board of equalization or the legislature. Justice MILLER, in rendering the opinion of the court, says: "The statute of Illinois, and the

rule adopted by the board of equalization, under the power conferred by the clause we have just recited, may not be the wisest mode of doing complete justice in this difficult matter; but we confess we have, on the whole, seen no scheme which is better adapted to effect the purpose, so far as railroad corporations are concerned, of taxing at once all their property, and of making the tax just and equal in its relation to other taxable property." This court cannot say as much for the rule adopted by the assessor of King county. On the other hand, it would be hard to conceive of a rule less liable to make the taxation of mortgages just and equal in its relation to other taxable property. The court in the case above cited further says, before an injunction will be granted to restrain the collection of taxes, that "there must be an allegation of fraud; that it creates a cloud upon the title; that there is apprehension of a multiplicity of suits; or some cause presenting a case of equity jurisdiction;" plainly inferring that, if one of these stated cases did exist, the case would be brought within one of the recognized rules of equity jurisdiction. It also states the doctrine that no injunction can be granted until it is shown that all the taxes conceded to be due, and which the court can see ought to be paid, have been paid. The complaint in this case shows that such an amount of taxes has been paid and tendered by plaintiff. In 10 Wis. 242, in *Weeks v. City of Milwaukee*, in a case nearly parallel with this, and under the constitutional provision that "the rate of taxes shall be uniform," the court decided that, where the taxes on the land of one citizen had been illegally increased by reason of the illegal exemptions of other lands from taxation, an injunction will be granted to restrain the sale of such lands for the payment of such illegal tax. In that case the complaint showed that the Newhall House, and the land on which it stood, had been purposely exempted from taxation, and, as plaintiff alleged, unjustly increasing his proportion of tax. It is true that this exemption only went to city taxes, but the decision was based on the broad principle of uniform taxation, and of the rights of individuals under that constitutional principle. The supreme court reversed the order of the lower court in refusing the injunction, and Justice PAINE, in rendering the opinion of the court, says: "I have no doubt this exemption originated in motives of generosity and public spirit, and perhaps the same motives should induce the tax-payers of the city to submit to the slight increase of the tax thereby imposed on each, without questioning its strict legality, but they cannot be compelled to. No man is obliged to be more generous than the law requires, but each may stand strictly upon his legal rights." That the property in the above cited case was wholly exempted from taxation, and the property in the case at bar, only partially exempted, makes no difference in principle; it is only a difference in degree.

Substantially the same announcement of the law governing such cases was made in the case of *State v. Railroad Co.*, 7 Nev. 99.

It was urged by defendant that the taxation in other counties in the state might be rendered ununiform by any interference with the value of plaintiff's property as fixed by the assessor. This would be a subject for the attention of a board of equalization, which the state has a right to provide for by legislative enactment, and which could make intercounty laws or regulations to secure uniformity of assessment between the counties. But no such officers exist in this state, and a failure of the state to provide for such a tribunal will not militate against the rights of the individual which are guaranteed to him by the laws of the state and the constitution or organic act. We think the uniform ruling of the higher courts has been that while equity will not interfere to correct mere mistakes or inadvertencies, or to contravene or set aside the judgments of assessors or boards of equalization in relation to values, it will interfere when the officers fraudulently, capriciously, or tyrannically refuse to exercise their judgment by adopting a rule or system of valuation designed to operate unequally, and to violate a fundamental principle of the constitution. We believe that the provisions of the statute in relation to the manner of making assessments, as set forth in section 2832 of the Code, are mandatory, and must be observed by the assessor. Applying the law, as we believe it to be, to the facts in this case, as shown by the complaint, which is the only statement of facts in the case, we are of the opinion that plaintiff was entitled to the remedy prayed for, and that defendant's demurrer should have been overruled, and the case tried upon the allegations of the complaint. The judgment of the court below is reversed, and the case remanded for further proceedings in accordance herewith.

STILES and HOYT, JJ., concur. ANDERS, C. J., and SCOTT, J., concur in result.

(1 Wash. St. 87)

WILKINS v. WILKINS.

(*Supreme Court of Washington*. Feb. 5, 1890.)

EXECUTORS AND ADMINISTRATORS—ALLOWANCE OF DEMANDS—CLAIMS HELD BY ADMINISTRATOR—APPEAL.

1. Under Code Wash. T. § 1473, providing that, when a claim against a decedent's estate is rejected by the executor, administrator, or probate judge, the holder must sue the executor or administrator within three months after its rejection, no appeal lies from an order of the probate court rejecting a claim. The holder's remedy is exclusively by suit.

2. Such section applies where a claim is held by the administrator; and, if his claim is disallowed by the probate judge, his only remedy is to resign his trust, and sue as any other creditor of the estate.

Appeal from district court, Chehalis county.

Robert Wilkins, administrator of the es-

tate of Oliver Seeley, deceased, presented to himself as administrator, and as such allowed, a claim of his own against said estate. The judge of the probate court disallowed the claim, and Wilkins appealed to the district court. From an order of said court denying a motion to dismiss the appeal, the attorney appointed by the probate court to represent the estate appeals.

Geo. J. Moody, for appellant. *Irwin & Evans*, for appellee.

HOYT, J. The only question presented by the record in this cause is as to the effect of section 1472 of the Code upon the right of appeal from the probate court, as provided in certain other sections of said Code. The said section is as follows: "When a claim is rejected by either the executor, administrator, or the judge of probate court, the holder must bring suit in the proper court against the executor or administrator within three months after its rejection; otherwise the claim shall be forever barred;" and we think the provision therein that the rejected claim must be sued upon within three months is exclusive, and that from the order of the probate court in such cases no appeal lies. To hold otherwise would be to make this section of no practical benefit to either party, and, besides, would tend to contradict the ordinary meaning of some of its language. The evident intention of all the provisions relating to the allowance of claims against estates of deceased persons is that the proceedings in the probate court thereon should be largely *ex parte*, and that a claim will be allowed only when it appears that there is little or no controversy in regard thereto, and that, as to all cases that are to be strongly contested, the more formal method of a suit in the proper court is to be resorted to.

Does the fact that the claim rejected was that of the administrator himself change the rule? It is urged that it does, for the reason that, as the administrator could not bring suit against the estate, he would be without remedy unless he can prosecute his appeal from an adverse decision of the probate court. We, however, see no greater impropriety in allowing him to bring suit against the estate of which he is the administrator than to allow him to wage a contested appeal in which he is the party in interest on one side, and the estate he represents on the other. The legislature could not have intended that he should occupy either of these positions; and we must hold that, if the probate judge and an administrator cannot agree as to the amount in his favor to be allowed against the estate he represents, and he desires to further contest the matter, he must resign his trust, and thus qualify himself to bring suit as any other creditor.

The district court obtained no jurisdiction by the proceedings on appeal, and should have granted the motion to dismiss; and its action in refusing to do so was error, for which the judgment below must be reversed, and the

cause remanded for further proceedings in accordance with this opinion.

ANDERS, C. J., and DUNBAR, SCOTT, and STILES, JJ., concur.

(1 Wash. St. 224)

GOING v. COOK.

(*Supreme Court of Washington*. March 8, 1890.)

PAROL CONTRACTS—EVIDENCE.

In an action for commissions for the sale of land placed, under a verbal contract with defendant, in plaintiff's hands for sale, where defendant claims that when the alleged contract was made he told plaintiff the property had been in the hands of another agent, but that, if the time allowed the latter in which to sell it had expired, plaintiff might sell, it is error to exclude evidence offered by defendant to show that at the time the contract was made the property was in fact in the other agent's hands, since such evidence tends to show the terms of the contract. **DUNBAR, J., dissenting.**

Appeal from district court, Pierce county.
Elwood Evans, for appellant. **A. A. Knight**, for appellee.

ANDERS, C. J. This action was brought by appellee against appellant to recover \$150, alleged to be due him as commission for selling certain real estate in the city of Tacoma, placed in his hands for sale by appellant. There was no written contract between the parties, but appellee contends that he and appellant made the contract verbally, on the street, during a casual conversation there had between themselves alone. In support of his contention plaintiff testified as follows: "Along about the 6th day of February I met Mr. Going on Pacific avenue, and I asked him if he had any property to sell, and he said he thought he had, and I told him if he had any I would like to sell it for him; and he said, 'I have a lot, with a building on it, on C street,—lot 12, block 1,306;' and I asked him what he wanted to realize from the property. The consideration was I could put it on the market at \$3,000. I said, 'You will pay the commissions, of course.' He wanted to know what the commission was, and I said five per cent., and he said that would be satisfactory; and I took a card out of my pocket, and made a note of the matter, and I asked him if there was any incumbrance on the property, and he said there was a mortgage on it for one thousand dollars, and that the parties who purchased it should assume that, and that whatever interest accumulated would be a consideration, and that I should go ahead and make the sale; and I asked him what time he would give me to make the sale, and he said 60 days' time to sell it." The defendant, **Going**, testified that "some time in the early part of February, 1888, I crossed the street nearly opposite Chilberg's. I was going to the Tacoma Hotel, and Mr. Cook was coming down the street, and we shook hands; and, while talking about the future prospects of Tacoma, he said, 'I am going into business.' I had never known before what his business was, and he said he was in the real-estate business. It was night-time, and he

said, 'If you wish to buy property, or your friends, bring them around;' and he said, in the course of the conversation, 'Have you any property to sell?' and I said, 'Yes; I had a piece in the hands of Sawyer;' and I mentioned this property on C street, of Mr. Goldsmith's. He asked me particularly about this property, and I told him it was in the hands of Sawyer, and I had given him option dates to sell it in,—30 days or 60 days,—and I didn't know whether it was sold or not; that I was told by Mr. Goldsmith to place that piece of property in Mr. Sawyer's hands. Mr. Cook said he would like to handle that property, and I told him it was then in the hands of Sawyer, and, so far as this property was concerned, if the time had expired, he was at liberty to handle it; and we went on, and I thought nothing more about it until I received a telegram from Portland that he had sold the property on C street, and when I received that telegram from Mr. Cook I answered that it was sold." At the trial in the district court the defendant offered to show, as matter of fact, that the property in question was in the hands of Sawyer for sale at the time of the conversation between plaintiff and defendant in regard thereto; but the court refused to permit the evidence to go to the jury, and this refusal is assigned as error. We think the court should have permitted the defendant to show the fact. It was some evidence as to whether a contract was or was not made between the parties such as alleged by the plaintiff. The defendant's relation to the subject-matter was material to the determination of the question in dispute. The weight to be given to the evidence was a question for the jury. Appellant also complains of the charge of the court to the jury; but we cannot see wherein he could have been prejudiced thereby. For the error above indicated the judgment of the court below is reversed, and the cause remanded for a new trial.

HOYT, STILES, and SCOTT, JJ., concur.
DUNBAR, J., dissents.

(1 Wash. St. 202)

COLUMBIA & P. R. CO. v. FARRINGTON.

(Supreme Court of Washington. March 8, 1890.)

RAILROAD COMPANIES—FIRES.

In an action against a railroad company for setting fire to grass on plaintiff's land, an instruction that, "if an expert testifies that he operated the locomotive at the time with due care and thought, and that it was so constructed that it would not set fire as thus operated, and the jury believe from the evidence that it actually did set fire at that time, the jury are to consider which of those proofs they will believe," is error, as it tends to convey the impression that the only question in dispute is as to the cause of the fire, and that plaintiff is entitled to recover if it was caused by defendant's engine.

Appeal from district court, Colfax county.
W. W. Cotton, for appellant.

DUNBAR, J. This is an action brought by appellee against appellant for causes shown

in the complaint, which was as follows: "The plaintiff alleges that the defendant was and now is a corporation organized under the laws of Washington Territory, and was and is the owner of a certain railroad, known as the Columbia & Palouse Railroad, together with the tracks, cars, and engines thereunto belonging; that during the two months prior to the commencement of this action plaintiff was the owner of and in the possession of a growing crop of corn and grass and certain fruit-trees, situated on the land of the plaintiff, and on the line of said railroad, in Whitman county, Washington Territory, between the towns of Farmington and Garfield, in said county; that defendants by its servants, and not regarding its duty in that respect, so carelessly and negligently ran and managed its said locomotive engines that the same emitted and dropped from themselves large and frequent numbers of sparks and hot cinders in and upon the land adjacent and contiguous to the track of said railroad, thereby setting fire to the dry grain and vegetation growing, and extending the fire to the land belonging to plaintiff, and destroying the crops and fruit-trees of the plaintiff on his said land, then and there growing, to his damage," etc. The answer of the defendant denied each and every allegation set forth in plaintiff's amended complaint, except the allegation of incorporation and ownership of the road as therein set forth. There was testimony introduced by the plaintiff tending to show that on the said 28th day of August fire originated on the right of way of said railroad company, and was communicated to the premises of plaintiff, where said damages were alleged, and that plaintiff's property was destroyed by said fire, as alleged; and that said fire was seen to break out on said right of way within two or three minutes after the passage of the train. Witness Randall, called by defendant, testified as follows: "I was the engineer in charge of the engine going from Colfax to Farmington, from which this fire is alleged to have escaped on the 28th day of last August. I have had eleven years' experience as a railroad engineer, and am thoroughly acquainted with all the modern improvements and applications used nowadays, and approved by the best-equipped railroad operators for the prevention of the escape of fire. That the engine in my charge on said day was equipped with the best known appliances used for the prevention of the escaping of fire, and that it was handled and managed by me on said day and on said trip in a careful and skillful manner, and that I saw no fire escape whatsoever. It was impossible for fire to escape on said day from said engine." At the conclusion of the testimony the court, refusing certain instructions asked for by counsel for the defense, gave to the jury the following instructions, which were unqualified by any other: "If the defendant owned the road upon which the locomotive ran, and the locomotive did set fire as alleged, the presumption is that it was the negligence of the

owner of the road, and this presumption continues until the contrary appears from the evidence. If an expert testifies that he operated the locomotive at that time with due care and thought, and it was so constructed that it would not set fire as thus operated, and the jury believe from the evidence that it actually did set fire at that time, the jury are to consider which of these proofs they will believe, the former or the latter."

This instruction is assigned as error by the defendant, and the defendant claims that, viewed in connection with the testimony, the court, in the last instruction, in effect, instructed the jury that the only question in dispute was the setting out of the fire; and that if they believed that the fire was set out by the engine they must find for the plaintiff. It seems to us that the instruction might reasonably bear this construction, which would, manifestly, not be the law. At all events, the language employed by the court is so confused and uncertain in its meaning that it is misleading, and it was error for the court so to instruct. As this is decisive of the case, it is not necessary for us to pass upon the question whether or not the court erred in refusing to give the instruction asked for by the defense, or whether or not the court correctly stated the law as to the presumption of negligence in the first paragraph of said charge or instruction. The judgment of the court below is reversed.

ANDERS, C. J., and HOYT, STILES, and SCOTT, JJ., concur.

(1 Wash. St. 110)

MCNAIR, Tax Collector, v. OSTRANDER
et al.

(Supreme Court of Washington. Feb. 3, 1890.)

TAXATION—ASSESSMENTS FOR STREET IMPROVEMENTS.

Act Wash. T. Nov. 28, 1883, § 8, incorporating the city of Olympia, gives the city power "to construct and repair sidewalks, and to curb, pave, grade, gravel, and gutter any street," and to levy and collect a special tax or assessment on the lots fronting on such street sufficient to pay the expense of construction of "said sidewalks, and graveling or paving said streets," and further gives to abutting owners the right to petition for "such improvement," and requires a two-thirds vote of the council to order it, in the absence of such petition. *Held*, that the act conferred authority to levy special assessments to pay for grading streets, as well as for graveling and paving them.

Appeal from district court, Thurston county.

Chas. H. Ayer, for appellant. J. W. Robinson, for appellees.

STILES, J. The appellant was tax collector of the city of Olympia, in the county of Thurston; and this action was brought to restrain him from selling a block of land fronting upon Adams street for the amount of a special tax levied upon the block by the city authorities for the expense of grading the street. The complaint alleged certain acts of the common council preceding and

leading up to the levy and threatened sale, against the regularity of which no complaint was made. The ground of the action was that under the act of the legislature approved November 28, 1883, incorporating the city of Olympia, no authority was given to the municipal corporation to levy special taxes for grading streets upon abutting property. A demurrer was interposed by the collector, but it was overruled by the court below; and, upon his declining to plead further, judgment finally restraining him was entered. By this appeal we are asked to review the judgment, and say whether or not the contested power exists.

It would naturally be expected that a legislative act which purported to confer upon a municipal corporation, created by its own terms, any power to levy special taxes for the improvement of streets, would clearly cover the matter of grading, which must be the beginning of all street improvement. But in the act before us the genius of legislation seems to have been invoked to aid confusion and uncertainty, rather than order and precision. Section 7 provides, generally, that the city "shall have power to provide for clearing, opening, grading, graveling, improving, and repairing streets," etc., which clearly goes no further than that the city may, out of its own treasury, procured from general taxation, do those things at the pleasure of its mayor and council. Section 8 gives the city power "to construct and repair sidewalks, and to curb, pave, grade, gravel, and gutter any street, * * * and to levy and collect a special tax or assessment on the lots and parcels of land fronting on such street * * * sufficient to pay the expense of construction of said sidewalks, and graveling or paving said streets," etc. Further along, after providing for assessment districts, the section reads: "But, unless the owners of more than one-half the property subject to assessment for such improvement petition the council to make the same, such improvement shall not be made until two-thirds of all the members of the council, by vote, authorize the making of the same."

Appellee maintains, and it was apparently so held by the district court, that the provision here made for the levy of special taxes must be taken to apply strictly to the particular kinds of improvement named in that connection, viz., "construction of sidewalks, and graveling or paving streets," to the exclusion of repairing sidewalks, and curbing, grading, and guttering streets. This view is claimed to be further strengthened by reference to section 96, providing for the details of special assessments, where it is enacted that, in all cases when the council shall order the "improvement of any street or alley by the construction of sidewalks, or graveling said streets," etc., there shall be certain proceedings designated, and leading to the levy of a special assessment therefor. On the other hand, section 93, which is the first of the sections providing specifically for the

manner of levying these special taxes, (chapter 8,) enacts that whenever the city council deems it expedient "to establish or alter the grade of any street or alley of the city, or to make any improvement thereof, as authorized by sections 5, 6, 7, 8, 9, and 10 of this act," it shall cause a survey, diagram, and estimate of the cost thereof to be made, and filed with the city clerk, "for the inspection of the persons interested therein;" and by section 94, if two-thirds in number of the persons owning property on the street, and representing one-half of the property thereon, do not remonstrate within 10 days, the council is authorized to proceed, and "make the improvement." Section 96 provides for an assessment of lots, and an apportionment of the whole cost of "planking" or "graveling" *pro rata*, although no previous mention has been made in the entire act of any "planking" whatever. Section 99, however, returns to the general term, and speaks merely of the "cost of improvements," and requires the council to provide by ordinance for its payment as apportioned; so, also, do sections 106-109.

It is the duty of this court to give to the statute that force which its provisions on the subject of street improvements will fairly sustain, although, in all its expressions, it may not be entirely clear. Counsel for the appellee has presented us with numerous authorities to the effect that the power to levy special assessments must be plainly and explicitly given, or it cannot be exercised; and to them we yield ready assent. But here the power to levy is most explicitly given; and the question to be answered is whether the language used in sections 8 and 96 is to be construed by itself, or with reference to that of other sections of the act upon the same subject. In section 8 the provision with regard to sidewalks is—*First*, to "construct and repair;" and, *secondly*, "construction." These terms are synonymous. *Gurnee v. Chicago*, 40 Ill. 165; *People v. Brooklyn*, 21 Barb. 484. With regard to streets and alleys, the power is to "curb, pave, grade, gravel, and gutter," while the special assessment mentioned is for "graveling or paving." The last clause of the section, which seems to qualify all that precedes it, gives to owners of abutting property the right to petition for such "improvement," and requires a two-thirds vote of the council to order it, in the absence of such petition. There would seem to be no propriety in this rule as to anything but the construction of sidewalks, and the graveling of streets, if the appellee's construction of the section were the correct one.

Again, do the terms "graveling" and "paving" fairly include the other things, "curb," "grade," and "gutter?" We think they do, and this view is sustained by authority. *Dill. Mun. Corp.* (3d Ed.) § 797, says: "The power to pave streets includes the power to furnish and do all that is necessary, usual, or fit for paving; and, on this ground,

it has been held that the expense of grading a street preparatory to paving is incident to paving, and the expense properly included in the assessment." *Williams v. Detroit*, 2 Mich. 560. In Illinois the power to pave is held to include the power to grade streets. *Burnham v. Chicago*, 24 Ill. 496. The power to pave was held to include the power to curb with stones. *Schenley v. Com.*, 36 Pa. St. 29. And so, also, the power to macadamize was held to include trimming and guttering. *McNamara v. Estes*, 22 Iowa, 246. The definition of the term "payment" was thus stated in *Burnham v. Chicago*: "A pavement is not limited to uniformly arranged masses of solid material, as blocks of wood, brick, or stone; but it may be as well formed of pebbles or gravel, or other hard substances which will make a compact, even, hard way or floor." In criticism of this definition, it may be said that paving is the generic term, under which "graveling" is the specific, and that, while the generic includes the specific, as the greater the less, the reverse does not follow. But the use of exact terms in this act is so entirely disregarded that we must have recourse to a telescopic rather than a microscopic view of it; and we therefore hold that, to the average reader of all the sections upon the subject of street improvements, it must appear that the intention of the legislature was to permit the city of Olympia to "improve" its streets, in any of the particulars named in section 8, with money derived from special taxes on abutting property. The system provided for making special assessments in chapter 8 starts out in section 93 with permission to the city council, whenever it deems it expedient to "make any improvement" of a street of the kind authorized by section 8 and other sections enumerated, to proceed in a certain way which, according to the contention of the appellee, would lead to a special assessment for "graveling," but would leave the city itself to pay for the grading which must precede the graveling, which we do not consider to be a reasonable interpretation of the act. The judgment of the court below will be reversed, with instructions to the successor of that court to overrule the demurrer, and proceed with the case in accordance with this opinion. Costs to the appellant.

ANDERS, C. J., and HOYT, SCOTT, and DUNBAR, JJ., concur.

(1 Wash. St. 195)

OREGON RY. & NAV. CO. v. DACRES.

(*Supreme Court of Washington.* March 8, 1890.)
RAILROAD COMPANIES—KILLING STOCK—PLEADING
—EVIDENCE.

1. While Act Wash. T. Nov. 28, 1883, §§ 2-7, providing that the value of stock killed on a railroad shall be assessed by appraisers, and the amount thereupon become due and payable, are unconstitutional as denying the right of trial by jury, sections 1 and 8 making railroads liable for all stock killed on their tracks unless they are fenced, are not so connected with the rest of the act as to

fall therewith, and are valid. Following *Dacres v. Navigation Co.*, 20 Pac. Rep. 601.

2. A complaint alleging that plaintiff owned a farm on which he pastured a bull, which went upon the unfenced track of defendant railroad company crossing the farm, and was killed, without plaintiff's fault, states a cause of action.

3. Under section 1 of the above-mentioned act, providing that every railroad company "owning or operating lines of railway within the Territory of Washington" shall be liable to the owner for the full value of all live-stock killed by its passing trains, the company is liable whether it owns or operates the road; and, in the latter case, it is immaterial that the road is leased.

4. In an action against a railroad company for killing a bull, defendant's original answer, admitting, in effect, that defendant owned and operated the train that killed the bull, is admissible in evidence, and the admission therein is conclusive unless shown to have been made under a mistake.

Appeal from district court, Walla Walla county.

W. W. Cotton, for appellant. *B. L. & J. L. Sharpstein*, for appellee.

ANDERS, C. J. This action was brought by appellee to recover the value of a bull alleged to have been killed by defendant's train. The complaint alleges "that at all the times hereinafter mentioned the defendant was and is a corporation, duly incorporated, and is engaged in operating a line of railroad in Washington Territory and elsewhere; that on the 3d day of May, 1888, and for a long time prior thereto, the plaintiff was the owner of, and in the possession of, a certain farm situated in sections 19 and 20, township 7 north, of range 36 east of the Willamette meridian, in Walla Walla county; and that, on said 3d day of May, plaintiff was the owner of a certain short-horned Durham bull, of the value of \$500, which bull was kept and pastured by plaintiff on said farm; that the track and railroad of the defendant cross over and through the farm of plaintiff aforesaid, and said track and railroad is, and was on said 3d day of May, 1888, and for a long time prior thereto, wholly unfenced; that, on or about said day, plaintiff's said bull strayed and went upon the said defendant's said track from plaintiff's said farm, without plaintiff's fault, and was then and there killed by defendant's train then passing over said road, to the damage of plaintiff in the sum of \$500." To the complaint a general demurrer was interposed, which was overruled by the court, after which the defendant answered as follows: "The defendant, by its answer, admits that at the time mentioned in the complaint the defendant was a corporation, and was the owner of the lines of railroad in Washington Territory, and of the immediate road in the complaint mentioned, but denies that it was then or there operating said railroad, or any railroad owned by defendant, in Washington Territory or elsewhere; admits that the plaintiff was the owner of the bull in said complaint described, but denies that he was of the value of \$500, or of any greater value than \$200; alleges that plaintiff's bull strayed upon the track of said railroad through the fault

of plaintiff; admits that said bull was struck by a locomotive running on said railroad track, and was killed, but denies that said locomotive or train on said railroad was then or there operated by the defendant, or defendant's servants, agents, or employees, or that it had anything whatever to do with said railroad, or any locomotive or train thereon; and denies that by any act whatever of the defendant, its servants, agents, or employees, or either or any of them, the said bull was killed, or that plaintiff was damaged by the defendant in the sum of \$500, or any other sum." The plaintiff replied, denying each and every allegation of the answer. Judgment, upon the verdict of a jury, was rendered for plaintiff for the sum of \$430.45 and costs, from which defendant appeals to this court.

Several errors are assigned by appellant as grounds of reversal of the judgment of the court below. The first to which our attention is directed by the brief and argument of counsel for appellant is that the court erred in overruling the defendant's motion for a continuance. But it does not appear that the defendant used such diligence in endeavoring to secure the attendance or deposition of absent witnesses as it might or should have done; and, as we cannot say that the trial court was guilty of an abuse of its discretion in that regard, its ruling will not be disturbed.

It is next urged that the act of the legislature of the Territory of Washington, approved November 28, 1883, under which this action was brought, is unconstitutional and void. We would be inclined to adopt the view of counsel for appellant as to the invalidity of this statute, were it an open question in this case. But the supreme court of the territory, upon a former appeal of this action, sustained sections 1 and 8 of the statute upon which this action is founded, but declared the remainder invalid. See *Dacres v. Navigation Co.*, 20 Pac. Rep. 601. And we are, therefore, constrained to accept that decision of the court as the law of this case. See *Parker v. Pomeroy*, 2 Wis. 112; *Railway Co. v. Hixon*, 11 N. E. Rep. 285; *Hiatt v. Brooks*, 22 N. W. Rep. 78; *Galveston Co. v. Gas Co.*, 10 S. W. Rep. 583; *Willis v. Smith*, Id. 685-687; *Applegate v. Dowell*, 20 Pac. Rep. 429.

It is also contended by appellant that the complaint fails to state a cause of action, and that its demurrer should therefore have been sustained. But we can predicate no error upon the ruling of the court upon the demurrer. We think it fairly appears from the complaint that the railroad track was at the time of the accident unfenced, and that the animal killed went upon the track from the plaintiff's field, and at a place unfenced. It is doubtless true that the complaint is not as specific in its allegation as, perhaps, it should have been; but we think it not insufficient on demurrer.

Appellant further insists that the court below erred in instructing the jury that "the

only questions for the jury to determine are whether the defendant was operating the railroad train at the time plaintiff's bull was killed, which killed the bull, and the value of the bull," and that "there is no evidence that there was a lease by the defendant; and, if there was, it would make no difference, for if, at the time the bull was killed, the defendant was operating the road through its lessees, it is as liable as it would be if it operated the road through its employees." This instruction must be considered in the light of the facts before the court, and of the statute above referred to, the first section of which is as follows: "That all railroad companies owning or operating lines of railway within the Territory of Washington shall be liable to the owners of all live-stock for the full value of all such live-stock killed or maimed by its passing trains." Section 8 of this act provides that "no railroad company shall be liable for such stock killed upon their roads when the same is fenced by such company with a good, lawful fence." It would seem from this statute that, if a railroad company either owns or operates a railroad, it is liable for live-stock killed, unless its track is fenced as specified in the eighth section; and, if this is so, appellant was liable, as owner of the road, even although it had proved that it had previously leased it to some other company or corporation. It therefore follows that the instruction was not erroneous, and must be sustained. Under the statute, therefore, as previously construed in this case, all that was necessary to entitle plaintiff to recover was to show the value of the animal killed, and that the road was unfenced; the ownership of the road and of the bull being admitted in the pleadings. See *Redf. R. R.* (4th Ed.) 490; *Lafferty v. Railway Co.* 38 N. W. Rep. 660.

Exception is urged to the admission in evidence of defendant's original answer in the case, in which it was, in effect, admitted that defendant owned and operated the train which killed the bull in question. But we have no doubt of its admissibility, and the admission therein is so far binding upon the defendant as to be conclusive of the fact admitted, unless shown to have been made under a mistake; and no such showing was attempted by defendant. And, it being thus admitted by the defendant that it was operating the road, the court was justified in saying to the jury that it would make no difference if the road was leased. We do not think that the oral evidence introduced to establish a lease was, under the circumstances, competent for the purpose. Counsel for appellant claims that, under the laws of Washington, railroad companies may lease their roads. But the only law brought to the attention of the court is that found on pages 62 and 63 of the *Laws of 1883*; and that statute requires such leases to be in writing, and they are not valid against any subsequent judgment creditor unless recorded in the office of the county auditor, in the county in which the principal

office of the lessee may be. We do not now decide that this statute applies to the alleged lease of the defendant's road; but, if it does, defendant should have complied with its requirements.

Objection is also made to the refusal of the court to give to the jury the instructions asked by appellant. But, as the court charged the jury in accordance with the established law of the case, we are of the opinion that appellant was not prejudiced by the refusal. We would not be understood, however, as saying that we would so hold were the case now up for review for the first time. Finding no substantial error in the record, the judgment of the court below must be affirmed, with costs; and it is so ordered.

HOYT and STILES, JJ., concur. DUNBAR and SCOTT, JJ., concur in result.

(1 Wash. St. 183)

TERRITORY v. KLEE *et al.*

(*Supreme Court of Washington.* March 3, 1890.)

ADMINISTRATORS—PROBATE JURISDICTION.

1. Under Code Wash. T. § 1341, providing that where one dies outside of the territory, owning property in it, the probate court of the county to which application is first made for letters of administration shall have exclusive jurisdiction of the settlement of the estate, a decree of the probate court vesting property in the territory for the support of public schools, as provided by section 3802, subd. 8, because its owner died without kindred or husband or wife, is void, where the court of another county has already granted letters of administration of the estate.

2. A deed purporting to be made by the attorney in fact of the grantor is no evidence of the grantee's title, where it is not shown that the attorney had any authority to make the deed, or that the grantee was ever in possession thereunder.

Campbell & Kreider and *B. W. Comer*, for appellant. *Judson, Sharpstein & Sullivan*, for appellees.

ANDERS, C. J. This action was brought by appellant in the district court of the second judicial district of Washington Territory, holding terms at Tacoma, in Pierce county, to quiet the title to certain land in that county, described in the complaint, and to set aside a tax-deed made by the sheriff of Pierce county to the defendant Joseph Klee, and also to set aside a quitclaim deed from the defendant Klee to defendant Joseph Miller, for the alleged reason that they are fraudulent and void, and are a cloud upon the title of plaintiff. Appellant claims title to the land in controversy by escheat from one Charles Gilbert, who, it is admitted, died intestate on the 30th day of August, 1879, at Astoria, in the state of Oregon. It appears that the land was assessed by Pierce county in the years 1880 and 1881, and that the taxes thereon became delinquent, and that the property was sold by the sheriff in the year 1882 to one Danforth, who received a certificate of sale from the sheriff, which he subsequently transferred to defendant Klee. On the 9th day of July, 1885, the sheriff ex-

ecuted and delivered the tax-deed, before mentioned, to Joseph Klee, who afterwards conveyed the premises, by quitclaim deed, to defendant Miller. It further appears from the record that the deceased, Charles Gilbert, was also, at the time of his death, the owner of real estate in King county, Washington Territory, and that, on the 27th day of June, 1883, the probate court of that county duly appointed A. P. Freeman administrator of the estate of the deceased, Gilbert, but revoked his letters of administration on the 13th day of June, 1884. On the 10th day of July, 1883, D. B. Hannah filed a petition for his own appointment as administrator of Gilbert's estate, in the probate court of Pierce county; and on the 23d day of July, 1883, that court made an order that letters of administration issue to him upon taking the usual oath, and filing a bond in a sum specified by the court. The record does not affirmatively show that Hannah ever filed his oath or bond, or that letters of administration were ever issued to him, but it appears from the records of the probate court, introduced in evidence, that on the 17th day of September, 1885, his final account was settled and allowed, and that he was discharged from further liability and action in the matter of said estate; the expenses and charges of administration having been fully paid and discharged by Pierce county. The court also, on that day, made and entered of record a decree of distribution of said estate, in which it is stated and set forth that there were no heirs living, and that decedent left no wife or kindred, and "that the said estate, and the whole thereof, be, and is hereby, declared escheated to the territory of Washington for the support of common schools in Pierce county." Upon this judgment and decree of the probate court appellant bases its claim of title to the land described in the complaint. The only law, in our statutes, on the subject of escheats, is contained in section 3302, subd. 8, Code, which is as follows: "If the decedent leaves no husband, wife, or kindred, the estate escheats to the territory, for the support of common schools, in the county in which the decedent resided during lifetime, or where the estate may be situated." In order, therefore, to recover in this action, appellant must allege and prove that Charles Gilbert was the owner of the land at the time of his death, and that he left no wife or kindred. To prove ownership in Gilbert, plaintiff introduced in evidence a deed to him, purporting, upon its face, to have been made by one Mathews, as attorney in fact of Gilbert's grantor; but no power or authority for so doing was shown, and no proof made that Gilbert ever went into possession under the deed. The deed was therefore not evidence of title in Gilbert, and, unless there is further evidence in the case of Gilbert's title, the court below did not err in finding that he was not the owner of the land in controversy at the time of his death. *Denn v. Reid*, 10 Pet. 524, 530; *Videau v. Griffin*, 21

Cal. 389; *Hagar v. Spect*, 52 Cal. 579; *Smith v. Lawrence*, 12 Mich. 431; *Wearin v. Munson*, 17 N. W. Rep. 746.

There is no direct allegation in the complaint that Charles Gilbert died leaving no wife or kindred, but the decree of the probate court of Pierce county, so stating, is therein set forth; and it is alleged that appellant, by virtue of this decree, became the owner of the land now in dispute. Whether this be true or not will depend upon the validity of the decree itself. Appellees contend that it is not valid or binding upon them, in any manner whatever in this action. They claim that the court had no jurisdiction or authority to render it; and they insist that the probate court of King county had exclusive jurisdiction of Gilbert's estate by priority of proceedings therein, and that the probate court of Pierce county wrongfully and unlawfully assumed to act in the matter. We think the objection is a valid one, and must be sustained. Where the estate of the deceased is in more than one county, he having died out of the territory, our statutes expressly provide that the probate court of the county in which application is first made for letters of administration shall have exclusive jurisdiction of the settlement of the estate. *Code Wash. T.*, § 1341; *Estate of Scott*, 15 Cal. 220; *Beckett v. Selover*, 7 Cal. 215-236; *Holyoke v. Haskins*, 5 Pick. 20; *Wells, Juris.* § 156. This being decisive of the case, we need not stop to consider minor questions raised in the briefs, and discussed by the respective counsel. Whether appellees have any title to the disputed premises we will not undertake to say. But we will here state that we are of the opinion that, if the territory is the owner of the land, the title vested in it immediately on the death of Gilbert, without the aid or intervention of the probate courts. See 6 *Amer. & Eng. Cyclop. Law*, 856, 857, and cases cited; *Com. v. Hite*, 29 *Amer. Dec.* 235, notes. And in that case it can recover the possession of the land, like any other owner, by an appropriate action in the proper court. The judgment of the court below, dismissing plaintiff's complaint, is affirmed.

STILES, DUNBAR, and SCOTT, JJ., concurring. HOYT, J., not sitting.

(31 Cal. 616)

PEOPLE v. RUSSEL. (No. 20,576.)

(*Supreme Court of California*. Dec. 4, 1889.)

ARSON—INFORMATION—DESCRIPTION OF OFFENSE.

An information which charges, in the language of *Pen. Code Cal.* § 447, defining arson, that defendant did willfully and maliciously burn "a building" with intent to destroy it, is sufficient, without describing the building, according to the definition of section 448, as one "capable of affording shelter to human beings, or appurtenant thereto, or connected with an erection so adapted."

Commissioners' decision. In bank. Appeal from superior court, Sonoma county.

Ira C. Jenks, for appellant. *Atty. Gen. Johnson*, for the People.

FOOTE, C. The defendant was convicted of the crime of arson in the first degree. From the judgment rendered against him in the premises, and an order denying him a new trial, he has appealed. He claims that his demurrer to the information should have been sustained, as that pleading did not charge him with any public offense. His argument in this connection is that, although the information is drawn substantially in the language of section 447 of the Penal Code,¹ it was fatally defective, because it did not go further, and declare, in the language of section 448² of the same Code, that the building the defendant is alleged to have burned was "one capable of affording shelter to human beings, or appurtenant thereto, or connected with an erection so adapted." It has been frequently held by the appellate court of California that an information or indictment drawn, substantially, in the language of the statute which defines the offense, is sufficient. *People v. White*, 34 Cal. 183-188; *People v. Cronin*, Id. 191, 208-210; *People v. Lewis*, 61 Cal. 366, 367; *People v. Turner*, 65 Cal. 541, 542, 4 Pac. Rep. 553. It has also been decided that an information for arson is sufficient if it follows the language of section 447, and that it need not set out the language of section 448, which the defendant claims to have been necessary to the sufficiency of the information in the present instance. The offense was stated in accordance with the language of section 447 of the Penal Code, and was sufficiently stated. As well might the provisions of sections 449 to 452 be held necessary to be stated as those of 448. Section 447 declares the offense, and the following sections relate to circumstances of its commission. *People v. Giacomella*, 71 Cal. 48, 49, 12 Pac. Rep. 302. Nor is it necessary, if the information or indictment charges arson in the language of section 447, that it should state in what degree the crime was committed. That is for the jury to determine from all the facts and circumstances developed in evidence. Pen. Code, § 1157; *People v. King*, 27 Cal. 507-512; *People v. Nichol*, 34 Cal. 211-217.

The further point is made that the court erred in not suspending the judgment, so that the defendant might obtain proof of the truth of an oral unsworn statement he made when called up for sentence, as to what a boy named Bryant had confessed that he had seen another boy, named Cramer, do. We perceive nothing in the action of the court in refusing the request, and the motion for a new trial, which indicated any abuse of discretion. Perceiving no prejudicial error in the record,

we advise that the judgment and order be affirmed.

BELCHER, C. C., and VANOLIEF, C., concurred.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(33 Cal. 296)

ANTHONY *et al.* v. JILLSON *et al.* (No. 12,665.)

(*Supreme Court of California*. Feb. 28, 1890.)

MINES AND MINING—PLACER CLAIMS—LOCATION—ADVERSE CLAIMS.

1. Under Rev. St. U. S. § 2319, providing that all mineral deposits in public lands shall be free, and open to exploration and purchase, and the lands in which they are found, to occupation and purchase by citizens of the United States, and those who have declared their intention to become such, one who is not a citizen, and who has not declared his intention to become such, acquires no rights by posting a notice of claim.

2. Failure to mark boundaries invalidates an attempted location of a placer mining claim. Following *White v. Lee*, 21 Pac. Rep. 363.

3. On proceedings to determine the validity of respective claims to a patent for a placer mine under Rev. St. U. S. § 2320, the answer must set forth the facts on which defendant bases his claim, and show his right as against the government, as well as against plaintiff.

4. A finding that for five years persons under whom defendants claim were in possession and working a certain claim, which is shown to be a part of the land surveyed for defendants on their application for a patent, does not show that it is a part of the piece claimed by plaintiffs, where that is but a small portion of the land surveyed for defendants.

5. Where a finding contains three specific statements of fact, a specification of error, designating it by numbers simply, as not sustained by the evidence, is insufficient.

6. An allegation, in a specification of error, that an alleged locator had "fully complied with the laws and statutes of the United States with reference to the location of placer mining claims," states a mere legal proposition, and points to no finding of fact.

In bank. Commissioners' decision. Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.

W. K. Boucher and Reddick & Solinsky, (*P. Reddy*, of counsel,) for appellants. *Ira Hill Reed* and *J. Warren Reed*, for respondents.

HAYNE, C. This was an action to determine the right to a patent to certain placer mining ground. The defendants applied for a patent to a tract of 36.17 acres, called the "Rough Diamond Mine." The plaintiffs claimed a tract of 30 acres which overlapped a corner of the defendants' claim to the extent of 7.44 acres. This latter piece is the one in controversy. An adverse claim was filed by the plaintiffs; and thereupon such proceedings were had that the present action was brought under section 2326 of the Revised Statutes, to determine the validity of the respective claims. The trial court gave judgment for the defendants, and the plaintiffs appeal.

¹Pen. Code Cal. § 447, defines arson as "the willful and malicious burning of a building with intent to destroy it."

²Section 448 defines the word building, as used in section 447, as "any house, edifice, structure, vessel, or other erection capable of affording shelter for human beings, or appurtenant to or connected with an erection so adapted."

1. The plaintiffs' mine is made up of two claims,—one of 20 acres, alleged to have been located by Severino Gobbi in 1878; and the other of 10 acres, alleged to have been located by the plaintiff Frank Anthony in 1885.

In relation to the Gobbi claim, the court found as follows: "That on December 6, 1878, one Severino Gobbi, a foreigner, sought to locate a placer mining claim by posting on the premises a notice, claiming, in his own name, twenty acres of ground situated in Chili Gulch mining district, in said county and state; said notice containing no description of boundaries other than giving the legal subdivision thereof, viz., being the N. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 25, township 5, N., R. 11, E. M. D. M. That on the next day thereafter, viz., December 7, 1878, he declared his intention of citizenship, and caused a copy of his notice of location to be recorded in the county mining records of said Calaveras county; but whether such notice was recorded before or after making such declaration of intention does not appear." The evidence justifies this finding. It shows that Gobbi did not file his declaration of intention to become a citizen until the day after he posted his notice of location; and it does not show that he did anything else after his declaration of intention, except, perhaps, to record his notice of location. The appellants assert in their specification that "there were no local rules or laws in force," and their counsel maintain in their brief that there were none. Certainly, there is no evidence of any local rules of any particular tenor; none requiring notices to be recorded, for example. Therefore, recording the notice was not required, (*Thompson v. Spray*, 72 Cal. 533, 14 Pac. Rep. 182; *Souter v. Maguire*, 78 Cal. 544, 21 Pac. Rep. 183;) and, not being required, it was useless. Leaving the record out of consideration, we see nothing that Gobbi did to effect a location except the posting of his notice, and at the time he posted his notice he was not a citizen, and had not declared his intention to become such. Under these circumstances, we do not think he acquired any right. *Rev. St. U. S. § 2319*; *Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. Rep. 97, 8 Pac. Rep. 621. There is another reason why he acquired no right. The court finds "that said Gobbi did not mark out on the ground the boundaries of such attempted location, nor did he set any stakes or marks defining the limits of said claim." There is no specification attacking this finding; and, if there had been, we see no evidence against it. The failure to mark the boundaries is fatal to the validity of the claim. *White v. Lee*, 78 Cal. 593, 21 Pac. Rep. 363.

In relation to the claim alleged to have been located by the plaintiff Frank Anthony,

the court finds that he "did not mark out upon the ground the limits of such claim by either stakes or monuments defining his boundaries." The only specification attacking this is as follows: "Finding 4 is contrary to the evidence in this, to-wit, that the evidence shows that plaintiff Frank Anthony, in locating the ground therein described, fully complied with the laws and statutes of the United States with reference to the location of placer mining claims, and that there were no local rules or laws in force." The finding designated as "4" contained three specific statements of fact; and, this being the case, the mere designation of it by number, as not sustained by the evidence, was not sufficient as a specification. *Eddelbuttel v. Durrell*, 55 Cal. 278, 279; *Parker v. Reay*, 76 Cal. 105, 18 Pac. Rep. 124. And the clause that the evidence showed that the locator had "fully complied with the laws and statutes of the United States with reference to the location of placer mining claims" amounted merely to a legal proposition, and did not point to any finding of fact. *Moyes v. Griffith*, 35 Cal. 556; *Coveny v. Hale*, 49 Cal. 552; *Thorne v. Hammond*, 46 Cal. 534; *Doherty v. Mining Co.*, 50 Cal. 187. But, if it be assumed in favor of the appellants that the specification is sufficient, the result would be the same, because the evidence does not show that the locator marked any boundaries upon the ground. Neither of the plaintiffs' locations, therefore, were of any validity.

2. Did the defendant show any right to a patent to the piece in controversy? In this regard, it is to be remembered that each party is to establish his right against the government as well as against his adversary. As was said concerning the plaintiff in *Gwillim v. Donnellan*, 115 U. S. 50, 5 Sup. Ct. Rep. 1110: "His location must be one which entitles him to possession against the United States, as well as against another claimant." And, if it appears that neither had acquired a right, judgment should be given against both. *Jackson v. Roby*, 109 U. S. 441, 3 Sup. Ct. Rep. 301. And we think that the pleading of each should set forth the facts upon which he relies. This is the rule in reference to the pleadings in actions to determine the right to purchase other kinds of public lands. In *Woods v. Sawtelle*, 46 Cal. 389, *RHODES, J.*, delivering the opinion, said: "The action is brought to determine which of the parties has the better right to make the purchase, and it becomes necessary for each party to state directly all the facts upon which he relies to show that his is the better right." So, in *Cadlerque v. Duran*, 49 Cal. 356, the same learned Justice, speaking for the court, said: "Each must state in his pleadings all the facts upon which he relies as showing his right to become the purchaser, and the steps he has taken to avail himself of, and secure, his right to make the purchase." The rule applies to the answer as well as to the complaint. *Christman v. Brainard*, 51 Cal. 586; *Ramsey v. Flournoy*,

¹ This section provides that all mineral deposits in public lands shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States and those who have declared their intention to become such, etc.

58 Cal. 260; *Dillon v. Saloude*, 68 Cal. 269, 9 Pac. Rep. 162; *Gilson v. Robinson*, 68 Cal. 543, 10 Pac. Rep. 193; *Garfield v. Wilson*, 74 Cal. 177, 178, 15 Pac. Rep. 620. And we think that it applies to actions to determine contests concerning the right to patents to mining land. Upon this theory, it was held in *Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. Rep. 97, 8 Pac. Rep. 621, that the complaint in such an action must allege that the plaintiff was a citizen; and, as a matter of course, where the party claims under a location made by another, he must show that the location was properly made by a qualified person. The defendants' answer in this case fails to show any right in them to a patent to the tract in controversy. They claim under two locations,—one known as the "Green & Guy Claim," and the other known as the "A. K. Smith & Co. Claim." The answer does not mention either, and does not show that either Green or Guy, or any one from whom they may have purchased, or Smith, was a citizen of the United States. There is nothing definite averred concerning either of the locations, unless what appears at folio 41 be considered such. The requirement that a certain amount of work be done each year is imperative. *Morgan v. Tillotson*, 73 Cal. 520, 15 Pac. Rep. 88; *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. Rep. 301; *Chambers v. Harrington*, 111 U. S. 353, 4 Sup. Ct. Rep. 428. But, beyond a general statement that a great deal of valuable work was done, nothing is averred. The evidence in relation to the claims is meager and unsatisfactory; but it is unnecessary to examine it in detail, because the matters above referred to are sufficient to dispose of the appeal. It is sufficient to say that, in our opinion, there are several particulars in which it clearly fails to make out a case of right in the defendants against the United States. In fact, hardly anything that was required is shown to have been done.

The defendants contend, however, that they were in possession of the ground for a sufficient time to entitle them to a patent without reference to any location; and they rely upon the following provisions of the Revised Statutes: "Sec. 2332. Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state, * * * evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter." The appellants contend that the evidence does not show that the defendants or their predecessors were in possession of the property for the period prescribed by the above provision; and the respondents reply that possession is found, and that there is no specification attacking the finding. But we do not think that there is any finding of possession of the tract in controversy. The finding is that, for five years prior to 1877, Green and Guy had been in pos-

session and working a "hill claim of 1,080 feet in length on the channel under Tunnel ridge, between Chili gulch, on the west, and Old Woman's gulch, on the east," and that transfers of the possession were made through various persons to the defendants. Now, aside from any other objection, there is nothing to show that the "1,080 feet in length" was a part of the 7.44 acres in controversy. It is found that it was a part of the 36 acres surveyed for the defendants on their application for a patent. But that might well be so, and yet it not be a part of the smaller piece in controversy. There is nothing in the pleadings or the findings which throws light on this subject. If this piece of 1,080 feet be in fact a part of the tract in controversy, the record should make the fact appear. Similar observations apply to the A. K. Smith & Co. claim, of 600 feet.

But, if the possession were otherwise sufficient, the showing would still be defective, because it is not pleaded or found that the persons whose possession is relied on were citizens of the United States, or had declared their intention to become such. That class is the only one that can acquire mineral land from the government. Rev. St. U. S. § 2319; *Lee Doon v. Tesh*, supra. The section above quoted provides an additional mode of acquisition, but does not enlarge the class who can acquire. Upon the record before us, we think that none of the parties showed a right to a patent for the tract in controversy; and we therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial, with leave to the parties to amend their pleadings, if so advised.

(83 Cal. 330.)

PEOPLE v. BOLING. (No. 20,582.)

(Supreme Court of California. March 3, 1890.)

HOMICIDE—CHALLENGE OF JUROR—INSTRUCTIONS—HARMLESS ERROR.

1. Pen. Code Cal. § 1170, giving defendant, on trial of an indictment, the right to take exception to a decision of the court in disallowing a challenge to a juror for implied bias, or in admitting or rejecting testimony on the trial of a challenge for actual bias, etc., does not authorize an exception to a decision disallowing a challenge for actual bias.

2. On a trial for murder, resulting in a conviction of manslaughter, an erroneous instruction as to malice, not having been prejudicial, is no ground for reversal.

3. On such trial an instruction that, "when the act is proved to have been done by defendant, if it be an act itself unlawful, the law in the first instance presumes it to have been intended, and the proof of justification or excuse lies on the defendant to overcome this presumption," does not require defendant to overcome such presumption by a preponderance of the evidence, and is not erroneous; Pen. Code Cal. § 1105, though not requiring a preponderance of evidence, does require de

defendant to prove circumstances in justification of the homicide.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Pen. Code Cal. § 1170, referred to in the opinion, provides that, "on the trial of an indictment or information, exceptions may be taken by the defendant to a decision of the court (1) in disallowing a challenge to the panel of the jury, or to an individual juror, for implied bias; (2) in admitting or rejecting testimony on the trial of a challenge to a juror for actual bias; (3) in admitting or rejecting testimony, or in deciding any question of law not a matter of discretion, or in charging or instructing the jury upon the law on the trial of the issue."

Ernest Graves and Wm. Graves, for appellant. *Geo. A. Johnson*, Atty. Gen., for the people.

FOOTE, C. The defendant was convicted of the crime of manslaughter, under an information charging him with murder. From the judgment and an order denying a new trial he appeals. His first point is that the court erred in not allowing his challenges as to three persons, sworn to answer questions as jurors, on the ground of actual bias. There was no exception taken to the decision of the court in the admission or rejection of testimony upon the trial of the challenges. It has been often held by the appellate court that no exception can be taken to a decision disallowing a challenge to a juror for actual bias; that section 1170 of the Penal Code does not authorize it. *People v. Riley*, 65 Cal. 108, 3 Pac. Rep. 413, and cases there cited.

It is also urged that the court erred in giving, of its own motion, a part of instruction 8, which is: "When the act is proved to have been done by the defendant, if it be an act itself unlawful, the law in the first instance presumes it to have been intended, and the proof of justification or excuse lies on the defendant to overcome this legal and natural presumption." And also in giving in the same way this part of instruction 9: "Malice is implied by law from any deliberate, cruel act, committed by one person against another, however sudden; as when a man kills another suddenly, without any considerable provocation, the law implies malice, and, unless overcome by preponderating proof the other way, it must be held murder. If malice be proved to the satisfaction of the jury, beyond all reasonable doubt, to have existed a short time before the crime was committed, if any there was, it will be presumed to have continued down to the actual commission, unless modifying circumstances are shown to have taken place, or the defendant is in some other way proved to have acted under fresh controlling motives." As to the last-mentioned instruction, it may be said that, even conceding it to have been erroneous under the rule laid down in *People v. Bushton*, 80 Cal. 160, 22 Pac. Rep. 127, 549, we do not per-

ceive that the defendant suffered any injury. He was not convicted of murder, where the ingredient of malice is necessary to be proven, but was convicted of manslaughter. The instruction could not have prejudiced him, as he was acquitted of malice in the killing. *People v. O'Neal*, 67 Cal. 379, 7 Pac. Rep. 790, and case cited.

The first-mentioned instruction, it is urged, shifts the burden of proving that the killing was justifiable on the defendant, after it is proved that the killing charged was done by him, which is in itself unlawful. The instruction does undoubtedly require that the defendant shall remove by some kind of evidence in the case (whether appearing in his own or the people's evidence, is not important) the presumption which arises from his having killed the deceased, and to that extent the law does shift the burden of proof on him; but the instruction does not declare that it shall be incumbent on him to remove the presumption by a preponderance of evidence, which was the vice found in the instruction declared erroneous in the *Bushton* case, supra. As was said in that case, page 164: "The section [1105, Pen. Code.] casts upon the defendant the burden of proving circumstances of mitigation, or that justify or excuse the commission of the homicide. This does not mean that he must prove such circumstances by a preponderance of the evidence, but that the presumption that the killing was felonious arises from the mere proof by the prosecution of the homicide, and the burden of proving circumstances of mitigation, etc., is thereby cast upon him. He is only bound under this rule to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt of the offense charged."

An unlawful act is presumed to have been done with unlawful intent. Subdivision 2, § 1963, Code Civil Proc. But such intent may be controverted by other evidence, and in a case of this sort, as we have seen, the intent may be rebutted by any evidence which may raise in the minds of the jury a reasonable doubt of its existence, but such rebuttal it is incumbent on the defendant to make somewhere in the evidence. The jury were directed in instruction 5, given on the part of the court, that they could not convict the defendant of manslaughter unless they were convinced beyond a reasonable doubt that the deceased was killed, that the killing was unlawful, and that it was done by the defendant. The instruction complained of did not conflict with this fifth instruction, but simply stated in addition that, the killing by the defendant once proved, there must appear from the evidence something to rebut the presumption that it was unlawful, and still left the fifth instruction unimpaired as to the requirement that all the concomitants of manslaughter must be proved beyond a reasonable doubt. In fact, in various other portions of the instructions, the necessity that the defendant should not be found guilty under

the information, unless the jury were satisfied from the evidence beyond all reasonable doubt that all the elements necessary to constitute his guilt of such crime existed, was fully and forcibly expressed. As to the point that the evidence shows without conflict that the defendant acted in self-defense, and was innocent of all crime, and was improperly convicted, it is simply to be said that such a state of facts does not so clearly appear as to warrant us in declaring that the jury convicted the defendant against all the evidence. What was said, what appearance the witnesses presented, and how they impressed the jury by their acts and language, the jury were in a better position to appreciate than an appellate court can be, and we do not think their verdict on that account should be disturbed. No prejudicial error appearing, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(9 Mont. 349)

PIERCE v. TEN EYCK.

(Supreme Court of Montana. Feb. 13, 1890.)

PARTNERSHIP—DISSOLUTION BY PURCHASE OF INTEREST—ACCOUNTING.

1. Though a partner has purchased the interest of his copartner in the partnership and its assets, he can recover from the latter one-half the amount of a private debt due him which had been collected by the copartner, and mixed with the firm assets.

2. A purchase by a partner of his copartner's interest for a sum certain without any reservation of demands, relinquishes a claim for a sum paid in by the purchaser in excess of his share, which it had been agreed should be first deducted from the assets on dissolution; the agreement not contemplating a dissolution by purchase by one of the partners of the other's interest.

3. Though the purchasing partner was misled by the way the retiring partner kept the books, and by the latter's failure to give him proper credits, and paid a larger sum than he would have done if he had known the condition of the books, he cannot recover the excess; he having been negligent in not examining the books.

4. The partner purchasing the interest of the retiring partner for a fixed sum cannot recover his portion of a sum which it is alleged the firm was to be credited with on account of the absence of the latter for a few months, the credit never having been made or looked after by plaintiff.

Appeal from district court, Jefferson county; N. W. McCONNELL, Judge.

McConnell & Clayberg, for appellant. Massena Bullard, Cowan & Parker, and John W. Eddy, for respondent.

BLAKE, C. J. Pierce brought this action to recover certain amounts which he alleged had been collected by Ten Eyck when they were copartners, and not entered upon the books of the firm, or accounted for. A referee was appointed to take the testimony, and his findings were adopted by the court. It appears that the copartnership continued

from the 15th day of September, 1882, until the 18th day of March, 1886, when Pierce "purchased the said defendant's interest in said partnership and in the property, and resources and assets belonging thereto, paying the said defendant for his said interest the sum of \$4,000." The judgment consists of three items, which will be considered in their order, in the report of the referee.

One Hubble was indebted to Pierce, personally, before the formation of the copartnership, in the sum of \$422.50, which was received by Ten Eyck in the year 1883, and not placed to the credit of Pierce upon the books. The entries regarding this amount indicate clearly that it was not appropriated by the appellant to his individual use, but became a part of the assets of the firm. The account of Hubble shows that there has been placed to his credit the sum of \$300, which is followed by the remark: "Debtor to Pierce." Hubble was in the employ of the firm, and one Locker, through a cattle trade with the parties, paid a debt to Hubble, who had another credit in the sum of \$122.50. While the books are not accurate in these matters, they do not establish the right of Pierce to the whole amount. This sum of \$422.50 did not lawfully constitute any part of the property of the firm, and the purchase by Pierce of the interest of Ten Eyck did not embrace or settle the account. But Ten Eyck, as a copartner, actually had the benefit of one-half of the amount, which had been credited to Hubble; and the respondent should have a judgment therefor.

Pierce contributed to the firm the sum of \$387.52 in excess of his share; and it was agreed that upon the dissolution of the copartnership this amount should be first deducted from the assets, and that the remainder should be divided equally between the parties. This is the second item of the account for which the respondent recovered judgment. There was no contract in writing which defines the rights of the copartners, and the evils which generally ensue under these conditions attend the parties. The sale by Ten Eyck to Pierce of his entire interest in the property of the firm worked a dissolution. *Rogers v. Nichols*, 20 Tex. 719. But we are of the opinion that the agreement did not contemplate a termination of the partnership in this way, and that Pierce, by his new bargain with Ten Eyck, which was a purchase without any reservation of demands, relinquished all claims of this class.

The respondent testified before the referee that he feared there was something wrong; that he did not believe the books were properly kept; and that he had discovered some mistakes. The errors of which he chiefly complains are the omissions of Ten Eyck, who was the book-keeper, to make entries pertaining to the business. Pierce could have investigated thoroughly the books, with the aid of experts, if necessary, and ascertained every fact therein concerning the affairs of the firm. Instead of pursuing the course

which was dictated by wisdom, when his mind was swayed by suspicion of the conduct of Ten Eyck, he purchased voluntarily the interest of his partner. The referee finds "that the books were in a condition to mislead the plaintiff, and that, by reason of defendant's failure to give to plaintiff his proper credits, plaintiff was misled, and plaintiff did pay a greater sum for defendant's interest than he would have paid if he had known the true condition of the books." This comprises a fair statement of the excuse which has been pleaded by the respondent to justify his negligence in the exercise of ordinary diligence. We confess that we cannot perceive any grounds on which Pierce is entitled to recover the amount of this excess from Ten Eyck. Mr. Justice FIELD, in *Slaughter's Adm'r v. Gerson*, 19 Wall. 383, lays down the law in one sentence: "A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness."

Judgment was entered against the appellant for the sum of \$75 through the following finding of the referee: "That it was agreed between plaintiff and defendant that during an absence of defendant, while out of the territory for three months, between December, 1883, and April, 1884, the firm should be credited with \$50 per month to compensate for defendant's loss of time; that no such credit was ever given." This demand is governed by the views which have been expressed in respect to the preceding item. When Ten Eyck was absent, it was the duty of the person in charge of the books, under the direct command of Pierce, to put in black and white the figures referring to this agreement. We cannot understand why the appellant is to be held responsible for this omission, or why the respondent did not look after the business in which he was an equal partner. The claim must meet the fate of its predecessor. It is therefore adjudged that the judgment be reversed, with costs, and that the cause be remanded, with directions to the court below to enter a judgment for the plaintiff for the sum of \$211.25, and interest thereon from the 23d day of February, A. D. 1888.

HARWOOD and DE WITT, JJ., concur.

(18 Or. 540)

STATE v. AH LEE.

(Supreme Court of Oregon. March 4, 1890.)

PERJURY—INDICTMENT—TIME—HEARSAY EVIDENCE.

1. An indictment which contains every allegation mentioned, in the form given in the appendix to the Criminal Code for such crime, is sufficient.

2. In the trial of a criminal case, it is not competent for the prosecution to introduce hearsay evidence; and, when it becomes material to prove the time when a Chinese row occurred in the city of Portland, it was not competent for the prosecution to ask a car-driver, who was shown to have been in a distant part of the city at the time, if he heard of the row in Chinatown on that trip, nor can he be permitted to state where he was when he first heard of the row.

3. "Hearsay," in its legal sense, denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other persons.

4. In prosecutions for perjury, the common-law rule seems to be that the time when the crime was committed must be truly alleged in the indictment, and proved as laid.

5. Whether section 1274 has changed that rule, *quære?*

(Syllabus by the Court.)

Appeal from district court, Multnomah county; L. B. STEARNS, Judge.

The defendant, Ah Lee, was convicted of the crime of perjury, from which judgment he has appealed. The indictment, after averring that a criminal charge was pending before the police judge of the city of Portland against one Pon Long, wherein this defendant was duly called and sworn as a witness, and that certain questions became and were material, which are fully set out in the indictment, proceeds as follows: "The said Ah Jo, so sworn as aforesaid, then and there, on said hearing, falsely, corruptly, willfully, knowingly, and maliciously, before said court and magistrate, did depose and say, among other things, in substance and to the effect, the following, that is to say: That the said Pon Long was engaged in the row which took place in Chinatown on the 2d day of December, 1888, and that the said Pon Long was present, on and in the neighborhood of Second and Alder streets, county of Multnomah, and state of Oregon, at the time that one Ah Lung was shot, and that Pon Long had assaulted the said Ah Lung with a revolver pistol charged and loaded with gun-powder and leaden balls, and that the said Pon Long inflicted a dangerous wound upon the said Ah Lung; whereas, in truth and in fact, the said Pon Long was not engaged in a row which took place in Chinatown on the second day of December, A. D. 1888; and whereas, in truth, the said Pon Long was not present on Second and Alder streets, nor was he in the neighborhood of Second and Alder streets, in said city of Portland, county and state aforesaid, at the time said Ah Lung was shot; and whereas, in truth and in fact, the said Pon Long had not assaulted the said Ah Lung with a revolver pistol charged and loaded with gun-powder and leaden ball, nor had he assaulted him at all, or in any manner; and whereas, in truth and in fact, the said Pon Long did not inflict a dangerous or any wound upon said Ah Lung,—all of which facts the said Ah Jo then and there well knew; and the said false statements made so upon oath, by the said Ah Jo, were material to the questions and matters then and there being inquired into before the said magistrate; and the said Ah Jo did then and there, and thereby, commit willful and corrupt perjury." The defendant was indicted by the name of Ah Jo. The other facts appear in the opinion.

W. H. Adams, for appellant. H. E. McGinn, Dist. Atty., for the State.

STRAHAN, J., (*after stating the facts as above.*) Upon the argument here, three points were insisted upon by the appellant's counsel: *First*, error in the court below in overruling the demurrer to the indictment; *second*, error in admitting hearsay evidence; *third*, a variance between the evidence and the indictment.

1. The objection to the indictment will first be considered. It is, that it is not alleged in the indictment that the defendant knew that the testimony given by him was false. Much of the learning found in the books in reference to the sufficiency of an indictment for the crime of perjury, and the particularity requisite in such cases, has been rendered inapplicable by the provisions of the Code of Criminal Procedure. Section 1270, Hill's Code, provides: "The manner of stating the act constituting the crime, as set forth in the appendix to this Code, is sufficient in all cases where the forms there given are applicable; and, in other cases, forms may be used as nearly similar as the nature of the case will permit." It has been several times held by this court that this appendix was a part of the Code, and that the forms of indictments therein set forth were sufficient in all cases where they are applicable, (*State v. Dodson*, 4 Or. 64; *State v. Spencer*, 6 Or. 152; *State v. Brown*, 7 Or. 186; *State v. Lee Yan Yan*, 10 Or. 365;) and it must not be overlooked that *State v. Spencer*, *supra*, was upon a charge of perjury. All the forms of indictments given in the appendix referred to are very concise and brief. The substance of the one for perjury is as follows: "On his examination as a witness duly sworn to testify the truth in the trial of an action at law, in the court of —, between C. D., plaintiff, and E. F., defendant, which court had authority to administer said oath, he testified falsely that, [stating the facts alleged to be false;] the matters so testified to being material, and the testimony being willfully false." It will be observed that this form does not require the averment used in common-law indictments immediately succeeding the assignments of perjury, to-wit: "All which statements made by the said J. S., the said J. S. then and there well knew to be false." *Whart. Prec. Ind.* p. 577. It is true the pleader undertook to follow the common-law form, and probably intended to use the exact phraseology contained in the precedent, but by oversight varied the language thus: "All of which facts the said Ah Jo then and there well knew." This averment, or any equivalent for it, might have been omitted entirely, and still the indictment would have been sufficient, under our Code. It is not intended by this to suggest that knowledge of the falsity of the matters sworn to is eliminated from this crime. If such knowledge was a necessary ingredient of the crime before the enactment of the Code, it is so still. The Code has wrought no change in the substance of the crime. It has only abolished useless forms. Under the Code, this is not a matter

of averment, but one of proof. The indictment is therefore sufficient.

2. The next assignment of error arises on the ruling of the court in the admission of evidence. One W. H. Adams was called as a witness on behalf of the state, and testified, in substance, that on the 2d day of December last he was driving a street-car on Third street; that his regular drive was on the line running up Morrison street to Ninth, up Ninth to Montgomery, and up Montgomery; and that about 1 o'clock, in the changes that were made for dinner, he drove the car out Third street; and that the time of leaving Carruther's street, in the upper end of the city, was 25 minutes past 1, and that he left there within a minute or two of that time. That, on that trip down, Pon Long got into the car at Carruther's street, with two other Chinamen, and rode with him, on his car, down to Third and Morrison streets; that he arrived at Morrison street 35 minutes past 1; and that his time of getting there did not vary more than two minutes from that time. The district attorney then asked him if he heard of the row in Chinatown on that trip, to which question an exception was taken, and he answered that he did. The district attorney then asked this witness to state where he was when he first heard of the row, to which an exception was also taken, and he answered: "About Market street." The object of this evidence, manifestly, was to prove that Pon Long could not have been present at the time Ah Lung was shot; thus negating Ah Lee's evidence given before the magistrate. If this evidence was competent; it was of the highest importance. It tended to prove that Pon Long could not have been present at the row, and therefore did not shoot Ah Lung. That was the very fact which the state was bound to prove to secure Ah Lee's conviction. But it is objected that this report, which the car-driver heard as he came down the street, was not competent, because it was hearsay. "The term 'hearsay,'" says Mr. Greenleaf, (section 99), "is used with reference to that which is written, as well as to that which is spoken; and, in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other person." Nothing can be plainer than that what this car-driver heard about the China row falls exactly within this definition. He had no knowledge of the fact himself. He was testifying to a fact that some person, not a party to this action, communicated to him. The person who gave him that information would not have been allowed to testify to the fact that he did communicate it, had he been present in court. The fact would have been *res inter alios acta*, and inadmissible for that reason. How, then, can it be claimed to be competent where the statement is removed still one step further from the person who first repeated it. No authority has been cited to support such a rule as is

relied upon by the district attorney, and it is believed that none exists. Numerous authorities might be cited which lay down a different rule. *Belverman v. State*, 16 Tex. 130; *Reeves v. State*, 7 Tex. App. 276; *Spencer v. State*, 31 Tex. 64; *Sneed v. State*, 4 Tex. App. 514; *People v. Hinchman*, 42 N. W. Rep. 1006; *Nuckolls v. State*, 11 S. W. Rep. 646. But it seems useless to collate or recite authorities on a principle of law so purely elementary. The law does not sanction or permit rumors or reports, however well authenticated, to be introduced. If the fact to which they relate become material, it may be proven, not by showing that some person reported it or narrated it, but by the introduction of a witness who knows such fact, and can testify concerning it. What the jury might have done without this evidence, it is not our province to inquire. It is sufficient for us to know that the evidence was not competent, and that its introduction might have injured the prisoner. I think the better rule, in criminal cases, is that where improper evidence is admitted, the legal intendment ought to be that it did injure the prisoner, unless the record itself affirmatively shows the contrary, which could only occur in rare instances.

3. The next objection is that there is a fatal variance between the indictment and the evidence offered by the state as to the time when the alleged false oath was taken, and the evidence given upon which the perjury is assigned. The indictment alleges that the defendant was sworn, and testified in the police court, on the 10th day of December, A. D. 1888. Judge TANNER, of the police court, testified that the defendant was sworn as a witness before him on the 14th day of December, A. D. 1888. The memorandum made by Judge TANNER at the time of Ah Lee's evidence, and used by him, when on the stand, to refresh his memory, stated that the case of Pon Long was heard on the 11th day of December, 1888. E. H. Peery, the short-hand reporter in the police court, testified that Ah Lee was examined as a witness in the police court on the 12th day of December, 1888. In each of these cases, as soon as it appeared from the evidence that Ah Lee testified in the police court on a different day from that alleged in the indictment, counsel for the prisoner objected to all of the evidence given by each of said witnesses, or that they should be permitted to relate what took place in the police court on a day other than that alleged in the indictment; but their objections were overruled, to which exceptions were duly taken. The general rule is that the time of the commission of an offense laid in an indictment is not material, and does not confine the proofs within the limits of that period, and the indictment will be satisfied by proof of an offense on any day anterior to the finding. *Whart. Crim. Ev.* § 103. But it is said there are several exceptions to this rule. Wherever deeds, bills of exchange, bank-notes, or promissory notes, of any kind whatever, are set forth, it is es-

sentia that the date, if stated, should correspond with the evidence. Where, also, any time stated in an indictment is to be proved by matter of record, a variance will be fatal. Thus, in an indictment for perjury, the time when the crime was committed must be truly stated. *Id.* § 103a. Several other authorities seem to indicate the same rule. *U. S. v. Bowman*, 2 Wash. C. C. 328; *U. S. v. McNeal*, 1 Gall. 387; *Com. v. Monahan*, 9 Gray, 119; *State v. Oppenheimer*, 41 Tex. 82; *People v. Parsons*, 6 Cal. 487; *McMurry v. State*, 6 Ala. 324. Whether section 1274, Hill's Code, has changed or abrogated this rule, *quare*? As to this, we do not deem it absolutely necessary to express an opinion at this time. For the errors already referred to, the judgment of the court below must be reversed, and a new trial awarded.

(14 Colo. 286)

TODD v. STEWART.

(Supreme Court of Colorado. Feb. 14, 1890.)

ELECTION CONTEST—PLEADING.

A petition in an election contest averred, generally, that, in four election precincts, corruption, fraud, and intimidation were practiced, and mentioned, specifically: *First*, the striking off of 27 or 28 names from the poll-books, thereby depriving such persons of the privilege of voting, but with no averment that the parties thus prevented from voting would have cast their ballots for contestor; *second*, the action of certain mine owners and managers, who endeavored to turn their employees' votes against contestor by unfair argument and implied threats of discharge from employment; *third*, the circulation by contestee of the report that a certain independent ticket, containing the name of contestor, was fraudulent, whereby numerous persons were prevented from exercising their free choice. The petition did not state the total number of votes cast in the county for the office in controversy, nor the total vote polled in the precincts complained of. It did not state the number of candidates for said office, nor the number of votes given for either candidate; nor was there any averment tending to show that the matters complained of altered the result of the election. *Held*, that a demurrer to the petition should be sustained.

Original contest proceeding.

George R. Todd, pro se. Stirman & Emerson, John Kinkaid, and S. L. Carpenter, for contestee.

HELM, C. J. Contestor and contestee were opposing candidates at the last general election for the office of county judge of Ouray county. Contestee received the certificate of election, and the present proceeding is instituted to try his right to the office. The principal ground of contest stated by the petition is that, in the registration of voters in six election precincts of Ouray county, preceding the election referred to, some of the specific requirements of the statute were not complied with by the boards of registration. The petition also avers, generally, that, in four of the six election precincts mentioned, corruption, fraud, and intimidation were practiced. But the only specific acts of corruption, fraud, or intimidation mentioned are: *First*, the striking off of 27 or 28 names from the poll-books, thereby depriving such

persons of the privilege of voting; *second*, the action of certain mine owners and managers, who endeavored to turn the votes of their employes against contestor by unfair argument and implied threats of discharge from employment; *third*, the circulation by contestee and his law partner of the report that a certain independent ticket containing the name of contestor was fraudulent, whereby numerous persons were prevented from exercising their free choice for the office of county judge. The foregoing petition is challenged by demurrer upon the ground that no sufficient cause of contest is therein stated, and also upon the ground that the same is ambiguous, unintelligible, and uncertain.

A general averment of election frauds, or the intimidation of voters, should be treated as insufficient; and the pleading of proper ultimate facts should be required, under the rules of this court, in election contests, as in other cases. The allegation that 27 or 28 names were stricken from the poll-book does not aid contestor, since there is no averment that the parties thus prevented from voting would have cast their ballots for him. The alleged reprehensible conduct of mine owners and managers would, if true, be a proper subject for denunciation by good citizens, and possibly for legislative action; but it is not within the realm of judicial cognizance in determining election contests. Nor can rumors circulated and arguments advanced against particular candidates during political campaigns, however false or malicious, affect the determination of such cases.

The sole remaining ground of contest rests upon contestor's assertion that the specific requirements of the law in relation to the registration of voters are conditions precedent to a legal ballot, and that where any of these requirements are omitted, either through ignorance, inadvertence, or evil design, the registration is void, the votes cast are illegal, and the returns should not be counted. Without passing upon the correctness of the foregoing propositions, we must hold that the petition is in this respect, also, insufficient; for, if we assume, for present purposes only, that contestor's position is sustained by authority, nevertheless, certain other matters must be averred and proved in order to successfully contest an election. If contestor does not show that, by reason of the illegal casting or rejection of votes, the result is different from what it would otherwise have been, the contest proceeding should not be entertained. *Cooley, Const. Lim.* (5th Ed.) 780; *McCrary, Elect.* (2d Ed.) § 281; *First Parish v. Stearns*, 21 Pick. 148; *People v. Cicott*, 16 Mich. 282.

The petition under consideration does not state the total number of votes cast in the county for the office in controversy at the election mentioned, nor the total number of votes polled in either or all of the six precincts complained of. It does not state the number of candidates in the field for said of-

fice, nor the number of votes given for either of the candidates. It does not state, or attempt to state, the number of electors who were prevented from casting their ballots for contestor by reason of fraud, intimidation, or other misconduct. It does not even specifically aver that the board of canvassers considered or counted the returns from the six precincts objected to. In short, there is a total absence of averment tending to show that the matters complained of altered the result of the election. The mere declaration in the pleading that contestee was not elected, and that contestor is entitled to the office, does not supply the foregoing omissions. The demurrer to the petition is sustained.

(20 Nev. 443)

BRAGG v. STATE. (No. 1,314.)

(Supreme Court of Nevada. Feb. 25, 1890.)

EXPENSES OF ELECTION—INDEMNITY BY STATE.

A legislative act appropriating a certain sum "for the purpose of paying the expenses of the various counties in this state of the special election," does not create a fund applicable to the payment of a demand for publishing proposed amendments to the state constitution, to be voted upon at such special election.

Appeal from district court, Ormsby county; RICHARD RISING, Judge.

Action by plaintiff against the state to recover \$616 balance alleged to be due for publishing proposed amendments to the constitution. Judgment for plaintiff. Defendant appeals.

J. D. Torreyson, for the State. *S. D. King*, for appellee.

BELKNAP, J. The law providing for the submission of certain proposed amendments to the constitution of the state at a special election upon the 11th day of February, 1889, required the state board of examiners to publish the proposed amendments in a daily newspaper of general circulation for the period of two weeks preceding the election. In compliance with this requirement, the board entered into a contract with the plaintiff, by which he agreed to make the publication in the *Reno Evening Gazette*, a newspaper of which he was proprietor and publisher. The law regulating rates to be paid for official advertising provides that for the publication of each square of 10 lines there shall be paid not to exceed the sum of \$2.50 for the first insertion, and not to exceed \$1 for each subsequent insertion; "an insertion being held to be one publication per week." *St. 1887, p. 135.* It was agreed that compensation under the contract should be governed by the provisions of this statute, but as the contract required a daily publication, and the statute contemplated only one publication per week, plaintiff reserved the right to seek additional compensation at the hands of the legislature. This branch of the contract is expressed in the records of the board as follows: " * * * It being understood that Mr. A. C. Bragg, the proprietor of the *Gazette*, shall only hold this board responsible for such compensation as

may be allowed by them under the law of 1887, p. 135; he being requested to publish the amendments daily for two weeks, and to look to the legislature for any further compensation that may be just and due." Plaintiff made the required publication, and received in payment therefor the sum of \$252, which is the amount of money to which he was entitled under the law of 1887. Afterwards he brought this action, alleging that the services rendered were reasonably worth the sum of \$868, and, deducting the payment made, a balance of \$616 remained due, for which amount he asked judgment.

In order to maintain an action of this nature against the state, an appropriation by the legislature for the payment of the demand must have been made. Two distinct appropriations were made for the purpose of meeting the expenses of the special election. The object of these appropriations was to reimburse the counties the expenses of the election for which they were primarily liable. The first act was approved by the governor upon January 23, 1889, and appropriated the sum of \$15,000 "for the purpose," as therein expressed, "of paying the expenses of the various counties in this state of the special election to be held on February 11, 1889." St. 1889, p. 21. The second is entitled "An act to provide for the payment of the expenses of the special election held February 11, 1889, in excess of the amount heretofore appropriated for that purpose," and is complete in one section, as follows: "Section 1. The sum of \$4,687.15 is hereby appropriated * * * for the purpose of paying any deficiencies that may arise on account of the insufficiency of the appropriation heretofore made to provide for the payment by the state of Nevada of the expenses of the special election held in this state on February 11, 1889." St. 1889, p. 94. The first appropriation was made before the election, at a time when, from the nature of the case, the expenses could only be estimated. The second was made after the election, when the expenses could be approximated. It is evident that the legislature ascertained after the election that the first appropriation was inadequate, and a further appropriation necessary. The "appropriation heretofore made," mentioned in the second act, refers to the appropriation of \$15,000 "for the purpose of paying the expenses of the various counties in this state of the special election." The second appropriation was made, as the law itself declares, to meet the deficiency of the first; and, the first being for the purpose of paying the expenses of the counties, the second was for the same purpose. Neither of these appropriations create funds applicable to the payment of plaintiff's demand, because it is in no sense chargeable against any of the counties. As no contention is made that any other fund is subject to the payment of the claim sued upon, it is ordered that the judgment be reversed, and the cause remanded, with instructions to dismiss the action.

AMERICAN CENT. INS. CO. v. HATHAWAY.

(*Supreme Court of Kansas.* March 8, 1890.)

INSURANCE—PROOF OF LOSS—INTERROGATORIES.

1. Where questions of fact submitted to a jury are not fully and substantially answered, the court, on application of either party, should instruct the jury to fully and explicitly answer them.

2. Where an interrogatory is requested to be submitted to the jury, within the issues joined by the pleadings and the evidence introduced, asking for a more explicit answer to another interrogatory submitted, it is error for the court to refuse to submit it to the jury.

3. In an action against a fire insurance company, where it is provided in the policy that in case of loss the insured must notify the company of the fire, and also forward to the home office of the company proofs of any loss sustained, upon a trial to recover for such loss the jury should find, under proper questions of fact, not only that notice of the fire had been given the company, but also that proof of loss had been either made or waived.

(*Syllabus by Holt, C.*)

Commissioners' decision. Error from district court, Sumner county; J. T. HERRICK, Judge.

Isaac G. Reed and Rosington, Smith & Dallas, for plaintiff in error. *George & King and McDonald & Parker*, for defendant in error.

HOLT, C. At the January term, 1887, of the Sumner district court, the defendant in error, as plaintiff, recovered a judgment for \$1,080.50 against the defendant, a fire insurance company located at St. Louis, Mo. The company had insured the plaintiff against loss by fire on merchandise and other personal property in his store at Caldwell, Kan., for \$1,000. The store and its contents was burned on the 8th day of October, 1885. This action was brought upon the policy issued, alleging compliance with all its conditions by plaintiff. The answer was a general denial. While there was quite a volume of testimony tending to throw suspicion upon the origin and circumstances of the fire, and also that there was not personal property to the value of \$1,000 consumed, yet the question discussed by the briefs of the parties is whether sufficient proof of loss had been given to the company as required by the terms of the policy, or waived by the actions and statements of its agent. A day or two after the fire Dave Rorick, the general adjuster of claims for the company, came to Caldwell, and looked over the ground where the building had been located. There is a conflict of testimony concerning what he did and said at that time; the plaintiff's testimony tending to show that he stated that if the proofs were furnished there at Caldwell he would come back and settle for the loss. The defendant denies that any such statement was made, or anything that could be construed into a waiver. Among the conditions of the policy were that the insured should give, under oath, a particular account of the loss; what property was destroyed or damaged; state the time, origin, and circumstances of the fire, and produce a certificate, under the seal of a magistrate, notary public,

or commissioner of deeds nearest the place of fire, and not concerned in the loss or related to the insured, stating that he had examined the circumstances attending the loss, and believed that the insured had, without fraud, sustained loss on the property insured to the amount such officer should certify to; and it was stipulated therein that the loss sustained should be paid within 60 days after such proof and statement had been received at the head office of the company in St. Louis, Mo. At the trial the plaintiff offered in evidence a copy of the items of the property consumed, and of his verification thereto, as proof of his loss. This was objected to, as being secondary evidence, and because no proper ground had been laid for its introduction. The plaintiff testified that on the 23d day of October, 1885, he placed this statement, a copy of which he had in court, in the Caldwell post-office, directed to the company at St. Louis, with postage prepaid. He further offered Rorick, general adjuster of the company, as a witness, who testified that it had never been received at the home office in St. Louis. The plaintiff never made a demand of the company for the statement sent, nor a copy thereof.

Besides the general verdict in favor of plaintiff, the jury made special findings of fact, the following of which are pertinent to the objections made by the plaintiff: "Interrogatory 4. Did the plaintiff render to the defendant a particular account under oath of the loss claimed to have been sustained? Answer. Yes. Int. 5. If you shall answer question number four in the affirmative, was the account therein mentioned received by the defendant at its head office, in St. Louis, Mo.? A. We do not know." "Int. 8. Has the defendant waived any of the conditions of said policy relating to the proceedings of the assured after a loss thereunder? A. Yes. Int. 9. If you answer question number eight in the affirmative, state each and every condition that you may find has been so waived. A. By the special agent of the company, Dave Rorick, being on the ground after the fire, about October 12 or 13, 1885, he waived the notice required by policy to be in writing. Int. 10. If you answer question number eight in the affirmative, state when and by whom such waiver was made. A. Answer in number nine. Int. 11. Have any of the conditions of said policy, relating to proceedings by the assured after a loss thereunder, been waived in this case by Dave Rorick? A. Answer in number nine. Int. 12. If you answer question number eleven in the affirmative, state specifically each condition waived by him. A. Answer in number nine." "Int. 15. If you answer question number four in the affirmative, state particularly when and in what way he so rendered said account to the defendant. A. Evidence shows that the plaintiff mailed at Caldwell, Kan., in the insurance company's printed envelope, postage prepaid, bill of items, under oath, required by policy. Int. 16. If you answer question number eleven in the af-

firmative, when did he waive the said conditions or either of them? A. By Special Agent Rorick's appearance at Caldwell after the fire. Int. 17. Was the plaintiff induced to delay the rendition to the defendant of the particular account of his loss, under oath, required in his policy, by any conversation he had with Dave Rorick? A. No."

One of the important controverted questions of fact in this case is whether proof of loss was received at the office of the defendant at St. Louis. The plaintiff, in introducing a copy of that proof, acted upon the theory and upon the testimony of Rorick that it had never been received there. Such evidence alone permitted a copy to be introduced in evidence, yet when he obtained a judgment against the company it must have been because a sufficient notice had been received at the office at St. Louis, or because there had been a waiver on the part of their adjuster, Mr. Rorick. If the notice had been received at St. Louis properly, then the introduction of the copy of the statement and proof of loss was error. On the other hand, if it had not been received, then the only evidence to sustain the judgment would be that showing a waiver by the defendant. We therefore shall confine the discussion of this case solely to the question of waiver, and the instructions of the court seem to indicate that that was the controverted question largely in its mind during the trial. There was evidence sufficient, if uncontradicted, to have upheld the verdict in favor of plaintiff on that ground; and it was upon that theory, and that alone, that the defendant's demurrer to the evidence was properly overruled.

By examination of findings 9, 10, 11, and 12, we learn that defendant company, by its agent Rorick, waived the notice required by the policy to be in writing, by being on the ground four or five days after the fire. There can be no question but what the notice of the fire was waived by the appearance of the adjuster of the company, but there is no certain or definite finding that the proofs of loss and certificates were waived by the company. Interrogatory 9 was not fully answered. It was sought to be made more definite by interrogatories 11 and 12, but in the answer the jury simply referred back to the answer they made to interrogatory 9. The defendant asked that interrogatory No. 19 be submitted to the jury: "Int. 19. If you answer No. 11 in the affirmative, state fully by what acts or representations, or in what manner, he waived the said conditions, or either of them." The court refused to submit it. It should have been submitted. It was within the issues and the evidence adduced. It might have made certain what conditions had been waived. Being within the issues of the case and the evidence submitted, it was error to refuse to submit it. This error is more manifest when we recall, also, that the court refused, on motion of defendant, to compel the jury to more definitely answer interrogatories 9 and 12. We recommend that the

judgment be reversed, and the cause remanded for a new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 375, 387)

MISSOURI PAC. RY. CO. v. SHARITT.

(Supreme Court of Kansas. Nov. 9, 1889.)

GARNISHMENT—DEBT DUE AND EXEMPT IN ANOTHER STATE.

Where an employe and resident of this state performs labor in this state for a railway company, a corporation of another state, but also doing business in this state, and the wages of such employe are exempt in this as well as in the other state, held, in an action by the employe to recover such wages in this state, the fact that the corporation has been garnished in such other state by a creditor of such employe before the bringing of this action in this state, and service of summons obtained upon the employe only by publication, is no defense to such action.

(Syllabus by Clogston, C.)

Commissioners' decision. Error from district court, Franklin county; A. W. BENSON, Judge.

Sharitt, plaintiff below, commenced this action on the 27th day of July, 1887, against the plaintiff in error, the Missouri Pacific Railway Company, to recover wages due him. The action was brought before a justice of the peace in Franklin county, and judgment was rendered against the defendant. An appeal was taken to the district court of Franklin county, and trial was had by the court, and the court made findings of fact and conclusions of law which are as follows: "(1) Plaintiff was in the employ of the defendant at Council Grove, Kan., during the month of June, 1887, performing manual labor in and about coupling cars and making up trains, and the like, and was styled a 'yard-master.' (2) As such laborer, he earned, and became and was entitled to receive from the defendant for such month's services, the sum of \$79, \$75 of which sum has not been paid. (3) That plaintiff is a citizen, resident, and householder of the state, and has been for more than two years last past. During said month of June, 1887, and ever since, the plaintiff had a family, to-wit, a wife and three children, supported by his labor, and his said earnings were necessary for the support of said family. (4) While the action was pending before the justice, it appeared that certain garnishee proceedings were pending in Morris county, Kan., whereby it was sought to subject said wages to the claim of a certain party there; and it was then agreed between the attorneys for the respective parties in this case that the suit here should be continued ten days, and that if, in the mean time, said garnishee proceedings were dismissed, the defendant would pay plaintiff's claim, or submit to judgment thereon, if plaintiff would pay costs. Accordingly, at the expiration of said ten days, said proceedings having been dismissed, the justice entered judgment accordingly. On the 13th day of July, 1887, at St. Louis, Mo., the defendant company

was garnished by and before a justice of the peace of that state at the suit of W. P. Stewart, a resident of Missouri, against said J. W. Sharitt, and ordered to answer therein, in which it did on July 28, 1887; and the company was, on September 23, 1887, ordered to pay into that court the amount so due the plaintiff. The plaintiff, Sharitt, defendant in that suit, was not served in said action otherwise than by publication. From the order so requiring said company to pay said moneys the said company appealed to the circuit court of St. Louis county, Mo., which said action is now pending and undetermined. Neither party or their attorneys had notice or knowledge of these proceedings in St. Louis when the agreement referred to in the fourth finding was made. I conclude, as matter of law, that said personal earnings were and are exempt from the payment of plaintiff's debts, and that he is entitled to recover the same in this action; and judgment will be rendered accordingly." Judgment thereon was rendered for the plaintiff. Defendant now brings the case here.

B. P. Waggener and John W. Deford, for plaintiff in error. E. Harpole, for defendant in error.

CLOGSTON, C. It is not contended that the claim sued on is not exempt under the exemption laws of this state, but it is contended that, because the garnishment proceedings were commenced in Missouri, and the court of that state obtained jurisdiction of the subject-matter before this suit was brought in Kansas, for that reason the defendant company became liable under their answer in Missouri under said proceedings, and should not again be held liable in this state in this action. The plaintiff in error recognizes the rule laid down by this court, that, if the garnishment proceedings had been commenced in this state, no question could have been raised, and also recognizes the rule adopted in this state, that the garnishee has the same right in his answer to raise all the questions that the debtor himself might raise, and plead the exemption law as completely as the debtor might plead it; but plaintiff in error says no such rule exists in Missouri; that, under the decisions of that state, it is precluded from asserting this right, and therefore, if it is compelled to pay this judgment, it will again have to pay the claim under its answer in Missouri. This seems to present a hardship; but, as the claim is exempt under the laws of this state, and presumably exempt under the laws of Missouri,—for it is presumed, in the absence of any showing to the contrary, that the laws of Missouri are the same as the statute of this state; and, therefore, if this claim is exempt under both the laws of Missouri and of Kansas, it would be unjust to the defendant in error if, by reason of some construction of the statute of Missouri, he should be prevented from securing the benefit of the exemption. It has been held in this state that the garnishee may

plead the exemption laws, and be protected thereby as completely as the debtor would be. See *Mull v. Jones*, 33 Kan. 112, 5 Pac. Rep. 388. This seems to be the well-recognized doctrine elsewhere; and, while there is some conflict in the authorities on this subject, the great weight of authority is with our court. We see no reason why an exception should be made in this case to a rule so well established. Under the rule laid down in *Railway Co. v. Maltby*, 34 Kan. 131, 8 Pac. Rep. 235, and *Railroad Co. v. Gough*, 35 Kan. 1, 10 Pac. Rep. 89, this judgment must be affirmed. See, also, *Drake v. Railway Co.*, 37 N. W. Rep. 70. Under those decisions, this claim would be exempt to the plaintiff below had he resided either in the state of Missouri, or, as he does, in Kansas; and such exemption ought to be a good defense for the defendant company in Missouri. It is therefore recommended that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered. HORTON, C. J., and JOHNSTON, J., concur.

VALENTINE, J. I concur in the decision of this case for the reason that I believe it is sustained by reason and the weight of authority. It seems to be generally held that the laws of any country where a debt is created enter into the contract upon which the debt is founded, so far as they are applicable and material, and form a part thereof. *Greer v. McCarter*, 5 Kan. 18, 22; *Deering v. Boyle*, 8 Kan. 532 et seq., and cases there cited. Also, in the absence of anything to the contrary, it will be presumed by the courts that the laws of all the other states are similar to their own. *Furrow v. Chapin*, 13 Kan. 107; *Dodge v. Coffin*, 15 Kan. 285 et seq., and cases there cited; *Railway Co. v. Cutter*, 16 Kan. 568; *Baughman v. Baughman*, 29 Kan. 284. And, when the *situs* of a debt is changed from the state or jurisdiction in which the debt was created to some other state or jurisdiction, all its incidents and conditions materially affecting it will be transferred with it, and its interpretation, scope, and validity will be governed by the *lex loci contractus*. For instance, if the debt is exempt from judicial process in the state where it is created, the exemption will follow the debt, as an incident thereto, into any other state or jurisdiction into which the debt may be supposed to be carried. *Drake v. Railway Co.*, 69 Mich. 168, 37 N. W. Rep. 70; *Wright v. Railroad Co.*, 19 Neb. 175, 27 N. W. Rep. 90; *Baylies v. Houghton*, 15 Vt. 626; *Pierce v. Railway Co.*, 36 Wis. 283. And see, especially, the opinion in the case of *Railway Co. v. Maltby*, 34 Kan. 125, 128, 8 Pac. Rep. 235 et seq. In the language of the Michigan case above cited, the exemption of the debt from judicial process "becomes a vested right *in rem*, which follows the debt into any jurisdiction where the debt may be considered as going." Also, the *situs* of a

debt is either with the owner thereof or at his domicile, or where the debt is to be paid; and it cannot be subjected to a proceeding in garnishment anywhere else. See the numerous authorities hereafter cited, commencing with the case of *Railroad Co. v. Dooley*, 78 Ala. 524. I shall now proceed to consider this case with reference to its facts.

The Missouri Pacific Railway Company, a Missouri corporation doing business in Missouri and Kansas and other states, and operating over 2,000 miles of railway in Kansas, owes a debt, not evidenced by any instrument in writing, to J. W. Sharitt, a resident of Kansas, for wages earned by him as yard-master for the railway company at Council Grove, Kan., and presumably payable at that place, which wages are, under the laws of Kansas, and presumably under the laws of Missouri, as nothing appears to the contrary, exempt from execution, attachment, garnishment, and other process. W. P. Stewart, a resident of Missouri, who puts forth the claim that Sharitt owes him, instituted a garnishment proceeding before a justice of the peace of that state against the railway company to procure the payment to him of the debt which the railway company owes to Sharitt. Such proceeding is now pending in the circuit court of St. Louis, Mo. No service of summons was ever made upon Sharitt in that case except by publication. The question now arises, and it is the principal question involved in this case, whether Sharitt is bound by such garnishment proceedings or not. Now, unless the Missouri court has jurisdiction of Sharitt, or of something belonging to him, of course, the proceeding is void as to him; and, as no personal service or summons was ever made upon him, it will be admitted that the proceeding is without jurisdiction and void as to him personally. But the further question remains, is the proceeding without jurisdiction and void as to any property belonging to Sharitt? Or, in other words, has the Missouri court any jurisdiction, as against Sharitt, over the debt which the railway company owes to Sharitt? Sharitt is not a resident of Missouri, nor is he in that state; but, on the contrary, he is a resident of Kansas, and in Kansas, and he has never been served personally with any summons in the garnishment proceeding. The debt is not evidenced by any written instrument; but, if it were, the instrument would presumably be in Kansas, and in the hands of Sharitt. It is not payable in Missouri, but, on the contrary, it is presumably payable in Kansas, where it was created, and where Sharitt resides; and in Kansas, and presumably in Missouri, it is exempt from all judicial process. It is not claimed that the railway company has ever set apart any fund, either in Missouri or in Kansas or elsewhere, for the purpose of paying this particular debt. Hence there is no specific fund connected with this debt, nor any tangible thing to which any jurisdiction could at-

tach. But, if it should be supposed that any particular fund had been set apart to pay this debt, then it should be supposed that it was so set apart in Kansas, as the debt was created in Kansas, is already due in Kansas, and is payable in Kansas; and probably the railway company could not set apart a fund in Missouri so as to defeat Sharitt's claim in Kansas. The debt is really and in fact a mere chose in action, resting wholly in parol, and is of such an intangible character that it could not be actually seized by any kind of process. And it can hardly be said to have any actual *situs* anywhere; but, if it should be considered as having any actual *situs* anywhere, then its more natural *situs* is where it is to be paid,—in Kansas, and to Sharitt. It is seldom, and perhaps never, held that the property in a debt, a mere chose in action, can be carried around with the debtor wherever he may go, and exist wherever he may be. *Drake, Attachm.* §§ 474, 481; *Wade, Attachm.* § 344; *Wheat v. Railroad Co.*, 4 Kan. 370. But, on the contrary, the *situs* of a debt is generally held to be with the creditor, or at his domicile, or at the place where it is made payable. It is the creditor that owns the debt, and not the debtor; and the *situs* of the debt must be considered as being either with the owner or at his domicile, or where it is to be paid. Indeed, the more natural *situs* of any contract, whether a debt or not, would seem to be where it is to be performed. Even tangible property is not subject to garnishment proceedings in a state or jurisdiction in which the property is not situated. See the above authorities, and also *Bates v. Railway Co.*, 60 Wis. 296, 304, 305, 19 N. W. Rep. 72. See, also, *Sutherland v. Bank*, 78 Ky. 250. Now, under the facts of this case, we do not think that the Missouri court has any jurisdiction either of Sharitt, or of anything belonging or appertaining to him; and hence the garnishment proceeding is void as to him. We think the weight of authority sustains this view of the case. See the authorities already cited, and also the following: *Railroad Co. v. Dooley*, 78 Ala. 524; *Lovejoy v. Albee*, 33 Me. 414; *Lawrence v. Smith*, 45 N. H. 533; *Miller v. Hooe*, 2 Cranch, C. C. 622; *Hamilton v. Rogers*, 67 Mich. 135, 34 N. W. Rep. 278; *Drake v. Railway Co.*, 69 Mich. 168, 37 N. W. Rep. 70; *Baylies v. Houghton*, 15 Vt. 626; *Towle v. Wilder*, 57 Vt. 622; *Wright v. Railroad Co.*, 19 Neb. 175, 27 N. W. Rep. 90; *Pierce v. Railway Co.*, 36 Wis. 283; *Tingley v. Bateman*, 10 Mass. 343; *Nye v. Liscombe*, 21 Pick. 263; *Sawyer v. Thompson*, 4 Fost. (N. H.) 510; *Railroad Co. v. Thornton*, 60 Ga. 300; *Green v. Bank*, 25 Conn. 452; *Cronin v. Foster*, 13 R. I. 196; *Bates v. Railroad Co.*, 4 Abb. Pr. 72; *Willet v. Insurance Co.*, 10 Abb. Pr. 193; *Noble v. Oil Co.*, 79 Pa. St. 354; *Myer v. Insurance Co.*, 40 Md. 595; *Williams v. Ingersoll*, 89 N. Y. 508, 523; *Bank v. Wickham*, 23 Mo. App. 663; *Fiedler v. Jessup*, 24 Mo. App. 91; *Keating v. Refrigerator Co.*, 32 Mo. App. 293; *Todd v. Railway Co.*, 33 Mo. App. 110; *Wheat v.*

Railroad Co., 4 Kan. 370. As before stated, it is not the debtor who can carry or transfer or transport the property in a debt from one state or jurisdiction into another. The *situs* of the property in a debt can be changed only by the change of location of the creditor who is the owner thereof, or with his consent.

It will be seen from what has been said that my concurrence in the decision in this case is founded almost wholly upon the theory that the Missouri court has no jurisdiction of Sharitt, or of anything belonging or appertaining to him, and therefore that there can be no such thing as a *lis pendens* by virtue of the Missouri proceeding, with regard to the subject-matter of this action, which is the debt, and nothing in the Missouri proceeding that can be considered as valid or binding as against Sharitt. And all my argument is also based upon the theory that the court first obtaining jurisdiction of the subject-matter of an action has the superior right to exercise jurisdiction over such subject-matter. But, not wishing to be misunderstood in this case, I will be a little more explicit as to some matters. I think that the Missouri court has jurisdiction of Stewart, the plaintiff in the Missouri action, and of the railway company, the garnishee; and that any judgment or order which might be rendered or made by the Missouri court as against Stewart or the railway company would be valid and binding as against them. And if Stewart, the plaintiff in that action, had obtained personal service of summons in Missouri upon Sharitt, then any judgment or order which might be rendered or made by the Missouri court as against Sharitt, or against the garnishee, would also be valid and binding as to Sharitt. And, even without personal service of summons upon Sharitt, if he had any tangible property in Missouri which the Missouri court could seize, even money in the hands of some other person, any judgment or order of such court which might be made or rendered after the seizure of such property would be valid as against Sharitt. And, further, if it could be considered that the debt owing by the railway company to Sharitt had a *situs* in Missouri, then any judgment or order made or rendered by such court respecting such debt would be valid; and, if Sharitt were a resident of Missouri, or was even temporarily there, at the time of the attempted seizure of the debt, or if the debt was made payable in Missouri, it might perhaps be considered that the debt had such a *situs* in Missouri that it might be subject to the order or judgment of the Missouri court. But none of these things exist in this case; and hence, in my opinion, the Missouri court has no jurisdiction of Sharitt, or of anything appertaining or belonging to Sharitt. Of course, the laws of a state can have no extraterritorial force; and, therefore, if exempt tangible property, such as could be seized by process, were carried into another state or jurisdiction, such property might cease to be exempt, and might be seized and

held in attachment or garnishment proceedings for the payment of debts, but debts existing in Kansas are not at the same time that kind of property in Missouri. Whether what we have just said with respect to tangible property would apply to debts created under contracts made under laws exempting such debts from all judicial process, it is not necessary, in this case, to express any opinion. But, generally, contracts with respect to everything of substance inhering in them—and the laws of the country where the contracts are made, so far as such laws affect the contracts, are generally considered as inhering in the contracts—are governed and determined by the *lex loci contractus*, in whatever jurisdiction the construction or character of such contracts comes into consideration. Several cases are referred to as enunciating doctrines adverse to the views herein expressed, to-wit: Furguson v. Bark, 25 Kan. 333; Railroad Co. v. Thompson, 31 Kan. 180, 1 Pac. Rep. 622; Zimmerman v. Franke, 34 Kan. 650, 9 Pac. Rep. 747; Stark v. Bare, 39 Kan. 100, 17 Pac. Rep. 826; Daniels v. Clark, 38 Iowa, 556; Moore v. Railroad Co., 43 Iowa, 385; Leiber v. Railway Co., 49 Iowa, 688; Mooney v. Railway Co., 60 Iowa, 346, 14 N. W. Rep. 343; Green v. Van Buskirk, 7 Wall. 139; Connor v. Insurance Co., 28 Fed. Rep. 549; Morgan v. Neville, 74 Pa. St. 53; Osborne v. Schutt, 67 Mo. 712; Blake v. Williams, 6 Pick. 285; Sturtevant v. Robinson, 18 Pick. 175; Railroad Co. v. May, 25 Ohio St. 347; Snook v. Snetzer, Id. 516; Railroad Co. v. Kennedy, 83 Ala. 462, 3 South. Rep. 852. Scarcely any of the above cases have any application to the question whether a court of one state, by virtue of a garnishment proceeding against a resident garnishee, but against a non-resident and absent defendant, residing in another state, and owning a debt created and payable to him in his own state, and by virtue of a service of summons upon the defendant only by publication, could obtain sufficient jurisdiction over the non-resident and absent defendant, or over the debt created and payable to him in the state of his residence, that such court could render a judgment or make an order against the garnishee that would be valid and binding as against the defendant. The case of Railroad Co. v. Thompson, 31 Kan. 180, 1 Pac. Rep. 622, is relied upon principally among the Kansas cases; but no such question was presented or decided in that case. In the opinion in that case, it is said, among other things: "Again, no question arises here as to the effect of a judgment against the garnishee in the courts of this state, as against proceedings to collect the debt in the state of Nebraska, where the debt was created. As to that question, the cases of Pierce v. Railroad Co., [36 Wis. 283,] and Moore v. Railroad Co., [43 Iowa, 385,] supra, seem to be divergent. As to which states the law correctly, we need not now inquire. The question in this case is not what is the effect of a judgment against a garnishee, but what ought to be such judgment." 31 Kan. 194, 1

Pac. Rep. 622. In the leading Iowa case of Moore v. Railroad Co., 43 Iowa, 385, jurisdiction was conceded. See opinion, p. 387. This was also the case in the case of Railroad Co. v. May, 25 Ohio St. 347. In that case, jurisdiction was admitted by the pleadings. In the case of Blake v. Williams, 6 Pick. 285, the question was not one of jurisdiction, but one of assignment. Besides, the actual *situs* of the debt in that case was, in all probability, just where the proceedings were commenced. The debt was probably payable there. The case of Green v. Van Buskirk, 7 Wall. 139, has no application to this case. No debt was attempted to be taken in attachment or garnishment in that case. The case of Connor v. Insurance Co., 28 Fed. Rep. 549, has perhaps some application to this case, though it certainly does not furnish much authority against the views herein expressed. It also criticises unfavorably the decision made by this court in the case of Railroad Co. v. Thompson, 31 Kan. 180, 1 Pac. Rep. 622. The case of Morgan v. Neville, 74 Pa. St. 52, is probably applicable. And yet the owner of the debt in that case was served personally with notice the next morning after the garnishment proceeding was instituted. This service of notice, however, was probably, for reasons not necessary to mention, not sufficient to give the foreign court jurisdiction. In the case of Railroad Co. v. Kennedy, 83 Ala. 462, 3 South. Rep. 852, the owner of the debt was served personally with summons in the foreign jurisdiction. It is unnecessary to mention more particularly the other cases cited for the railway company.

The principal argument urged against holding that the railroad company is liable in the present case is that by such holding, and by the possible judgment of the Missouri court, the company might be required to pay the debt twice. This would certainly be wrong, but wherein would the wrong consist? If this court is right, should it refrain from doing its duty because of some possible wrong somewhere else? Should this court violate its own laws because some foreign court may ignore them? Besides, is the railroad company the only party entitled to sympathy? Is not the owner of the debt, with his family, also entitled to some consideration? The debt is his personal earnings, for his own personal services for less than three months—indeed, for less than one month—next preceding the issuing of the garnishment process, and is necessary for the support of his family, and, by the laws of his own state, is exempt from the payment of his debts, and from all judicial process. Now, notwithstanding the fact that this fund is set apart by the laws of the state for the support of himself and family, and is necessary for their support, may it be taken away from them by a foreign jurisdiction four or five hundred miles away,—and it might be thousands of miles away,—and, possibly, upon some false or trumped-up charge, without any personal service of summons upon him? Is he not entitled to have his day in court, and in a court that has first rightfully ob-

tained jurisdiction of him personally, or of his debt? If it be said that the garnishee should serve notice upon him, then what is such notice for? Is such notice necessary in order to give the foreign court jurisdiction of the owner of the debt, or of the debt? Will it be admitted that, without such a notice from the garnishee, the judgment or order rendered or made by the foreign court would be without jurisdiction and void as to the owner of the debt, and still claimed that, with such notice, such judgment or order would be valid and binding as to him? Besides, the garnishee might be unable to give the notice; and, if he could not, then what? I would hardly think that such a notice could give jurisdiction to the foreign court, if it did not have jurisdiction prior to that notice. Besides, why compel the owner of the debt, upon such a notice, to go four or five hundred miles or more to defend an action, and thereby spend more money than the amount of his debt? It might be better for him and his family to lose the debt entirely, and let the laws of the state setting it apart for the benefit and support of himself and family become nugatory and inoperative. Of course, the debt in this case is small,—only \$75; but it is a great deal to the laborer who earned it, and his family, and the state has set it apart for the support of his family; and the principle as to jurisdiction is the same as though the debt amounted to many thousands of dollars. If the rule contended for by the railroad company should be adopted, then it would be prudent for every creditor to continually watch his debtor, and to follow him around into every jurisdiction into which he might go, for fear that some unscrupulous person, who really had no just claim, might institute a garnishment proceeding and obtain the debt before the creditor could have an opportunity to prevent it. I concur in affirming the judgment of the court below.

ON REHEARING.

PER CURIAM. Now comes on for decision the motion for a rehearing of this cause, and thereupon it is ordered that the said motion be overruled.

HORTON, C. J., (dissenting.) When the judgment of affirmance was rendered in this court, I had grave doubts whether the law had been properly declared. Since then, I have re-examined the facts disclosed by the record, the decisions referred to by the attorneys, and the authorities in the opinions heretofore filed. My opinion now is that a rehearing should be granted, and that the judgment of the trial court should be reversed. My reasons are as follows:

It appears that Sharitt, the employe, during the month of June, 1887, performed manual labor for the Missouri Pacific Railway Company, which system extends through Missouri and Kansas. For these services the railway company owed its employe wages,—a debt. These wages are exempt from at-

tachment or garnishment under the laws of this state. W. P. Stewart, a creditor of Sharitt, who resided in St. Louis, Mo., brought an action against him by attachment in St. Louis on the 13th day of July, 1887, and garnished the railway company, which answered on July 28, 1887, to the facts of its indebtedness to the employe; and, upon its answer, judgment was rendered against the company. The employe was served by publication. From the order of judgment requiring the company to pay the wages or debt to the creditor, the company appealed to the circuit court of St. Louis, Mo., where the action is now pending. Subsequent to the commencement of the action by attachment in St. Louis, Mo., and on the 27th day of July, 1887, Sharitt commenced his action before a justice of the peace in Franklin county, of this state, to recover the same wages or debt which had been garnished in St. Louis, Mo. The justice of the peace rendered judgment against the railway company. The company took an appeal to the district court of Franklin county, and that court also rendered judgment in favor of the employe, and against the railway company. This is complained of.

The question in the case therefore is, can the employe of the railway company bring his action in this state, and recover his wages, notwithstanding the defendant company has been garnished for the same wages by the employe's creditor in Missouri? Although the amount in dispute is small, the principles involved are important. Several great lines of railroad, like the Atchison, the Missouri Pacific, the Rock Island, and others, extend through this into other states. These railroads have thousands of employes in their service, whose wages are liable to be garnished, and the law ought not to compel them to pay for the services of an employe twice,—once to the creditor, and afterwards to the employe. Again, many of the employes of these railroads go from state to state in search of work, and often change their employer as well as their residence. These wage workers ought to be protected in the payment of their personal earnings to themselves, which generally are exempt under the statutes of most of the states, so far as the law will permit. "The laborer is worthy of his hire." If the railway company is compelled to satisfy the judgment rendered against it in Missouri, then the employe ought not to recover, and the action commenced in this state should be delayed until the final disposition of the attachment or garnishee proceedings in Missouri. *Ferguson v. Bank*, 25 Kan. 333. "Of course, no debtor should be required to pay his debt twice; but, at the same time, if he goes into a state outside the state of his residence, and transacts business therein, he must expect, as to all matters of procedure and remedy, to abide by the laws of that state. * * * It cannot be doubted that the courts of the state where he resides will respect a judg-

ment rendered against him in this state, provided he has made a perfect and full disclosure, and a reasonable defense, against the claim presented." Railroad Co. v. Thompson, 31 Kan. 180, 1 Pac. Rep. 622. Kent says: "A *lis pendens*, before the tribunals of another jurisdiction, has, in cases of proceedings *in rem*, been held to be a good plea in abatement of a suit. Thus, where a creditor of A., a bankrupt, had, *bona fide* and by regular process, attached in another state a debt due to A., and in the hands of B., it has been held that the assignees of the bankrupt could not, by a subsequent suit, recover the debt of B. The pendency of the foreign attachment is a good plea in abatement of the suit. In such a case, the equity of the maxim, *qui prior est tempore, potior est jure*, forcibly applies. Unless the plea in abatement was allowed in such a case, the defendant would be left without protection, and would be obliged to pay the debt twice." 2 Kent, Comm. 122, 123, 125. See Morgan v. Neville, 74 Pa. St. 52; Thomp. Homest. & Ex. §§ 21-23; Connor v. Insurance Co., 28 Fed. Rep. 549; Freem. Ex'ns (2d Ed.) § 209; Thomp. Homest. & Ex. § 23. Pierce v. Railway Co., 36 Wis. 283, is in conflict with some of the foregoing decisions, but that case has been severely criticised. 2 Cent. Law J. 378. But, upon examination, that case does not, I think, militate against the conclusion I have reached. It is said in that case: The garnishee must bring the fact of the exemption to the notice of the court where the attachment is pending, or notify the employee of the pendency of the proceedings. In the state of Missouri, the supreme court holds that the exemption of property from judicial process is a personal privilege of its owner, and that the debtor of such owner cannot assert it for him by way of defense to a garnishment proceeding. Osborne v. Schutt, 67 Mo. 712. Therefore, the railway company could not, under the decisions of Missouri, have protected itself or its employee by alleging the exemption of the wages attached. As the attachment proceedings are still pending in Missouri, and the employee has notice now of these proceedings, even within the Wisconsin rule, the garnishee has done all that it could do. If the law is decided otherwise, it is manifest that the railroad company will be subjected to a double liability, which does not comport with justice.

It is argued in the concurring opinion that, as Sharitt is not a resident of Missouri, and has not been personally served with any summons in the garnishment proceeding, the action in Missouri by Stewart, a resident of Missouri, and the creditor of Sharitt, against the Missouri Pacific Railway Company, a Missouri corporation, is void as being without jurisdiction, and therefore that the garnishment proceeding is no defense to the action of Sharitt in this state. This view of the law is not, I think, sustained by the weight of the authorities. Drake, in his work on Attachment, § 597, says: "Where

the garnishee is indebted, it will not vary his liability that his contract with the defendant is to pay the money in another state or country than that in which the attachment is pending. Thus, where it was urged as a ground for discharging a garnishee, that his debt to the defendant was contracted in England, and was payable there only, so that the defendant could not, and therefore the plaintiff could not, make it payable elsewhere, the court said: "We do not perceive any legal principle upon which the objection rests. This was a debt from the garnishee everywhere, in whatever country his person or property might be found. A suit might have been maintained by the defendant here, and therefore the debt may be attached here." In Blake v. Williams, 6 Pick. 286, it was held that "where W., a banker in England, having advanced money to pay a bill of exchange drawn upon him by M., a citizen of this state, became a bankrupt, and, after an assignment of his effects by commissioners of bankruptcy, but before notice of it had reached this country, the debt due from M. (he not having remitted funds to replace the money advanced) was attached in his hands, by virtue of our trustee process, by B., a citizen of this state, and a creditor of the bankrupt, the attachment was held valid as against the assignment." In the opinion in that case it is said: "By our law the service of a trustee process upon one who is indebted to the defendant in the suit creates a lien upon the debt in favor of the plaintiff in the action, so that, if he recovers judgment against the principal, he shall have execution against the trustee to the amount of the effects in his hands, or the debt which he owes; and no distinction is made, in the application of this law, between citizens who may be trustees of other citizens, and those citizens who may be indebted to a person residing in a foreign country, who is indebted to citizens of the United States." In Railroad Co. v. May, 25 Ohio St. 347, it was decided that, "in an action to recover money due on contract, it is a sufficient defense to show that the money sought to be recovered has been attached by process of garnishment duly issued by a court of a sister state, in an action there prosecuted against the plaintiff by his creditors, although it appear that the plaintiff and such creditor are all residents of this state." So, where the debt was contracted where the garnishment took place, but the garnishee agreed to pay the money in another state, he was nevertheless charged. Sturtevant v. Robinson, 18 Pick. 175. See, also, Leiber v. Railroad Co., 49 Iowa, 688; Mooney v. Railroad Co., 14 N. W. Rep. 343.

The concurring opinion, it seems to me, attempts to establish a rule which ignores the fact that the proceedings in garnishment in Missouri are entitled to full faith and credit as a judgment of a sister state, and that, being proceedings *in rem*, and the debt being condemned by a court having jurisdiction, the judgment cannot be contested in

this state. Stewart, the creditor in the garnishment proceedings, is a resident of Missouri. The Missouri Pacific Railway Company is a corporation of Missouri. At the time of the garnishment proceedings that corporation owed money to J. W. Sharitt. Sharitt was duly served by publication. The court of Missouri had jurisdiction both of Stewart and the railway company, and had full authority to condemn any money owing by that company to any of its employes, whether residents or non-residents, if payable in Missouri. "Every country [state] may regulate as it pleases the disposition of personal property found within it, and may prefer its attaching creditor to any foreign assignee; and no authority has a right to question the determination." *Blake v. Williams*, supra. This point was expressly decided in *Connor v. Insurance Co.*, supra. The syllabus in that case is as follows: "The defendant, an insurance company under the laws of New York, but doing business also in Illinois and Michigan, became indebted to the nominal plaintiff, a resident of Michigan, for a loss under one of its policies, which loss was, after adjustment, assigned by her to the actual plaintiff, also a resident of that state. Creditors of the nominal plaintiff, citizens of Illinois, commenced suit in that state by attachment against her, and garnished the defendant there. Subsequently to the service of garnishment in Illinois, the assignee of the plaintiff began suit against the defendant in Michigan, and obtained judgment before the case in Illinois was tried. Judgment was soon afterwards had in Illinois. Held (1) that, as a general rule, the *situs* of a debt is either at the domicile of the creditor, or at the place where it is payable; (2) that, under the laws of Illinois, suit having been first commenced there, and the courts of that state having obtained by garnishment control of the subject-matter, there was no jurisdiction in the courts of Michigan." Of course, between courts of concurrent jurisdiction, the court first acquiring jurisdiction will retain, and the other will not interfere with, it. The courts of Missouri first acquired jurisdiction of the debt or money due to Sharitt, and the courts of this state ought not to interfere in that case until the cause is finally disposed of.

If the rule is established as stated in the opinion, then the railway company is twice liable for the same debt,—once to Stewart, the creditor in Missouri, and then, again, to Sharitt, in this state. The company has done and is doing all it can to defeat and escape any liability in the garnishment proceeding. It has appealed from the judgment of the justice of the peace of St. Louis to the circuit court of St. Louis county, and has notified Sharitt of the pendency of the garnishment proceedings. The company is helpless. In Missouri, exemption is a personal privilege. The company cannot assert the exemption for Sharitt. *Osborne v. Schutt*, supra. Sharitt can alone exercise this personal privilege. If he will assert his rights in the Mis-

souri court, the debt or money will be declared exempt. It all lies with Sharitt. Under the circumstances, ought the company to pay twice, when the action of Sharitt will prevent any judgment against him or the railway company in Missouri? Ought the railway company to suffer a double liability because Sharitt refuses to answer in a case in which he has been served by publication, and in which he has been personally notified by the railway company? I think not. It is stated in one of the foregoing opinions that "the debt is really and in fact a mere chose in action, resting wholly in parol, and is of such an intangible character that it could not be actually seized by any kind of process; and it can hardly be said to have any actual *situs* anywhere." Ante, 432. It is further stated in one of the opinions that "I think that the Missouri court has jurisdiction of Stewart, the plaintiff in the Missouri action, and of the railway company, the garnishee, and that any judgment or order which might be rendered or made by the Missouri court as against Stewart or the railway company would be valid and binding as against them." Ante, 432. It was said by Mr. Justice BREWER in *Railroad Co. v. Thompson*, 31 Kan. 180, 1 Pac. Rep. 622, that "a mere debt is transitory, and may be enforced wherever the debtor or his property can be found; and, if the creditor can enforce the collection of his debt in the courts of this state, a creditor of such creditor should have equal facilities." I think that Sharitt, as a creditor of the railway company, could have enforced the collection of his debt in the courts of Missouri; and, if he could have an action in that state, his creditor is entitled to equal facilities. It is not shown anywhere in the record that the debt was payable in the place or county where Sharitt performed his labor; and, if the decision is carried to its logical results, Sharitt should have brought his suit at Council Grove, or in the county where he worked, and not in Franklin county. If his debt was created in Morris county, according to the decision, it was payable in Morris county; and therefore, according to the decision, he had no right to bring his action at Ottawa. This, however, is not the law. "A mere debt is transitory, and may be enforced wherever the debtor or his property can be found."

If it be decided by this court, under the facts of this case, that the Missouri court has no jurisdiction either of Sharitt, or of anything belonging to him, or of any money due to him, and that therefore the garnishment proceeding in Missouri is void as to him, then there can be no garnishment of a person in this state owing a debt to a person residing in another state. The practice among the profession is contrary to this decision. Very often persons in this state owing debts to non-residents are garnished by the creditors of the non-residents in this state, and the only service had on the non-residents is by publication; being the same service had in the Missouri court upon

Sharitt. Sections 28-54, pp. 702-706, Comp. Laws 1885. Section 72 of the Civil Code of this state expressly provides, the same as the Missouri Code, that "service may be made by publication in * * * actions brought against a non-resident of this state, or a foreign corporation, having in this state property or debts owing to them, sought to be taken by any of the provisional remedies, or to be appropriated in any way." I think, however, that this court is foreclosed by its previous decisions, and that the rule stated in the concurring opinion cannot be adopted unless the prior cases are overruled.

In *Railroad Co. v. Thompson*, 31 Kan. 180, 1 Pac. Rep. 622, the railroad corporation was organized, and had its principal place of business, in Nebraska, but its line extended into this state. It was garnished in the courts of this state for a debt due to one of its employes for wages, at the suit of the creditor of the employe. The employe resided in Nebraska, had earned his wages there, and those wages were exempt to him and his family by the laws of that state. No service of process was had on the principal defendant. It did not appear where the plaintiff resided. The able district judge of Atchison county (Judge MARTIN) held in that case "that, under our statute, when a railroad company incorporated under the laws of a sister state leases a line of railroad in this state, and keeps local agents, and operates its lines, within this county, it is liable to the process of a garnishment here for all indebtedness which may be owing to a defendant, although, by the usual course of its business, such indebtedness is payable at the principal office of the corporation in the sister state; the corporation, in such case, being an inhabitant of this state for the purpose of business, and the service of process upon it, and the indebtedness not being of a local character, but enforceable in any jurisdiction in which service may be had." The railroad company prosecuted its writ of error to this court, and expressly made the point "that a foreign corporation cannot be garnished in this state, as the debtor of a non-resident, for a debt contracted and payable in a foreign state, by service on a servant or on the officers of the corporation." The judgment of the trial court was affirmed. Mr. Justice BREWER, speaking for the court, said: "He [the plaintiff] is a citizen of Kansas, appealing only to the laws and the courts of this state for the collection of his debt, and simply denying that the laws of another state shall prevent the collection of his debt according to the laws and procedure of his own state." The syllabus states the following proposition of law: "A foreign corporation coming into this state, and leasing property and doing business here, may be garnished for a debt due to one of its employes, although such employe is not a resident of this state, and although the debt was contracted outside of the state." At the time of the rendition of this decision, the members of this court

were Mr. Justice VALENTINE, Mr. Justice BREWER, and the writer. Mr. Justice BREWER delivered the opinion in this case. All of the justices concurred in affirming the judgment of the trial judge.

In *Zimmerman v. Franke*, 34 Kan. 650, 9 Pac. Rep. 747, Franke was perpetually enjoined from prosecuting garnishment proceedings in Nebraska against the Missouri Pacific Railway Company by Zimmerman, who was indebted to Franke, and who had personal earnings coming to him from the railway company. Both Franke and Zimmerman resided at Atchison, in this state; but Zimmerman was an employe of the railway company, running between Kansas City and Omaha. He was the head of a family. Zimmerman was not personally served with any process in or from Nebraska, and Franke was proceeding, before the injunction, to collect his claim against Zimmerman, by garnishment in Nebraska, from the Missouri Pacific Railway Company. If the garnishment proceeding in Nebraska was without jurisdiction and void as to any debt or money coming or belonging to Zimmerman, why was this court asked to interfere with its strong arm to forbid Franke from carrying on a void and useless proceeding in Nebraska? That decision, as I understand it, was rendered upon the theory that, if Franke was permitted to prosecute his proceedings by garnishment in Nebraska, he would thereby deprive Zimmerman of his personal earnings, which were exempt under the laws of this state.

In *Stark v. Bare*, the latter was a married man, living in this state, and engaged in the service of the Atchison, Topeka & Santa Fe Railroad Company. He was indebted to Stark; and Stark, to evade the exemption laws of this state, sold his claim to John W. Leatherbury, of Kansas City, Mo., for the purpose of permitting Leatherbury to bring an action in Missouri, by garnishment against the railroad company, to appropriate the personal earnings due from the railroad company to Bare. This court sustained a judgment in favor of Bare against Stark upon the ground that the garnishment proceedings instituted by Leatherbury against the railroad company in Missouri deprived Stark of his personal earnings from the railroad company. This decision was also rendered upon the theory that the garnishment proceedings of Missouri deprived Bare, the employe, of the debt due from the railroad company to him in Kansas. Both of these decisions follow *Snook v. Snetzer*, 25 Ohio St. 516.

In *Railroad Co. v. May*, Id. 347, it was decided, as already stated, that, "in an action to recover money due on contract, it is a sufficient defense to show that the money sought to be recovered has been attached by process of garnishment, duly issued by a court of a sister state, in an action there prosecuted against the plaintiff by his creditors, although it appear that the plaintiff and such creditors are all residents of this state."

I do not think the decisions cited in the opinion, and in the concurring opinion, adversely to the views herein expressed, have very much application to this case.

In the cases of *Railway Co. v. Maltby*, 34 Kan. 131, 8 Pac. Rep. 235, and *Railroad Co. v. Gough*, 35 Kan. 1, 10 Pac. Rep. 89, about all that was decided was that, where the debt of the garnishee to the defendant is by the laws of Kansas and Missouri exempt, the debt is exempt in this state from garnishment, and no distinction is to be made between residents and non-residents. In *Bates v. Railway Co.*, 60 Wis. 296, 19 N. W. Rep. 72, a carload of hogs was attempted to be attached by garnishment. It was held in that case that "property outside of the state is not the subject of garnishment under our statute, and that a common carrier cannot be held liable as a garnishee for goods in actual transit when the process is served." In *Sutherland v. Bank*, 78 Ky. 250, a carload of oats was attached, and the attachment was held wrongful, because the oats were beyond the jurisdiction of the court. In *Wheat v. Railroad Co.*, 4 Kan. 370, an attempt was made to attach or garnish \$300,000 of Leavenworth bonds, which were in the state of Missouri, and in the possession of the treasurer of the railroad company. Many of the other decisions cited in the concurring opinion are like these. Of course, no one contests but that these are the law as to the points decided; but the *situs* of personal property, like "hogs, oats, and bonds," is somewhat different to the *situs* of debts owing to employes and other persons.

In *Wright v. Railroad Co.*, 19 Neb. 176, 27 N. W. Rep. 90, the case was very similar to *Railway Co. v. Maltby*, supra, and disposed of the same way; that decision being fully cited and approved. Something, however, was said in that decision, and in several of the other cases cited, about debts not being liable to garnishment where the corporation or person garnished is not owing the debtor money payable in the state where the proceedings are commenced. Again, some of these decisions go to the effect that debts are local, and remain at the residence of the debtor. I need not review these cases, because they do not meet the question presented as to the jurisdiction of the Missouri court, under the laws of that state, over the debt of the railway company due to Sharitt. They are nearly all cases where the garnishment proceedings have been commenced and disposed of in the states where the decisions have been rendered. The decisions are constructions of garnishment laws of the state where the decisions have been rendered. The question whether proceedings in garnishment of a sister state are entitled to full faith and credit as a judgment, where the corporation or person owing the debt has been garnished in such sister state, and service has been made by publication upon the debtor, is not discussed in but one or two, and those cases are very different from this. I think, if Sharitt had brought his action in Missouri,

instead of Kansas, and the railroad company had not been garnished, he could have recovered his wages in that state; and, if he could have recovered his wages by an action brought there, his claim or wages could be attached or garnished there.

(43 Kan. 310)

ST. LOUIS, FT. S. & W. R. CO. v. NOBLE.

(Supreme Court of Kansas. March 8, 1890.)

APPEAL—REVIEW—MATTERS NOT APPARENT ON RECORD.

Where a case is tried before the court and a jury, and the jury render a general verdict, and make special findings, and the special findings appear to be slightly ambiguous, but do not appear to be in conflict with the general verdict, and the court renders judgment in accordance with the general verdict, *held*, in the absence of the evidence in the supreme court, the judgment of the court below will not be reversed.

(Syllabus by the Court.)

Error from district court, Harvey county; L. HOUX, Judge.

This was an ordinary condemnation proceeding instituted by the St. Louis, Fort Scott & Wichita Railroad Company to procure a right of way through certain lands in Harvey county, including a tract of land consisting of 200 acres, belonging to Lewis Noble. Eight and twenty-four hundredths acres of the land were taken for the right of way, and the remainder thereof was thereby injured. After the assessment of damages by the commissioners, Noble appealed to the district court, where the case was tried before the court and a jury; and the jury rendered the following general verdict; and, in answer to the following interrogatories, made the following special findings:

Verdict. "We, the jury impaneled and sworn in the above-entitled case, do upon our oaths find for the plaintiff, and assess the amount of his recovery at \$2,650.00."

Special Findings. "(1) What was the actual market value of the land taken for right of way, without reference to the question of damages to the remainder of the farm? Answer. \$329.60. (2) In addition to the value of the land taken, what was the amount of the real and actual damages to the remainder of the farm by reason of the taking of the strip of land by defendant for a right of way for its railroad? A. \$2,320.40. (3) How much was the damage to that part of the farm north and east of the right of way? A. \$1,492.24. (4) How much was the damage to that part of the farm south and west of the right of way? A. \$828.16. (5) Was the railroad improperly constructed over plaintiff's farm in respect to drainage? A. No. (6) If you answer the last question in the affirmative, state how much damage you allow on account of such improper construction. A. (No answer.) (7) What, if anything, do you allow because sufficient crossings have not been put in on plaintiff's farm? A. Nothing. (8) How much damage, if any, do you allow plaintiff on account of the liability of fire being set by defendant's engines?

A. Nothing. (9) How much damage do you allow for injury to improvements on land taken, and how much for injury to improvements on lands not taken? A. *First*, \$60; *second*, none, if the jury understand question. (10) How much damage, if any, do you allow for the inconvenience of crossing the railroad on plaintiff's farm? A. \$500. (11) How much, if anything, do you allow for the inconvenience in farming plaintiff's land in shape in which it now is; and in what does that inconvenience consist? A. \$1,643.90; and in loss of time. (12) What elements and sources of damage have you considered in making up the amount of your verdict? State fully. A. Destruction of crops, hedges, and trees; appropriation of land for right of way, and inconvenience of crossing track and farming the land in its present shape; and depreciation of the commercial value of the land; building of three crossings. (13) What was the market value of plaintiff's farm immediately prior to the locating of defendant's right of way through it? A. \$8,000."

The railroad company filed a motion for a new trial, which motion was overruled by the court; and the court then rendered judgment upon the verdict and special findings of the jury, awarding to Noble \$2,650 as damages, and costs of suit. The railroad company brings the case to this court.

Ady & Nicholson and *J. H. Richards*, for plaintiff in error. *Brown & Kline*, for defendant in error.

VALENTINE, J., (*after stating the facts as above.*) The only question presented by the plaintiff in error, the railroad company, in this court, is stated in its counsel's brief as follows: "The amount awarded by the court upon the special findings of the jury was excessive." The portions, however, of the special findings to which the counsel for the plaintiff in error particularly objects are those portions allowing \$500 for the inconvenience of crossing the railroad on the plaintiff's farm, and \$1,643.90 for the inconvenience and loss of time in farming the plaintiff's land in the shape in which it was left by the appropriation of the right of way. These damages, in fact, include nearly all the damages that could be allowed as damages to the land not actually taken, but not all. Whether these amounts are excessive or not, we do not know, and cannot tell; for none of the evidence upon which the jury made their findings has been brought to this court. The special findings of the jury appear to be slightly ambiguous. But still we cannot say that they are in conflict with the general verdict; and, if they are erroneous in any particular, we cannot say in what particular. Under the interrogatories presented to the jury for findings, they could not have found and stated separately the precise amount of each and every item or element of damage which they had a right to consider, and which they evidently did consider, for the interrogatories did not call for such findings; and they

did not attempt to state in their findings the amount of each and every element of damage which they in fact did consider. They considered the "destruction of the crops, hedges, and trees," and we must, of course, presume, in the absence of the evidence, that there was evidence authorizing the jury to consider these matters; and, if these crops, hedges, and trees were upon the land actually appropriated for the right of way, the jury had the right to so consider them. Comp. Laws 1885, c. 23, art. 9, § 86. But what amount is allowed for these matters is not stated. The jury also considered the "depreciation of the commercial value of the land." We suppose that the jury, by using the words "commercial value," meant the market value; and the market value of the land is affected by everything that would tend to make the land more or less valuable. In estimating the market value of the land, or the depreciation of the market value thereof, the jury had the right to take into consideration, among other things, the symmetry and beauty of the land before the right of way was appropriated, and the destruction of that symmetry and beauty by the appropriation. Whether the jury took into consideration these things or not, we cannot tell; and what, if anything, was allowed for these things, we cannot tell. Indeed, from anything presented to us by the record in this case, we cannot say that any material error was committed by either the jury or the court in the trial of the case in the court below. The judgment of the court below will therefore be affirmed, all the justices concurring.

(1 Wash. St. 179)

SCAMMON v. WARD.

(*Supreme Court of Washington.* Feb. 28, 1890.)

MORTGAGES — PRESENTATION OF CLAIM AGAINST MORTGAGOR'S ESTATE.

1. Failure to present against a decedent's estate a claim secured by a mortgage on his land, within a year after notice to present their claims is given to creditors of the estate, under Code Wash. T. § 1467, which provides that claims shall be barred unless so presented, cannot affect the mortgagee's right to subject the mortgaged land to payment of his debt, though it will bar his right to have decedent's other estate applied on any deficiency that remains after exhausting the land.

2. Where the owner of a mortgage on lands of a decedent applies to the probate court, under Code Wash. T. § 1523, to have the mortgage redeemed out of the personal assets of the estate, or, in the alternative provided by section 1524, to have the land sold and the proceeds applied on the debt, he must apply within the year allowed by section 1467 for presentation of claims against the estate of a decedent.

Appeal from district court, Klickitat county.

William G. Ward, during his life-time, made his promissory note in favor of Justin Scammon for \$1,500, and secured the payment thereof by a mortgage on certain real estate. Said William G. Ward died, and on the 22d day of August, 1887, Elizabeth Ward, his widow, was appointed executrix of his will, and qualified as such on the 27th day of

said month. Soon thereafter she published the notice to creditors to present their claims against the estate, as required by Code Wash. § 1465. Scammon did not present his claim to said executrix within a year after such notice, but on the 4th day of October, 1889, began this proceeding under sections 1523, 1524, of the Code of Washington, asking that the mortgaged property be sold to satisfy the mortgage debt, or in case the court should find it to be beneficial to the estate, and not injurious to creditors, that said executrix be ordered to redeem the same. Code Wash. § 1467, referring to the notice to creditors to present their claims, required to be given by section 1465, provides that "if a claim be not presented within one year after the first publication of the notice, it shall be barred." Sections 1523 and 1524 are as follows: "Sec. 1523. If any person die, having mortgaged any real or personal estate, and shall not have devised the same, or provided for the redemption thereof by will, the probate court, upon the application of any person interested, may order the executor or administrator to redeem the estate out of the personal assets, if it should appear to the satisfaction of the court that such redemption would be beneficial to the estate, and not injurious to creditors." "Sec. 1524. If such redemption be not deemed expedient, the court shall order such property to be sold at public sale, * * * and the purchase money, after paying the expenses of the sale, shall first be applied to the payment and discharge of such mortgage, and the residue in due course of administration. If said sale of the mortgaged premises shall be insufficient to secure the mortgage debt, the mortgagees shall file a claim for balance, authenticated as other claims, and payable in due course of administration." The probate court denied Scammon's application to redeem or sell the land under the above sections. On appeal the district court allowed the application, and from this ruling the executrix appeals.

W. B. Presby, for appellant. *Bennet & Wilson* and *H. Dustin*, for appellee.

SCOTT, J. Plaintiff instituted this proceeding in the probate court of Klickitat county under sections 1523 and 1524 of the Code, to require said executrix to redeem certain lands from the lien of a mortgage given to plaintiff by William G. Ward, who died in June, 1887, leaving a will. In August, 1887, the probate court of said county admitted said will to probate, and appointed defendant executrix thereof. A notice to creditors was duly published under Code, § 1465, in September, 1887. The claim secured by the mortgage was not presented to the executrix. The lands covered by it were a part of Ward's estate at the time of his death, but were not devised by him, nor was their redemption provided for in the will. In October, 1889, after the time for presenting claims against the estate had elapsed, Scammon commenced this proceeding. He sought for no relief ex-

cept as against the land mortgaged. Defendant resisted the application upon two grounds: (1) That the mortgaged debt was barred by reason of its not having been presented within the year, as provided by section 1467 of the Code; (2) that if the claim was not barred the plaintiff could not apply to the probate court after the expiration of said year without having presented his claim within the time prescribed. The probate court sustained the objections, and the plaintiff appealed to the district court, where the objections were overruled, and a redemption of the land was ordered; whereupon the defendant appealed to this court.

As to the first objection raised by the defendant, we think that the plaintiff's rights under his mortgage, as to the lands mortgaged, were not barred by a failure to present his claim secured thereby to the executrix; that the failure to present his claim would only operate to prevent him from making any deficiency that might remain after exhausting the mortgaged property out of the testator's other estate. *Woerner, Adm'n*, § 409, and authorities there cited; *Allen v. Moer*, 16 Iowa, 307; *Fisher's Ex'r v. Mossman*, 11 Ohio, St. 42; *Wilt. Mortg. Forec.* § 63; *Wood, Lim.* 390, cases cited in note 5, (commencing on preceding page); *Willard v. Van Leeuwen*, 56 Mich. 15, 22 N. W. Rep. 185; *McClure v. Owens*, 32 Ark. 443; *Richardson v. Hickman*, Id. 407. The only authorities produced by defendant holding a contrary doctrine, that were not subsequently overruled in the same courts where rendered, were from California, and were founded upon the provisions of a statute materially differing from our probate act. Section 1524 of the Code, where it allows the mortgagees to file a claim for a balance remaining unpaid after selling the mortgaged land, seems to imply that it is not necessary to present the claim, and have it allowed or established before applying to have the lands redeemed; for, if the claim should be established in the first instance, subsequent proceedings thereunder in selling the land, and applying the proceeds, where a sale is ordered, would be conducted by, and be within the knowledge of, the probate court and the executor or administrator of the estate; and it would be an entirely idle and useless provision to require a filing and authentication of a claim for a deficiency in such a case. By holding that a mortgage debt, as to the land mortgaged, is not barred by a failure to present the claim, the usefulness of this provision in section 1524 becomes apparent, where proceedings are resorted to in the probate court to have the land redeemed, and where a sale is had therein, and an amount remains unsatisfied thereafter.

As to the second objection urged, however, we are of the opinion that a mortgagee who wishes to apply to the probate court under section 1523, to compel the redemption of land from his mortgage lien, (the alternative being that when the order to redeem is not

granted the land must be sold under section 1524, and the proceeds applied upon the mortgage debt,) whether he seeks any relief outside of the property mortgaged or not, must so apply within the year allowed for the presentation of claims against the estate. It is contrary to the intent of the probate act, and also to public policy, to allow these matters to come in afterwards; and, where the application is not made within said time, the remedy must be sought in a foreclosure suit. Upon this last ground the judgment of the district court is reversed.

ANDERS, C. J., and STILES and HOYT, JJ., concur. DUNBAR, J., not sitting.

(1 Wash. St. 26)

MOMILLAN v. MAU et al.

In re MOMILLAN'S ESTATE.

(Supreme Court of Washington. Jan. 28, 1890.)

HOMESTEAD—JUDGMENT LIEN—NOTICE OF APPEAL.

1. A judgment which became, under Code Wash. T. § 321, a general lien on the land of a decedent on which he resided at the time of his death, before he began to reside thereon, cannot cut off the widow's right to select the land as her homestead, under section 1460, as amended by Laws 1885-86, p. 170, which provides that a decedent's widow or children may remain in possession of the homestead; and if decedent has not, in his life-time, complied with the law for acquiring a homestead, they may have the same set aside for their use, exempt from decedent's debts.

2. In Washington, notice of appeal, given in open court, within the time allowed by law, though at a subsequent term of the court, when appellees are not present, is sufficient.

Appeal from district court, Pierce county.

Laws Wash. 1885-86, p. 170, referred to in the opinion, reads as follows: "That section 1460 of the Code be amended to read as follows: 'Sec. 1460. When a person shall die, leaving a widow or minor child or children, the widow, child, or children shall be entitled to remain in possession of the homestead, and of all the wearing apparel of the family, and of all the household furniture of the deceased; and, if the head of the family in his life-time had not complied with the provisions of the law relative to the acquisition of a homestead, the widow, or the child or children, may comply with such provisions, and shall be entitled on such compliance to a homestead as now provided by law for the head of a family, and the same shall be set aside for the use of the widow, child or children, and shall be exempt from all claims for the payment of any debt, whether individual or community. Said homestead shall be for the use and support of said widow, child or children, and shall not be assets in the hands of any administrator or executor for the debts of the deceased, whether individual or community.'"

Judson, Sharpstein & Sullivan, for appellant. G. M. Haller and C. D. Young, for appellees.

SCOTT, J. Appellees move to dismiss the appeal herein for various reasons. The only

one that seems to need consideration is as to whether the notice of an appeal was sufficient. It appears that the notice was given in open court within the time allowed by law, but at a subsequent term of the court. It does not appear that appellees were present, and they contend that notice should have been served upon them to appear, as the appeal notice was not given at the term of court when judgment was rendered. We do not think the point well taken, and hold that the notice was sufficient under the law. The motion is therefore denied.

This case comes here upon an agreed statement of facts. Appellant is the widow of James McMillan, who at the time of his death owned certain lands in Pierce county. He left several minor children. While his estate was being administered upon in the probate court, appellant petitioned said court to set aside a homestead under section 1460 of the Code, as subsequently amended in the Laws of 1885-86, at page 170. It appears that appellees obtained a judgment against James McMillan, and filed a transcript thereof in the auditor's office, and that the same became a lien, generally, upon his real estate, under section 321 of the Code; that after said lien attached said James McMillan, with his family, moved upon the land which appellant petitioned the probate court to set aside as such homestead; that the family has since continued to reside thereon; and that no claim of a homestead had been made prior to the filing of said petition. Appellees filed objections to the allowance of such homestead, setting up their judgment lien, and maintaining that as the lien was obtained before McMillan moved upon the land, or took any step to claim the same as a homestead, the lien takes precedence of appellant's claim. The probate court sustained this view, and refused to set the same aside. An appeal was taken to the district court, where the decision of the probate court was sustained, and an appeal was then taken to this court. We think that, under the laws relating to the selection of homesteads, the action of the probate and district courts was erroneous; that the obtaining of a general judgment lien does not cut off the subsequent selection of a homestead at any time before sale. Therefore the judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

ANDERS, C. J., and HOYT, STILES, and DUNBAR, JJ., concur.

(1 Wash. St. 19)

PAXTON et al. v. DANIELL.

(Supreme Court of Washington. Jan. 24, 1890.)

SERVICE OF PROCESS—NON-RESIDENT DEFENDANT—APPEARANCE.

1. A judgment rendered on a promissory note by a state court, on service by publication only, against a non-resident defendant, who has no prop-

erty within the state, and who does not appear voluntarily, is void.

2. The subsequent appearance of such defendant by attorney to move the court to set the judgment aside, is not such a voluntary appearance as will give the court jurisdiction.

Appeal from district court, Pierce county.

Action by Arthur Daniell against Joseph E. Shaw and J. W. Paxton on a promissory note, of which said Paxton was guarantor. Service was had by publication against Paxton, who was a non-resident of the state, and judgment by default was entered against him. Afterwards said Paxton made, through his attorneys, a special appearance, and moved the court to set aside the judgment against him, for the reason that he had never been served with process, and that the judgment was rendered against him without authority and contrary to law. The motion was conditionally allowed by the court,—the condition being that said Paxton answer upon the merits of the case within 10 days. From this ruling Paxton appeals.

Carroll, Coiner & Davis, for appellant.
R. F. Hensill, for appellee.

DUNBAR, J. In this case the essential question to be considered, and the one upon which the case hinges, is the validity of a judgment rendered against a non-resident defendant by the publication of a summons, where no property of the defendant is brought under the control of the court. It is not shown by the record in this case that any attachment had been served upon the property of the defendant or had been issued in the case. In fact, it is admitted by the argument that no property has been brought under the control of the court. Statutes providing the mode for acquiring jurisdiction of a defendant by publication of a summons, being in derogation of the common law, must be strictly followed in any case in order to give the court jurisdiction over the person of the defendant; and we are of the opinion that the law is well settled that such statutes are not effective, excepting where the action is for the purpose of effecting the *status* of the defendant; and that the tribunals of a state have no authority to adjudicate upon the obligations of non-residents where they have no property within its limits; and that a judgment rendered against non-residents, without personal service of process upon them, or their voluntary appearance, where the suit is merely *in personam*, is void. *Pennoyer v. Neff*, 95 U. S. 714; *Harkness v. Hyde*, 98 U. S. 476; 3 *Estee* Pl. 9. The case at bar seems to us, as far as the record discloses, to fall within this rule.

We do not think that the appearance made by the defendant in the court below was such an appearance as would waive any jurisdictional rights, and that it must be held to be a special appearance, for the purpose of making a motion that he was entitled under the law to make. It therefore follows that the judgment of the court below must be reversed, and this cause is remanded to the

court below for action in accordance with this decision.

ANDERS, C. J., and STILES, SCOTT, and HOYT, JJ., concur.

(1 Wash. St. 70)

HAWKS v. VOTAW *et al.*

(Supreme Court of Washington. Feb. 3, 1890.)

JUDGMENTS—AMENDMENT AND VACATION.

Where a person against whom a judgment which is erroneous but not void has been entered, neither appeals therefrom, nor applies to the court, in the manner and within the time prescribed by law, to have it set aside, the district judge has no power, after the time has expired, to vacate or modify it.

Appeal from district court, Pierce county.
E. P. Cadwell, for appellant. *Town & Likens*, for appellees.

SCOTT, J. In April, 1887, plaintiff brought suit upon a promissory note against the defendants Votaw, as maker, and Cook, as guarantor. Cook appeared in the action, and filed a written consent that judgment might be taken against him for the amount found due; and judgment was rendered against him thereon, March 2, 1887, for the amount of the principal, interest, and costs, and an attorney's fee of \$40. The note provided for a reasonable attorney's fee. Defendant Votaw resisted the suit, and judgment was rendered against him June 30, 1887, at the trial, for the amount found due, including an attorney's fee of \$40. No appeal was taken by either of the defendants. Executions were issued at different times, and various amounts were collected. August 28, 1888, after more than a year had elapsed since the expiration of the term at which the last judgment was rendered in said action, defendant Cook filed an affidavit setting up, substantially, the foregoing facts, and claiming that the \$40 attorney's fee included in the judgment was unauthorized, and also that a sufficient amount had been collected upon the several executions to satisfy the judgment. Whereupon, he applied to the district judge for an order citing the plaintiff to appear and show cause why said judgment should not be satisfied and discharged of record. The order was granted, and a hearing was had thereon before the judge at chambers. The plaintiff objected to the proceeding, alleging that it was unauthorized by law; that the judge had no jurisdiction, etc.,—and claimed that a sufficient sum had not been collected to satisfy the judgment. Apparently, the judge did not find that enough had been collected to pay it, but made an order that the judgment against Cook be modified and reformed by striking out and disallowing the \$40 attorney's fee. The plaintiff excepted to the order, and appealed therefrom to this court. Appellee insists that there was no objection to the order; that the bare exception thereto was not sufficient.

The final order made in the proceeding was not within the scope of the original order to show cause, which was only directed to the satisfaction of the judgment. This order was objected to, but the objection was not allowed to prevail. The entry of a different order from that contemplated could not deprive the objection made of its force, especially as it does not appear that there was any opportunity to object specially to the final order before it was granted. Ordinarily, where an opportunity is given, the objection must be made, and grounds stated upon which to base an exception. Under the circumstances of this proceeding, however, it is held that the point was sufficiently raised by the objection that was made, and the exception taken. Without passing upon the power of a judge to order a judgment satisfied of record in such a proceeding, we think the final order was clearly unauthorized. The original judgment may have been erroneous in some respects, but it was not void; and the injured party, if he desired its correction, should have appealed therefrom, or have applied to the court in the manner, and within the time, prescribed by law, to have it set aside. The time therefore in this case had expired, and the district judge had no power to vacate or change it. Consequently, the order modifying the judgment is hereby reversed, and set aside.

ANDERS, C. J., and DUNBAR and STILES, JJ., concur.

HOYT, J., not sitting, being disqualified.

(14 Colo. 386)

TOWN OF LONGMONT v. PARKER.

(Supreme Court of Colorado. Feb. 28, 1896.)

HIGHWAYS—ABUTTING OWNERS.

Where a land-owner has no fee in the land occupied as a highway, but his land abuts on it, and he has rights therein not shared in common with the general public for purposes of travel and use, a person using or appropriating such highway or a portion of it for other and different purposes than the one contemplated, whereby the highway is obstructed and impaired as a means of ingress and egress, is liable to the abutting owner for any consequential damages arising from such appropriation and use depreciating the value of the property. Following *City of Denver v. Bayer*, 2 Pac. Rep. 6. *RICHMOND, C.*, dissenting.

Commissioners' decision. Appeal from district court, Boulder county.

Action by Edward Parker against the town of Longmont, to recover damages for the depreciation of property by the excavation of a ditch in the highway upon which the property abutted. There was a verdict and judgment for plaintiff, and defendant appeals.

F. B. Secor and *B. L. Carr*, for appellant. *Kinne & Way*, for appellee.

REED, C. Parker, the appellee, plaintiff below, claimed to be the owner of a five-acre tract of land near the town of Longmont. Upon the trial, no direct proof of ownership of Parker was offered, but no objection was

made on account of the kind of proof offered and admitted, and the ownership will be regarded as conceded by appellant on the trial. Plaintiff had a brick house and some other improvements on his land near the west line of the lot, and resided in it. The lot abutted upon the east line of the public highway, 60 feet in width. The house was about 25 feet from the line of the road. The defendant was a municipal corporation. In the spring of 1885, some time after the occupation of plaintiff commenced, and after the erection of the house and buildings, the defendant excavated a ditch, for the purpose of supplying the town with water, in the highway in front of the residence of plaintiff, on the west side of the highway; the distance from the line of plaintiff's lot to the bank of the ditch being about 49 feet. Directly in front of the premises of plaintiff the ditch, at its greatest width, was from 14 to 17 feet, and its depth about 6 feet or more. Plaintiff's land abutted upon the highway, no part of which had been his property; the party from whom he acquired title having dedicated the land in the highway to public use previous to the sale of the land to plaintiff. Plaintiff brought this suit to recover damages to his property by the constructing and maintaining of the ditch. It is assigned for error that the court overruled the demurrer to the complaint. On examination, we do not think the grounds of demurrer well taken, or that the court erred in the judgment upon it. It is unnecessary for an understanding of the case that the pleadings be set out in full. It is sufficient to say that the issue presented for trial was whether the plaintiff's property had or had not been damaged by the excavation and existence of the ditch. The case was tried to a jury. The evidence was conflicting. Several witnesses testified to damage, varying in amount from \$300 to \$500; but their evidence in regard to the manner of arriving at the amount of damage and the elements of damage going to make up the aggregate was quite vague and indefinite. About an equal number of witnesses testified that in their opinion there was no damage. It was in evidence that the earth taken out in excavating the ditch was deposited in the road in front of the premises of plaintiff; a part of it had been removed by the defendant a short distance, and used in grading the road in front of plaintiff's property; and that this left the road higher in places than the adjoining land of plaintiff. The verdict was found for the plaintiff for \$150, and judgment entered upon the verdict.

Considerable latitude was allowed and indulged in in the way of proof upon the trial, and some very remote and novel elements of damage introduced, but no objection appears to have been made or exceptions taken. No exception was taken and no error assigned upon the instructions given. Taken as a whole, they substantially submitted the question of damage, and the law in this state, as announced in *City of Denver v. Bayer*, 7 Colo.

113, 2 Pac. Rep. 6, where section 15 of article 2 of the state constitution ("that private property shall not be taken or damaged for public or private use without just compensation") is carefully considered and applied; and where it was held that in a case like the present, where the land-owner had no fee in the land occupied as a highway, but his land abutted upon it, and he had rights therein not shared in common with the general public for purposes of travel and use, a party using or appropriating such highway, or a portion of it, for other and different purposes than the one contemplated, whereby the highway was obstructed and impaired as a means of ingress and egress, would be liable to the abutting land-owner for any consequential damages arising from such appropriation and use depreciating the value of the property. This application of the constitutional prohibition is well sustained by many authorities, particularly by the construction given by the English courts to the land clauses consolidation act and railway clauses consolidation act of 1845, (8 Vict. cc. 18, 20.) In those cases the words used are "injuriously affected," which are certainly in meaning and intention the same as the word "damaged," in our constitution. In those cases it has invariably been held that abutting owners, under circumstances like those presented in this case, could recover consequential damages to the extent of the lessened value of the property. The case of *Beckett v. Railway Co.*, L. R. 3 C. P. 82, was tried before *COCKBURN, C. J.*, (1867.) In that case the street by an embankment was narrowed from 50 to 33 feet opposite the property of the plaintiff, and upon the trial it was left to the jury to say from the evidence "whether there had been any diminution in the value of the plaintiff's house by reason of the construction of the road in front of it." Upon review, in the opinion of *BOVILL, C. J.*, the instruction was held to be correct, and it was said: "Now, the question arises whether the plaintiff's house in the case was 'injuriously affected,' * * * and whether there is damage sustained by the plaintiff," etc. Here it will be observed that the words "injuriously affected" are treated as synonymous with "damage," the word used in the constitution. Some states, notably Pennsylvania, have given provisions similar to that in our constitution a construction different from that given by this court. The language in section 8, art. 16, of the constitution of Pennsylvania, is, "shall make just compensation for property taken, injured, or destroyed." In *Railroad Co. v. Lippincott*, 116 Pa. St. 472, 9 Atl. Rep. 871, it was held that a depreciation of property, by reason of the construction and operation of a railroad upon the lands of the company, was not an injury for which any damages could be recovered. But for the protection of individual rights, and as being more in harmony with the principles of the common law, we think the construction of this court and those of England better and

more consonant with reason. Under the decisions of this court, the questions for the jury to determine from the evidence were whether the plaintiff suffered damages differing in kind from those suffered by the general public, and whether the property of the plaintiff had been lessened in value by the acts of the defendant. It cannot be said, under the evidence, that the verdict was excessive. It was midway between nothing, as fixed by defendant's witnesses, and \$800, the lowest estimate of witnesses for plaintiff. There having been no serious error in the admission of the testimony or charge by the court, the judgment should be affirmed.

PATTISON, C., concurs. *RICHMOND, C.*, dissents.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

(14 Colo. 164)

ARNOLD et al. v. WOODWARD.

(*Supreme Court of Colorado. Jan. 20, 1890.*)

RES ADJUDICATA—ADVERSE POSSESSION—EJECTMENT—DAMAGES.

1. A judgment in ejectment, by a landlord against his tenant for breach of the conditions of the lease, will not bar a subsequent action against the landlord by an heir of the tenant to recover the land, on the ground that a patent therefor was issued to the tenant during his tenancy, as in the former action the tenant was estopped to deny his landlord's title. *ELLIS, J.*, dissenting.

2. The bringing of the action by the heir of the tenant is a sufficient recognition that the relation of landlord and tenant had been terminated, so as to entitle the heir to sue for possession under the patent, where the landlord was, and had been for years, in possession under the judgment in the former action.

3. Under Gen. St. Colo. § 2186, requiring "a claim and color of title made in good faith" as ground of adverse possession, one cannot hold adversely to another when he knows that his entry in the land-office has been set aside or disregarded, and a patent has issued to the person against whom he claimed an adverse holding.

4. Where the complaint in ejectment contains no allegation of special damage, the damages recoverable cannot include the value of the use of the premises by defendant.

Commissioners' decision. Appeal from district court, Chaffee county.

The undisputed facts in this case are as follows: In the year 1869, Charles G. Arnold first occupied the lands in controversy; having entered the same for pre-emption in the United States land-office at Fairplay, Colo. He proved up on them, and on March 31, 1874, paid the sum of \$200 therefor, taking a receipt in full, describing the lands, from the receiver of the land-office. During the year 1874, Arnold leased the premises to one James A. Woodward, who after entry, and while in possession as such tenant, filed his application for said land in the United States land-office at Fairplay, for the purpose of acquiring title thereto in his own right. Thereupon Arnold brought an action of ejectment under the lease for condition broken for the premises against Woodward, in

the district court, and in 1875 recovered judgment, and was thereby restored to the actual possession of the land. Woodward died about this time; but his widow and heir, Mary S. Woodward, continued the litigation. She procured herself to be substituted as defendant in place of her deceased husband, paid the costs in the action, and obtained a new trial. In March, 1877, a patent to the land was granted by the United States to the heirs of Woodward, deceased, upon the application made by him while he was the tenant of Arnold. The record does not disclose what became of Arnold's pre-emption claim. On the second trial, which occurred in September, 1877, Mrs. Woodward was permitted, against the objection of Arnold, to introduce in evidence the patent to the Woodward heirs, and upon this proof a verdict and judgment were rendered in her favor for possession of the premises; but, before possession was restored to her, Arnold appealed the case to this court. In November, 1878, that judgment was reversed on the sole ground that neither Woodward nor his heirs could in that suit make use of the patent acquired by virtue of steps which he had taken while he was a tenant of Arnold to defeat the title of his landlord. The cause being remanded to the district court, no further action has ever been taken therein; and Arnold, in the meantime, has remained in possession of the premises, paying the taxes thereon. In March, 1888, this present action was commenced by said Mary S. Woodward, as plaintiff, against said Charles G. Arnold, as defendant, to recover possession of the same premises described in the former action. The defendant Arnold, among other things, pleaded the commencement of the former suit, the proceedings thereunder, the reversal thereof by this court, and its continued pendency, peaceable possession, and payment of taxes, as an answer to the action. On this trial in the district court the plaintiff read in evidence the same patent as on the second trial of the former suit. The opinion of this court, (*Arnold v. Woodward*, 4 Colo. 249,) and the bill of exceptions in the original case, were admitted in evidence without objection; and it was also admitted that the plaintiff is the sole heir of James A. Woodward, deceased, and that she resides in Chaffee county, Colo., and that defendant is in possession of the land in controversy. Upon this proof of title alone, the facts hereinbefore stated being admitted or proved without contradiction, a finding and judgment were rendered in favor of plaintiff by the court for the possession of the property. The defendant Arnold appeals again to this court.

Patterson & Thomas, for appellants.
Wells, McNeal & Macon, for appellee.

RICHMOND, C. (*after stating the facts as above.*) The present and former actions between these parties relating to the land in controversy are dissimilar. In the former, Arnold was plaintiff, and, though he pro-

ceeded in ejectment, yet his suit was based upon the lease to Woodward, and possession was claimed for condition broken. The right to possession, as between landlord and tenant, was alone in controversy. Woodward's possession as tenant at that time under the lease being then admitted, the question of title was not and could not be litigated; for "the tenant is estopped to deny the landlord's title." By entering upon and occupying the premises under the lease, Woodward and his heir were estopped from questioning Arnold's ownership, and from introducing the patent which during the tenancy had been acquired by Woodward from the United States. The present action, on the other hand, was instituted by Mrs. Woodward in ejectment against Arnold to try the title to the premises. The lease was ignored in the complaint, and the action brought upon the assertion of a fee-simple ownership under the patent. It is therefore apparent that, besides a reversal of the position of the parties, the pleadings, the issues made, the relief sought, and the evidence admissible in the two cases were radically different. A judgment for Arnold in the former suit would not estop Woodward from prosecuting the present suit. It follows, therefore, that that suit could not bar or abate this one. 6 Waite, Act. & Def. 499, and cases; *Vance v. Olinger*, 27 Cal. 358; *Screw Co. v. Bliven*, 3 Blatchf. 240; *Osborn v. Cloud*, 23 Iowa, 104.

It is said, however, that Mrs. Woodward could not rely upon her patent title until the property held under the lease had been surrendered, and thus the relationship of landlord and tenant terminated. This proposition was announced by the court, on appeal, in the former suit. *Arnold v. Woodward*, 4 Colo. 249. Upon the reversal and remanding of that cause, Mrs. Woodward acquiesced in the conclusion then pronounced by this court, and took no further steps in that suit. Her sole defense to that action had been declared entirely unavailing, and Arnold was in position to take his judgment, or perhaps to dismiss his action; for he held the actual and exclusive possession, having obtained the same as a result of the first trial. At the time of commencing the present action, Mrs. Woodward was not, and for years had not been, in possession of the premises. She did not assert, and for years had not in any way asserted, her right to such possession as a tenant or otherwise. By commencing the present action to try the title she satisfied fully, if she had not done so before, the requirement concerning a surrender of property. The institution of this suit is clearly a recognition by Mrs. Woodward of the fact that the relation of landlord and tenant no longer exists; also that she is not in possession, but that Arnold is. The law commands no foolish or needless acts. To say that, under the circumstances, it was her duty, before commencing this suit, to notify Arnold that she voluntarily surrendered a possession which she did not have, would be to com-

mand an idle and useless ceremony; or to hold that, as a condition precedent to her assertion of the present right of action, she should have withdrawn her answer, and notified the court below that judgment might be taken against her in the former suit, would be to require a proceeding equally superfluous; she did not control that suit, and its result was a matter of indifference to her. We think that plaintiff, having a patent from the United States, was entitled to assert her rights thereunder in the present suit.

It is scarcely necessary to add that there is no inconsistency between this decision and the decision in *Arnold v. Woodard*, supra. That case simply held that, since the patent in question was obtained while Woodward was a tenant under the lease, he could not rely upon it in defending the action of Arnold as lessor or landlord, for possession against him as lessee or tenant; and that he was bound to surrender, and thus terminate, the tenancy, before he could be permitted to assert his title. Holding, as we now do, that there has been a surrender of such possession and a termination of the tenancy, the obstacle to the assertion of ownership under the patent has been removed. The claim of a bar by the statute of limitations (Gen. St. § 2186) is not well taken. Arnold's entry in the land-office had been set aside or disregarded, and the patent from the United States had issued to Woodward. Such issuance of the patent necessarily indicates that all steps required in connection therewith were duly taken. *Arnold v. Woodard*, supra. During a large part of the period covered by Arnold's alleged adverse holding, these facts existed and were known to him. Under the circumstances, there was not such a "claim and color of title made in good faith" as laid the foundation for an application of the statute. *Spellman v. Curtin*, 12 Ill. 415. The complaint in the present action contained no allegation of special damage; therefore the damages recoverable could not include the value of the use of the premises during their occupancy by Arnold. *Larned v. Hudson*, 57 N. Y. 151. It follows that the admission of testimony and the instruction to the jury on this point were erroneous. For error in the measure of damages adopted, the judgment must be reversed.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed.

ELLIOTT, J. (dissenting.) There is one important particular in which I cannot concur in the able opinion of Mr. Commissioner **RICHMOND**. The correctness of the decision in *Arnold v. Woodard*, 4 Colo. 249, whereby that case was reversed and remanded, is conceded by counsel for appellee. They also admit that upon a retrial of that case the present plaintiff must inevitably be defeated. It is difficult to perceive how her cause is improved by the present action. It will be observed that

the former suit is between the same parties as this, it is of the same nature, it concerns the same subject-matter, the same relief is sought, and it is still pending. Mrs. Woodward seeks in both actions to establish the same title upon the same evidence. It is true, the parties occupy reverse positions as plaintiff and defendant; but the present plaintiff, if successful as defendant in the former suit, would be entitled to the same relief as if successful as plaintiff in the present action. Rev. St. 1868, c. 27, § 50. A more complete identity of parties, nature, and cause of action, subject-matter, relief, and evidence could hardly arise.

It is claimed, however, that the relation of landlord and tenant no longer exists, and that, in this respect, the present action differs from the former one. In the former opinion it is said that the steps taken by Woodward to acquire title from the United States during his tenancy under Arnold were of necessity hostile to his landlord's title, and that, before he could assert any rights under a title thus acquired, he must surrender possession of the premises. From this and other language in the opinion it is insisted that, though a tenant may not use a superior title acquired by his own act hostile to the title of his landlord during the tenancy as a defense to a suit brought by his landlord against him for possession, yet that he may, by surrendering possession, use such superior title in an action thereafter brought by himself to regain possession from his former landlord. Conceding the correctness of this proposition, it avails the plaintiff nothing in the present action; its terms are not broad enough to include a party in her situation. Plaintiff has never surrendered possession of the premises in any proper sense of the term. On the contrary, she has strenuously resisted the landlord's efforts to regain possession; and, though driven from the field by legal process, has steadily maintained an attitude of hostility. So long as the former action remains pending and undisposed of, it is in law a continuing menace to the landlord's possession. A surrender implies a yielding up of the lesser estate by the tenant to him who has the immediate estate in reversion or remainder, whereby the lesser estate is merged in the greater by mutual agreement. *Bouv. Law Dict.* The surrender must be voluntary, or, at least, the controversy concerning the possession must be fully terminated before the tenant can be permitted to assail the landlord's title by means of a title inconsistent therewith, acquired through hostile action on his part, while the tenancy continued. While the former action remains pending and contested, it cannot be well said that plaintiff has surrendered possession; but her *status* in respect to the property must be considered the same in legal effect as if she had remained in possession while the case was being litigated through the various courts. In actions of ejectment under our practice, the party in possession may retain it until final judgment,

and during the prosecution of an appeal; and if a change is effected through legal process, before the final termination of the litigation, it does not affect the rights of the parties. Rev. St. 1868, *supra*.

But it is said that plaintiff has acquiesced in the conclusion pronounced by this court on the former appeal. In what manner has she manifested this acquiescence? The only final judgment ever pronounced against her was on the first trial of the former action. That judgment she caused to be vacated, as she might do under the statute then in force, (Rev. St. 1868, c. 27, § 26;) and upon the second trial the judgment was in her favor. This court reversed the latter judgment, and remanded the cause, but did not enter final judgment, nor direct the district court so to do. Since then no action whatever has been taken in the cause by either party, and there is no final judgment therein remaining of record anywhere.

It is urged that the lapse of time during which Mrs. Woodward remained out of possession, forbearing to assert any claim to the premises, is a circumstance strengthening her right to maintain this action before the termination of the former one. A most novel doctrine, that a claim is to be received with more favor because it is stale! Great virtue is also attached to the commencement of this action as an evidence of acquiescence and surrender on the part of plaintiff. A singular way to manifest acquiescence in defendant's claim, to commence a fresh action against him for the same cause before the former action is terminated! The surrender of possession spoken of in the former opinion must mean something more than a mere physical change of possession,—as the putting of Woodward out and the putting of Arnold in,—for that kind of a change had already taken place before the second trial of the former action occurred; and yet it was held erroneous to admit the Woodward patent in evidence against Arnold on that trial, and the judgment based thereon was reversed for that very reason. How, then, can the present judgment be sustained on the same evidence? As we have seen, the former action in all its aspects is precisely the same as the present. Since long before the second trial of the former action the possession of the property and the attitude of the parties in relation thereto have remained *in statu quo*. No change whatever has occurred. Mrs. Woodward has not given or offered any deed of surrender; she has not moved the former action to trial or judgment, nor attempted so to do; she has not withdrawn her answer, nor offered to allow judgment to be taken therein; she has in no way acknowledged the landlord's original title, nor done any act signifying her acquiescence therein. Her attitude is the same as it was when she paid the costs of the first suit, and obtained a new trial. Everything remains in the precise condition it was when the second trial was entered upon. The

cause stands contested upon the record, the same as if there had never been a trial. In this view, the matter is too plain for argument that, since Mrs. Woodward confessedly cannot introduce the patent to defeat the former suit pending, she cannot, without in some way disposing of the obstacle thereto, maintain a fresh action against Arnold, for precisely the same cause, by the introduction of the self-same patent. It would be a strange anomaly in our jurisprudence if, where two actions in ejectment are pending at the same time, in the same court, involving the same title to the same land, and between the same parties, occupying the same position in respect to the property in the one case as in the other, one party might recover the possession in one action, and the other party recover it in the other action, upon precisely the same evidence. If this be allowable, when and where will the litigation end? If plaintiff may oust defendant by the present action, what is to prevent defendant from regaining possession by prosecuting the former suit to judgment, since it is conceded that plaintiff cannot defend against it? In 1 Bac. Abr. 29, it is said: "The law will not allow two *quare impeditis* to be brought for the same presentation, viz., a second by the defendant against the plaintiff, when there is one pending in the court by the plaintiff against the defendant; *et sic in brevi de partitione*, because the defendant can have the same remedy on the first writ as he could on the second. The law is so watchful against all vexatious suits that it will neither suffer two actions of the same nature to be pending for the same demand, nor even two actions of a different nature." Rev. St. 1868, c. 27, § 30; Tayl. Landl. & Ten. § 705; 6 Wait, Act. & Def., 496 *et seq.*; Ward v. Gore, 37 How. Pr. 119; Parker v. Colcord, 2 N. H. 36; Tracy v. Reed, 4 Blackf. 56; Hart v. Granger, 1 Conn. 154; Colt v. Partridge, 7 Metc. 575; Ryerson v. Eldred, 18 Mich. 12; Doe v. Baytop, 30 E. C. L. 105. It follows from the foregoing that, under the pleadings and proof, the former suit pending should be held sufficient to abate the present action, and that the judgment by the district court should be reversed for that reason.

(14 Colo. 174.)

SICKMAN *et al.* v. ABERNATHY *et al.*

SAME v. HAX.

(Supreme Court of Colorado. Dec. 24, 1889.)

FRAUDULENT CONVEYANCES — PARTNERSHIP — RIGHTS OF CREDITORS.

1. Where an insolvent firm has transferred all its property, taking notes in payment, its creditors, who have not sought to have the sale set aside, but have acquiesced in it, and treated it as legitimate, by proceeding against the purchasers by attachment for the money supposed to be due on the notes, cannot question the *bona fides* of the sale.

2. Nor can they in such proceeding attack the validity of payments made by the purchasers, though the latter had knowledge of the firm's indebtedness, since there is no privity between them and the purchasers.

3. In such proceeding, evidence as to contracts between the firm and the purchasers, as to the application on the notes of accounts due the firm by the partners individually, and assigned to the purchasers with the other firm accounts, is immaterial, since the parties had a right to make any contract they chose as to the mode of paying the notes.

4. No creditor's lien can attach to the partnership assets of an insolvent firm until they have been brought into the custody of the law by the interposition of the court.

5. The right of a creditor to garnish property, effects, etc., of a debtor, in the possession and charge, or under the control, of a third person, under Gen. St. Colo. 518, § 1554, does not apply as against purchasers, without fraud, of the property of an insolvent partnership, who have paid the purchase money.

Commissioners' decision. Appeal from district court, Larimer county.

In October, 1881, Alonzo P. Sickman and S. B. Livingston formed a partnership for transacting a mercantile business; were equal partners; only continued in business until about the 4th day of February following, when the firm of Livingston & Sickman sold to Jonathan Sickman, father of A. P. Sickman, and T. H. Davy, and by bill of sale assigned and transferred to them, the entire stock of goods then on hand, book-accounts, credits, and good-will, for the sum of \$15,000, and received in payment three notes, of \$5,000 each, made by Sickman & Davy, due, respectively, 60, 90, and 120 days after date. Livingston & Sickman at the time of the sale were badly in debt, if not insolvent. Immediately upon commencing business, or very shortly afterwards, Sickman & Davy commenced to pay the \$15,000 for which the notes were given, without regard to the time of their maturity. Such payments were made upon the orders of Livingston & Sickman, and paid either in cash, or by substituting the paper of Sickman & Davy for that of Livingston & Sickman. At the time of the purchase by Sickman & Davy, A. P. Sickman was indebted to the Poudre Valley Bank for \$2,000 for money borrowed, for which the bank held his note, which, with interest, amounted to \$2,083, on April 19, 1882, at which time it was paid by Sickman & Davy at the request of Livingston & Sickman, and a credit given for the amount upon one of the \$5,000 notes of Sickman & Davy. Among the accounts standing upon the books of the old firm at the time of the sale which were assigned to Sickman & Davy was a personal account of A. P. Sickman, due the firm of Livingston & Sickman, of \$327.16; one of S. V. Livingston, \$665.43; and another of Livingston, called the "house account," of \$1,066.99,—Livingston's two amounting to \$1,732.42; also, an account against one L. Welch of \$409.22, against which Welch had a set-off for the full amount, which did not appear upon the books. These several accounts, amounting to \$2,968.80, together with a bill of goods, amounting to \$254.78, bought by Livingston from Sickman & Davy after the transfer, making in the aggregate over \$3,000, were, by the mutual agreement of Livingston and A. P. Sickman with Sick-

man & Davy, indorsed as credits upon the notes of the latter. These being the payments over which the controversy arose, others need not be noticed. About the 1st of March, 1883, appellees Abernathy and Hax, respectively, commenced proceedings by attachment against Livingston and A. P. Sickman for sums due them for goods sold, and Jonathan Sickman and Davy were served as garnishees. They having answered that they were not indebted, the answers were traversed. After trials had been had in the county court, appeals were taken to the district court, a trial had by jury, resulting in favor of the garnishees, which verdict was set aside by the court. In March, 1885, another trial was had, resulting in finding the garnishees indebted to Livingston & Sickman in the sum of \$3,123.44. From which judgments, appeals were taken to this court. Errors are assigned upon the giving by the court of the 3d, 4th, 7th, 8th, 9th, 10th, 11th, 12th, and 13th instructions on the part of plaintiffs, and upon the refusal of the court to give two instructions asked by garnishees.

Ballard, Robinson & Love, for appellants.
Haynes, Dunning & Annis, for appellees.

REED, C., (*after stating the facts as above.*) At the time the suits by attachment against Livingston & Sickman, and the proceeding by garnishment of Sickman & Davy, were commenced, the three notes of the latter, which were negotiable, had been paid to the satisfaction of the payees, delivered up to the makers, and the whole transaction closed. Section 12, c. 46, Gen. St. 520, is as follows: "No person shall be liable as a garnishee by reason of having drawn, accepted, made, or indorsed any negotiable instrument, when the same is not due in the hands of the defendant at the time of service of the garnishee summons, or the rendition of the judgment." This might, perhaps, be considered as concluding this case, when applied to the facts, if our construction of it is correct; but the learned and experienced judge before whom the case was tried does not seem to have so considered it. Neither did the counsel. The importance of the case seems to render a full discussion of the questions presented necessary.

At the time of the sale and transfer of the assets of the defendants to the garnishees, the attendant circumstances and relation of some of the parties were such, perhaps, as to raise a doubt in regard to the honesty of the transaction sufficient to have caused an investigation by the creditors, which might have been had under proper proceedings; and, if found fraudulent, the sale could have been set aside, and the entire property in the hands of Sickman & Davy subjected to the payment of the debts, or, if found best, the sale could have been affirmed, and provision made for the application of the entire proceeds to the payment of the debts. But no such course was taken. The creditors, instead of questioning the honesty of the sale,

acquiesced, treated it as legitimate, and elected to proceed against the purchasers for money supposed to be due. By the course pursued the sale and transfer of the assets of the firm to the garnishees was ratified. There are numerous authorities in support of this proposition. In *Bishop v. Trustees of Hart*, 28 Vt. 75, it is said: "By instituting this suit to recover the avails of the property assigned, and therein charging them as trustees under the assignment, they have not only ratified the assignment itself, but also any disposition of the property which may have been made by the trustees under it. The plaintiffs will not be at liberty after that to question the legality of any transfer of the property which the trustees may have made." After having acquiesced in the sale, and by failing to institute proper proceedings, and by instituting this suit, having ratified the sale, it is clear the creditors could not challenge the *bona fides* of the transaction, nor impeach it for fraud. Neither could they attack collaterally, on the proceeding against the garnishees, the validity of the payments made. To have enabled them to successfully attack it, there must have been some privity existing between the creditors and garnishees; otherwise, the transaction, being one they had affirmed, rested entirely with the parties to the purchase and sale. A knowledge of the indebtedness of the old firm, of itself, imposed upon the purchasers no obligation, either legal or moral, in regard to the application of the funds. Such obligation could only be imposed by contract, or by the intervention of legal proceedings. Unless creditors intervened by proper suits while an indebtedness existed, the garnishees could not be affected by the question of solvency or insolvency of the parties, or their own knowledge, or want of knowledge, on that subject. An individual or firm may be notoriously insolvent, and yet, as long as they are unrestrained at law by legal proceedings, can continue to do business as if absolutely solvent. A purchaser can take good title to any property purchased, and discharge his indebtedness in any agreed manner.

There was evidently a misconception by the court in regard to the law applicable to the case. As before stated, previous to the closing of the transactions between the old firm and the new one, no suit was instituted. There are two propositions of law necessary to be discussed in this connection: *First*, until a court interposed, and the assets of the firm were in the custody of the law, there could be no creditors' lien upon partnership assets, as supposed by the court; *second*, previous to intervention and custody of assets by the court, the right to have firm assets applied to the payment of firm debts in preference to those of the individual debts of the partners was one that pertained to the firm, and individuals composing the firm, and in no wise pertains to the creditors of the firm. In *Case v. Beauregard*, 99 U. S. 119, it is said: "So long as the * * *

partner retains an interest in the firm assets as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce through it the application of those assets, primarily, to payment of the debts due them, whenever the property comes under its administration. It is indispensable, however, to such relief, when the creditors are, as in the present case, simple contract creditors, that the partnership property should be within the control of the court, and in the course of administration, brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode. This is because neither the partners nor the joint creditors have any specific lien, nor is there any trust that can be enforced until the property has passed *in custodia legis*." This case was followed by another between the same parties in 101 U. S. 688, where the decision was reaffirmed. This was followed by *Fitzpatrick v. Flannagan*, 106 U. S. 648, 1 Sup. Ct. Rep. 369, where nearly the identical question involved in this case was presented. In that the court below instructed the jury as follows: "If you shall find from the evidence that the defendant sold or transferred any of the property or assets of the late firm of Fitzpatrick Bros. with intent to prevent the creditors of the firm of Fitzpatrick Bros., or any of them, from collecting their debts, such sale or disposition will sustain this ground of attachment. It was the duty of the defendant, as such surviving partner, to apply all of the assets of the firm to the payment of the debts due by the firm; and, if he appropriated any part of them to the payment of his individual debts, it was a fraud upon the firm creditors, whether he so considered it or not, and, if established by the proof, will sustain this ground of attachment, as the law will presume that he intended the natural result of his act." In the opinion of the court the learned Justice MATTHEWS, since deceased, said: "It is fair to consider this charge, although not so qualified, in connection with the facts, in reference to which there was evidence that the firm of Fitzpatrick Bros. and its individual members were insolvent, in the sense of not being able to pay their debts, during the whole period of its existence, and the additional fact that the deceased partner had before his death drawn from the partnership more than his interest therein, and was indebted to the firm. The legal right of a partnership creditor to subject the partnership property to the payment of his debt consists simply in the right to reduce his claim to judgment, and to sell the goods of his debtors on execution. His right to appropriate the partnership property, specifically, to the payment of his debt, in equity, in preference to creditors of an individual partner, is derived through the other partner, whose original right it is to have the partnership assets applied to the payment of partnership obligations; and this equity of the creditor subsists as long as that of the partner through which

it is derived remains,"—and, after quoting the paragraph above cited, from *Case v. Beauregard*, proceeded to say: "Hence it follows that if, before the interposition of the court is asked, the property has ceased to belong to the partnership, if by a *bona fide* transfer it has become the several property either of one partner, or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end." Further, speaking of *Case v. Beauregard*, he said: "In that case it was held, in respect to a firm admitted to be insolvent, that transfers made by the individual partners of their interest in the partnership property converted that property into individual property, terminated the equity of any partner to require the application thereof to the payment of the joint debts, and constituted a bar to a bill in equity filed by a partnership creditor to subject it to the payment of his debt; the relief prayed for being grounded on the claim that these transfers were in fraud of his rights as a creditor of the firm,"—and then cited with approval the case of *Schmidlapp v. Currie*, 55 Miss. 597, where it is said: "The doctrine that firm assets must first be applied to the payment of firm debts, and individual property to individual debts, is only a principle of administration adopted by the courts where, from any cause, they are called upon to wind up the firm business, and find that the members have made no valid disposition of, or charges upon, its assets. Thus where, upon the dissolution of the firm by death or limitation or bankruptcy, or from any other cause, the courts are called upon to wind up the concern, they adopt and enforce the principle stated; but the principle itself springs alone out of the obligation to do justice between the partners." "In that case, one of two partners, but with the assent of the other, and without any fraudulent intent, transferred the whole business and stock of the firm to a third person in payment of an individual debt. A creditor of the partnership sued out a writ of attachment against them, and caused it to be levied on the goods in the possession of the purchaser, upon the ground that the transfer of the firm goods in satisfaction of the individual debt of one of the partners was fraudulent and void as against firm creditors." And it was held that an attachment would not lie. The learned justice, in *Fitzpatrick v. Flannagan*, supra, after stating that the same principle applied in cases of dissolution, whether voluntary or by the death of a partner, proceeded to say: "And unless a partnership creditor, or the personal representatives of the deceased partner, commenced such a proceeding to liquidate the affairs of the partnership, there is nothing to prevent the surviving partner from dealing with the partnership property as his own, and acting in good faith to make valid dispositions of it; * * * and if, in like good faith, with the acquiescence of the personal representatives of the deceased partner, he uses the firm property to continue the

business on his own account, and in his own name, he does it without other liability than to be held accountable to the estate of his deceased partner for a share of the profits, or, as we have seen, upon a bill filed for that purpose by the personal representatives of the deceased partner or a partnership creditor to wind up the firm business, and apply its assets to the payment of its debts. Any intermediate disposition of the property made in good faith, even although it may have been specifically a part of the partnership assets, and even if it has been applied to the payment of his individual obligations, will be valid and effectual, and, without circumstances showing an actual intention to defraud, cannot be treated as a fraud in law upon partnership creditors." 1 Bates, Partn. § 540: "Each partner has the right to require that all the assets be applied to the payment of debts, for otherwise his own liability *in solido* for them all would be undiminished. This is a right which appertains to him personally, and not to the partnership creditors. In case the assets pass under the control of the courts for distribution, either by reason of bankruptcy, death, or suit for accounting and dissolution, not only will the rights of the partners to have the debts paid be carried out, but the court will subrogate the credits to this right, and treat it as an obligation, provided it had not been parted with by the partners at the time the court came into possession of the fund." In 2 Bates, Partn. § 820, it is said: "While creditors have no lien nor claim upon the partnership assets other than any individual creditor has against his debtor's property, except as derived in consequence of the partner's equity, as will be seen, yet each partner has an equity to compel the application of the assets to the joint debts." And in section 824: "As stated at the beginning of this chapter, the partnership creditors, except when they are given the benefit of the partner's equity, have of themselves no other claim than any creditor has on his debtor's property. The right of a partnership creditor to be paid has been extended in many jurisdictions beyond what the logic of its original foundation will warrant. The partners have jointly the same right of absolute disposition of their joint property that any individual has. They may sell it, pledge it, convert it into other forms, divide it up among themselves, devote it to the payment of debts, or part of the debts, or exercise other ownership over it, subject only to each other's rights, and to the operation of statutes forbidding voluntary conveyances to hinder and defraud creditors." And these positions are sustained by numerous authorities both in England and the different states. See, also, Story, Partn. §§ 347, 358, 362, and notes. Further, to the point that creditors have no lien except through the partners, and that when the assets have been disposed of by the consent of the partners the equity of the individual partners has been extinguished, and no lien remains to the creditors, see *Hoxie v. Carr*, 1

Sum. 173; Allen v. Center Val. Co., 21 Conn. 130; McDonald v. Beach, 2 Blackf. 55; Kistner v. Sindlinger, 33 Ind. 114; Harris v. Peabody, 78 Me. 262; Glenn v. Gill, 2 Md. 1; Locke v. Lewis, 124 Mass. 1.

This, according to all the authorities, is the law as applicable to the creditors, the firm, and the individual members of the firm; and it will readily appear that the law supposed by the court to be applicable to the garnishees would not have been correct if attempted to be applied on attachment proceedings by creditors against Livingston & Sickman; for, as between them, fraud *per se* could not be presumed. Section 20, c. 43, Gen. St., is as follows: "The question of fraudulent intent in all cases arising under the provisions of this title shall be deemed a question of fact, and not of law, nor shall any conveyances or charges be adjudged fraudulent against creditors or purchasers solely on the ground that it was not founded on a valuable consideration." One who alleges fraud must clearly and distinctly prove the fraud he alleges. Beatty v. Fishel, 100 Mass. 448; Klein v. Horine, 47 Ill. 430; Morgan v. Olvey, 53 Ind. 6. "In order to establish fraud, the true rule, in all courts, is to require such legal evidence as will overcome in the mind of the tribunal the legal presumption of innocence, and beget a belief of the truth of the allegation of fraud." Marksby v. Taylor, 10 Bush, 519. There is a wide distinction between fraud *per se* (a fraud at law) and fraud in fact. The first, as shown by the instructions, was assumed to exist and control. If, in this case, there was any question of fraud, it was a question of fraud in fact, depending upon the intention of the parties to be charged, and to be determined by the jury, on proper instructions, and not by the court. Bigelow, Fraud, 139; Milne v. Henry, 40 Pa. St. 352; Twyne's Case, 1 Smith, Lead. Cas. (5th Ed.) 47, Amer. note. The *bona fides* of the sale could, as has been shown, only have been tried in a proceeding to set it aside. "The general rule is that the garnishee is not chargeable unless the defendant could recover of him what the plaintiff seeks to secure by garnishment." Wap. Attachm. 202; Drake, Attachm. § 458. And this rule has been adopted and decided to be the law in the federal courts, and in the courts of nearly if not all the states. This rule is subject to this exception: "Where the garnishee is in possession of effects of the defendant under a fraudulent transfer from the latter, there, though the defendant would have no claim against the garnishee, yet a creditor of the defendant can subject the effects in the garnishee's hands to his attachment." Drake, Attachm. § 458; Wap. Attachm. 215. The reason is obvious: The defendant, by making a fraudulent transfer, precludes himself from proceeding at law to recover the value, while the creditor is not precluded.

The court and counsel for appellees seem to have misapprehended our statute, and the

proper application of the exception above stated. Under our statute, and it is substantially the same in nearly all the states, garnishment will be effective—*First*, where the garnishee is indebted to the defendant either in money or property; *second*, when the garnishee is in possession and charge of, or has under his control, any property, effects, goods, chattels, rights, credits, or choses in action of the defendant. Gen. St. p. 518, § 1554; Code 1883, § 104. It will be observed that the two are entirely distinct and separable. The language of the exception and the authorities confine it entirely to the second. It is "effects" in the hands of the garnishee, as contradistinguished from the debt payable in money or property. In this case the proceeding was under the first clause, for a debt payable in money, while the law supposed to apply was only applicable to the second clause, where the garnishee had effects of the defendant, where by reason of the fraud no title had passed to the effects, and they could be subjected to attachment as the property of the defendant, when he had precluded himself from asserting his legal ownership. There is no evidence whatever of an intended fraud. It could only have been assumed or inferred from the supposed illegal application of the personal accounts to the payment of the notes. The fraud contemplated in, and to be prevented by, law, is the illegal disposition of property by transfer, to place it beyond the reach of the creditor, with the expectation of subsequently deriving some benefit himself from it or its proceeds. Without such intention or expectation, there could be no motive. Section 11, c. 43, Gen. St. p. 509, is as follows: "All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing, of such person." By no possibility, in this case, could the indorsement of the amount upon the notes, and canceling so much of the indebtedness, have injured to the benefit of the defendants. It was clearly against their interest, and can only be explained as being done in pursuance of the agreement made at the time of the purchase.

It is assigned for error that the court refused to allow the witness Jonathan Sickman to testify further as to what the contract between the parties was in regard to the individual accounts of the members of the old firm. We think this was not an error, not on the ground on which it was presumably put by the court, that the indorsements were fraudulent *per se*, but from the fact that the inquiry was unimportant, being one that could not legally arise in a controversy between creditors and garnishees, under the circumstances and facts as before shown. We do not intend to be understood as holding that the debts of individual partners, due to the firm of which they are members, can or cannot be

assigned so as to pass as assets of the firm by a sale. A case might arise where it would become necessary to determine the question; but, in our view, it is not necessary to determine it here. There were no intervening suits. The property was not in the custody of the law. The parties to the contract all united in the transaction, and its conclusion was mutually satisfactory. A mutual mistake of the parties in regard to the law, if one was made, could not vitiate the transaction. The creditors, by the course pursued, as shown above, had ratified it, and could not raise and adjudicate the question of legality in a proceeding against garnishees to recover a supposed debt. If, as appears, the accounts were sold, and the amounts were to be, and were, deducted from the purchase price, then they became and were a part of the consideration for which the notes were given, and when indorsed were a payment *pro tanto*. To hold otherwise would be to make a new contract, never contemplated by the parties, and increase the purchase price over \$3,000. To arbitrarily say that the individual accounts could not be regarded in law as assets, and transferred,—hence, that the indorsements of the amounts upon the notes were illegal, and no payment,—and that the garnishees were liable for the amounts to the attaching creditors, would be to create a debt for that amount due the defendants, which creditors could appropriate, never contemplated by defendants or garnishees; one that had been satisfactorily settled and discharged by the only parties legally concerned; a debt in favor of defendants that they could in no wise enforce as against the garnishees.

We think the learned judge erred in his instructions to the jury, particularly in those from 7 to 13, both inclusive, given on the part of plaintiffs. They were inapplicable in the case presented. They are based upon the mistaken theory that the garnishees were the trustees of the creditors of the old firm, and as such chargeable with the proper application of the funds. As shown, the position is not tenable. It was a purchase and sale in which creditors in no way participated, nor in any way attempted to interfere, by suit or otherwise, until the whole purchase price had been paid, and the transaction closed to the mutual satisfaction of all the parties having a legal right to question it. It follows that the learned judge was mistaken, not as to the law controlling the application of partnership funds, but in applying in this case the principles of law only applicable to the funds, assets, or effects of partnership, when, by proper suits, they were in the custody of the court for distribution. The judgment should be reversed, and the garnishee discharged.

RICHMOND and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgments are reversed, and the causes remanded, with directions to discharge the garnishees.

Mr. Justice ELLIOTT, having presided at the trials below, did not participate in this decision.

(14 Colo. 227)

JOHNSON v. MITCHELL.

(Supreme Court of Colorado. Feb. 14, 1890.)

CONTRACTS—CONSIDERATION.

A promissory note was given by defendant solely as collateral security for a debt due plaintiff on account. Before the giving of the note, this account, together with a trust-deed securing it, had been assigned to a third person. Defendant was ignorant of such assignment, and would not have executed the note had he known of it. After the assignment, and before the commencement of suit on the note, the assignee received payment in full of the account in question. The note had not been negotiated. Held, that plaintiff could not recover, there being no consideration for the note.

Error to Fremont county court.

A. Macon, for plaintiff in error.

HELM, C. J. There is no appearance in this court by defendant in error, and we are at a loss to know upon what ground the court below rendered the judgment challenged by the present proceeding. The evidence before us, which was properly admitted under the pleadings, shows without serious conflict that the promissory note sued on was given by Johnson solely as collateral security for a debt to Mitchell & Co. upon account, owed by a certain mining company, of which Johnson was the general manager; that prior to the giving of the note this account, together with a trust-deed securing the same, had been assigned to a third party, and neither Mitchell, the payee of the note, nor Mitchell & Co. retained any interest whatever therein; that Johnson was ignorant of such assignment, and would not have executed the note had he possessed knowledge thereof; that subsequent to the assignment mentioned, and prior to the commencement of suit, the assignee received payment in full of the account in question. The promissory note in suit was not negotiated, and the action is between the original parties thereto. From the foregoing evidence, it appears that there was no consideration in law for the original making of the instrument; also that the consideration upon which the maker supposed he was giving the instrument had failed by payment of the account prior to suit. Clearly, upon the record as now presented to this court, plaintiff below was not entitled to recover. The judgment is accordingly reversed.

(14 Colo. 229)

EMPIRE LAND & CANAL CO. v. ENGLE et al.

(Supreme Court of Colorado. Feb. 28, 1890.)

DISTRICT COURTS—PRESIDING JUDGES—BILL OF EXCEPTIONS.

1. The judges of the district courts may hold courts for each other, and it is their duty so to do under certain circumstances.
2. When a district judge holds a term of court outside his own district, his authority so to do, and to try the causes pending in such court, will be presumed unless the contrary appears.

8. When one district judge tries a cause for another, the judge actually presiding is the proper one to authenticate the bill of exceptions as to any and all rulings excepted to before him on the trial.

(*Syllabus by the Court.*)

Appeal from district court, Rio Grande county.

J. P. Brockway and Holbrook & Brown, for appellant. *C. A. Johnson, D. V. Burns, and Adair Wilson*, for appellees.

PER CURIAM. This is a motion to strike from the record of this cause the bill of exceptions, on the sole ground that the same is not signed and sealed by the proper judge. It appears that the cause was tried by Hon. JOHN C. BELL, district judge of the seventh judicial district, while holding the district court of Rio Grande county, and that said county is in the sixth judicial district of which Hon. GEORGE T. SUMNER is the district judge. By the constitution of this state, article 6, § 12, it is provided that "the judges of the district courts may hold courts for each other, and shall do so when required by law;" and the Act of March 3, 1887, p. 265, makes it their duty so to do under certain circumstances. In the absence of anything in the record to the contrary, we must presume that Judge BELL was legally holding the Rio Grande district court, and was duly authorized to try this cause. Indeed his authority is in no manner questioned by this motion. Under the circumstances, therefore, he was the proper judicial officer to authenticate the bill of exceptions as to any and all rulings excepted to before him on the trial. The views expressed in the case of *Fechheimer v. Trounstiene*, 12 Colo. 282, 20 Pac. Rep. 704, are applicable to this motion; and the doctrine therein announced may now be regarded as definitely settled in this state. The motion to strike out the bill of exceptions is denied.

(14 Colo. 37)

LACLEDE FIREBRICK MANUF'G CO. v. WILLIAMS *et al.*

(*Supreme Court of Colorado. Feb. 14, 1890.*)

ACCEPTANCE OF TRUSTS.

A power of attorney authorized defendant to receive the warrants and other evidences of indebtedness coming to one W. under a contract for the construction of a sewer, to exchange the same for money on the best terms possible, and with the proceeds to liquidate the claims against W. for work performed and materials furnished in the construction of the sewer. The contract between W. and plaintiff provided that plaintiff was to receive from defendant 80 per cent. of the price agreed on for sewer pipe delivered and used, whenever, from time to time during the construction of the sewer, the city paid defendant that percentage on estimates of the city engineer, and that out of the 20 per cent. remaining plaintiff should be paid by defendant its balance in full, as soon as the latter fund came into his hands. Held, that defendant, by indorsing on this contract his written acceptance thereof, thereby became a trustee for plaintiff, and rendered himself personally liable to plaintiff on failure to comply with the terms of such contract.

Error to district court, Arapahoe county.

In the year 1882, defendant in error Joseph Williams contracted with the city of

Denver to construct what is known as the "Twentieth-Street district sewer." By the terms of this contract, at stated intervals as the work progressed, the city engineer was to make estimates of the value of the work done thereunder. Eighty per cent. of the amount represented by each of these estimates was to be at once paid by the city. The remaining 20 per cent was to be withheld as a guaranty until the final completion and acceptance of the sewer. Williams was required to give bond, and, for the purpose of securing his bondsmen, he executed to John W. Horner, who was one of said bondsmen, an irrevocable power of attorney, in words and figures as follows: "Know all men by these presents that I, Joseph Williams, of the city of Denver, in the county of Arapahoe and state of Colorado, do hereby make, constitute, and appoint John W. Horner, of the city of Denver, in the county of Arapahoe, in the state of Colorado, my true, sufficient, and lawful attorney, irrevocable, for me and in my name to receive, receipt for, and take from the city of Denver all warrants or other evidences of indebtedness that may become due me for work done or to be done, materials furnished or to be furnished, or otherwise, that may become due me under my contract with the city of Denver for the construction of the Twentieth-Street district sewer, in the city of Denver aforesaid, and to see to or negotiate and sell said evidences of indebtedness or warrants for the best price that can be obtained therefor at the time, and apply the proceeds thereof, or see that the proceeds thereof are applied, to the payment for the materials used in the said district sewer, and the labor that may be employed in the performance of the work necessary to construct said sewer. The intention of this instrument being the protection of the parties interested in the construction of said district sewer, including the bondsmen of the party of the first part, the city of Denver, and the parties furnishing materials and labor for the construction of said district sewer. Hereby giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I myself might or could do if personally present, with full power of substitution and revocation; hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do, or cause to be done, by virtue hereof. In witness whereof I have hereunto set my hand and seal this 27th day of April, A. D. 1882. [Signed] JOSEPH WILLIAMS. [Seal.]"

Williams entered into a written contract with plaintiff in error to furnish sewer-pipe for use in the construction of said sewer. This contract contained the following, among other, provisions: "Said herein named material shall be in accordance with the requirements of said second party's contract with the

said city of Denver, as per specifications relating thereto furnished to first party hereto; and the second party agrees to and with the first party to receive the material herein mentioned, and shipped according to the terms of the contract, on board cars at the works of first party, in accordance with the terms of bills of lading, taken by the first party, in the usual manner and form, and to pay for the same as follows: Eighty per cent. of the amount of material furnished under this contract, included in city engineer's monthly or other estimate, shall be paid to John W. Horner, of Denver, acting as trustee, by agreement of the parties hereto, within thirty days after the delivery of the warrant for any such estimate, who shall, without delay, pay over any such amount to first party, either by sight draft payable to first party's order in St. Louis, or by a legal warrant of said city of Denver, at par value, properly issued and presented to the city treasurer, so that any such warrant will bear ten per cent. interest per annum from the date thereof until paid. And it is further understood and agreed by and between the several parties hereto, and by John W. Horner, acting as trustee for the parties hereto, that in consideration of first party's agreement to receive eighty per cent. of value in part payment of the material furnished under this contract, as the same may be estimated upon at any time by the city engineer of the said city of Denver, that said first party shall have a special lien upon the twenty per cent. retained by the said city of Denver out of all estimates under the contract of said second party with the said city of Denver, for the construction of the said Twentieth-Street district sewer, for the purpose of securing said first party in the full payment of any claim that may be due to said first party by said second party under the provision of this contract; and inasmuch as said John W. Horner holds a power of attorney from said second party, authorizing him to collect all moneys or other things that may be due said second party under said contract with said city of Denver, as therein fully set out, it is agreed between the respective parties hereto (said John W. Horner assenting) that said John W. Horner shall, out of said twenty per cent., as and when the same shall come into his hands under said power of attorney, pay to said first party in full any amount in any manner accruing to first party from said second party, under this contract; it being the intention of this contract that said twenty per cent. of all estimates retained by said city of Denver, under second party's contract therewith, or as much thereof as may be necessary therefor, shall, upon receipt thereof by said John W. Horner, under said power of attorney, be held and deemed to be for the use and benefit of said first party, for the purpose of paying in full all claims of said first party, against said second party, that may arise in any manner under this contract. It is fur-

ther agreed between the parties hereto that for any amounts unpaid out of the monthly or other estimates of the city engineer of the city of Denver, for material shipped in accordance with the provisions of this contract, and included in said estimates, that said first party shall be entitled to interest upon any such amounts, or part thereof, remaining unpaid after thirty days from date of estimate, at the rate of ten per cent per annum, until paid in accordance with this contract." Upon said contract appears the following indorsement by Horner: "I hereby accept the aforementioned trust, created by the parties in the foregoing contract, according to the true tenor and effect of said contract, and will perform the same according to the true tenor and effect thereof, construed with the power of attorney given me by Joseph Williams, party of the second part, to collect and disburse the proceeds arising from this contract with the city of Denver, referred to in said contract. JOHN W. HORNER. Denver, Colorado, June, 1882."

Williams in due time completed the work to the satisfaction and acceptance of the city. All moneys due him in pursuance of his contract with the city, including the reserved 20 per cent., were paid to Horner, who claims to have disbursed the same in accordance with the power of attorney. Plaintiff in error furnished most of the sewer-pipe used; it received from Horner 20 per cent. of the contract price therefor, as the same was from time to time paid by the city according to the estimates of the city engineer. But there remained a balance of \$1,897.32 due plaintiff in error from Williams under the contract. To recover the foregoing balance, the present action was brought against Williams and Horner. The cause was tried to the court without a jury, and judgment was duly entered against Williams for the amount mentioned, together with the accrued interest. But the court found in favor of defendant Horner, and entered judgment dismissing the complaint as to him. To this judgment exceptions were duly taken, and the questions thereby raised are adjudicated in the following decision.

F. D. W. Yonley, for plaintiff in error.
L. P. Marsh and *J. W. Homer*, for defendants in error.

HELM, C. J., (*after stating the facts as above.*) Upon the facts in the present case there is no substantial conflict of testimony. It does not appear that Horner has remaining in his hands any money or evidences of indebtedness paid by the city in connection with the Twentieth-Street district sewer, nor is any intentional fraud on his part shown in the disbursement of this fund; therefore the question of his liability in the present case must be answered by construction of the written instruments under which he acted. The contract between Williams and the Laclede Company clearly provided that the company were to receive from Horner 80 per

cent. of the price agreed upon for sewer-pipe delivered and used, whenever, from time to time during the prosecution of the improvement, the city paid Horner upon estimates of the city engineer 80 per cent. of the amounts due Williams from the city; that the company should have a lien for the balance of its claim upon the remaining 20 per cent. retained by the city under its contract with Williams until the completion of the sewer; and that out of this 20 per cent. the company should be paid by Horner its balance in full, as soon as the latter fund came into his hands. Horner indorsed upon the contract his written acceptance thereof. He thereby became a trustee for the company, and obligated himself to comply with the foregoing terms and conditions, unless such compliance was in some way qualified or limited. In his written indorsement accepting the trust, Horner declared that he would perform the contract "according to the true tenor and effect thereof, construed with the power of attorney given [him] by Joseph Williams. * * *" We shall assume, without discussion, that this language operated to render Horner's compliance with the agreement subject to any limitation of his authority contained in the power of attorney through which he became Williams' financial agent in the premises. It therefore becomes necessary to briefly notice the latter instrument. The power of attorney authorized Horner to receive the warrants and other evidences of indebtedness coming to Williams under the latter's contract with the city, to exchange the same for money on the best terms possible, and with the proceeds to liquidate the claims against Williams for work performed and materials furnished in constructing the Twentieth-Street district sewer. By the very terms of the instrument, Horner, in receiving and disbursing the money in question, was placed as nearly as possible in the position occupied by Williams, and vested with the precise power and authority that Williams himself would have exercised had no one been selected to act in his stead. He was not required to distribute the funds *pro rata* among the workmen and material-men, nor were preferences among creditors forbidden. If the money coming into Horner's hands by virtue of Williams' contract with the city should prove insufficient to pay all the claims in connection therewith, he might discriminate in favor of one claimant and against another; he could pay all that was due the workmen, and leave the material-men partially unpaid; or he might pay the entire claim of one material-man and a portion of the claim of another. Whatever Williams could legally have done in this regard Horner was empowered to do. That this was Horner's belief at the time is evidenced by the fact that he paid a part of the creditors, viz., the workmen, in full, leaving others, including the Laclede Company, partially unsatisfied. We discover in the power of attorney no inconsistency with Williams' agreement

as to the mode of paying and securing the purchase price of the Laclede Company's sewer-pipe, and upon Horner's acceptance of the trust he became a party to this portion of the contract for pipe, and bound himself to comply with its terms. If he did not intend to do so, he should have declined acceptance; for, under the circumstances, it is fair to presume that his conduct induced the company to make the agreement with Williams, and to part with its property. No brief has been filed by defendant in error, and we are not advised of the theory upon which the court below proceeded; but according to our view, under the pleadings and evidence as presented by the present record, Horner, as well as Williams, should have been held liable. The judgment is accordingly reversed, and the cause remanded for a new trial.

ELLIOTT, J., having presided at the trial below, did not participate in this decision.

(14 Colo. 294)

CRANE v. FARMER.

(Supreme Court of Colorado. Feb. 28, 1890.)

FORCIBLE ENTRY—APPEAL—JOINDER IN ERROR.

1. Appeals to the supreme court in forcible entry and detainer cases are allowable only where the judgment appealed from amounts, exclusive of costs, to \$100, or relates to a franchise or freehold.

2. Where the judgment sought to be appealed from is not appealable, consent by joining in error is ineffectual to save the appeal.

(Syllabus by the Court.)

Appeal from Arapahoe county court.

Ross & Deweese, for appellant. F. A. Williams, for appellee.

ELLIOTT, J. Appellee moves to dismiss the appeal on the ground that the judgment sought to be reviewed is not appealable. The action was one of forcible entry and unlawful detainer, and it is conceded that the judgment rendered does not "amount, exclusive of costs, to the sum of one hundred dollars, or relate to a franchise or freehold." It is clear that the judgment is not appealable, if the Code of Civil Procedure (section 388) is to control. But it is claimed that all actions of this kind are appealable under the act of 1885 relating to forcible entry and detainer. By section 22 of the latter act, (page 230, Sess. Laws 1885,) it is provided: "Appeals and writs of error to the supreme court from the judgment of the district, county, or superior courts of this state, in proceedings under this act, shall be allowed as in other cases: provided, that in addition to the conditions now prescribed by law, the condition of the undertaking on appeal, and the time of filing the same, shall be required by this act [as] in cases of appeal from justices of the peace. And in cases of appeal from judgments founded upon causes of action, embraced in subdivision four of section three of this act,

the deposit of rent money during pendency of appeal shall be made, or judgment of affirmance shall be entered, in the manner provided in section eighteen of this act." Upon careful consideration, we are of the opinion that it was not the intention of the general assembly to give greater opportunity for appeals to the supreme court in this class of cases than in other civil actions. We construe the act of 1885 as providing that appeals to the supreme court in forcible entry and detainer cases shall be allowed as in other cases only when the judgment appealed from amounts to \$100, exclusive of costs, or relates to a franchise or freehold; thus making the right of appeal in such cases subject to the conditions prescribed by the Code of Civil Procedure, or other general law regulating appeals to this court, and other additional conditions, as provided in section 22 of the act. In the case of *Eckles v. Bouco*, 11 Colo. 522, 19 Pac. Rep. 465, it appears that the suit was commenced as an action of unlawful detainer. The defendant, by his answer, sought to raise an issue of a freehold title in a third person, but was unsuccessful. Upon the county court giving judgment for the restitution of the premises, without any money judgment in favor of the plaintiff, an appeal was taken and entertained by this court. But the question of the validity of the appeal was not raised in this court, and the judgment of the lower court was affirmed. So the case cannot be considered in any sense as a precedent against the views expressed in this opinion.

It is urged by counsel for appellant that appellee, having joined in error in this case, should now be held to have consented to the appeal. If this were a new question, we might be inclined to give it serious consideration; for we are aware that it has been determined differently in different jurisdictions. In the preparation of their briefs on this motion, counsel have been very diligent in searching for the decisions of other states upon this question, while entirely overlooking our own. This is a common fault, especially among the older attorneys of this bar, whose habits were formed while our reported decisions were exceedingly limited. But it should be borne in mind that Colorado now has 12 volumes of published reports, covering a variety of subjects; and counsel may save time and aid us materially by citing them whenever they are pertinent. There are numerous decisions of this court expressly declaring that, where the judgment sought to be appealed from is not appealable, consent by joining in error is ineffectual to save the appeal; that the defect is a jurisdictional one, and may be taken advantage of after, as well as before, joinder in error. *Peabody v. Thatcher*, 3 Colo. 275; *Thorne v. Ornauer*, 6 Colo. 39; *Hall v. Mining Co.*, Id. 81; *Vallette v. Smelting Co.*, 11 Colo. 204, 17 Pac. Rep. 509. This disposes of the motion adversely to appellant. The motion of appellee will be sustained, and the appeal dismissed.

CANNON et al. v. WILLIAMS.

(Supreme Court of Colorado. Jan. 31, 1890.)

MECHANIC'S LIENS.

1. Gen. St. Colo. § 2140, requires a mechanic's lien claimant to file with the clerk and recorder of the county a statement containing "an abstract of indebtedness showing the whole amount of debt, the whole amount of credit, and the balance due or to become due to the claimant." *Heid*, that a statement which contains neither the total amount of debts or credits, nor an abstract of indebtedness, but merely the balance claimed to be due, one-third of which represents an item for which no lien could be allowed under the statute, is not sufficient to entitle the claimant to a lien, even though the owner of the land was not misled thereby.

2. Where a prior owner continues to work a mine for his own benefit, a settlement by him with one of his employees for services performed cannot be regarded as putting the subsequent owner, who consented to the working of the mine, in possession of facts relating to the debits and credits of the account of the employee, who subsequently seeks to subject the mine to a mechanic's lien.

3. Under Gen. St. Colo. § 2155, which provides that a mechanic's lien claimant, on establishing his claim, "shall have a judgment against the party personally liable," and also a decree establishing the lien, a lien claimant may have a personal judgment for the sum due him, though the lien itself fail; section 2161 providing that the practice in mechanic's lien cases shall be in accordance with the Code of Civil Procedure. *HART, J.*, dissenting.

Appeal from district court, Douglas county.

Suit was begun by one George C. Bates against James Cannon, Jr., William J. Dounce, Morgan D. Williams, and others, to establish his claim for services rendered as an attorney, and to secure a prior lien upon certain coal mines, as to which two of the defendants were considered owners, and the others lien claimants. Williams filed an answer and cross-complaint, alleging the performance of labor upon the mining property, the non-payment of compensation therefor, and a compliance with the mechanic's lien law then in force. He asked judgment for \$1,923.39, and that the same be made a lien upon the premises in accordance with the statute. Cannon and Dounce filed an answer to the cross-complaint, and the issue thus made was tried by a referee, who reported findings of fact, conclusions of law, and a judgment denying the lien. Exceptions being taken to the conclusions of law and judgment, the court, upon the hearing, set them aside, and entered judgment against Cannon for \$1,822.66; also a decree giving Williams a lien for \$1,075 of the amount claimed as demanded in his cross-complaint. From that decree the present appeal is prosecuted.

T. D. W. Youley, for appellants. *William Dillon*, for appellee.

HELM, C. J., (after stating the facts as above.) No exceptions were taken to the referee's findings of fact, hence these findings are to be accepted as true. The decision of this court turns, therefore, upon the law applicable to such facts. Differences of opinion exist among the decisions as to whether mechanic's lien statutes should receive a strict or a liberal construction. But since these statutes are manifestly equitable

in purpose, and remedial in nature, and especially since the course of legislation on the subject in this state has been reasonably just to all parties concerned, we are inclined to favor the doctrine of liberal construction. *Barnard v. McKenzie*, 4 Colo. 251; *De Witt v. Smith*, 63 Mo. 263; *Skyrme v. Mining Co.*, 8 Nev. 219. But to lay the foundation for this peculiar relief there must, of course, be a substantial compliance with all material requirements of the law. *Phil. Mech. Liens*, § 16, and cases; *Railroad Co. v. Harris*, 12 Colo. 226, 20 Pac. Rep. 764. The statute in force at the time of these proceedings (section 2140, Gen. St.) required the lien claimant to file a "statement" or notice with the clerk and recorder of the county where the land was situate, containing, among other things, "an abstract of indebtedness, showing the whole amount of debt, the whole amount of credit, and the balance due, or to become due, to the claimant." In the case at bar the notice contains no such abstract. It wholly fails to state the account. It names neither the total amount of debt, nor the total amount of credit. It makes no attempt in any way to show the debits or credits. It merely states the balance claimed to be due. Moreover, more than one-third of this alleged balance represents an item for which no lien could be allowed under the statute. We shall assume that appellee, by including this item, was not guilty of bad faith either in fact or in law, and that his act constituted an innocent mistake, which would not, of itself, destroy the lien. *Phil. Mech. Liens*, § 355. Nevertheless it might deceive, and is a serious additional imperfection in the notice. We do not speculate concerning the purpose of the legislature in requiring that the notice contain this abstract. Whatever such purpose may have been, it is sufficient for us that the statute was thus written, and that its language is free from ambiguity. The doctrine of liberal construction is not broad enough to cover such defects as the one in question. There is not a substantial compliance with the statute. Stating a balance due can hardly be regarded even as an attempt to give the abstract of indebtedness required; and this is especially true where a large part of the alleged balance arises from an account for which no lien could be decreed. *Id.* § 357, and cases cited.

Counsel for appellee seeks to avoid the effect of the omission in question by claiming that appellants could not have been deceived or misled thereby. When there has been a substantial compliance with the statute, mistakes that do not tend to deceive parties interested may be overlooked. But the consideration that there is in a given case an absence of resulting injury in fact cannot supersede or dispense with the material steps designated as a condition precedent to the lien. If it could, liens might be maintained in many cases without filing any "statement" whatever; for it will sometimes happen that the parties interested are in possession otherwise of all facts to be stated in the no-

tice, including the intention to claim a lien.

But the facts in the case at bar, as well as the law, do not support counsel's premises. During the period of appellee's service under his employment, which employment was by Cannon, the property changed hands twice. The first of the three owners, the Denver Coal Company, was not made a party to the original suit, nor to the proceeding by cross-complaint. The second owner was appellant Cannon. The third owner, who held title at the time of trial, was appellant Dounce. Cannon does not appear to have been Dounce's agent in mining and marketing coal. The referee reports that after Dounce purchased Cannon continued to work "the mine for his own benefit, with the knowledge of Dounce, though Dounce was not interested pecuniarily in such mining operations." The due-bills resulting from the settlement between appellee and Cannon, prior to the filing of the notice in question, were in Cannon's name alone, and apparently exclusively on his own behalf. Under these circumstances, this settlement, without other proofs, cannot be regarded as putting Dounce in possession of the facts relating to the debits and credits constituting appellee's account. Thus the settlement, which is the main reliance of counsel in support of his proposition that Dounce could not have been misled or prejudiced by the defective notice, fails to perform the function assigned it.

Under the mechanic's lien law of 1872, and the lien laws enacted during the succeeding 10 years, the foregoing conclusions would probably require a dismissal of the cross-complaint, for the money judgment then shared the fate of the lien. *Barnard v. McKenzie*, supra; *Hart v. Mullen*, 4 Colo. 512. But the lien statute of 1883, under which the parties to this litigation acted, contained the following: "Each party who shall establish his claim under this act shall have a judgment against the party personally liable to him for the full amount of his claim so established, and shall have a lien established and determined in said decree upon the property to which his lien shall have attached, to the extent hereinbefore stated." Gen. St. § 2155. Also, "The practice under this act shall be in accordance with the Code of Civil Procedure of the state of Colorado." *Id.* § 2161. Giving these provisions a liberal construction, we must regard them as modifying the preceding statutes; and a departure from the view announced in the decisions mentioned is accordingly rendered necessary. Such legislative action, while in accord with the principles of the reformed procedure, tends also to promote substantial justice. The pecuniary recovery is based upon a judicial investigation of all matters that would be pertinent in an ordinary action at law, a multiplicity of suits is avoided, and it will hardly be claimed that injury follows because the court, as a chancellor, determines the amount of plaintiff's recovery. Besides, the special finding of a jury may be invoked upon the question of damages, as in

other equity cases. The foregoing construction is in harmony with the policy of present legislation upon this feature of the subject in hand. The act now in force places the right to a personal judgment for the sum due, though the lien itself fail, beyond possible controversy. Sess. Laws 1889, p. 252, § 11. The decree recognizing the lien upon the premises referred to is reversed, but the judgment against Cannon for \$1,822.66 will not be disturbed. The cause is remanded, with directions to dismiss the proceeding so far as the mechanic's lien is concerned, but to issue execution for collection of the debt, as in the case of money judgments recovered through ordinary actions at law.

HAYT, J., (*dissenting*.) I concur with that portion of the foregoing opinion in which it is held that the mechanic's lien cannot be maintained, but dissent from the views expressed upon the other branch of the case. In my judgment, upon the failure of the appellee to establish a lien, the entire proceedings should have been dismissed. This rule has been repeatedly announced by this court, and ought not to be now departed from unless changed by positive legislative enactment. *Jensen v. Brown*, 2 Colo. 694; *Barnard v. McKenzie*, 4 Colo. 251; *Hart v. Mullen*, Id. 512; *Mining Co. v. Finch*, 6 Colo. 214; *Railroad Co. v. Harris*, 12 Colo. 226, 20 Pac. Rep. 764. Such change was made at the last session by the insertion of the following provision: "If, on trial of a cause under the provisions of this act, the proceedings will not support a lien, the plaintiff or plaintiffs may proceed to judgment, as in an action on contract, and execution may issue as in such cases provided, and said judgment shall have all the rights of a judgment in a personal action." See Sess. Laws 1889, § 11, p. 252. This cause had been tried and determined in the courts below, however, prior to this amendment, and of course cannot be affected thereby.

I discover nothing in the language quoted in the majority opinion from sections 2155 and 2161, Gen. St., that permits the entry of a personal judgment unless the lien be first established. I am of the opinion that the amendment of 1889 referred to was enacted for the sole purpose of making this change. If the prior statute permitted a personal judgment without a lien, this amendment of 1889 was unnecessary. I think it was necessary, and that the only authority for such a judgment is derived therefrom. As this case is not affected by the act of 1889, the entry of a personal judgment against Cannon was improper, and this part of the judgment should also be reversed.

(14 Colo. 79)

RICO REDUCTION & MINING CO. v. MUSGRAVE *et al.*

(*Supreme Court of Colorado. Jan. 31, 1890.*)

MINERS' LIENS—TENANTS IN COMMON—EVIDENCE AT FORMER TRIAL.

1. The legislation of this state upon the subject of mechanics' and miners' liens should receive a liberal construction.

2. A statement upon which a miner's lien is sought to be based, which clearly expresses an intention to hold and claim a lien, and contains a description of the property complete on its face, and shows the sum total in dollars and cents which the claimant's work amounts to, and states that the same is due, and that no portion of it has been paid, is admissible in evidence against an objection challenging its sufficiency.

3. A statement filed in the recorder's office against several mining claims need not state that said claims are owned, claimed, or worked by the same person or persons so as to be deemed one mine, for the purposes of the miners' lien statute; it is sufficient if such matters are established by proper averment and proof, or by proof alone, when the defect in the pleadings is waived by answering over.

4. To entitle a party to such lien there must be a contract, express or implied, with the owner of the property on which the lien is claimed. The burden of proving such contract rests on the party asserting it, and he must ascertain for himself whether the person with whom he contracts is the owner, or has an interest in the land on which he expects to claim a lien. It is sufficient if the contract be with an authorized agent of the owner.

5. The law does not invest one tenant in common with authority to improve or develop real property at the expense of his co-tenants, without their authority or consent.

6. It is not the usual practice of this court to substitute its own findings in the place of the findings of the trial court upon matters of fact based upon conflicting evidence given orally in open court; but, where the conclusions of law are erroneous, the general rule is to reverse the judgment, and remand the cause for a new trial.

7. On a retrial, where there has been a loss of witnesses by death or removal from the jurisdiction of the court, evidence taken at the former trial, and reserved by bill of exceptions, or otherwise correctly preserved, may be resorted to.

(*Syllabus by the Court.*)

Appeal from district court, Dolores county. *Russell & McCloskey*, for appellant. *Julius Thompson* and *Pence & Pence*, for appellees.

ELLIOTT, J. The appellant, the Rico Reduction & Mining Company, was defendant below in proceedings instituted to enforce sundry liens upon certain mining property on account of work and labor performed thereon by appellees, who recovered judgment, sustaining their respective claims as liens against the property of appellant. The statements filed in the office of the recorder, upon which the several liens of appellees were based, respectively, were as follows, differing as to name of claimant, dates, and amounts, but not as to substantial requisites: "The Rico Reduction and Mining Company, Harry Cahn, and L. Silverman: You are hereby notified that I claim and hold a lien upon the Little Suse, Little Wonder, and Russian Bear lodes and mining claims, situated adjoining each other on the north side of, and about one-half mile from, West Dolores river, in Dolores county, state of Colorado; location certificate of the first of said claims being recorded in book 21, page 97; location certificate of second of said lodes being recorded in book 21, page 97; and location certificate of third of said claims being recorded in book 21, page 79, of records of Dolores county, to which reference in each case is here made for a more particular description, and that such lien is claimed for and on ac-

count of 121 days' work performed by me, as a miner upon said properties, between the 7th day of January, 1884, and the 31st day of May, 1884, for which labor you agreed to pay me at the rate of two and a half dollars per day, amounting to the sum total of \$302.50, which you agreed to pay me as soon as said work was done, but no portion of which has as yet been paid." Objections to the sufficiency of these statements at the trial were overruled by the court, and these rulings are assigned for error.

It is contended that the statements are defective in the description of the property, and in the abstract of indebtedness. In a recent and well-considered opinion by this court, *Cannon v. Williams*, ante, 456, it is declared that our legislation upon the subject of mechanics' and miners' liens should receive a liberal construction. The same doctrine was announced in *Barnard v. McKenzie*, 4 Colo. 251, in relation to the law of 1872. Section 27 of the Act of 1883, (Gen. St. c. 65,) referring to the statement by which the lien may be claimed, provides that "any informality in any such statement that shall not tend to mislead shall not affect the validity thereof." Viewing this provision of the statute in the light of the opinions above cited, it is apparent that neither of the foregoing objections is well taken. On the face of the several statements, the description of the property appears to be complete. The "notice of intention to claim and hold a lien" is clear. The "whole amount of debt" is shown in the "sum total" of dollars and cents which the claimant's work amounted to. The "whole amount of credit" is shown to be nothing by the positive assertion that "no portion" of the amount earned "has yet been paid." It is plainly asserted that the amount earned was agreed to be paid "as soon as said work was done," hence, it is evident that the "balance due" is exactly the same as the "whole amount of debt," and the sum need not be repeated. Thus the requirements of the statute are substantially complied with.

The further objection is urged that the statements do not show how many days the claimants worked on each lode, nor the amount due therefor, nor that said lodes and mining claims were owned, claimed, or worked by the same person or persons, so as to be deemed one mine for the purposes of the mechanics' and miners' lien statute. In our opinion, these matters need not be set forth in the statement more fully than they are. It is sufficient if they are established by proper averment and proof, or by proof alone, when the defect in the pleading is waived by answering over, as in this case.

It is further assigned for error that the judgment is contrary to the findings of the court, and the law applicable thereto. An intelligent consideration of this question necessitates a further statement of the matters at issue in this litigation, and a better understanding of the interest of the parties in the property in controversy. These proceedings were originally commenced against the Rico

Reduction & Mining Company, a corporation, Harry Cahn, and L. Silverman, as joint defendants; it being alleged that said company was the owner of an undivided half interest in all of said property. Each plaintiff based his claim for a lien upon work performed under an alleged verbal agreement with the Rico company, entered into through one Phil Crout, as the agent of the company, duly authorized to employ laborers on the property in its behalf. The Rico Company, by its answer, admitted its ownership of the undivided half of the property, but denied the making of any agreement for the employment of plaintiffs, or either of them, through the agency of Crout, or otherwise. It was further alleged in the answer, on information and belief, that Crout was the owner of the other half interest in said mining property, and that whatever work may have been done by plaintiffs on said property, as alleged in the complaint, was so done for and on behalf of said Crout, and for and on behalf of his own interest in the property, and without the knowledge or consent of the Rico Company. The proceedings as against Cahn and Silverman were voluntarily dismissed by plaintiffs before the trial in the district court, and upon the trial the findings of the court were, *inter alia*, in substance as follows: That the defendant the Rico Company was the legal and equitable owner of an undivided one-half interest, and that Phil Crout and Joseph Hoskins were the equitable owners of the other undivided half interest in said mining lodes; that no contract was entered into between the defendant company and Phil Crout, authorizing said Crout to act as the agent of said company, and to bind said company for the contracts made by said Crout with plaintiffs, and that said company did not ratify the contracts of said Crout with said plaintiffs; that defendant company had actual knowledge of the working and development of the said lodes by the plaintiffs, and received one-half the benefit and advantage of the labor bestowed by plaintiffs on the same. To entitle a party to a mechanic's or miner's lien the work must be done or the material furnished by contract, express or implied, with the owner of the property on which the lien is claimed. The burden of proving such contract rests on the party asserting it, and he must ascertain for himself whether the person with whom he contracts is the owner or has an interest in the land on which he expects to claim a lien for the improvement contributed to by his work or material. It is sufficient if the contract be with an authorized agent of the owner; and, if the contract be with one of several co-tenants, undertaking for himself alone, the lien may be enforced for the whole value of the improvement against the moiety of such contracting party. *Mellor v. Valentine*, 3 Colo. 255; *Williams v. Canal Co.*, 13 Colo. —, 22 Pac. Rep. 806. In *Phillips on Mechanics' Liens* (section 77) it is said: "No man has a right to improve the property of another against his consent, and charge him with the expenses. Perhaps a joint owner

may repair and preserve property at the expense of all the owners, and without their consent, especially if such consent is unreasonably withheld. But this is all that he can do. He cannot improve the property. * * * One joint tenant, however, may create a lien in favor of a mechanic on his own interest in land. So, although the contract is to be made with the 'owner,' yet, if but one of several persons who purchase materials for building owns the land, the lien will be good against his interest." *Freem. Co-ten.* §§ 261, 262; *Mumford v. Brown*, 6 Cow. 475. From the findings of the court it appears that Crout was one of several owners of the property upon which plaintiffs were employed, and against which they seek to establish their several liens. They claim to have made their contracts of employment with the company by verbal agreement, through Crout, as the company's agent. The court finds that he had no authority as such agent, and that the company did not ratify his contracts with plaintiffs. It is true the court finds that the company had actual knowledge of the working and development of the property by plaintiffs, and that it received one-half the benefit of their labor; but the findings do not state when the company acquired such knowledge, nor do they indicate that at any time the company had knowledge that Crout had assumed to employ plaintiffs for or in its behalf. As we have seen, the law does not invest one tenant in common with authority to improve or develop real property at the expense of his co-tenants, without their authority or consent. Hence, it was error for the court, upon such findings, to render judgment sustaining plaintiffs' liens against the interest of the Rico Company in the mining property.

It is contended by counsel for appellees that the evidence is sufficient to warrant this court in finding that Crout did have authority from the Rico Company to employ plaintiffs in its behalf for the development of the mine, and that they were so employed. If the trial court had made such findings as a basis for its decree, perhaps a judgment of affirmance might be rendered. But we cannot disregard the fact that the findings are otherwise, and that they are based upon conflicting evidence, most of which was given orally in open court. Under such circumstances, the usual practice of this court, where the conclusions of law are erroneous, is to reverse the judgment, and remand the cause for a new trial; and it is accordingly so ordered.

ON PETITION FOR REHEARING.

(March 14, 1890.)

PER CURIAM. The only matter suggested in the application for a rehearing is that we shall direct a money judgment in favor of appellees, on the ground that on a retrial of this case there may be a failure of justice, occasioned by the lapse of time and the loss of witnesses by death or removal from the jurisdiction of the court. In case of such diffi-

culty, it is well settled that the evidence taken at the former trial, and reserved by bill of exceptions, or otherwise correctly preserved, may be resorted to, in connection with any additional evidence which either party may produce; and thus a trial *de novo* upon the whole case, with new findings of fact, may be had. This may be quite advantageous to appellees, for the findings of fact on the former trial would not sustain a personal judgment against the Rico Company any better than they sustain the lien. With this explanation, the rehearing asked for will be denied.

(14 Colo. 280)

JORDAN v. McNULTY et al.

(Supreme Court of Colorado. Feb. 28, 1890.)

PARTITION—PARTIES—COMMISSIONERS.

1. Code Civil Proc. Colo. 1888, c. 24, § 280, provides that when any lands, tenements, etc., shall be held in joint tenancy, tenancy in common, or coparcenary, it shall be lawful for one or more of the parties interested to present to the district court of the county where such lands or tenements lie their petition, praying for a division and partition. Section 282 provides that "every person having such interest as is specified in this chapter, whether in possession or otherwise, * * * shall be made a party to such petition." *Held*, that an answer which avers that the premises sought to be partitioned had been leased "prior to the commencement of this suit," and that the lessees "have been in possession" without disclosing the terms, duration, or continued existence of the lease, is not sufficient to require the lessees to be made parties to the proceeding.

2. Under Code Civil Proc. Colo. § 288, which provides that "the court, when it shall order a partition of any premises to be made under the provisions hereof, shall appoint three commissioners, not connected with any of the parties either by consanguinity or affinity, and entirely disinterested, to make partition," notice to the parties of the substitution of a commissioner in the place of one previously appointed, who has declined to act, is not necessary, as any objection to the commissioner may be interposed as an objection to the report at any time before confirmation.

3. Where the commissioners appointed to make partition of lands view the premises before one of them has taken the oath prescribed by the statute, and their report is filed, which for some reason is not confirmed, and afterwards the commissioner takes the oath before the filing of the final report, the filing of the first report does not render the commissioners *functus officio*, nor is the failure to take the oath before viewing the premises a reversible error.

Commissioners' decision. Appeal from district court, Clear Creek county.

W. P. Hughes, for appellant. *R. S. Morrison*, for appellees.

RICHMOND, C. McNulty and Noone filed a complaint for partition of certain mining property. Jordan and Ryan were made parties defendant. Ryan demurred to the complaint, and afterwards withdrew the demurrer, and permitted default to be entered. Jordan answered, and, among other things, set up the fact that all of the parties had agreed to and did lease the premises sought to be partitioned, prior to the commencement of this action. Thereafter the court appointed three commissioners to partition the land. At a subsequent term of the court, one of the commissioners having declined to act, the

court appointed one G. W. Hall in his place. On the 20th of June, 1886, the commissioners filed a report. This report was objected to by Jordan, for the principal reason that Hall had not taken the oath prescribed by the statute. What, if any, action was taken by the court concerning this report, does not appear by the transcript or abstract of record. But it is fair to assume, from the record, that the report was not received, because the record discloses that a third report was subsequently filed. It also discloses the fact to be that, prior to the filing of the third report, Commissioner Hall took the prescribed statutory oath. No objection was made to the conclusion of the commissioners, nor to their conduct. It would seem, from the transcript, abstract, and arguments, that the proceedings of the commissioners were regular and in conformity with the statute, save and except the one fact that Hall took the oath prescribed by the statute, after reviewing the premises to be partitioned, and before making the final report. This was the main objection relied upon by appellant in the oral argument before the court. It is also urged that the lessees were necessary parties to this proceeding, and, further, that Hall's appointment was made without notice to appellant. Section 280, c. 24, Code, (Gen. St. 1883), provides that "when any lands, tenements, or hereditaments shall be held in joint tenancy, tenancy in common, or coparcenary, whether such right or title be derived by purchase, devise, or descent, or whether any, all, or a part of such claimants be of full age or minors, it shall be lawful for one or more of the parties interested * * * to present to the district court of the county where such lands or tenements lie * * * their petition, praying for a division and partition. * * *" "Sec. 282. Every person having such interest as is specified in this chapter, whether in possession or otherwise, and every person entitled to dower in such premises, if the same has not been admeasured, shall be made a party to such petition." "Sec. 284. All persons interested in the premises of which partition is sought to be made according to the provisions hereof, whose names are unknown, may be made parties to such petition by the name and description of unknown owners or proprietors of the premises, or as the unknown heirs of any person who may have been interested in the same." By the above provisions it seems that the only necessary parties, at least in the first instance, in proceedings of this nature, are those who hold a joint tenancy, tenancy in common, or coparcenary. Besides, from the abstract of the record under which this appeal is prosecuted according to the act of 1885, it does not appear that the alleged lessees had any definite or subsisting leasehold interest in the premises sought to be partitioned. An answer which avers that a lease had been granted "prior to the commencement of this suit," and that the lessees "have been in pos-

session," etc., without disclosing the terms, duration, or continued existence of the lease, is not sufficient to require the supposed lessees to be made parties to the proceeding for partition under the provisions of the statute.

The next objection to the report and its confirmation that we shall consider is the absence of notice to appellant of the intention of substituting Hall in place of the commissioner who had declined to act. Section 288 provides that "the court, when it shall order a partition of any premises to be made under the provisions hereof, shall appoint three commissioners, not connected with any of the parties either by consanguinity or affinity, and entirely disinterested. * * *" No objections were interposed that Hall was related directly or indirectly, or in any way interested in the proceedings. Ordinarily, courts prefer to make the appointment of such individuals with the consent of the parties to the proceedings, but we can conceive of many circumstances which would justify a court in making appointments without such acquiescence, when the parties appointed do not come within the exceptional provisions of the law, and we are justified in assuming that such circumstances existed at the time Hall was appointed. The statute does not contemplate, nor does the practice in such cases warrant the court in giving, notice of its purpose to comply with the mandatory provisions of the statute. If Hall was objectionable, because he came within the exceptions above enumerated, the objection could have been raised as well after as before his appointment. It could have been interposed as an objection to the report before confirmation. We think there was no error in the failure of the court to give notice as claimed by appellant.

The next and most serious question is the objection raised that the oath prescribed by the statute was not taken by Hall previous to entering upon the duties of commissioner. A careful examination of the authorities inclines us to the opinion that this, of itself, is not sufficient to warrant us in reversing the judgment of the court. The statute provides that the commissioner "shall take an oath, before the court or some justice of the peace, fairly and impartially to make partition of said lands in accordance with the judgment of the court," etc. Code Civil Proc. 1883, § 288. It appears that the first report was filed before Hall had taken his oath as commissioner, and it is suggested that, the commissioners having filed a report, they became *functus officio*, and any subsequent act would not cure the objection of failure to take the oath. We cannot concur in this position. In *Freem. Co-tenancy*, § 526, the doctrine is announced that, "if the report be set aside for the misconduct of the commissioners or any of them, new ones may be appointed in their places. If for a mere irregularity or unintentional omission to perform some duty, such as to give notice to the par-

ties or to take the oath prescribed by statute, the same commissioners will be retained, and proceed a second time to execute the order for partition." "If any irregularity has been committed by the commissioners, or they have exceeded their authority, or acted fraudulently or unfairly, any party dissatisfied may move, on the usual notice, to set aside the report. This the court has power by statute to do, and to appoint new commissioners, who are to proceed in like manner. * * * The causes for setting aside a report are, of course, various. * * * It is said that it will not be disturbed except upon grounds similar to those upon which a verdict would be set aside and a new trial granted. Doubleday v. Newton, 9 How. Pr. 71. * * * For an unintentional omission to * * * take the oath required by statute, the same commissioners will be retained and proceed a second time to execute the order for partition." 2 Van Santv. Eq. Pr. 47.

There is nothing in this case tending to show the slightest impropriety on the part of the commissioners,—no objection that the recommendations presented in the report were not equitable and eminently proper; and the mere omission to take the oath prescribed is, in our judgment, such an irregularity as could be readily cured, and was cured, by a re-reference of the matter to the commissioners, and the taking of the oath by Commissioner Hall, prior to the filing of the report which was subsequently confirmed by the court. Having once viewed the premises, being thoroughly familiar with the situation, and finding that the premises were not susceptible of a division, without manifest prejudice to the owners, a further view of the premises was unnecessary. The commissioners had met together upon the premises, had consulted upon the matter of the partition, and had arrived at a conclusion. This, we think, was a substantial compliance with the provisions of the statute. It has been held, in some instances, that a report of the commissioners need not necessarily be signed by all three. In the case of Kane v. Parker, 4 Wis. 123, it was held that the signature of the three commissioners to the report is not essential. The court said: "It is true that he [one of the commissioners] did not sign and acknowledge this report with the other commissioners, nor was it necessary for him to do so. If he met and acted with the other commissioners in making the partition, it was sufficient. His neglecting to sign and acknowledge the report does not do away with the presumption arising from the above circumstances, that he did meet and act with the other commissioners in making the partition." See, also, Underhill v. Jackson, 1 Barb. Ch. 73. We find no error in the action of the court in confirming the report of the commissioners. The judgment should be affirmed.

REED and PATTISON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

(14 Colo. 125)

BUTLER *et al.* v. GAGE *et al.*

(Supreme Court of Colorado. Dec. 24, 1889.)

CONTRACTS—INTERPRETATION—PARTIES—EXECUTORS—DECEIT.

1. A provision in a contract for the sale of land that it should not be "assignable or negotiable," and that the purchase money should be payable to the vendor, and "only to him, and none other," is not violated by the vendor assigning the contract as collateral security, as the only effect of such provision was to prevent the title to the chose in action from passing to another so as to preclude defendants from asserting any equity or defense that might arise between the original parties.

2. The assignee has such an interest in the contract as makes him a proper party to an action to enforce it.

3. The vendor, after such assignment, still retains such an interest in the contract as makes him a proper party to an action for its enforcement; and, after his death pending such litigation, his executors have the right to be substituted as parties.

4. The right of the executors to be made parties is not extinguished by the act of the assignee in asking to be made sole plaintiff, and by the order of court making him so; nor does such action work a discontinuance as to the executors, though it is had with their full knowledge.

5. The fact that, by making the executors parties to the action, defendants were precluded from making their proof, cannot affect the right of the executors to become parties.

6. Where purchasers of mining property enter into possession, and, after finding that they have been deceived by misrepresentations of the seller, fail to either rescind the contract of purchase or affirm it, and bring an action for the deceit, but continue to exercise acts of ownership, they are estopped from setting up the misrepresentations as a defense to an action to enforce the contract.

Commissioners' decision. Appeal from district court, Lake county.

The complaint upon which the cause was tried was the original complaint, to which a general demurrer was filed; defendants alleging that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained. The case was brought to this court on error, where the judgment of the court below was reversed, and the cause remanded for further proceedings. Linn v. Butler, 8 Colo. 355, 8 Pac. Rep. 588. The portions of the complaint necessary to an understanding of the case are as follows: "(1) That on the 24th day of May, A. D. 1879, the plaintiff, William P. Linn, was the owner of, and in possession of, an equal undivided one-fourth (1/4) interest in and to the American mine, lode, ledge, or deposit, situated in California mining district, Lake county, Colo. * * * (2) That upon the day and year last aforesaid said Linn sold his right, title, and interest in and to said American mine to the defendants for the sum of five thousand seven hundred and fifty dollars, (\$5,750,) which sale was evidenced by the following agreement in writing, in words and figures following, and is made a part of the complaint, to-wit: 'This agreement, in duplicate, made and entered into

this 24th day of May, A. D. 1879, by and between W. P. Linn, party of the first part, and Hugh Butler and C. W. Wright, parties of the second part. Whereas, on the day of the date hereof said second parties purchased of and from said Linn his right and title in and to the American mine for the sum of five thousand seven hundred and fifty dollars, (\$5,750,) payable in installments, that is to say, two hundred and fifty dollars (\$250) which has already been paid, receipt whereof is hereby confessed, two hundred and fifty dollars (\$250) in thirty (30) days next after the date hereof, two hundred and fifty dollars (\$250) in sixty days next after the date hereof, and the remaining five thousand dollars (\$5,000) out of the net proceeds of said mine, as hereinafter specified. Whereas, in pursuance of said agreement, said Linn hath on this day, in due form, conveyed unto said second parties said interest in said mine: Now, therefore, this agreement witnesseth, that for and in consideration of the premises it is mutually agreed by and between said parties that this agreement shall not be assignable or negotiable, and that the sums of money herein agreed to be paid shall be due and payable to the said Linn, and only to him, and to none other. And it is further agreed on the part of said second parties that they will at the end of thirty (30) days next after the date hereof pay unto said Linn said sum of two hundred and fifty dollars, (\$250,) and in thirty (30) days next thereafter a like sum, and that they will also pay unto said Linn the remaining installment of five thousand dollars, (\$5,000,) it being well understood, however, that said payment of five thousand dollars (\$5,000) shall only be due and payable upon the terms and conditions herein, that is to say, that said latter sum shall be due and payable only out of the net proceeds received from the sale of ore taken from the said American mine by said second parties, such net proceeds to be the net proceeds aforesaid of the undivided one-fourth interest of said mine, that being the interest conveyed by said Linn to said second parties. And it is hereby further agreed and fully understood that the net proceeds above specified shall be construed only to mean the money received by said second parties from the sale of ores mined and taken from said mine by them on account of said one-fourth interest, and left remaining in hand after paying all expenses of such mining, as well, also, all moneys advanced by said second parties, or paid out by them, for and on account of said undivided one-fourth interest, including the seven hundred and fifty dollars (\$750) paid on account of the purchase of said one-fourth interest; and, in case of sale by said second parties of said interest, then, and in that event, said five thousand dollars shall at once become due and payable. In witness whereof, said parties have hereunto set their hand on this, the day and year first hereinabove written. HUGH BUTLER. C. W. WRIGHT. WM. P. LINN.' (8) And af-

terwards, and on the 5th day of April last past, said Linn, for a good and valuable consideration, assigned in writing, to Charles F. Burrell, his right, title, and interest in and to the foregoing agreement, as security for the loan of twenty-seven hundred dollars (\$2,700) before then made by said Linn from said Burrell, which assignment was made with the knowledge and consent of said defendants. And afterwards, and on the 29th day of October last past, said Charles F. Burrell, for a good and valuable consideration, assigned and set over in writing all his right, title, and interest in and to said contract to Lewis C. Rockwell, who now holds said contract as collateral security for money theretofore loaned by him to said William P. Linn."

On the 5th of December, 1885, the defendants moved the court to dismiss the cause for the reason, "because it appears from the suggestion of the plaintiff of record in this cause that William P. Linn, the former co-plaintiff of said Rockwell, has, since the institution of the suit, departed this life, and because the action does not accrue to, or survive in, the said plaintiff Lewis C. Rockwell," which motion was argued, and on March 12, 1886, was overruled by the court. On the same date, defendants filed a demurrer to the complaint, which was likewise overruled. On the 14th of April following they filed their answer to the complaint. On April 30th the plaintiff L. C. Rockwell filed a motion that David A. Gage and Nathan S. Hurd, executors of Linn, deceased, be made co-plaintiffs with him in the case, assigning that the reasons or grounds of said motion were: "First, because defendants, by motion and in the answer, insist that plaintiff is not the real party in interest in this case; second, because defendants insist the contract sued on was not assignable by Linn, and hence L. C. Rockwell has no right to receive the money due thereon." Which motion was supported by the affidavit of L. C. Rockwell, and was argued by counsel, and taken under advisement by the court. On the same day plaintiff filed a demurrer to the answer of defendants. On the 25th of June, Nathan S. Hurd filed a petition asking that David A. Gage and himself, executors, be made co-plaintiffs with Rockwell. On the 23d of November following, by consent of counsel, an order was made that counsel, respectively, submit briefs in regard to the making of the executors co-plaintiffs on or before December 15th. On January 10, 1887, an order was entered making the executors parties, to which defendants excepted; and they were required by the court to prepare and tender a bill of exceptions within 60 days. In the first paragraph of the answer, defendants admit the making of the contract as alleged in the complaint. The second paragraph is as follows: "They deny that said contract was assigned to the said Charles F. Burrell with the knowledge and consent of said defendants, and they deny that they ever assented to the assignment of said contract either to the said Burrell or

to the said Rockwell." It is also averred that at some time thereafter, which date is not given, Moffatt and others began to sink a shaft on a small strip of unoccupied land near the line of the American claim, and discovered mineral in such shaft before any was discovered in the American mine, and that the vein or ledge found by Moffatt and others was the same as that alleged by Linn to have been found in the American claim previous to the sale; that defendants immediately informed Linn of the finding of the ore by Moffatt and others, and of the fact that the shaft of the American mine had not been sunk to mineral, and he again asserted that there had been found in the American mine before the other shaft had been commenced; that after having found the mineral or ore in the shaft, and fully complying with the law, Moffatt and others made application for a patent from the United States government to the ground under the name of "The Little Sliver," and that the application so made embraced a large part of the ground claimed as the American claim; that defendants, by the advice and at the request of Linn, joined the other owners of the American claim, and filed an adverse claim in the United States land-office against the application of Moffatt and others for a patent to the Little Sliver mine, and, within the time prescribed by law, brought suit in the district court for Lake county in support of said adverse claim; that, in preparing for the trial of the case, defendants learned that the representations made by Linn, that mineral in place had been found in the shaft on the American mine, were false; and that mineral in place had been first found on the Little Sliver claim, and that the location of the American mine was invalid. In the ninth paragraph defendants aver, in effect, that they stated all the facts to Linn, and that he advised defendants to make a compromise with the claimants of the Little Sliver lode, and stated to and agreed with defendants that any compromise that they might make would be satisfactory to him, and that he would change and modify the existing contract so as to relieve the defendants from its expressed terms. And in the tenth paragraph it is averred that, after making the compromise and consolidation of the two conflicting claims, defendants immediately and fully informed Linn of the said settlement and transaction, and that he assented to and ratified the same, and that it was agreed that the contract existing should be so modified that the interest of defendants in the consolidated property should be substituted for the payment of the money in place of the property sold by Linn to defendants. The fourteenth and part of the fifteenth paragraphs of the answer are as follows: "Said defendants further aver that it was stipulated by and between the said Linn and these defendants in said original contract, as well as in said supplemental contract, assenting to the settlement, adjustment, and compromise as aforesaid, that all the rights, benefits, and

privileges of the said Linn, and the right to demand and receive any and all moneys that might come to him under said contract, should not be assignable, and that the same should be payable to the said Linn only, and that the same was a joint, and not a several, contract on the part of these defendants; and they aver that they have never agreed or consented to any assignment of said contract, or any part thereof, or any interest therein, either to the said Burrell or to the said Rockwell; and they deny that the said Rockwell is now the owner of said contract, or any part thereof, or any interest therein; and they deny his right to maintain this suit against them. (15) And defendants further aver, upon information and belief, that the supposed assignment of said contract to said plaintiff was only for the purpose of securing the payment to said Rockwell of certain debts and claims held by said Rockwell against said Linn; and they further aver, upon information and belief, that the said debts and claims have been fully paid and satisfied. * * *

In the seventeenth paragraph, it is in substance averred that the plaintiff Linn died pending the decision of the writ of error in this court; that no application was made by the executors to become parties to the same; that, after the cause was remanded, Rockwell, with the knowledge and consent of the executors, applied to be and was made sole plaintiff; and that for those reasons the suit was discontinued as to them, and that they had no right to prosecute and maintain this suit against the defendants. Plaintiffs replied to the answer at great length, traversing and denying all the material averments in the answer. Trial was had in the latter part of December, 1887, resulting in a judgment in favor of plaintiffs for the sum of \$9,008.33.

Hugh Butler and R. D. W. Youley, for appellants. L. C. Rockwell and Clint. Reed, for appellees.

REED, C. (*after stating the facts as above.*) There are in this case 43 errors assigned upon the record; but a large part of them, if not the majority, arise out of, and are ancillary to, one important question, viz., who were the proper parties, or who was the proper party, to prosecute the suit?

In instituting the suit, William P. Linn was made a plaintiff with L. C. Rockwell, and so remained, without a challenge or objection, so far as is disclosed by the record of the proceedings had in the district court in the first instance. It is true that the only adjudication in that court was upon a general demurrer to the complaint; but, under our Code of Practice, the objection that the plaintiff had no legal capacity to sue, or that there was a defect or misjoinder of parties plaintiff or defendant, could have been made and determined upon demurrer. Code, § 55, p. 18. This was not done. The question in regard to Linn's being a proper party does not appear to have been raised until after the dis-

position of the case in this court on writ of error, and the death of Linn. Upon its being remanded for further proceedings, the question first arose on motion to substitute the executors in the place of the deceased plaintiff. So far, defendants must be held to have acquiesced, if not in the necessity of Linn's being a plaintiff, at least in the propriety of it. No argument or authorities are necessary to show that if Linn was a proper party his executors should have succeeded him. But defendants are not concluded by this apparent acquiescence and failure to raise the question in regard to Linn. The motion to substitute the executors was resisted, and the correctness of the decision of the court was questioned, and the question raised by the answer. An exception was taken to the order of the court making the executors plaintiffs, and 60 days given in which to tender the bill of exceptions. None appears to have been tendered. This should have been done, as the order was not one of those enumerated in the Code, where a bill of exceptions was unnecessary. But this failure, probably, will not relieve the court from the necessity of an examination; for, as above stated, the same question is raised by the answer.

But there arises a difficulty; for it is averred that Rockwell was improperly a plaintiff, having no legal interest. The same proposition had been presented to the court by motion, and had, after argument, been overruled. In a subsequent paragraph it was averred that the executors were not properly plaintiffs; that the failure to be substituted in time, and the application of Rockwell to be allowed to prosecute as sole plaintiff, and the order of the court allowing it, worked a *retractit* or a discontinuance on the part of the executors,—defendants claiming, in effect, by their answer, that the cause could not proceed at all. Such a position was clearly untenable,—certainly anomalous,—and an attempt to abate the suit first as to one plaintiff, then as to the other, piecemeal. At common law the pleader was required, in a plea in abatement, not only to show that the parties were not the proper ones, but to show who were; in the language of the books, "to give a better writ." Here the attempt was, in effect, to bar the suit by matter in abatement, which could hardly be done even under our Civil Code. Ordinarily, under our practice, the question of too many plaintiffs or defendants is one of no great importance, except in the matter of costs. It can be disposed of at the close of the trial in accordance with the established facts. But in this case it became important on account of the character of some of the plaintiffs as executors, placing defendants under a disability in the way of proof or evidence of their defense.

The contract executed between Linn and defendants had been assigned to Burrell, and by Burrell to Rockwell. Whether it could have been by its own terms legally assigned will be discussed hereafter. It was a ques-

tion that could only be determined upon the trial. Having been assigned for an unquestioned valuable consideration, he had, unquestionably, such an interest in the subject-matter of the controversy as would make him a proper party, if not an indispensable one, regardless of the character of the assignment, as to whether it was absolute, so as to pass the title, or qualified, as being assigned as collateral security. But, as to the executors, the determination of the question as to the character of the assignment becomes important, in fact determines the question of the right to become parties. In the third paragraph of the complaint it is alleged that Linn assigned to Burrell his right, title, and interest in and to the agreement as security for the loan of \$2,700, etc.; that Burrell afterwards assigned his right, title, and interest to said contract to Rockwell, "who now holds said contract as collateral security for money theretofore loaned by him to said William P. Linn." In the fifteenth paragraph of the answer it is said: "And defendants further aver, upon information and belief, that the supposed assignment of said contract to said plaintiff was only for the purpose of securing the payment to said Rockwell of certain debts and claims against said Linn," etc. That the contract was assigned by both Linn and Burrell, and that Rockwell took and held it as collateral security, is shown by the testimony of Rockwell. It is nowhere shown or claimed that the assignment was absolute, so as to pass the title and invest the holder with the ownership. It was in both instances assigned as security for the payment of a loan of a trifle more than one-half its face. In all transactions of this kind the ultimate object of the inquiry is, what was the understanding and intention of the parties? And when ascertained such intention must control. Where the transaction imports nothing more than giving a security, without a sale or change of title to the property, the law makes it a pledge. In Jones on Pledges and Collateral Securities, § 17, it is said: "An assignment of securities by a debtor to his creditor is presumed to be as collateral security, and not in payment of the debt, in the absence of evidence tending to show an intention that the securities should be applied in satisfaction of the debt, in whole or in part." In section 15: "A bill of sale, absolute in terms, * * * intended only as collateral security, is a pledge, if accompanied by a delivery of the property to the creditor." See Walker v. Staples, 5 Allen, 34; Whitaker v. Sumner, 20 Pick. 399. "That the assignment is absolute in form is of no consequence, as regards the question of intention." Jones, Pledges, § 17. A transfer, absolute upon its face, "may be shown by parol evidence to have been executed by way of security, and therefore to be a pledge." Id. § 15; Eastman v. Avery, 23 Me. 248; Shaw v. Wilshire, 65 Me. 485. See, also, in equity, Morgan v. Dod, 3 Colo. 551.

The fact stated by Rockwell, that he afterwards advanced a larger sum of money, and was the real party in interest, is unimportant in determining the character of the transaction, so long as it is shown that the nature of the transaction was not changed by a new contract, and the absolute title vested in the assignee. Not only does the evidence establish the fact of a pledge as security; but, aside from that, when the question as to whether it was a sale or a pledge is raised, unless the debtor shows by positive evidence that it was intended to be a sale, the inference of law is positive that it was transferred only as collateral security. *Leas v. James*, 10 Serg. & R. 307; *Perit v. Pittsfield*, 5 Rawle, 166; *Jones v. Johnson*, 3 Watts & S. 276. Collateral security is defined by Bouvier as "a separate obligation attached to another contract to guaranty its performance;" by Webster, as "security for the performance of covenants, or the payment of money, besides the principal security;" by Worcester, as "security for the fulfillment of a contract or a pecuniary obligation in addition to the principal security." In *Halliday v. Holgate*, L. R. 3 Exch. 299, it was said by Mr. Justice WILLES: "There are three kinds of security: The *first* is simple lien; the *second*, a mortgage passing a property out and out; the *third*, a security intermediate between a lien and a mortgage, viz., a pledge where, by contract, a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt." In all cases of a pledge as collateral security, the general property remains in the debtor. The creditor has only a special property,—a lien,—a right to retain his security until the payment of the debt. When the debt is paid the security reverts. If default is made, the assignee can proceed to dispose of the security, discharge his own debt, and the balance, if any, goes to the assignor or debtor. *Jones*, Chat. Mortg. § 4; *Jones v. Baldwin*, 12 Pick. 315; *Robertson v. Wilcox*, 36 Conn. 426; *Conner v. Carpenter*, 28 Vt. 237; *Trust Co. v. Rigdon*, 93 Ill. 458. It follows that the transaction, in the first instance, having been one of pledge as collateral security, and never having been changed by subsequent contract, and no default having been made, and the property of Linn extinguished by sale, he and his estate remained the owner of the contract assigned, subject to the lien of Rockwell; and the special property of Rockwell could have been at any time, by becoming due, or by consent of parties, extinguished by payment of the amount for which it was held; and that Linn was a proper party during his life, and, having been such, his executors were proper parties after his death. See Gen. St. p. 1058, c. 115, § 155.

We do not intend to be understood as saying that either Linn or his executors were absolutely indispensable parties, and that Rockwell could not have prosecuted as sole plaintiff, but that Linn, and after him his

executors, had a legal right to be parties at their own election. They could not be precluded at the option of defendants, nor could their right to be parties be extinguished by the act of Rockwell in asking to be made sole plaintiff, and the action of the court in making him so. The ultimate effect of making the executors plaintiffs may have been disastrous to defendants, by placing them under a disability in establishing a defense. They were unfortunate in not being able to make their proof by evidence aside from their own; but this grew out of a rule of evidence, not out of the fact of the executors having been made parties. Although such was the result of their having been made parties, it could in no wise affect or determine their right to be such, and to prosecute the suit.

This, in effect, disposes of the question raised in regard to the assignment of the contract by Linn; defendants contending that by its terms it prevented any legal transfer, and that Rockwell took nothing by it. The legal effect of the provision in the contract that it should not be assigned must be construed to be that the title to the chose in action should not pass to another so as to prevent defendants from asserting any equity or defense that might arise between the original parties. In the language of the contract, the object was to prevent its negotiability. This contract was not violated by a pledge as collateral security. The assignees, having only a lien or special property, held it subject to all the existing equities. Such is always the rule in regard to choses in action held as collateral, unless they are negotiable upon their face, and are taken out of the rule by the operation of the law-merchant. If this is not conclusive of the question, there was evidence, although contradictory, from which the jury might have found, as they evidently did find, that defendants consented to the transfer. Section 1, c. 116, Gen. St., is as follows: "That no party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends * * * as the executor or administrator, heir, legatee, or devisee of any deceased person. * * * unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely:" The evidence offered by defendants, and excluded by the court, was not taken out of the general rule by any exception to it. After a careful examination of the testimony offered and excluded, we cannot say that the court erred, or extended the rule beyond its proper limits; and the rule is a just and salutary one. Finding that the executors were properly made parties, and the only evidence offered in support of many of the averments in the answer was that of the defendants, which was properly excluded, disposes of many of the sup-

posed errors. The defense of misrepresentations on the part of Linn in regard to title, rights, and development of the property sold, to induce the purchase, was untenable—*First*, from the character of the conveyance made by Linn; *second*, from the conduct of defendants after the purchase, which resulted, in law, in affirmance and ratification.

When defendants went into the possession and occupation of the property, and found they had been deceived by the statements of Linn, they could have either rescinded at once, or affirmed and brought an action in the nature of an action on the case at common law, for damages for the deceit, and recouped or set off such damages against their own obligation to pay. Neither was done. Having entered into the occupation of the property, and proceeded to exercise rights of ownership, and to deal with it as their own, they were estopped and precluded from asserting the defenses set up, except by establishing by evidence the modification of the contract as alleged, which, in effect, would have been the abrogation of the old contract entirely, and the substitution of a new and different one. Such alleged contract not having been reduced to writing, and defendants having no evidence but their own to establish it, and that being inadmissible, the several defenses failed as against Linn's executors. As to Rockwell, there was evidence before the jury sufficient to warrant it in saying that defendants, failing to notify Burrell and Rockwell of their supposed defenses against Linn when applied to for information, were estopped by their own conduct.

The other and remaining errors assigned were predicated upon the supposed fact that the executors were erroneously made parties, and defendants erroneously precluded from making the proof of the alleged new contract, and hence are disposed of in our view of the case. The defendants having failed to establish their defense by competent testimony, in fact having been prevented from putting in any testimony by reason of its character to support the averments in the answer, the court below was warranted in finding that the matters relied upon had been considered and determined by this court on error in the former case, and were *res adjudicata*, and in so regarding and treating them. Although, as before stated, the defendants, by the course pursued, and the rulings of the court, had been placed at a disadvantage, yet this resulted not from the erroneous acts or rulings of the court, but was the unfortunate result of failing to procure competent evidence; a result quite frequent in the history of judicial proceedings. The judgment should be affirmed.

PATTISON, C., concurs. RICHMOND, C., dissents.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

COLORADO M. RY. CO. v. BOWLES.

(Supreme Court of Colorado. Jan. 31, 1890.)

EMINENT DOMAIN—COMPENSATION—SUSPENDED ENTRY—SURPRISE.

1. When the entry of a pre-emption claimant has been suspended, and proceedings to condemn a right of way through the land for a railroad have been instituted, the claim of the railway company for a continuance of the latter proceedings pending the determination of the suspended entry by the department of the general land-office appeals strongly to the discretion of the court.

2. When a party, in the midst of a trial, is taken unawares, and, without fault of his own, is placed in a situation greatly injurious to his interests, as by the unexpected admission of evidence upon an issue which, by reason of an order of court made previous to the commencement of the trial, he was not prepared to meet, a case of surprise is presented which, if not otherwise remedied, may be made a ground of motion for a new trial.

(Syllabus by the Court.)

Appeal from district court, Pitkin county.

H. T. Rogers, A. E. Pattison, and Wilson & Stimson, for appellant.

ELLIOTT, J. The Colorado Midland Railway Company, appellant, was the petitioner below in proceedings to condemn certain land as a right of way for the construction of its railroad. Appellee, Bowles, defendant below, had entered the land under the pre-emption laws of the United States, had paid the government price therefor, and had received from the United States land-office the certificate of purchase in the usual form. It was alleged in the original petition, presented August 9, 1886, that Bowles claimed and appeared to be the owner of the land. On February 15, 1887, an amended petition was filed in which it was alleged, *inter alia*, that the pre-emption entry of Bowles has been and now is suspended and held for cancellation by order of the honorable commissioner of the general land-office of the United States, and that petitioner has in all respects complied with the act of congress, approved March 3, 1875, granting to railroads the right of way through the public lands of the United States. The cause being reached for trial, petitioner moved for a continuance on affidavits showing that the entry of Bowles had been suspended on account of fraud and perjury committed by him in securing the certificate of purchase from the land-office. The court first held the grounds of the motion sufficient, but finally overruled the same on terms limiting defendant in respect to the admission of evidence, and the measure of damages. On the trial, the defendant was permitted to introduce evidence tending to show the validity of his entry, also to show the value of the land actually taken, and damages to the residue. Petitioner's counsel objected to this testimony on the ground that defendant's pre-emption entry was suspended, and claimed surprise because the court, in denying the motion for continuance, had ruled that "defendant would be confined to proof of damages to his actual possession

only; that is, damages to his surface improvements." Afterwards, during the trial, the court defined its rulings to be that "the certificate of entry or the receiver's receipt should not be offered as conclusive evidence of the entry." And so, against the objection of petitioner, the case was tried, and submitted to the jury, upon the theory that defendant might recover full compensation and damages for the land taken and damaged upon showing compliance with the pre-emption laws of the United States, as in case of making final proof before the United States land-office; petitioner being allowed to controvert the validity of defendant's entry; the jury to determine the controversy. The jury found the value of the land taken to be \$411.79, and the damages to the residue to be \$721.66. It is evident from this verdict that the jury sustained defendant's title to the land as though there had been no suspension of his entry, and allowed him full compensation and damages therefor. Petitioner appeals, and assigns for error, among other things, the refusal to grant a continuance, its surprise at the admission of evidence to sustain defendant's entry, and to show the value of the land, and also the denial of the motion for a new trial.

Defendant's title to the land depended upon the validity of his pre-emption entry. If his entry should be canceled, and the lands should become a part of the public domain, petitioner would be entitled to a right of way through the same for its railroad, upon complying with the act of congress of March 3, 1875. Hence, petitioner's claim for a continuance pending the investigation and determination of such entry by the department of the general land-office, whether a matter of absolute right or not, was based upon grounds appealing most strongly to the discretion of the court. So the trial court must have considered when the motion for a continuance was held sufficient in the first instance, and was overruled on terms. The terms, as shown by the abstract of the record, are somewhat ambiguous; but we think a reasonable construction of them is that defendant would be allowed to recover compensation and damages to his possessory interest, merely,—that is, to the surface improvements on said land. The court may not have intended to prescribe such terms, and defendant's counsel may not have so understood them; but petitioner's counsel were certainly justifiable in so construing the language of the order. Defendant made no objection to the terms on which the continuance was refused, while petitioner objected and excepted to the refusal on any terms. The object of the desired continuance was to have defendant's title settled by the ultimate authority of the United States, before attempting to assess the compensation and damages. This object was defeated by allowing the jury to try the question respecting the validity of defendant's entry, and to give defendant full compensation and damages for the land itself

in case they should find in his favor upon that issue.

The trial was entered upon immediately after overruling the motion for a continuance. As petitioner's counsel understood the terms upon which the motion was overruled, they were not advised that the facts respecting the validity of defendant's entry and title were to be litigated until the trial was actually entered upon. It is an elementary principle of our jurisprudence that parties are entitled to be advised concerning the matters to be litigated a sufficient length of time in advance of the trial to be prepared to meet them. When the issues are formed, as is usual in courts of record, by the pleadings of the parties, they must ordinarily advise themselves, at their peril. So, too, where amendments to pleadings are properly allowed during the trial, a continuance for a new trial may not be a matter of right, without showing special injury resulting therefrom. But when, as in this case, the court restricts the issues to be tried, or limits the evidence to be received in a material matter, as a condition for refusing a motion for continuance otherwise well grounded, the terms of the condition should be substantially free from ambiguity, and should not be materially changed, to the prejudice of either party, during the progress of the trial.

This case presents an instance, somewhat rare in actual practice, of genuine surprise. Petitioner's counsel were not only taken unawares by the unexpected admission of evidence to sustain defendant's entry, and to show the value of the land itself, whereby the damages were greatly augmented, but they were placed in a situation, without any fault of their own, greatly injurious to their interests, in which they were not prepared, and could not be expected to be prepared, to meet such an issue. There was doubtless a misunderstanding between court and counsel as to the limitation placed upon defendant as a condition for refusing the motion for continuance. A surprise of this nature, if not otherwise remedied, may be made the ground of motion for a new trial. *Burr. Law Dict.*; *Knoth v. Barclay*, 8 Colo. 300, 6 Pac. Rep. 924; *Mulhall v. Keenan*, 18 Wall. 342. As already intimated, the court, in its discretion under the circumstances, might well have granted a continuance; but, as the question is not likely to arise again, we need not determine whether the refusal to continue would have been substantial error if the terms as understood by appellant had been observed. If, when the case is reached for trial again, the title is still in abeyance by the suspension of the entry, the district court should grant a further continuance, if desired by either party.

The case having been presented by appellant *ex parte* in this court, we do not deem it expedient to consider and determine the remaining assignments of error. The judgment of the district court is reversed, and the cause remanded.

(9 Mont. 308)

HERRON v. FROST.

(Supreme Court of Montana. Feb. 10, 1890.)

MARRIED WOMEN—POWERS AS SOLE TRADERS.

Comp. St. Mont. div. 5, §§ 1434, 1435, providing that a married woman, after declaration as sole trader, shall be individually liable for all debts contracted in the business, that she may carry on her business in her own name, and shall be allowed all the privileges, and be liable to all the processes, provided by law against debtors and creditors, do not enable her to execute a note in favor of her husband, and such note is void in the hands of a *bona fide* holder.

Appeal from district court, Gallatin county; M. J. LIDDELL, Judge.

Luce & Luce, for appellant. *Armstrong & Hartman*, for respondent.

BLAKE, C. J. The respondent filed, December 1, 1888, his complaint, and alleged that appellant is the wife of Nathan Frost; that she is a sole trader, carrying on the business of farming at Gallatin county, Mont.; and that on the 8th day of February, 1887, as such sole trader, and for her use, benefit, and purpose, as such sole trader, she did make and deliver to said Nathan Frost, for a valuable consideration, the following promissory note, to-wit: "Bozeman, Montana. February 8th, 1887. Ten months after date, for value received, I promise to pay to Nathan Frost, or order, two hundred and sixty dollars, with interest at the rate of ten per cent. per annum from date until paid. LORETTA E. FROST, Sole Trader." That afterwards, and before the maturity of this note, the respondent purchased it for a valuable consideration, and is now the owner and holder thereof, and that no part of the same has been paid. The answer alleged that "said note was given by the defendant to said Nathan Frost for the balance of an account claimed by said Nathan Frost to be due to him from the defendant for work done by said Nathan Frost for defendant long prior to the date of said note, and prior to the time the defendant filed her declaration as sole trader, and before she made such declaration, and before she commenced business as a sole trader, the greater portion of which work was done after the defendant was married to said Nathan Frost, and while they were living together as husband and wife, as aforesaid; and so the defendant says that said note was given to said Nathan Frost for what said Nathan Frost claimed of her as a balance due him on an account which occurred long prior to her declaration or commencement of business as a sole trader, and that the claim on account of which said note was given was not against her as sole trader, nor was it in any way connected with her business as a sole trader, nor for her benefit as a sole trader, nor for the purposes of her said business." The answer further alleged "that said note was transferred to the plaintiff by said Nathan Frost without her consent or knowledge;" that the plaintiff knew at that time that defendant was, and had been for a long time, the wife of said Nathan Frost; and that plaintiff knew

all the foregoing facts when he purchased the note. The replication avers that the defendant became indebted to Nathan Frost on an account for work done by Nathan Frost for her in the sum specified in the note; that this was the consideration of the note; and that before and after the purchase of the note she informed the plaintiff that she executed the note "for her uses, benefit, and purposes, as a sole trader." Subsequently the defendant moved the court for a judgment on the pleadings. The motion was overruled. The cause was tried by the court without a jury. The sole evidence offered was the note sued on. The motion of the defendant for a nonsuit was overruled, and judgment was entered for the plaintiff.

Assuming, for the purposes of the argument, that the note above recited is valid, its introduction as evidence establishes a *prima facie* case for the plaintiff. In California, under a similar statute, the court held, in *Melcher v. Kuhland*, 22 Cal. 524, that "the fact that she is a sole trader, and that she executed the note, is sufficient to raise the presumption, if any presumption is necessary, that the debt was contracted on account of her business as a sole trader." The appellant in the case at bar strengthened this presumption, if possible, by adding to her signature the words "Sole Trader." The question that now confronts us is this: Could a married woman, who was a sole trader under the laws of Montana upon the 8th day of February, 1887, make and deliver to her husband a legal promissory note? If she then possessed this power, the judgment was lawfully entered; but, if this authority has not been conferred in express terms, the instrument is void, and no recovery can be had thereon. The transfer of the note by the husband before it was due to a *bona fide* purchaser for a valuable consideration does not affect the relations of the parties. There is a question of turpitude in this transaction, which is not within our jurisdiction; but we cannot keep silent, and will remark that the appellant has sought and accepted all the statutory privileges of a sole trader, and at the same time pleaded her disability as a married woman to evade the payment of an honest debt. We are obliged to confess that her defense is maintained by the authorities.

This court, in the case of *Vantilburg v. Black*, 3 Mont. 459, investigated some of the propositions which have received the consideration of counsel, and concluded that a married woman had no right to make a promissory note, and execute a mortgage to secure its payment, and that the entry of a personal and deficiency judgment against her was erroneous. Mrs. Vantilburg was not a sole trader, and the effect of the statute governing this subject was not involved in the decision. Does the act modify the common-law disabilities relating to husband and wife, and allow the appellant to make and deliver the promissory note which is owned by the respondent? The provisions of the statute,

which are relied on by the respondent, declare that from the date of her declaration she "shall be individually responsible in her own name for all the debts contracted by her by virtue of said business." Comp. St. div. 5, § 1434. "After such declaration has been duly recorded, as heretofore provided, the person so making her declaration, as aforesaid, shall be entitled to carry on her business in her own name, and the property, revenue, money, and debts and credits shall belong exclusively to said married woman, and shall not be liable for any of the debts of her husband; and she shall be allowed all the privileges, and be liable for all the legal processes, now or hereafter provided by law against debtors and creditors." Id. § 1435. There is no clause which provides that a married woman, under this act, shall be liable for her engagements in the same manner as if she were sole, or that a husband or wife may enter into any contracts with the other respecting property which either might if unmarried, or any language of like signification. These weighty phrases, which are incorporated in the legislation of other states upon this matter, render inapplicable to this hearing the decisions of courts on which they are founded. In *Lord v. Parker*, 3 Allen, 129, Mr. Justice HOAR refers to this legislation, and says: "Their leading object is to enable married women to acquire, possess, and manage property, without the intervention of a trustee, free from the interference or control, and without liability for the debts, of their husbands. They are in derogation of the common law, and certainly are not to be extended by construction. And we cannot perceive in them any intention to confer upon a married woman the power to make any contract with her husband. * * * If she could contract with her husband, it would seem to follow that she could sue him, and be sued by him. How such suits could be conducted, with the incidents in respect to discovery, the rights of parties to testify, and to call the opposite party as a witness, without interfering with the rule as to private communications between the husband and wife, it is not easy to perceive; and the consequences which would follow in respect to process for the enforcement of rights fixed by a judgment, arrest, imprisonment, charges of fraud, proceedings *in invitum* under the insolvent laws, and the like, are not of a character to be readily reconciled with the marital relation. We cannot suppose that an alteration in the law involving such momentous results, and a change so radical, could have been contemplated by the legislature, without a much more direct and clear manifestation of its will." In *Haas v. Shaw*, 91 Ind. 389, the court construed a similar statute, and approved *Lord v. Parker*, supra, and said: "We are of opinion that these statutory provisions did not wholly abrogate or supersede the common-law rule in force in this state at the time of their enactment, under which, as we have seen, a married woman

was incapable of binding herself by any executory contract, and all such contracts, howsoever made, were absolutely void." In *Barnett v. Harshbarger*, 105 Ind. 414, 5 N. E. Rep. 718, the same views are entertained, and the court says: "The question is not whether disabilities have been removed, but whether the long prevailing rule of the law, declaring husband and wife to be one person in legal contemplation, has been annulled. This question cannot be solved by affirming that a disability has been removed, for there yet remains the positive rule that the husband and wife are one person. Until this rule is annulled, they cannot contract with each other as persons not bound together by marital ties, and, so long as they cannot thus contract, the usual rules of law do not govern their transactions. See, also, *Bear's Adm'r v. Bear*, 33 Pa St. 525; *Robertson v. Bruner*, 24 Miss. 244; *Jenne v. Marble*, 37 Mich. 325; *Dodge v. Kinzy*, 101 Ind. 106; *Roby v. Phelon*, 118 Mass. 541; *Schouler, Dom. Rel.* (3d Ed.) § 192; *Kelly, Cont. Mar. Wom.* 225, 263, 264. When these decisions are applied to the laws of Montana which were in force at the time of the making of the foregoing promissory note, we cannot escape the deduction that the appellant could not enter into contracts of this nature with her husband. The instrument which is the foundation of this action is a nullity, and cannot support the judgment which has been entered herein. It is therefore adjudged that the judgment be reversed, with costs, and that the cause be remanded, with directions to dismiss the action.

HARWOOD and DE WITT, JJ., concur.

(9 Mont. 243)

HARMON v. COMSTOCK HORSE & CATTLE CO.

(Supreme Court of Montana. Jan. 28, 1890.)

JUDGMENTS OF INFERIOR COURTS—PLEADING—ATTACHMENT.

1. Under Code Civil Proc. Mont. § 103, permitting a judgment of a court of special jurisdiction to be pleaded by stating it "to have been duly given or made," an allegation that judgment was rendered is not sufficient.

2. In an action against a subsequent attaching creditor, an allegation that plaintiff "commenced a suit. * * * and procured from the court a writ of attachment in said cause," does not show a valid attachment, the court being of limited jurisdiction.

3. Under Code Civil Proc. Mont. tit. 7, c. 6, relating to the attachment of range stock between November 1st and May 15th, and requiring certain notices to be filed with the recorder of the county, a filing made at 10:30 P. M. of May 14th is sufficient; the hours during which such office shall be kept open not being specified, except that it shall be open during the business hours of each day. Comp. St. div. 5, § 911.

Appeal from district court, Custer county.

James H. Garlock, and *J. W. Shecell*, for appellant. *C. R. Middleton*, for respondent.

BLAKE, C. J. This action was commenced by Harmon to recover damages for the wrongful taking by the appellant, a corporation, of

certain horses which are described in the complaint. The cause was tried by the court below without a jury, and the findings of the facts which are pertinent to this hearing are to this effect, to-wit: That Harmon commenced an action May 14, 1887, in the probate court of Custer county, against one Speelman, upon an account for \$200.16; that an attachment was then issued out of said court, and placed in the hands of the sheriff of the county; that the writ of attachment was levied the same day upon said horses, by filing a copy thereof in the office of the recorder of deeds of the county, with a list of said property annexed thereto, and a notice that the said range stock was attached by virtue of the writ; that said horses were then range stock, and running and roaming at large upon the range; that afterwards the appellant, without the consent of Harmon or the sheriff, took and drove away the horses from their range, and converted them to its use; that a judgment was entered in the probate court June 3, 1887, for Harmon and against Speelman, for the sum of \$255.66, which has not been paid, and is wholly due; that the sheriff, after diligent search, has not been able to find the horses, or any property of Speelman out of which any part of said judgment can be satisfied; and that Harmon has been damaged by these acts of the corporation in the sum of \$255.66. The judgment was entered accordingly for Harmon. The motion for a new trial was refused, and the corporation appealed.

No testimony was offered by the company, and the notice of the motion for a new trial specifies the particulars in which the evidence produced on the trial is insufficient to justify the findings. An examination of the transcript satisfies us that none of the findings can be set aside upon this ground. An analysis of the testimony, and a statement of the deductions therefrom, would be valueless to the parties, and are therefore omitted.

The errors of law which are assigned and relied on in the brief of the appellant will be reviewed. At the trial the appellant made many objections to the introduction of the testimony, which depend upon one legal proposition: that the complaint does not state grounds sufficient to constitute a cause of action, and that it does not appear that the probate court had the right to issue the writ of attachment in the case of *Harmon v. Speelman*. We quote from the pleading the paragraphs which relate to these matters: "That on the 14th day of May, A. D. 1887, the plaintiff commenced a suit in the probate court of said county against one S. W. Speelman upon an account for the sum of \$200, and interest thereon, and then and there procured from said court a writ of attachment in said cause; * * * that on the 3d day of June, A. D. 1887, the said probate court rendered judgment in favor of this plaintiff, and against the said S. W. Speelman, in the sum of \$209.56, and costs in the sum of \$46.10,

amounting in all to the sum of \$255.66." These allegations are not denied by the answer, and for the purposes of this action must be taken to be true. This court has held in *Charlebois v. Bourdon*, 6 Mont. 376, 12 Pac. Rep. 775, that "the probate court is of limited jurisdiction." In pleading at common law the judgment of this inferior tribunal, it is necessary to set forth the facts which confer jurisdiction. *Turner v. Roby*, 3 N. Y. 193, and cases cited; *Smith v. Andrews*, 6 Cal. 652; *Townsend v. Gordon*, 19 Cal. 188. This rule has been modified in this state by the the enactment of the following section of the Code of Civil Procedure: "In pleading a judgment or other determination of a court or officer of especial jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction." Section 103. Statutes of the same import have been passed in New York, California, Indiana, Nevada, and other states, and received judicial interpretation. In *Hunt v. Dutcher*, 18 How. Pr. 540, the court holds that an allegation that "judgment was entered in said action * * * is clearly not equivalent to the words that such judgment has been made, or was 'duly given or made.'" In *Young v. Wright*, 52 Cal. 410, Mr. Justice CROCKETT, in the opinion, says: "A party wishing to avail himself of a provision of this character must comply strictly with its terms. In exonerating him from an obligation which would otherwise be incumbent upon him, the statute prescribes the precise conditions on which he is to be relieved; and they must be strictly performed. In this case the averment is not that the judgment was duly 'given or made,' but that it was 'duly rendered;' and we are inclined to think these are not equivalent terms. A judgment is duly 'rendered' when it is duly pronounced and ordered to be entered. *Gray v. Palmer*, 28 Cal. 416; *Peck v. Courtis*, 31 Cal. 207; *Genella v. Relyea*, 32 Cal. 159. But a judgment duly 'made or given' is a complete judgment properly entered in the judgment book, so that it may be pleaded in bar of another action." In *Keys v. Grannis*, 3 Nev. 551, the court says: "To show the jurisdiction is as necessary, under our practice, as it ever was; the only change being in the manner of stating it." See, also, *Crake v. Crake*, 18 Ind. 156; *Judah v. Fredericks*, 57 Cal. 391; *Los Angeles v. Mellus*, 59 Cal. 451. This court held in *Territory v. Cox*, 3 Mont. 205, that an averment in a complaint which alleges that letters testamentary which had been granted were "duly revoked" by the probate court was sufficient. In *Hootman v. Bray*, 3 Mont. 411, Chief Justice WADE says, in the opinion: "Neither the original answer nor the proposed amendment contains any averment showing that the attachment was

regularly issued by a court having jurisdiction; and this, we hold, is a fatal defect in a case like the one we are considering, where the plaintiff claims the property by a prior sale, and the officer attempts to justify the levy by impeaching such sale for fraud."

We are not required to state fully the pleadings in this action, but assert that the respondent cannot prevail unless he alleges and proves the issuance of a valid writ of attachment, and the entry of a lawful judgment. The foregoing facts, which are material and relevant, lead to this conclusion. The writ of attachment was essential to enable the respondent to acquire a statutory lien upon the horses. When the allegations of the complaint which have been cited are examined in the light of the authorities, it is plain that they are fatally defective, and do not conform to the rule of the common law, or the statute. It is not averred that the judgment or other determination of the probate court has been "duly given or made," but it is alleged that the judgment was "rendered" and the writ of attachment was "procured." The pleading does not contain the facts which would authorize the probate court to issue the attachment against the property in controversy, or give it jurisdiction over the defendant, Speelman. Among other matters pertaining to the probate court in the case of *Harmon v. Speelman* which should be specified in the complaint, and do not appear, are the following: That a complaint was filed; that a summons was issued and served; that an affidavit of attachment and undertaking on appellant were filed; and that the horses referred to were "range stock," within the purview of the statute providing for the "attachment of live-stock on ranges." The transcript shows that the appellant has been persistent in attacking the complaint, and pointing out these defects; and the respondent should have appealed to the liberality of the Code of Civil Procedure, and the decisions of this court, in allowing amendments to pleadings.

The court below erred in overruling the objections of the appellant to the introduction of the testimony in support of the findings. Another legal question, which will necessarily arise in the retrial of this action, can be finally decided at this time. It appears that the property was attached under the provisions of the Code of Civil Procedure as "horses running and roaming at large and commonly known as 'range stock.'" Title 7, c. 6. The law defines what shall constitute a sufficient service of process "between the 1st day of November and the next succeeding 15th day of May," and that certain copies and notices shall be filed "with the recorder of the county wherein such property is running at large." It is conceded that the proper officer made this filing in his office upon the 14th day of May, 1887, in the night-time, at 10:30 P. M. The appellant maintains that

this hour was too late for the transaction of official business, and that the attachment papers cannot be deemed public records to impart notice until the succeeding day. The postponement of the legal consequences of this action of the recorder until the 15th day of May would destroy the lien sought to be secured on the horses by these proceedings, and prevent Harmon from levying thereon in this mode until the following month of November. The case of *Hathaway v. Howell*, 54 N. Y. 97, which is cited by the appellant, is inapplicable. The laws of New York prescribe the hours during which the offices of this public nature must be open for the people; and the subject is not definitely regulated by the statutes of this state, although the same shall be opened during the business hours of each day. Comp. St. div. 5, § 911. But these periods are not fixed, and the transaction of official business at other times is not prohibited. One section of the Code under investigation provides that "it shall be the duty of said county recorder to file all papers deposited with him for that purpose, and required to be filed under this chapter, and preserve the same as other records of his office are preserved." Code Civil Proc. § 226. "There shall be kept in the recorder's office of the county recorder of each county a book called 'Attachment Book,' in which shall be entered by such recorder, in alphabetical form, the names of any person or persons against whom any writ or notice of attachment has been filed in his office. There shall also be entered in said book the time such writ was filed." Id. § 205. The county recorder has complied in all respects with the laws. The contention of the appellant cannot be sustained. Blackstone gives this definition: "In the space of a day all the twenty-four hours are usually reckoned; the law generally rejecting all fractions of a day, in order to avoid disputes. Co. Litt. 135. Therefore, if I am bound to pay money on any certain day, I discharge the obligation if I pay it before 12 o'clock at night, after which the following day commences." 2 Bl. Comm. 141. In *Bank v. Burkhardt*, 100 U. S. 689, the court says: "For most purposes, the law regards the entire day as an indivisible unit. But when the priority of one legal right over another, depending upon the order of events occurring on the same day, is involved, this rule is necessarily departed from." *Lapeyre v. U. S.*, 17 Wall. 198; *Garity v. Gligle*, 130 Mass. 184; *Manufacturing Co. v. Grant*, 60 Me. 93; *Benson v. Adams*, 69 Ind. 354. The mere fact that the county recorder filed the attachment papers at an hour when his office is usually closed does not invalidate the process in *Harmon v. Speelman*. It is therefore ordered and adjudged that the judgment be reversed, with costs, and that this cause be remanded for a new trial.

HARWOOD and DE WITT, JJ., concur.

(21 Or. 341)

WILKES v. CORNELIUS.

(Supreme Court of Oregon. March 10, 1890.)

APPEAL FROM COUNTY COURT — MAINTENANCE OF NEAR RELATIONS.

1. To enable a circuit court to acquire appellate jurisdiction over a judgment of a county court, an appeal therefrom to the circuit court must be duly taken and perfected, and a transcript of the judgment and proceedings had thereon be filed in that court.

2. Where an appellant presented to a respondent, as executor of an estate, a claim against the estate which the latter rejected, and the county court of the proper county thereafter, under section 1134, Ann. Code, having heard the matter, allowed to the appellant the greater part of the claim, and caused an entry of such allowance to be made on the record, and the circuit court subsequently reviewed the case, and ordered and adjudged that the claim as allowed by the county court be disallowed, and that the judgment of that court be set aside, reversed, and annulled, from which adjudication the appellant took an appeal to the supreme court, and it not appearing from the transcript or the cause filed in the latter court how the case was gotten into the circuit court,—it containing no copy of any notice of appeal from the county court to the circuit court, nor of any proceedings showing that an appeal had been taken, and the certificate of the clerk of the circuit court, which was appended to the transcript, being to the effect that the copies of the papers constituting the transcript included all the papers in the case,—*held* that, in the light of the record, the circuit court had no jurisdiction to attempt to interfere with the said judgment of the county court. *Held, further*, that an order of allowance or rejection of a claim against an estate made and entered of record by a county court in accordance with said section 1134 of the Code shall be regarded in the light of a judgment in an action for the recovery of money; and, if an appeal be taken therefrom to the circuit court, it will involve the trial anew of the matters in issue between the parties, to be conducted in the same manner as trials at law for the recovery of money are conducted in said courts, and that the parties will be entitled to a jury trial upon such appeal, which can only be waived as provided in section 218 of the Code.

3. *Held, also*, that the furnishing support and maintenance to a near relative will be presumed to have been done gratuitously, however valuable it may have been, and that such presumption can only be overcome by proof that there was some contract or understanding between the parties that compensation was to be made therefor. Proof of an express contract or agreement is not essential, but it may be shown from the circumstances of the case that it was the understanding of the parties that payment in some form was intended and expected.

(Syllabus by the Court.)

Appeal from circuit court, Washington county.

T. B. Handley and *W. D. Hare*, for appellant. *Thomas H. Tongue*, for respondent.

THAYER, C. J. This appeal comes here from the circuit court of the county of Washington, but how the case got into that court is not shown by the record. We are informed by verbal statements of counsel that the case was appealed to the circuit court from a judgment of the county court for Washington county.

The record shows that on the 2d day of July, 1888, the will of Annie Wilkes was admitted to probate by said county court, and that letters testamentary upon her estate were ordered to be issued to the respondent; that

on the 30th day of July, 1888, the appellant presented to the respondent an account against the said estate amounting to \$1,130, which the latter, as such executor, allowed \$50 upon, and disallowed the balance; that on the 24th day of November, 1888, the said county court, at a session thereof duly convened, adjudged that the said appellant have and recover of and from the said respondent, as such executor, the sum of \$918.50 upon the said account or claim, and the costs and disbursements of the proceedings to be taxed, and that the same be paid in due course of administration; that subsequently, and on the 23d day of March, 1889, the honorable judge of the said circuit court filed what he termed "findings" with the clerk of said court, which are as follows: "In the matter of the will of Annie Wilkes, deceased. This matter having been heretofore submitted upon the pleadings and testimony herein, heretofore taken and filed, the appellant, T. R. Cornelius, executor of the last will and testament of Annie Wilkes, having appeared herein by Thomas H. Tongue, his attorney, and the respondent and claimant, A. Wilkes, having appeared by T. B. Handley and W. D. Hare, his attorneys, and the court, having considered the allegations and testimony herein, and the arguments of counsel, finds that the claimant, Jabez Wilkes has no greater, valid, or legal claim against the estate of Annie Wilkes, deceased, except the sum of \$50, as allowed by said executor, and indorsed on said claim July 30, 1888; that the order and decree of the county court made in this matter November 24, 1888, in which said court adjudged that the said Jabez Wilkes have and recover of and from the said T. R. Cornelius, executor of the will of Annie Wilkes, deceased, the sum of \$918.50, and the costs and disbursements of this proceeding to be taxed, was erroneous, and without authority of law. It is therefore ordered, adjudged, and decreed that the order of said county court be, and hereby is, set aside, reversed, and annulled; that the claim of said Jabez Wilkes against the estate of Annie Wilkes be, and hereby is, disallowed, except so far as allowed by the executor of the will of Annie Wilkes, and that T. R. Cornelius, executor of the will of Annie Wilkes, recover of and from the said Jabez Wilkes his costs and disbursements herein to be taxed, and that execution issue herein to enforce this decree. [Signed] FRANK J. TAYLOR, Judge."

From the judgment entered in the said circuit court in accordance with this decision the appeal herein was taken. Attached to the transcript brought to this court is what purports to be the testimony of several witnesses taken in the said county court, and to which is appended a certificate of the clerk of said county of Washington to the effect that the transcript contains all the evidence, depositions, and papers filed as evidence, or received as evidence by said court, upon the hearing of the application of Jabez Wilkes to

said court for the allowance of his claim against the estate of Annie Wilkes. There is also a certificate of the said clerk, as county clerk and clerk of the circuit court for said county, appended to the said transcript, which is to the effect that it contains a full and complete transcript of the notice of the presentation of the claim against the said estate, together with a copy of all orders, decrees, and journal entries made in said county court, with the orders and decrees of the said circuit court in relation thereto, and a copy of the notice of appeal, with proof of service and undertaking for appeal therein filed; that he had compared each copy with the original thereof, as the same appears of file and record in his office, and each of said copies was a true copy of said original, and, together with the original testimony taken in said case, they constituted the entire papers, pleadings, and orders on file or made by said court in relation to the claim of Jabez Wilkes against the estate of said Annie Wilkes, deceased. The copies of notice of appeal and undertaking referred to in said certificate are copies of a notice of appeal from the decision of the said circuit court, and of an undertaking given thereon. It is very probable that the appellant, after the respondent disallowed his claim against the estate of Annie Wilkes, presented it in accordance with section 1134, Ann. Code, to the said county court for allowance, and that the adjudication of said court on the 24th day of November, 1888, to the effect that the appellant recover from the respondent, as such executor, said sum of \$918.50, was made under a provision contained in that section. It provides such a course of procedure, and declares that the order of allowance or rejection of the claim shall have the force and effect of a judgment, from which an appeal may be taken as in ordinary cases. Such a judgment must, obviously, be regarded in the same light as a judgment for the recovery of money in an action; and, if an appeal be taken therefrom to the circuit court, it will involve the trial anew of the matters in issue between the parties, which should be conducted in the same manner as trials at law for the recovery of money are conducted in circuit courts. The parties are entitled to have a jury trial, which can only be waived as provided by section 218, Code, and to have the judgment given therein reviewed in this court in the same way as judgments in actions at law are reviewed, and not otherwise. We have no authority to consider the evidence annexed to the transcript in this case for the purpose of ascertaining whether or not the appellant's claim against the said estate should have been allowed by the respondent or executor thereof, nor to consider any question in the case except that of the jurisdiction of the circuit court to reverse and annul the said judgment of the county court. The circuit court, evidently, did not attempt to try the matter in difference between the parties anew, but proceeded to review the judgment of the county court as upon writ of

review. This could not properly be done, as no such writ had been issued for that purpose, nor could be legally issued in such a case. Nor had the circuit court any jurisdiction to retry the matters adjudicated upon in the county court, unless an appeal from such adjudication to the circuit court was regularly perfected as in cases of appeal from judgments of county courts rendered in civil actions. Whether any such appeal was taken or not, the record herein fails to disclose. It was held by this court in *Wolf v. Smith*, 6 Or. 73, that an appellant must bring into the appellate court a perfect record, and, in case of loss or destruction of originals, they must be supplied by copies embracing every paper necessary to show that the appellate tribunal had jurisdiction, and that the fact that the parties appeared, and the cause was thereupon heard and determined, in the circuit court, could not be taken as curing the defects. The judgment of the circuit court appealed from in this case, viewed in the light of the record which is before us, is a nullity. No notice of appeal from the judgment of the county court appears to have been given, nor any steps taken whereby the circuit court could have acquired jurisdiction of the case; and the certificate by the clerk of that court to the transcript brought here imparts that no such notice was given, or steps taken. The said judgment must therefore be reversed, and the case remanded to the circuit court with directions to dismiss it, unless it appear from the records and files of said court that such appeal was duly taken and perfected, in which event the court will retain the case, and proceed to try it in the manner herein indicated.

This disposes of the case for this time, but, as there may be a trial thereof in accordance with the above direction, it becomes necessary to declare the general rules of law which govern in such cases. The respondent's counsel submitted in his brief the question as to whether the statute, referring to said section 1134 of the Code, above referred to, is constitutional. In answer to that query, I would suggest that its constitutionality would be questionable if it were to receive the construction which counsel for both parties seem to have given it, as it would, under their view, deprive parties of the right of trial by jury in the enforcement of a legal obligation to pay money; but the legislature, evidently, did not intend that it should receive that construction. Giving to the adjudication of a claim against an estate the force of a judgment, as provided in said section, does not impair the right of the party against whom it is made to a jury trial, within the meaning of the constitution, if he can secure it by an appeal from such adjudication to the circuit court, which, in my opinion, he is clearly entitled to under the provisions of the section.

The main question for determination upon the trial of the case, if a trial thereof be had, will be whether the appellant is entitled to

recover upon his alleged claim against the respondent as executor of the estate of Annie Wilkes, deceased. Said claim is for board, lodging, care, and medical treatment furnished to the deceased during the last six years of her life, amounting to \$1,080; and, as she was his mother, his right to recover will depend upon proof as to whether there was any contract or understanding between the parties by which he was to receive compensation therefor. The rule in such cases is that furnishing support and maintenance to a near relative will be presumed to have been done gratuitously, however valuable it may have been, and that such presumption can only be overcome by showing that payment therefor was intended and expected in some manner to be made. But proof that there was an express contract or agreement to pay is not necessarily essential. *Smith v. Milligan*, 43 Pa. St. 107. It is impossible, however, as was said in *Hart v. Hess*, 41 Mo. 441, 446, "to lay down precise or accurate rules to govern all the cases which may arise. Each case will depend upon its own special circumstances." The language of Chief Justice SHAW in *Guild v. Guild*, 15 Pick. 129, quoted in *Hart v. Hess*, supra, expresses the rule in a practical light: "That it would be quite competent for the jury to infer a promise from all the circumstances of the case, and that, although the burden of proof is upon the plaintiff, as in other cases, to show an implied promise, the jury ought to be instructed that if, under all the circumstances of the case, the services were of such a nature as to lead to a reasonable belief that it was the understanding of the parties that pecuniary compensation should be made for them, then the jury should find an implied promise, and a *quantum meruit*; but, if otherwise, then they should find that there was no implied promise." This is as far as I am willing to undertake to lay down any rule upon the subject, in advance.

(18 Or. 476)

STATE v. HAWKINS.

(Supreme Court of Oregon. March 10, 1890.)

MURDER—EVIDENCE—TRIAL—SELF-DEFENSE—CONTINUANCE.

1. An affidavit made in support of a motion to postpone the trial of a criminal case until the next term of court examined, and held insufficient.

2. In a criminal trial, where the defendant offers himself as a witness, and omits to testify concerning one fact which the state deemed material, and in the concluding argument counsel for the state mentioned such omission, but no objection was made to such argument at the time, held that, if counsel for the state transcended the proper bounds of debate before the jury, it was the province of defendant's counsel to take an objection at the very time of the utterance of the offensive words, and to take the ruling of the court upon their propriety.

3. If the objection had been promptly taken, and counsel had desisted, there would have been no available error; or if an objection had been made, and the court had ruled the counsel was not in order, the defendant would have no cause for an exception.

4. An instruction by which the jury was informed that if they found, beyond a reasonable

doubt, that the prisoner was then seeking O., the deceased, to provoke a quarrel with him, or with the intent of having an affray with him, and a difficulty did ensue, he could not, without some proof of a change of conduct or action, excuse the killing of O. on the ground that he believed that O. was attempting to draw a weapon with which to assault the deceased; held not erroneous.

5. An instruction by which the court told the jury that he need not admonish this intelligent jury that it is important to the ends of justice, and to secure public respect for our judicial tribunals, that juries agree upon verdicts in cases submitted to them, so that causes may be determined, and new trials and delays of justice avoided, held not erroneous.

6. If the publication of articles in a newspaper cause such prejudice in the public mind as to preclude a fair and impartial trial in the county where the action is pending, the defendant's remedy is a motion to change the place of trial for that reason, and not a motion to postpone the trial.

ON REHEARING.

1. A party has not the right to arm himself, and seek his adversary, and provoke a quarrel or difficulty with him, and take advantage of it, and justify the killing of such party on the ground that he acted in self-defense.

2. The right of self-defense does not imply the right of attack, and will not avail in any case where the difficulty was induced by the party himself.

(Syllabus by the Court.)

Appeal from circuit court, Marion county; R. P. BOISE, Judge.

The defendant was indicted for the crime of murder in the first degree. A trial resulted in his conviction of murder in the second degree; and, having been sentenced to the penitentiary during his natural life, he has brought this appeal. The points relied upon to reverse the judgment will be noticed in the opinion:

W. M. Kaiser, S. L. Hayden, and Tilmon Ford, for appellant. *H. H. Hewitt and E. B. Williams*, for the State.

STRAHAN, J., (after stating the facts as above.) 1. The first point made by the appellant's counsel is that the court below erred in overruling the motion for the continuance of the cause for the term. The killing took place on the 1st day of May, 1889. On the 13th day of June following the defendant was indicted by the grand jury; and on the 17th day of June, 1889, he filed his motion for a postponement of the trial of the cause until the next regular term of the court, for the reason that one M. B. Goldstein, a witness whose evidence was alleged to be material, could not then be procured at that term of court. The court declined to postpone the cause for the term, but did postpone it until the 15th day of July, 1889, to which time the court adjourned for the purposes of the trial. The residence of the absent witness was Portland, but he was the manager of an itinerant theatrical troupe which was performing in Washington Territory at the time. The affidavit recites: "I am informed and believe that said witness will swear that said deceased was armed with a pistol, and that he heard the report of the same, and saw the flash of the powder therefrom, when the deceased fired the same at me, which occurred at the time of my effort to defend myself from said attack

of said deceased, and that the said witness testified before the coroner's jury as the state's witness. He was also subpoenaed by the state, attended the preliminary examination, but gave no testimony at that time. He was subpoenaed as a witness before the grand jury at the present term of this court, and gave testimony concerning said difficulty,"—and that no effort has been made by the state's counsel to detain said Goldstein as a witness in said cause. This affidavit is silent as to whether the same facts could not be proven by other witnesses; but on the 15th day of July, 1889, the application was renewed, and an additional affidavit was submitted by one of the defendant's counsel, in which he says that he knows of no other witness by whom the important facts stated in the affidavit of the defendant heretofore filed can be so clearly and satisfactorily established and proven. The killing occurred on the street in the city of Salem, and was witnessed by a number of people; and the affidavit fails to disclose that Goldstein possessed any different means of knowledge from all others who witnessed the unfortunate encounter. The affidavit fails to disclose how or when the affiant acquired a knowledge of what Goldstein would swear to, nor does it appear why he was not promptly subpoenaed before he left the city after testifying before the grand jury; and, finally, the inference is made very strong by Mr. Ford's affidavit that the same facts could be proven by other witnesses, though not so clearly and satisfactorily. It must be observed that if the deceased was armed with a pistol at the time of the killing, and made an attack on the defendant with it, and any witness knew the fact, his testimony on that subject would be neither dubious nor uncertain. It would be a fact about which there could be no doubt. Looking at the entire tenor of these affidavits, we are unable to say the trial court erred in overruling the appellant's application to postpone the trial. In such cases, the trial courts exercise a large discretion. Ordinarily, that court can determine better than we can whether or not the ends of justice will be promoted by an adjournment. Still, having a supervisory power over the proceedings of the circuit court, if we could see it had abused its discretion to the injury of the appellant, we would not hesitate to reverse. But in this case the fact does not appear. The appellant's application was too weak and uncertain to require the circuit court to allow a continuance.

Neither are the allusions in the affidavits to what the newspapers contained sufficient to have required the court to give a continuance. If the newspaper articles had been of so serious and inflammatory a character as to actually cause so deep a prejudice in the public mind as to preclude a fair and impartial trial in the county, the proper motion was not for a postponement, but for a change of the place of trial. Hill's Code, § 1222.

2. It appears from the record that during the progress of the trial the state introduced

testimony tending to show that a person was seen in the vicinity of the house where the deceased was stopping on the occasion of his visit to Salem, on the evening of the homicide; and during the trial of said cause the defendant offered himself as a witness in his own behalf, and made no allusion to this evidence so introduced by the state. During the closing argument made on behalf of the state by Hon. Richard Williams, he commented on this circumstance, saying that he did not know, and did not ask the jury to believe, that the person seen in the vicinity of where the deceased was stopping was the defendant, but that the defendant had been on the witness stand, had an opportunity to deny the same, but did not do so. No objection was made to this remark at the time of its utterance, but after the argument was closed the defendant's counsel asked the court to instruct the jury as follows: "The statute of this state, in allowing a party to testify in his own behalf in a criminal cause, expressly provides that his failure to do so shall not create any presumption against him; and I caution you against the comments of the counsel for the state, as they had no right to speak of the failure of the defendant to testify on any point or circumstance of the case." This instruction was refused, apparently, for the reason that it was not submitted to the court within the time prescribed by a rule of court. This rule requires all instructions desired by counsel to be submitted to the court before the last argument commences. Conceding, without deciding, that when a defendant in a criminal case offers himself as a witness in his own behalf, and is silent as to some fact appearing in the case against him, that no unfavorable inferences can be drawn against him on account of such silence, still I think, in this case, counsel for appellant did not raise the question at the proper time, or in the proper manner. If counsel for the state transcended the proper bounds of discussion, it was the province of defendant's counsel to take an objection at the very time of the utterance of the objectionable words, and to take the ruling of the court at the time upon their propriety. Suppose that objections had been promptly made to the observations of counsel for the state, and he had immediately desisted. There would have been no available error. *Worley v. Moore*, 97 Ind. 15. Or, if objection had been made, and the court had ruled that counsel was not in order, the defendant would have had no cause of exception. But it is claimed that, in a spirit of abundant caution, the court ought to have given the instruction asked by the defendant. In any view of the subject, I do not think the remark of counsel was of such a character as to call for special instructions from the court. The subject was barely alluded to by counsel; and where no objection was made at the time, and where it is apparent such remark could in no manner have misled or influenced the jury, I think it would be going too far to reverse the the judgment on ac-

count of, or by reason of, such remark. This view of the subject renders it unnecessary to consider or determine the applicability or effect of the rule of court referred to in the record. It may be observed generally, however, that it is within the discretion of the trial court to promulgate and enforce all such rules for the speedy and convenient dispatch of business as are not inconsistent with law.

3. The court, in effect, gave the jury the following instruction, to which an exception was duly taken: "That if the jury found from the evidence, beyond a reasonable doubt, that the prisoner was then seeking to meet Ogle to provoke a quarrel with him, or with intent of having an affray with him, and a difficulty did ensue, he cannot, without some proof of a change of conduct or action, excuse the killing of Ogle upon the ground that he believed that Ogle was attempting to draw a weapon with which to assault the defendant." Counsel for the defendant now insists that the giving of this instruction was error, but he has cited no authority to support his contention. I do not think, under the facts assumed in this instruction, that the doctrine of apparent danger from the deceased can be invoked by the prisoner. He was armed, as the evidence fully shows; was seeking the deceased for the purpose of provoking a quarrel with deceased, or with the intent of having an affray with him. It must be supposed that the deceased was able to judge of such hostile purpose. To say, under those circumstances, that the defendant might act upon alleged appearances, and draw his pistol, and shoot the deceased, would be equivalent to allowing any desperado to go and seek his victim, and, as soon as appearances were sufficiently favorable, to draw his gun, and murder him. This would not be self-defense, but murder. When a man is armed, and seeks another for an affray or an altercation, the law will not permit him to provoke and urge on the difficulty to a point where there is an appearance of an attempt to use weapons, and then justify the aggressor in taking of life simply on the ground of apparent danger. In such case he is the aggressor, and the active cause of the danger which menaces him; and he must abide by that condition of things which his own lawless conduct has produced.

4. The court further charged the jury: "I need not admonish this intelligent jury that it is important to the ends of justice, and to secure public respect for our judicial tribunals, that juries agree upon verdicts in cases submitted to them, so that causes may be determined, and new trials and delays of justice avoided." An instruction in relation to the duty of the jury to agree upon a verdict, couched in stronger and more imperative language than the one now complained of, was before this court in *State v. Saunders*, 14 Or. 300, 12 Pac. Rep. 441, and it was held not to be erroneous. Such instructions announce no principles of law, further than to impress upon the minds of jurors the duty of considering the case, in all of its bearings, fairly,

and without prejudice, and to endeavor to reach a just conclusion. In *State v. Saunders*, supra, the court, after remarking the effect of disagreements of juries at common law, and that under that system juries were kept together until they did agree, and how such rule had been mitigated in the United States, said the jury would have to remain together, and could not separate, until they agreed upon a verdict, and brought it into court. This court, in disposing of an exception to this charge, said: "It was proper for the court to inform the jury respecting their duty,—advise them how they should consider the matter before them, and the course to pursue in reaching a conclusion. Nor should the concluding remark in the charge be construed as any determination to keep them together until they had agreed, or an indication that the case in the mind of the court was so plain that they would not be justified in failing to agree." No intelligent or conscientious juror could be misled by such an admonition. He understands the motive of the court not to be to control or coerce his judgment contrary to his conscientious convictions, or to induce him to yield to the judgment of his fellows without the fullest comparison of all of the facts. It is impossible to see in what manner such advice to the jury could have injured the defendant. The claim that its tendency was to make weak jurors yield their judgments to the majority, or to those having stronger wills, cannot affect the question, if it were true, which is not conceded; for the reason that those considerations would be just as likely to operate favorably as unfavorably to the prisoner. After the most careful consideration of this case which I have been able to give it, I am unable to see any error in this record prejudicial to the appellant. So far as the record discloses the proceedings of the court below, every step in the progress of the trial seems to have been carefully taken, with a view of securing, to the fullest extent, a fair and impartial trial. Having reached the conclusion that there is no error in the record, we have no discretion, but must affirm the judgment.

ON REHEARING.

STRAHAN, J. Appellant's counsel have filed a petition for rehearing, in which they mainly rely upon the alleged error in the trial court in giving the instruction set out in the opinion. That instruction told the jury that under the circumstances therein enumerated the defendant could not, without some proof of change of conduct or action, excuse the killing of Ogle upon the ground that he believed that Ogle was attempting to draw a weapon with which to defend himself, or assault the prisoner. This instruction appears to have been copied almost literally from *State v. Neeley*, 20 Iowa, 108. It was conceded upon the argument that at the time of the meeting between Hawkins and Ogle which resulted in Ogle's death the parties were not on friendly terms, and, when they

met, Hawkins addressed him by saying: "I understand you have been lying about me." Ogle then faced Hawkins, and put his hand down in his pocket. Some other words were also used. Hawkins states that Ogle said, when he put his hand in his pocket: "I'll settle it now with you, you d——d son of a b——h!" He says, when he saw this, he threw his hand under his coat, got hold of his pistol, and fired. I think the evidence tended to prove that Hawkins armed himself, and sought Ogle, with the intent of provoking a difficulty that he expected might be deadly. If not, why did he arm himself? And, if he did not intend to precipitate a difficulty, why did he address Ogle in the offensive manner in which he says he did? He must have known that it was highly probable that Ogle might resent such an offensive salutation; and it seems he was ready, with his pistol concealed under his coat, to carry into effect a previously formed design to kill him. That is the light in which the jury might have regarded both the language and conduct of the defendant. After arming himself, and seeking Ogle, and addressing him in the offensive manner he says he did in his own evidence, could he have had but one purpose, or expected but one result? Those words, if not designed to bring on a difficulty, were well chosen for that purpose. The defendant, in his preparation, in seeking Ogle, and in addressing him in the manner he did, was not without fault. The jury had the right to weigh these circumstances, and to consider the relations of the parties at the time of the homicide. In this case, Hawkins was the aggressor from the beginning of the transaction to the termination of the fatal affray. He armed himself with a deadly weapon, and sought his adversary with the intent to have a difficulty with him. He did not salute Ogle in a friendly manner, or in friendly language. On the contrary, he used those words which he was bound to know might move Ogle to some angry retort, or hostile demonstration. When Ogle put his hand in his pocket, where there was no weapon except a common pocket-knife, the defendant shot him down, and his counsel call that "self-defense;" and they contend that Hawkins' conduct did not so far put him in the wrong, as to deprive him of the right to justify the killing of Ogle on the ground that he acted in self-defense. The charge excepted to must be considered in the light of the facts before the court. Had it been shown in evidence that the defendant approached Ogle, for a lawful or legitimate purpose, in a peaceable manner, and used no words calculated or designed to precipitate a difficulty, another and quite a different question would have been presented, upon which it is not necessary to express an opinion in this case.

Counsel for appellant present a number of cases in support of their petition for a rehearing which were not cited or considered at the argument, and which they think sustain their contention that the instruction ex-

cepted to was error. *Stewart v. State*, 1 Ohio St. 66, is a well-considered case, in which the opinion of the court was delivered by that eminent jurist, Judge THURMAN; but it does not sustain appellant's contention. A single point in the head-note sufficiently indicates the effect of the opinion: "When the slayer seeks and provokes an assault upon himself in order to have a pretext for stabbing his adversary, and does, upon being assaulted, stab and kill him, such killing is not excusable homicide, in self-defense." The authority of this case is with the ruling of the court below. The case of *Adams v. State*, 47 Ill. 376, belongs to the same category. That case holds that while a man threatened with danger must determine from appearances, and the actual state of things surrounding him, as to the necessity of resorting to self-defense, and, if he acts from reasonable and honest convictions, he will not be held responsible, criminally, for a mistake as to the extent of the actual danger, where other judicious men would have been alike mistaken; and at the same time he has not the right to provoke a quarrel, and take advantage of it, and then justify the killing of the party with whom he provoked the quarrel. In *Atkins v. State*, 16 Ark. 568, the point under discussion was not directly presented. The court instructed thus: "That if the jury believe from the testimony that Atkins, the prisoner, went to Wicker's house on the night of the homicide for the purpose of a difficulty with Wicker, and in that difficulty killed him with a deadly weapon, he is guilty of murder." This was held to be error, and properly so. In passing on this question the court uses this guarded language: "If the prisoner went to the house of Wicker with a hostile purpose, or for the purpose of getting into a difficulty with him, and if he used a deadly weapon in the fight, these were facts to be considered by the jury in passing upon his guilt or innocence, or in determining the grade of his offense; but these alone, regardless of all other circumstances attending the difficulty, would not necessarily make him guilty of murder." It will be seen that the doctrine of self-defense was not presented. It does not appear that the slayer was assailed, or in any way molested, by the deceased. It was the grade of the crime that was the point of the inquiry. One fatal objection to the instruction was that it declared the legal effect of certain portions of the evidence, which belonged to the jury, and necessarily excluded from their consideration other facts proper for their consideration. *Cotton v. State*, 31 Miss. 504, is much relied upon by appellant, and it must be conceded that some of the language used in the opinion might seem to justify this contention; but the real point arose on an exception to an instruction which was in these words: "That if the accused was armed with a deadly weapon, and sought and brought about the difficulty with the deceased, and killed the deceased, in the difficulty, with such a

weapon, he is guilty of murder." It will be seen that this is substantially the same instruction given in *Atkins v. State*, supra, and it might properly have been held erroneous for the same reasons. Nor did the question of self-defense necessarily arise upon the record. It did not appear in that case that the deceased assailed his slayer, or even used force in his own defense. Cotton walked backward across the street, and Smith, the deceased, walked slowly after him till he was shot. *Regina v. Smith*, 34 E. C. L. 666, is also relied upon by counsel. The syllabus of that case is favorable to the appellant; but neither the facts recited, nor the opinion of the court, contain anything upon which such a statement of law could be properly based. *State v. Herrell*, 97 Mo. 105, 10 S. W. Rep. 887, is another case cited by appellant. The question arose upon the following instruction given to the jury: "The court instructs the jury that if you believe from the evidence in the case that the defendant sought or invited the difficulty in which Ring was killed, or that he provoked or commenced or brought it on by any willful act of his own, or that he voluntarily, and of his own free will, engaged in it, then and in that case you are not authorized to acquit him on the ground of self-defense. The right of self-defense does not avail as a defense in any case where the difficulty is sought for and induced by the party by any willful act of his own, or where he voluntarily, and of his own free will, enters into it." The opinion says: "This instruction is erroneous in that it cuts off the defendant from a limited or qualified right of self-defense, though actuated by no felonious intent, provided he 'brought on the difficulty.'" This learned opinion is written with rather too much energy to be safely followed in all particulars. But, after citing numerous cases, it says: "Those cases, as well as all carefully considered cases in other jurisdictions, and all the text writers, recognized as sound and wholesome law the principle that if a man bring on a difficulty with the purpose of wreaking his malice by slaying his adversary, or doing him some great bodily harm, and, actuated by such a felonious purpose, he does the homicidal act, then there is no self-defense in the case, and he is guilty of murder in the first degree, and nothing less."

These are all the cases upon which counsel rely in support of their petition for a rehearing. A few cases in support of the opinion already announced may be cited on the particular point under discussion. The case of the *State v. Benham*, 23 Iowa, 154, is a well considered case, in which the opinion of the court was delivered by that distinguished jurist, Judge DILLON. He said: "Nor can the defendant get the benefit of the plea of self-defense if he sought the deceased with a view to provoke a difficulty, or to bring on a quarrel. *State v. Neeley*, 20 Iowa, 108. The law regards human life as the most sacred of all interests committed to its protection; and

there can be no successful setting up of self-defense unless the necessity of taking life is actual, present, urgent,—unless, in a word, the taking of his adversary's life is the only reasonable resort of the party to save his own life or his person from dreadful harm, or severe calamity, felonious in its character." *State v. Rogers*, 18 Kan. 78, is to the same effect. *State v. Johnson*, 76 Mo. 121, belongs to the same class. It was there held that "the right of self-defense does not imply the right of attack, and it will not avail in any case where the difficulty is sought for and induced by the party himself." It must not be overlooked that the instruction excepted to did not undertake to define the grade of the offense, but left that matter entirely in the hands of the jury, where it properly belonged. The rehearing must therefore be denied.

(43 Kan. 330)

STATE *ex rel.* ATTORNEY GENERAL v.
SCATES.

(Supreme Court of Kansas. March 8, 1890.)

COUNTY COMMISSIONERS—ALLOWANCE OF ILLEGAL
CLAIMS.

Where a board of county commissioners, upon the advice of able and competent attorneys at law, allow certain claims, which are not strictly legal charges against the county, their official action in so doing will not render them liable to the charge of corruption or forfeiture of office, if the allowances were honestly made, and the board acted merely upon a mistake or error of law as to the liability of the county.

(Syllabus by the Court.)

This is an original proceeding *in quo warranto*, brought February 15, 1888, by the state of Kansas, upon the relation of the attorney general, against T. A. Scates, to remove him from the office of county commissioner of Seward county. His term of office commenced in January, 1887, and will expire in January, 1890. The petition states, as grounds for removal—*First Charge*. That Scates and Kimball, being a majority of the county board, at the April session, 1887, "unlawfully, corruptly, and with intent to defraud the tax-payers of Seward county," allowed a claim presented in the name of T. N. Sedgwick, and purporting to be for \$488, traveling expenses, and \$1,500 for attorney's fees, which claim was illegal and unjust. Sedgwick never filed said claim. A county warrant was issued for \$1,988, the full amount of said claim, and paid out of county funds. Sedgwick received only \$475, and the balance of \$1,513 was corruptly converted by Scates to his own use. *Second Charge*. That in February, 1887, Scates and Kimball, having disobeyed an order of the district court, were fined for contempt, and in default of payment were imprisoned by order of said court in the jail of Barber county. They applied to this court to be discharged upon *habeas corpus*, and were remanded. Afterwards, "well knowing that the county of Seward was not liable for the payment of said fines and costs, nor

for attorney's fees in making their defense before the judge of the district court, nor for attorney's fees in the *habeas corpus* proceedings in this court, said Scates and Kimball, in April, 1887, allowed and voted to said Scates the sum of \$234.41," as and for his expenses and *per diem*, while under arrest and in jail, and while attending the supreme court on the *habeas corpus* proceedings, for which sum a county warrant was issued and signed by said Scates. *Third Charge.* That at said meeting in April, 1887, said Scates and Kimball "unlawfully and corruptly" allowed a claim in favor of one J. L. Wells, amounting to \$90 for traveling expenses in the matter of the *habeas corpus* proceedings already mentioned. *Fourth Charge.* That at the April session, 1887, of the county board, Scates and Kimball, as a majority of said board, allowed one H. C. Finch the sum of \$701.25 for services "as the attorney of said Scates and Kimball," in attending to their private business in said contempts and *habeas corpus* proceedings. *Fifth Charge.* At said April meeting, 1887, Scates and Kimball, "in pursuance of their unlawful and corrupt conspiracy," allowed said Kimball the sum of \$254.11, "as and for his expenses and *per diem*," while in custody and in jail respecting said contempt proceedings, and while attending the supreme court in said *habeas corpus* proceedings. *Sixth Charge.* At said meeting in April, 1887, Scates and Kimball, as county commissioners, unlawfully and corruptly allowed and voted to one J. W. Hixon the sum of \$433.29 as and for the fines and costs imposed on them in the *mandamus* proceedings aforesaid. *Seventh Charge.* In July, 1887, Scates and Kimball, as county commissioners, unlawfully and corruptly allowed to said Scates the sum of \$82.39 as "traveling expenses on trip to Newton, Emporia, and Topeka, to consult attorneys concerning decision of supreme court in *habeas corpus* proceedings." This Exhibit G contains three items,—one as above, under date of 14th April, for \$82.39; and one, under date of 8th May, for \$22.19, for "traveling expenses to Newton to consult attorneys in injunction case." *Eighth Charge.* At the July session of the board of commissioners, Scates and Kimball unlawfully and corruptly allowed, as a claim against Seward county, a bill in favor of Brown and Simpson, amounting to \$425, "for legal services rendered for said Scates and Kimball in their private affairs in the *habeas corpus* proceedings aforesaid in the supreme court." *Ninth Charge.* In July, 1887, said Scates and Kimball, as county commissioners, corruptly made an allowance of \$50 to one H. D. Merritt, "for services as deputy county attorney," said "claim not being one for which Seward county was liable." *Tenth Charge.* In October, 1887, said Scates and Kimball, as such commissioners, unlawfully and corruptly allowed \$818 to one Theodore Botkin, an attorney at law, "there being nothing then due to said Botkin for anything whatever." *Eleventh*

Charge. Scates and Kimball as commissioners, and Oliver Leisure as county clerk, unlawfully and corruptly issued, and caused and procured to be issued, a county warrant in favor of one G. S. Stein for the sum of \$5,100, which warrant was signed by said Scates as chairman, and by said Leisure as county clerk. No bill, claim, or account was ever presented to the county board by said Stein, nor filed for said claim. Said warrant was issued, dated July 30, 1887, and was paid by the treasurer of Seward county on 23d November, 1887, and said warrant was issued for the purpose and with the intent to defraud Seward county. *Twelfth Charge.* At the January session, 1888, of the county board, said Scates and Kimball, constituting a majority of said board, unlawfully and corruptly allowed to one H. D. Merritt \$190 on account of matters, "in no wise legal claims against Seward county." *Thirteenth Charge.* At said January session, 1888, Scates and Kimball, as county commissioners, "unlawfully and corruptly" allowed Theo. Botkin, attorney at law, the further sum of \$303 for pretended services; whereas, the supposed services were not rendered for or on behalf of Seward county. *Fourteenth Charge.* In July, 1887, Scates and Kimball, as county commissioners, entered into a conspiracy with one Adkison, for the issuance to Adkison bonds of Seward county, "to take up and fund outstanding orders of said county; whereas, at that time Seward county had no bonded debt of any kind, and said Scates and Kimball as commissioners, and said Leisure as county clerk, corruptly issued and sold to Adkison bonds of said county in the sum of \$40,000, without any vote of the electors, and without any authority of law; and at that time the total indebtedness of the county was only \$33,730, so that in any event, even if said bonds were applied in payment of actual indebtedness, there was still an excess of \$6,270 corruptly issued, without any consideration whatever." The defendant filed his answer on April 6, 1888, admitting that he was a member of the board of county commissioners of Seward county, as alleged in the petition. And for further answer he denied generally and specifically all the other allegations and statements contained in the petition. J. H. Stuart, Esq., was appointed a commissioner to take and report the testimony. His report embraces 308 pages of type-writing. The case was orally argued, and submitted to the court upon briefs, at its May sitting for 1889.

L. B. Kellogg, Atty. Gen., Webb, Campbell & Spencer, G. W. Collins, and S. N. Wood, for plaintiff. Joseph Wisby and J. D. McFarland, for defendant.

HORTON, C. J., (after stating the facts as above.) Seward county was organized in 1886. In the fall of 1886, T. A. Scates, W. W. Kimball, and E. A. Watson were elected county commissioners, and Oliver Leisure county clerk. The term of each began in

January, 1887, and it was during the spring and summer of 1887 that the matters complained of in these proceedings occurred. The object of the action is to remove Scates from office for alleged misconduct, under section 219, c. 25, Comp. Laws 1885, p. 300, which reads: "If any board of county commissioners, or any commissioner, or any other county officer, shall neglect or refuse to perform any act which it is his duty to perform, or shall corruptly or oppressively perform any such duty, he shall forfeit his office, and shall be removed therefrom by civil action in the manner provided in the Code of Civil Procedure." The petition alleges that the acts complained of were done "corruptly, and with the intent to defraud the tax-payers of Seward county." This case has been under advisement for several months. All the members of the court have carefully examined and fully considered the testimony. The differences among the members of the court as to the judgment which should be rendered has been the cause of the delay in filing this opinion. In regard to the claim presented against Seward county in the name of T. N. Sedgwick, for \$1,500 as attorney's fees, and \$488 for traveling expenses, the majority of the court think that the testimony does not show that the charge is illegal. The alleged retention or conversion of \$1,513 of the claim or county warrants issued to pay the same by Scates rests almost wholly upon the testimony of A. B. Carr. The majority of the court do not believe him worthy of credit, and therefore are unwilling to accept his testimony as truthful. If his evidence is rejected, or if it is held that it is sufficiently denied by the evidence of the other witnesses, there is not any testimony showing, or tending to show, that Scates acted dishonestly or corruptly in allowing the Sedgwick claim, or that he in any way realized any personal benefit or advantage therefrom. The writer of this thinks, from the testimony, that there was a corrupt agreement between Carr, Scates, and G. S. Stein, which resulted in the presentation of the Sedgwick claim for \$1,988, and that only \$475 of this went to Sedgwick, the balance being for the benefit of Scates, Carr, and Stein. Concerning the other charges alleged in the petition, the majority of the court are of the opinion that, while many of the allowances made by Scates, as a member of the board of county commissioners of Seward county, were extravagant, and several of them not strictly legal, yet that the testimony does not disclose any corrupt or intentional wrong upon his part in voting to allow these claims, or in issuing county warrants therefor. The majority of the court do not think that the testimony shows, or tends to show, that Scates obtained any personal advantage or benefit from the allowance of any of these claims. In support of the good faith of Scates, it is also urged by the majority of the court that all of these claims were allowed upon the advice of able and competent attorneys. With these conclusions,

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however, I do not concur. As the majority of the court do not find that any of the acts complained of were done by Scates corruptly, or with the intent to defraud the tax-payers of Seward county, judgment will be rendered in his favor, and against the plaintiff. It seems unnecessary to recite or comment upon the testimony presented upon the hearing. It is very voluminous and contradictory. If the important parts were incorporated in the opinion, it would cover many pages. The defendant will recover his costs.

VALENTINE, J. I do not concur in the foregoing opinion of the chief justice, although I think I can say I concur in the judgment recommended. During the year 1887, T. A. Scates, W. W. Kimball, and Edwin A. Watson constituted the board of county commissioners of Seward county, and during that time, and principally in April, 1887, they allowed a number of claims against the county of Seward, for which the defendant Scates is now prosecuted in this action. Some of such claims, as I think, were unreasonable, indeed unconscionable; and some of them, or, at least, portions of the amounts allowed, were illegal. In my opinion, the Sedgwick claim spoken of was unreasonable, both in the amount claimed and the amount allowed. Seward county warrants, or, in other words, Seward county scrip, was at that time worth only about 70 cents on the dollar, and the county board generally allowed an amount on each claim, and issued scrip therefor, which, if sold at its market value, would bring the amount in cash of the original claim. In one instance, and one of the earliest, if not the earliest, where the claim was about \$2,877, the board allowed the sum of \$4,106.09, and issued scrip for the last-named amount, the difference between the two amounts being over \$1,000; and if the members of the board had been prosecuted under section 3 of the act to restrain the issuing of county warrants, and found guilty, they would, and should, in my opinion, all have been removed from office. Comp. Laws 1885, p. 301, par. 1699. Said section 3 also applies to county clerks. Oliver Leisure was the county clerk. His case has been disposed of. *State v. Leisure*, 42 Kan. —, 21 Pac. Rep. 1070. But not one of the guilty parties, the county commissioners or the county clerk, has ever been prosecuted under said section 3. Scates is now prosecuted under section 180 of the act relating to counties and county officers. Comp. Laws 1885, p. 300, par. 1694. That section provides that a county officer may be removed from office for a neglect or refusal to perform his official duties, or for corruptly or oppressively performing the same, and does not provide for any removal from office for any other cause. Now, there is no pretense under the facts of this case that Scates so neglected or refused to perform the duties of his office, or so oppressively performed them, that he could be removed from office for any

such reasons, but the only claim made as against him is that he so corruptly performed the duties of his office that he may be removed therefrom. It is not claimed that he can be removed from his office because he united with the other members of the board, or either of them, in allowing unreasonable claims or illegal claims, unless it can also be said that in the allowance thereof he acted corruptly. In my opinion, as above stated, every member of the board might have been removed from office by a prosecution under section 3 of the act to restrain the issuing of county warrants, for the reason that they allowed amounts on the claims presented to them greater than the actual amounts of the claims themselves, and for issuing county warrants or county scrip which included these increased amounts; yet all the members of this court agree that no one of them could be removed from office under section 180 of the act relating to counties and county officers, for allowing such excess, unless he received some portion of the excess himself, or unless he received a bribe of some kind for making such excessive allowance. My opinion, however, is that if any member of the board united with the other members, or either of them, in allowing to himself an excessive amount on his own claim, and received the same, he might be prosecuted and removed from office under section 180 of the act relating to counties and county officers, as well as under section 3 of the act to restrain the issuing of county warrants. But the chief justice says that no instance of an excessive amount being allowed and received by a commissioner is shown by the evidence introduced in this case, and I think this statement is correct. Therefore the defendant, Scates, cannot be removed from office in this case, unless actual and absolute corruption is shown against him, and it seems virtually to be admitted that no corruption is shown against him unless it is shown by the testimony of A. B. Carr. Now, in my opinion, in the light of all the evidence in the case, the testimony of Carr is wholly unworthy of credit; and in its material statements it is not only against a large preponderance of the evidence, but it is also absolutely untrue. Also the county board seems in all cases in the allowance of doubtful claims and the claims now complained of, and especially in the allowance of excessive amounts on such claims, to have acted under the advice of legal counsel and others, and under the advice of counsel for both sides in the local difficulties then existing in that county. I think the plaintiff has utterly failed in its proof as to all the allegations of its petition charging fraud or corruption as against the defendant. While he acted mistakenly in several instances under the bad advice of counsel and others, yet, from the evidence in the case, I do not think that it sufficiently appears that he acted corruptly. For the reasons above stated I concur in the judgment.

JOHNSTON, J. While I cannot assent to all that is said in the foregoing opinions, I concur in the judgment.

(43 Kan. 337)

STATE *ex rel.* ATTORNEY GENERAL *v.* KIMBALL.

(Supreme Court of Kansas. March 8, 1890.)

Original proceeding in *quo warranto*.

L. B. Kellogg, Atty. Gen., Webb, Campbell & Spencer, G. W. Collins, and S. N. Wood, for plaintiff. Joseph Wisby and J. D. McFarland, for defendant.

PER CURIAM. Upon the authority of *State v. Scates*, ante, 479, (just decided,) judgment in this case will be rendered for the defendant, W. W. Kimball, and against the plaintiff. The defendant will also recover all his costs.

(43 Kan. 364)

BRUNDIGE *et al.* *v.* BLAIR *et al.*

(Supreme Court of Kansas. March 8, 1890.)

REFORMATION OF CONTRACT — SPECIFIC PERFORMANCE.

1. To authorize a court to rectify a contract, and insert other and additional terms and conditions therein, the proof must be full, strong, clear, and the fact shown beyond reasonable controversy.

2. In order to maintain an action for the specific performance of a contract, required by the statute of frauds to be in writing, it is essential that the whole contract, with all its terms and conditions, made certain and definite, be in writing, or that they can be made definite and certain by reference to other written instruments, or by reference to extrinsic and existing facts, which may be shown to the court. *Fry v. Platt*, 32 Kan. 62, 3 Pac. Rep. 781, cited and followed.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Brown county; R. C. BASSETT, Judge.

Waggener, Martin & Orr and C. W. Johnson, for plaintiffs in error. James Falloon, for defendants in error.

SIMPSON, C. The facts are embodied in the special findings made by the trial court, as follows:

"(1) In the month of September, 1886, the Chicago, Kansas & Nebraska Town Company were the owners of three lots in the city of Horton, Brown county, Kan., described as follows: 'Lots 5, 6, and 7, in block 10;' and at said time they sold the said lots to William M. Wellcome and John D. Blair, who were then and have ever since been residents of Hiawatha, in said county. At the time of said sale the said town company did not convey the said lots by deed, but executed a contract to convey the same to said purchasers, in consideration of the payment of the sum of \$400.

"(2) Some time after the purchase of the said lots by the said Wellcome and Blair, they made an assignment on the back of said contract given them by the town company, whereby they assigned to one F. D. Krebs a one-third interest therein, and the said Krebs has ever since been the owner of a one-third interest in the said contract for a deed.

"(3) The said town company has never executed a deed in pursuance of said contract, and the legal title to said lots before and

since said purchase has remained in said company, and is in the town company at the present time, and upon said contract for a conveyance, before a deed is due from said town company, they are entitled to be paid a balance due on said purchase price of \$——, but the town company have been ready to convey said lots by deed upon payment of the unpaid purchase money ever since the making of said contract.

"(4) On the 12th day of May, 1887, the said F. D. Krebs, who was then engaged in a bank at Horton, Kan., was the owner of a one-third interest in the contract for a deed, and was the duly-authorized agent of John D. Blair and W. M. Wellcome for the sale thereof; and on the morning of said day Alva C. Ricksecker, one of the plaintiffs and one of the copartners in a real-estate firm doing business as Brundige, Bear & Ricksecker, at Horton, Kan., went into the bank of the said Krebs, at Horton, and asked the said Krebs if he would not sell the said lots. Said Krebs at first declined, but finally, in said conversation, he told said Ricksecker that he would sell said lots for \$1,100,—\$550 cash, and \$550 in one year, secured by a note bearing 10 per cent. interest and a mortgage upon said lots. The said Alva C. Ricksecker then asked the said Krebs if he would let him sell the said lots, and hold said offer open for three or four days, and Krebs replied that he would give him one week for the sale of said lots upon said terms.

"(5) Said Ricksecker then left said bank, and was gone fifteen or twenty minutes, when he returned, and said to the said Krebs that they (meaning the firm of Brundige, Bear & Ricksecker) would take said lots upon the terms proposed by the said Krebs; and thereupon they paid to the said Krebs, by check and currency, the sum of \$100 upon said purchase; which said \$100 was thereupon by the said Krebs deposited in said bank to the credit of W. M. Wellcome, and which still remains to his credit upon the books of said bank. At the time of signing the said memorandum receipt Krebs said that he would at once send for the deeds.

"(6) At the time the said Ricksecker notified the said Krebs that he would take said lots, he produced and handed to the said Krebs, to be signed, the written memorandum receipt referred to in plaintiff's petition, which is in words and figures as follows, to-wit: 'H. W. Brundige. S. E. Bear. A. C. Ricksecker. Office of Brundige, Bear & Ricksecker, Real-Estate, Loan, Insurance Agents, and Notaries Public. \$100. Horton, Kansas, May 12th, 1887. Received of Brundige, Bear & Ricksecker, one hundred dollars, as part cash payment on purchase of lots five, six, and seven, in block number 10, situated in the city of Horton, Brown county, Kansas. Total purchase price, \$1,100. Balance due, \$450, on delivery of papers. W. M. Wellcome. By F. D. Krebs, Agent. [Indorsed:] State of Kansas, Brown county—

ss.: This instrument was filed for record on Oct. 1st, 1887, at 11 o'clock A. M., and duly recorded in Book 31, on page 131. M. G. HAM, Register. Fee, 25. Pd. [Seal.]' The said Krebs thereupon took the said contract, and hastily read that portion of the same which acknowledged the receipt of \$100, and signed it, without giving any further attention, and returned it to the said Ricksecker.

"(7) The said receipt was drawn upon a blank used in the office of the said real-estate firm of Brundige, Bear & Ricksecker, and was filled out by some member of said firm in their office, and when the said Krebs was not present, and the said Krebs had no knowledge that such a memorandum contract had been prepared, or was going to be prepared, until it was handed to him for his signature as aforesaid.

"(8) Shortly after the said memorandum receipt or contract was signed as aforesaid, the said Krebs notified the said John D. Blair and W. M. Wellcome of the sale of said lots, and the terms of said sale, and requested them to forward to him a deed conveying said lots to the said Brundige, Bear & Ricksecker; and within a few days, and before the 18th day of May, 1887, the said Krebs received back a warranty deed from William M. Wellcome and John D. Blair and their wives, conveying to the said plaintiffs the said lots in controversy, and the said deed was kept by the said Krebs at the bank until the 21st day of May, 1887, when it was returned to Blair and Wellcome.

"(9) From the 12th day of May, 1887, no demand was made of the said Krebs, or any of these defendants, for said deed, and no communication was had between the said Krebs and any of the plaintiffs, in reference to consummating the said sale, until on the 21st day of June, 1887, the said Ricksecker made inquiry of the said Krebs for the said deed, and was informed by Krebs that he had sent it back. During all of said time the plaintiffs were depositing money and doing business with the bank of Horton, and some of them were in said bank nearly every day.

"(10) On the morning of June 22, 1887, the plaintiffs made a tender of \$450 to the said Krebs, and demanded a deed to the said lots, and stated that they were willing to execute a note and mortgage for the deferred payment, and were then told by the said Krebs that he had no deed for them; and thereafter, on the same day, the said plaintiffs made a tender to the defendants John D. Blair and W. M. Wellcome of \$450, but the said John D. Blair and W. M. Wellcome refused to accept the same.

"(11) On June 25, 1887, the said plaintiffs, at Hiawatha, Kan., tendered the defendant W. M. Wellcome \$450 in gold, and told him they were ready to execute a note and mortgage at any time for the deferred payment, and demanded the deeds to said lots; but the said W. M. Wellcome refused to accept said

money, and said note and mortgage, and to make said deed.

"(12) On the 27th day of June, 1887, about two hours before the bringing of this suit, C. W. Johnson, the attorney of the plaintiffs, made a tender to W. M. Wellcome of a note for \$550, due in one year, and a mortgage to secure the same upon the lots in controversy, the said note and mortgage being executed by the plaintiffs herein, but the said defendants have refused, and still refuse, to execute any deed to the plaintiffs for said lots.

"(13) At the time this suit was brought the plaintiffs deposited in court the note and mortgage as described in the last finding, and the same have remained on file in the custody of the clerk of this court since the bringing of said suit; and, on the same day this cause was called for trial, the plaintiffs tendered in open court to the defendants \$450, and deposited the said sum with the clerk of this court.

"(14) At the time of the conversation between said Krebs and Ricksecker, on May 12, 1887, the said Ricksecker did not know who were the owners of said lots until the said receipt was signed, when he ascertained that William M. Wellcome was to make the deed, and at no time during any of the negotiations between the parties was any mention made of the interest of said F. D. Krebs in the contract from the town company, and in the said transactions it was never agreed or understood that Krebs should join in the execution of a deed to the plaintiffs, nor was John D. Blair mentioned in the oral agreement on May 12th, nor until a deed was demanded and refused. No agreement was made between any of the parties hereto, as to when or how the title from the Horton Town Company should be obtained.

"(15) The wives of the defendants never had any part in the contract between plaintiffs and defendants relating to the sale of the lots, and they have never had anything to do in said transactions, except as referred to in the eighth finding.

"(16) On the 12th day of May, 1887, the said lots were vacant and unimproved, and have so remained ever since. The plaintiffs did not act towards taking possession thereof, except that shortly after the commencement of this suit they put up 'For Sale' notices thereon. The defendants paid the taxes on the lots for 1887.

"(17) On the 12th day of April, 1887, real estate was, and for some months prior thereto had been, rapidly advancing in value in the city of Horton, and continued to advance in value until the present time; but the market value of the said lots on the 21st day of June, and since, is not shown by the evidence.

"(18) Shortly after the demand was made of the defendants for a deed, F. D. Krebs requested one of the plaintiffs to call at the bank, and get the \$100 paid on the lots, but

said plaintiffs have never received back the money.

"Conclusions of Law. Time being of the essence of the contract, and the plaintiffs having failed to perform their part of the agreement within the time limited for the sale of said real estate, they ought not to have a reformation of the contract, nor specific performance, and the defendants should recover their costs herein."

The plaintiffs below bring the case here for review.

The theory upon which this action was probably instituted was that as the contract of the 12th day of May, made between Ricksecker and Krebs, could not be enforced under the statute of frauds, the receipt for \$100 could be so reformed as to embrace all the terms and conditions of the sale, and then specific performance would be decreed. The plaintiffs in error, who commenced this action below, have never asked that the verbal contract be enforced; the prayer of their petition is that the memorandum receipt be reformed and then enforced. In the nature of things, the first question is, ought the contract to be reformed? The trial court refused to decree a reformation, or, speaking with greater legal precision, a rectification. This is equivalent to a finding of fact against the plaintiffs in error on that question, and in this particular case, in view of the conflict in the evidence, and all the other considerations so often enumerated, will not be disturbed. Special findings of fact numbered 6 and 7 state the circumstances under which the receipt was signed, and seem to us to authorize the conclusion of the trial court not to reform the contract in accordance with the claim of the plaintiffs in error.

It has been laid down by the text-writers, by Story in his Equity Jurisprudence, and by courts of last resort, that, before a court can decree a rectification, the evidence must be "strong and plain." Whart. Cont. § 208. "That the error should be proved beyond reasonable doubt." Story, Eq. Jur. (12th Ed.) § 157, citing *Tucker v. Madden*, 44 Me. 206; *Shattuck v. Gay*, 45 Vt. 87; *Hudson Iron Co. v. Stockbridge Iron Co.*, 107 Mass. 290; *Edmonds' Appeal*, 59 Pa. St. 220; *Coale v. Merryman*, 35 Md. 382; *Hileman v. Wright*, 9 Ind. 126; *Miner v. Hess*, 47 Ill. 170. The proof must be "full, clear, and decisive." *Bish. Cont.* § 708, citing, in addition to those cited by Story, *Insurance Co. v. Davis*, 131 Mass. 316; *Wry v. Cutler*, 12 Heisk. 28; *Alexander v. Caldwell*, 55 Ala. 517; *Campbell v. Hatchett*, Id. 548; *Vreeland v. Bramhall*, 28 N. J. Eq. 85; *Flucke v. Jersey City*, Id. 110; *Cummins v. Bulgin*, 37 N. J. Eq. 476. It is also said by Bishop that "mere preponderance of evidence is not enough. The mistake must appear beyond reasonable controversy." *Bish. Cont.* § 708, supra. Citing *Potter v. Potter*, 27 Ohio St. 84; *Hinton v. Insurance Co.*, 63 Ala. 488.

The trial court might have very properly

stopped with a refusal to reform the contract, but it gave, as an additional reason for its decree against specific performance, that time was of the essence of the original contract, and performance was not had or tender made within the week. This conclusion we do not assent to, but, in addition to what has already been said about the failure of proof to compel rectification, we are confronted with the requirements of the statute of frauds in contracts of this character. The effect of the special findings of the trial court is that Krebs, at the time of the execution of the receipt, intended to sign only an acknowledgment of the payment for \$100. But put it in the strongest view that can be taken in favor of the plaintiffs in error, and then we have a contract for the sale of the lots, signed by the party that is to be charged, that does not contain all the terms and conditions of a sale, but shows affirmatively on its face that there are other terms and conditions that must of necessity exist to make the contract complete. In the case of *Fry v. Platt*, 32 Kan. 62, 3 Pac. Rep. 781, VALENTINE, J., says: "In order to maintain an action for the specific enforcement of a contract, where the contract is required to be in writing by virtue of the provisions of the statute of frauds, it is required that the whole of the contract, with all its essentials, be in writing, and that its terms be definite and certain, or that they can be made definite and certain by reference to other instruments in writing, or by reference to extrinsic and existing facts which may be shown to the court." It seems therefore that, if we accept the receipt as embodying a part of the terms and conditions of sale, it is so indefinite and uncertain, as to when and how the balance of the purchase money is to be paid, that specific performance could not be decreed. We recommend that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 294)

FIRST NAT. BANK v. CITY OF OTTAWA *et al.*

(Supreme Court of Kansas. March 8, 1890.)

BANKS—COLLATERAL SECURITY—GARNISHMENT—CITIES.

1. A banking corporation organized under the laws of the United States can take an assignment of the money due and to become due from a city of the second class, on a contract for paving a street, from the contractors, to secure an existing, *bona fide* indebtedness by the contractor to the bank.

2. Considerations of public policy will not allow a city of the second class to be liable under a process of garnishment. *Switzer v. City of Wellington*, 40 Kan. 250, 19 Pac. Rep. 620, cited and followed.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Franklin county; A. W. BENSON, Judge.

H. P. Welsh, for plaintiff in error. Wm. H. Clark, H. A. Richards, W. Littlefield, and Mechem & Smart, for defendants in error.

SIMPSON, C. On the trial of this cause in the district court of Franklin county, the parties made an agreed statement of facts, and the court made this statement, in the form of special findings of fact, as follows:

"(1) The plaintiff is a banking corporation duly organized under the laws of the United States commonly called the 'National Currency Act,' and, as such bank, is doing business at Ottawa, in this state. (2) C. C. Minton is, and for the last past year or more has been, a stockholder in said bank, and the cashier thereof; he is also, and for the six months last past has been, a councilman of said defendant city. (3) The city of Ottawa is, and for many years has been, a city of the second class, in this state. (4) On the 19th day of May, 1887, the city of Ottawa duly entered into a contract in writing with the firm of Hanway Bros., whereby the latter agreed to macadamize a certain street in the city for a certain sum per yard. This contract was duly performed by Hanway Bros., and accepted by the city, so that on the 18th day of October, 1887, the city owed to Hanway Bros. on said contract the sum of \$1,461.24, which has not been paid. (5) On the 8th day of July, 1887, said Hanway Bros. owed the plaintiff the sum of \$3,000 for moneys before that time loaned to them by the bank; and thereupon, to secure said debt, Hanway Bros., at the request of the bank, duly executed the written assignment, a copy of which is attached to the petition. They were then engaged in the work under said contract, and thereafter continued in the full and sole management and control thereof, the same as though the assignment had not been made, to its completion, October 18, 1887. (6) During the summer of 1887, the firm of Thomas Bros., intervenor herein, purchased time-checks, from time to time, issued by said Hanway Bros. to the men employed by them upon said macadam work, and said Hanway Bros. paid said Thomas Bros. on said time-checks, at each stated period of the month, as they (Hanway Bros.) received their pay from the city on their contract, until October 5, 1887, when Thomas Bros. held said checks so purchased by them to the amount of \$462, when Hanway Bros. gave their promissory note therefor to Thomas Bros., due November 6, 1887, and on the back of said note made and assigned, at the time of its execution, the following agreement, viz.: 'We do hereby agree to pay the within note out of the money due us from the city of Ottawa for macadam.' (7) On the 18th day of October, 1887, at 9 o'clock A. M., Thomas Bros. filed a notice in writing with the city clerk of their claim on said fund, as set forth in the answer of the city herein, and at 10 o'clock A. M. of the same day the plaintiff filed with said city clerk a copy of their said assignment. (8) On the 17th day of October, 1887, Robert Atkinson, intervenor, commenced an action before a justice of the peace of this county, against Hanway Bros.,

to recover the amount of a promissory note held by him, and made by them, and in said action caused a garnishee summons to issue against the city of Ottawa, as a debtor of Hanway Bros. This summons was served on the same day, and thereupon the mayor, on the 25th day of October, duly made answer thereto in writing, under oath, a copy whereof is attached to the answer or interplea of W. L. Service herein. (9) In the carrying out of their said contract with the city, Hanway Bros. employed a large number of laborers in the placing of said stone upon the street, and preparing the said material, to whom, on the completion of said work, they owed for such labor amounts ranging from \$4 to \$295, aggregating \$1,309.15. On October 18, 1887, said laborers severally commenced actions before a justice of the peace of this county to recover the amounts so due them, and therein garnishee summons were duly issued against the city, and due answers made thereto by the mayor. A copy of his said answer is attached to the interplea of W. L. Service herein, the answer being the same in each case. The action of said Atkinson was prosecuted to judgment before said justice, resulting in a recovery of \$300 debt and \$—— costs. The said laborers also recovered judgments for the amount so due them, with costs. None of said judgments have been paid. On October 19, 1887, said Hanway Bros. duly made a voluntary assignment for the benefit of their creditors, under the provisions of the laws of this state upon that subject, and are insolvent; and the assignees of said Hanway Bros. answered in this action, claiming the whole of said fund. The plaintiff, by its action, seeks to recover said fund of \$1,461.24, under its assignment. The city admits the amount to be due under the contract with Hanway Bros., but sets up the various assignments and garnishee proceedings against it; prays that all claimants to the fund may interplead, and their rights be determined. Such interpleader having been made, the sole question before the court is upon the distribution of the said fund of \$1,461.24. That at the time of service of garnishee summons, and prior thereto, neither Robert Atkinson, W. L. Service, or any other of said creditors, had any knowledge of the said assignment by Hanway Bros. to Thomas Bros., and to said plaintiff."

Conclusions of Law. The trial court then found, as a matter of law: "(1) To pay the costs of this action; (2) to pay the claim of the intervenor, Robert Atkinson; (3) to pay the several laborers' claims set forth and stated in the ninth finding of fact." Judgment was rendered in accordance with these legal conclusions.

The bank brings the case here, and claims that the trial court erred in its conclusions of law.

1. The fifth finding of fact states that the assignment by Hanway Bros. to the bank was made to secure the bank for the loan of a

large sum of money made by the bank to them before that time, and that Hanway Bros. continued in the full and sole management and control of the work until its completion, the same as though the assignment had not been made. In view of this finding, that is amply supported by the action of both the bank and Hanway Bros., that the assignment was in fact intended only to embrace the money due, or to become due, on the contract, it is not necessary to pass upon the questions as to whether the assignment is void either from want of power in the bank to take it, or by reason of a stockholder and cashier of the bank being a member of the city council. For the purposes of this opinion only, it may be safely assumed that, if the bank took an assignment of the entire contract, and undertook to complete the work, such assignment would be void for both the reasons urged; and yet we see no legal objection why Hanway Bros. would not assign the money due, and to become due, from the city on the contract to pay the bank a *bona fide* existing indebtedness, and it is perfectly evidenced that this was all that was intended by the written instrument executed by Hanway Bros. to the bank.

2. It has been recently decided by this court in the case of *Switzer v. City of Wellington*, 40 Kan. 250, 19 Pac. Rep. 620, that "a city of the second class cannot be required to answer as garnishee, and is not liable under section 54a, c. 81, Comp. Laws 1879." *Switzer* sued *Cronin*, and recovered a judgment against him before a justice of the peace. He had a garnishee process served upon the mayor of the city of Wellington. The mayor answered under oath that the city was indebted to *Cronin* in the sum of \$45.88. The city failing to pay this amount, *Switzer* brought his action to recover it; and this court, basing its decision on considerations of public policy, says he cannot recover against the city. In this case the city answers under oath the various garnishee proceedings, admitting the indebtedness to Hanway Bros., but, when this action is instituted by the bank, files its answer setting up these various assignments and garnishments, admits its indebtedness, and prays that all the claimants of the fund be brought into court, and their respective rights to the fund be determined. The attitude of these parties to the city is the same as in the *Switzer* Case. Each claimant to the fund has the right to contest the liens of all others,—not only their priority, but their legality. It cannot be permitted that a city of the second class shall waive considerations of public policy by answering garnishee process in favor of one party, and insist on the observance of these considerations by refusing to answer the attempted garnishment of another party. The creditors take nothing by their various garnishee proceedings, and the first and third legal conclusions of the trial court are erroneous. The *Thomas Bros.* are not here asking a review of their branch of the case. It is

recommended that the judgment of the district court of Franklin county be reversed, and that a judgment be rendered in that court, in favor of the plaintiff in error against the city, for the amount of the fund remaining after the costs are first paid.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 338)

LARIMER et al. v. KNOYLE.

(Supreme Court of Kansas. March 8, 1890.)

DIVORCE—SERVICE BY PUBLICATION—JUDGMENT—AVOIDANCE.

1. It is not necessary in any case that the clerk of the district court should issue a summons, where service of summons is made by publication.

2. In a divorce case, where an affidavit is filed stating that the residence of the defendant is unknown to the plaintiff, and cannot be ascertained by any means within the control of the plaintiff, and such affidavit is filed in lieu of sending a copy of the petition and a copy of the publication notice to the defendant, it is not necessary that the affidavit should be filed within three days next after the date of the first publication.

3. And after judgment in such a case, where it appears in another action, and in another court, that such affidavit was sworn to in the county where the divorce proceedings were pending, before "S. Fee, J. P.," it will be presumed that "S. Fee, J. P.," was a man by the name of S. Fee, who was a justice of the peace of such county.

4. And in such a case, where service of summons is made by publication in a newspaper, and after judgment it appears in another action, and in another court, that the petition in the divorce case, and the affidavit for service by publication, and the affidavit filed in lieu of sending a copy of the petition and publication notice to the defendant, were and are all untrue and false, such facts will not render the judgment rendered in the divorce case absolutely void.

5. More than two years after the time when judgment in the divorce case was rendered, the defendant in the divorce case, in another action and in another court, in order to defeat and avoid such judgment, filed a pleading, setting forth and alleging the falsity of the petition, and of the affidavit for service by publication, and of the affidavit filed in lieu of sending a copy of the petition and publication notice to the defendant, and the fraud of the plaintiff in procuring the decree of divorce, but did not set forth or allege in the pleading that the defendant did not have actual notice of the pendency of the divorce proceedings within time to appear in court, and make defense thereto, nor that such defendant did not have knowledge of the fraud perpetrated by the plaintiff in procuring the divorce until within less than two years next preceding the filing of such pleading. *Held*, that the pleading does not state facts sufficient to authorize the defendant to defeat or avoid the divorce judgment.

(*Syllabus by the Court.*)

Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

Action by Sarah Ann Knoyle against J. B. Larimer; the First Presbyterian Church of East Green Township, Erie county, Pa.; the First Presbyterian Church of the city of Topeka, Shawnee county, Kan.; the First Presbyterian Church of the city of Wamego, Pottawatomie county, Kan.; the Young Men's Christian Association of the city of Topeka, Shawnee county, Kan.; and the Board of Home Mission of the Presbyterian Church of the United States of America.

John W. Day and J. B. Larimer, for plaintiffs in error. *G. N. Elliott and John T. Bradley*, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Shawnee county, by Sarah Ann Knoyle against J. B. Larimer and others, to set aside a certain will of Jeremiah Knoyle, deceased, and to have the estate purporting to be disposed of by the will declared to belong to the plaintiff, who, she alleges, is the widow and sole surviving heir of the deceased; but the question finally decided by the court below, and the one brought to this court, is whether a certain decree of divorce, purporting to divorce the aforesaid Jeremiah Knoyle from the aforesaid Sarah Ann Knoyle, is void or not for want of jurisdiction in the court rendering it, or for fraud on the part of Knoyle in procuring it. A full set of pleadings was filed in the case,—a petition, an answer, a reply, and a demurrer by the defendants to the second paragraph of the reply. The demurrer was overruled by the court below, and the defendants, as plaintiffs in error, bring the case to this court for the purpose of having such ruling reviewed and reversed.

The facts of the case, admitted by the pleadings, appear to be substantially as follows:

On October 16, 1860, the aforesaid Jeremiah Knoyle and Sarah Ann Knoyle were married. She at the time had about \$2,000 in money and personal property, which he obtained from her and used. They lived together as husband and wife up to about February 24, 1884, and during the time by their joint efforts they accumulated a large amount of property. From about the year 1869 until his death, which took place on May 1, 1887, they resided in Kansas, and she has resided here since, except as hereafter stated. Prior to February 24, 1884, he sent her out of the state of Kansas to visit friends in other states, where she remained until after his death, which took place, as before stated, on May 1, 1887. On September 1, 1884, he paid to her \$1,700, and took a receipt therefor, which shows on its face that the amount was paid in discharge of all claims by her against him and his estate; but she alleges in her reply that the receipt was procured from her fraudulently, she believing at the time that it was intended to be nothing more than merely a receipt for \$1,700. On February 24, 1885, Knoyle, by his counsel, drew up a petition for a divorce from his wife upon the ground of willful absence from him and abandonment of him for a period of more than one year. On the same day he verified his petition by stating upon oath that the allegations therein contained were true. Also on the same day, February 24, 1885, he made another affidavit, which was for service of summons by publication, in which he stated, among other things, that Sarah Ann Knoyle, the defendant in that action, was a non-resident of the state of Kansas, and that service

of summons could not be made upon her within the state. On February 26, 1885, he filed all these papers in the district court of Pottawatomie county, in which county he resided; and on the next day, February 27, 1885, he commenced to procure service of summons by publication, by having a proper notice of the action published in a newspaper of the city of Wamego, in said county; the first publication being on that day. This publication was continued in each issue of the newspaper for four consecutive weeks. The answer day was to be on or before April 11, 1885. On February 28, 1885, Knoyle made another affidavit, in which he stated that the residence of Sarah Ann Knoyle, the defendant in that action, was unknown to him, and that he could not ascertain the same by any means within his control. This affidavit was filed in the district court of Pottawatomie county on March 3, 1885. On June 13, 1885, the aforesaid decree of divorce was granted to Knoyle; Sarah Ann Knoyle never having made any appearance in the case. On July 24, 1886, Knoyle executed a will, giving all his property, real and personal, to others than Sarah Ann Knoyle, and appointing J. B. Larimer as his executor. On May 1, 1887, Knoyle died, leaving no children or offspring, nor any wife, unless Sarah Ann Knoyle was still his wife. Afterwards the aforesaid will was duly probated, and J. B. Larimer, who is the executor under it and one of the defendants in this action, is now in the possession of all the estate of the deceased testator. This action, which was brought to set aside said will, etc., was commenced on June 2, 1887. On July 14, 1887, Larimer answered, setting up, among other things, the aforesaid decree of divorce, and alleging that, because of such divorce, the plaintiff, Mrs. Knoyle, was not the wife of Knoyle at the time of his death, and could not, under the laws of Kansas, and the laws of descents and distributions, take any interest in her former husband's estate.

On August 24, 1887, the plaintiff replied, setting forth in the second paragraph of her reply as follows: "(2) And for a further and additional reply to said answer the plaintiff says: That when she, the said plaintiff, was married to said Jeremiah Knoyle, now deceased, she owned in her own right a large amount of money and personal property, aggregating in value about \$2,000, and she at that time gave it into the possession of said Jeremiah Knoyle, and that he invested the same in real estate in his own name, and used the same as his own money, and never refunded any portion of it to plaintiff, or in any manner paid it, or any part of it, to her, and that she continued to live with him for a period of about 24 years, as his wife, and toiled and drudged for him, and by her work and economy and toil assisted him to accumulate all the property of which he died possessed. That during the entire period of her married life she continued to be a loyal, devoted, and obedient wife to said Jeremiah

Knoyle. That some time in 1878, and when she was far advanced in years, the said Jeremiah Knoyle, by the careless and reckless driving of a team, injured her, the plaintiff, so severely that she became a cripple for life. That, when he realized she was so hopelessly crippled that she could toil and drudge for him no more, he cruelly determined to rid himself of her, to get divorced from her, and without her knowledge and consent; and some time prior to February 24, 1884, he, said Jeremiah Knoyle, sent the plaintiff away to visit her relatives, with the understanding that she was to visit and rest with her relatives in the states of Wisconsin, Michigan, and Pennsylvania. That while she was away on said visit he knew all the time and every day where she was, and was continually corresponding with her and her relatives, with whom she was visiting during all of said time; and while she was so visiting, he, said Jeremiah Knoyle, gave her the \$1,700 mentioned in the exhibit attached to plaintiff's answer, and, by representing to her that said writing was only a receipt, induced her to sign the said paper copied in said answer; and she, relying upon his representations and good faith, and believing that it was only intended as a receipt for that money, signed said paper; and afterwards the said Jeremiah Knoyle, fraudulently designing to obtain a divorce from said plaintiff, and without her knowledge and consent, did, on the 26th day of February, 1885, file a false petition against her for a divorce, falsely charging her with abandoning him, in the office of the clerk of the district court of Pottawatomie county, Kan.; and the plaintiff says the said charge of abandonment was wholly false. That he never made, or caused to be made, any legal service of summons, either personal or constructive, or by publication or otherwise, in said cause. He caused a notice of said divorce proceedings to be published in the Kansas Reporter, a newspaper published in the city of Wamego, in said Pottawatomie county; but he, said Jeremiah Knoyle, notwithstanding he well knew all the time where said Sarah Ann Knoyle was, and what her post-office address was, never sent her any notice of said divorce, and never at any time inclosed a copy of his said petition for divorce with a copy of said publication notice attached thereto in an envelope addressed to said Sarah Ann Knoyle at her place of residence, postage prepaid, or otherwise, and never deposited the same in the nearest post-office, or in any post-office, and never sent the same, and never attempted to send it, to the said Sarah Ann Knoyle; but he, said Jeremiah Knoyle, falsely, fraudulently, and wrongfully did, on the 28th day of February, 1885, make and file an affidavit in said district court of Pottawatomie county, stating, in substance, that the residence of the said Sarah Ann Knoyle was then unknown to him, and the same could not be ascertained by any means within his control; and the plaintiff avers that said Jeremiah

Knogle well knew where her place of residence was on the said 28th day of February, 1885. A complete transcript of the records of the court in said pretended divorce proceedings is hereto attached and made a part of this reply, marked 'Exhibit A'; and plaintiff says that there was no other service, or pretended or attempted service, of summons, either personally, constructively, or otherwise, except as hereinbefore stated, in said pretended divorce proceedings; and the plaintiff never waived any service of summons in said case, and never in any manner entered her appearance therein, and that the said pretended service of summons was null and void. That the said pretended judgment of said Pottawatomie county district court in said pretended divorce case was wholly void. That said district court never obtained and never had jurisdiction in said pretended action of divorce, and that all said proceedings in said pretended action were null and void."

Larimer filed a demurrer to this second paragraph of the plaintiff's reply, upon the following grounds, to-wit: "*First*, that the said second ground of reply contained in said plaintiff's reply to the separate answer of the said defendant, is not sufficient in law; *second*, that said second ground of reply contained in said plaintiff's reply to the defense set forth and contained in the separate answer of said defendant is upon its face insufficient in law; *third*, that it appears upon the face of the said reply that the facts set forth in the second ground of said reply to the defense set forth and contained in the separate answer of the said defendant J. B. Larimer are insufficient in law to constitute a traverse or avoidance of said defense."

The court below overruled this demurrer, and the defendants, as plaintiffs in error, bring the case to this court for review.

Since this case was brought to this court Sarah Ann Knogle died, and on July 8, 1889, the case was revived against James M. Foster, as executor of her last will and testament, and the case is now prosecuted against him.

It would seem from the pleadings of the parties, as they now stand, that Mrs. Knogle never abandoned her husband, Jeremiah Knogle, and in this respect his petition for the divorce is untrue and false; that she all the time during the pendency of the divorce proceedings, and prior and subsequent thereto, was a resident of Kansas, and in that respect the affidavit for service by publication was untrue and false; and she was not only a resident of Kansas, but her absence from the state during the pendency of such divorce proceedings was not with any intent to avoid the service of summons, and therefore service of summons could not legally have been made at all upon her by publication for the purpose of procuring a divorce. Civil Code, § 72. And the plaintiff in the divorce case all the time well knew where she was and where she received her mail, so that he could have sent a copy of the petition

in the divorce case, and a copy of the publication notice to her, and in this respect his second affidavit also is substantially untrue and false. The defendants' pleadings, however, are to some extent defective. She does not state where in fact she was during the pendency of the divorce proceedings; nor does she state that she did not have, during all that time, full knowledge of the pendency of such proceedings; and, from anything stated in her pleadings, she may have had full knowledge of the pendency of all the divorce proceedings during all the time while they were taking place, and also full knowledge of the judgment in the divorce case when it was rendered, and full knowledge of all the alleged frauds connected with these divorce proceedings at the time they were occurring.

It is well settled in this state that a judgment rendered without jurisdiction is void, absolutely and entirely, and may be shown to be void in a collateral as well as in a direct proceeding, and by extrinsic evidence as well as by the record itself, and a judgment rendered against a party who has not been served in any manner with summons or notice, and who has not made any appearance in the case, is a judgment rendered without jurisdiction. *Mastin v. Gray*, 19 Kan. 458; *Litowich v. Litowich*, Id. 451; *Amsbaugh v. Bank*, 33 Kan. 100, 5 Pac. Rep. 384; *Thorn v. Salmonson*, 37 Kan. 441, 15 Pac. Rep. 588. But a judgment rendered with jurisdiction is not void, but, at most, only voidable, and can be impeached or overturned only in a direct proceeding instituted for that purpose, although it may be ever so irregular or defective, and founded upon service or process ever so irregular or defective: provided, of course, that in all cases the judgment, the service, and the process are not so irregular or defective as to absolutely destroy the jurisdiction of the court. *Armstrong v. Grant*, 7 Kan. 285; *Ogden v. Walters*, 12 Kan. 282; *Simpson v. Kimberlin*, Id. 580; *Pierce v. Butters*, 21 Kan. 124; *Rowe v. Palmer*, 29 Kan. 337. In this case it is claimed that the service of summons in the divorce case was and is absolutely void, and therefore that the judgment in such case was and is absolutely void, for the following reasons:

First. No summons was issued by the clerk of the court in the divorce case. This question has already been disposed of by this court in the case of *Bannister v. Carroll*, 22 Pac. Rep. 1012, (decided in January, 1890.) It is true that no summons was issued in the divorce case, but where service of summons is made by publication it is not necessary that an ordinary summons should be issued. See case above cited.

Second. In a divorce case, where service of summons is procured by publication, it is necessary also that a copy of the petition, with a copy of the publication notice attached thereto, should be sent to the defendant within three days after the date of the first publication, "unless the plaintiff shall make

and file an affidavit that such residence is unknown to the plaintiff, and cannot be ascertained by any means within the control of the plaintiff." The plaintiff in the divorce case did not send any copy of the petition or of the publication notice to the defendant, but in lieu thereof filed an affidavit which seems to be sufficient on its face, but it was not filed within three days after the first publication was made, but was filed on the fourth day thereafter, and for that reason it is claimed that the service by publication was and is void. Now, the statute does not require that the affidavit should be filed within three days after the first publication is made, and we do not think that it is necessary that it should be filed within that time. Indeed, the plaintiff in the case might not feel that he was able to make the necessary affidavit until after the three days had expired. He might in fact believe, up to the end of the third day, that before the three days should expire he could ascertain where the residence or post-office address of the defendant was.

Third. The aforesaid affidavit was sworn to in Pottawatomie county before "S. Fee, J. P.," and there is nothing further to show who "S. Fee, J. P.," was; and for that reason it is claimed that the affidavit was void, and therefore that the service was void. We shall presume, however, that "S. Fee, J. P.," was a man by the name of S. Fee, who was a justice of the peace of Pottawatomie county; that the letter "S." represented his first name; that "Fee" was his surname; and that the letters "J. P." represented the words "justice of the peace;" and therefore we shall presume that the affidavit was regular and valid.

Fourth. It is also claimed that the petition in the divorce case, though verified by the oath of the plaintiff, also the affidavit for service of summons by publication, and also the affidavit filed in lieu of sending a copy of the petition and publication notice to the defendant, were all false and fraudulent, and that the plaintiff in the divorce case had full knowledge of their falsity and untruthfulness; and therefore it is further claimed that the judgment rendered in the divorce case was rendered without jurisdiction, and is void; and the case of *Mastin v. Gray*, supra, and cases like it, are cited as authority. On the other hand, it is claimed that, although the petition and the two affidavits may be false and fraudulent, still that such things do not render the judgment void, but at most only voidable, and that the judgment cannot be attacked in this proceeding, but only in a direct proceeding instituted for that purpose; and the case of *Ogden v. Walters*, supra, and other cases of like import, are cited as authority. Now we do not think that there is any conflict between these two classes of cases just mentioned. In the case of *Mastin v. Gray* no service of summons of any kind was in fact made, while in the case of *Ogden v. Walters*, supra, service of summons was

in fact made by publication. In the first case it was not true, as returned by the constable, that service of summons was made by leaving a copy of the summons at the usual place of residence of the defendant, while in the second case it was in fact true that service of summons was made by publication in a newspaper. If no service of summons had in fact been made by publication in a newspaper in the case of *Ogden v. Walters*, nor by any other mode, then that case would have been like the case of *Mastin v. Gray*. The affidavits for publication, and in lieu of sending a copy of the petition and publication notice to the defendant, are no part of the service of the summons; they are simply foundations for such service, where service is made by publication. Where they are sufficient on their face, service may be made by publication, and by publication alone. But being foundations for the service by publication, it is, of course, necessary that they should be filed, and if they are not filed a service of summons made by publication without them would be void. *Shields v. Miller*, 9 Kan. 390; *Harris v. Clafin*, 36 Kan. 543, 13 Pac. Rep. 830. But where they are valid and sufficient upon their face, and service by publication is made upon them or in pursuance of them, no one can afterwards impeach such service, or question its validity in a collateral proceeding, by showing that the affidavits were in fact untrue. No one would think of impeaching an attachment of property, real or personal, in a collateral proceeding, because he might think that the grounds set forth in the affidavit for the attachment were untrue and false. Such a thing could be done only in a direct proceeding instituted for that purpose, as upon a motion to quash or to set aside, or to vacate or to discharge the attachment, or some part thereof.

We shall pass over the claim that the judgment in the divorce case is void, for the reason that the allegations of the plaintiff's petition in that case were untrue and false; for we do not think that it has ever been held by any court that a judgment was absolutely void because the allegations contained in the plaintiff's petition were in fact untrue or false. We now come to the question whether the judgment in the divorce case is void because of the untruthfulness of the affidavits for service by publication, and in lieu of sending a copy of the petition and publication notice to the defendant in that case. In the case of *Ogden v. Walters*, supra, it was held that the affidavit for service by publication could not be contradicted in a collateral proceeding for the purpose of avoiding the judgment. That case, however, does not quite cover all the elements of service contemplated by the statute in a case like the present. That case was an action in the nature of ejectment; this is an action for divorce. In that case, if the defendant was a non-resident, and if service of summons in the ordinary mode could not be made upon him in this state, then the affidavit for serv-

ice of summons by publication in a newspaper, and such service, without anything further, was all that was necessary, in the way of service, to give the court jurisdiction; but in this case, which is an action for divorce, something more is necessary. See Civil Code, § 641. In addition to the affidavit for service by publication and the publication itself, it is also necessary either to send to the defendant a copy of the petition, with a copy of the publication notice, or else to make and file an affidavit that the residence of the defendant is unknown, and that the plaintiff cannot ascertain the defendant's residence by any means within the plaintiff's control. The sending of the copy of the petition and the publication notice to the defendant, when that is done, is, according to the decision of this court in the case of *Lewis v. Lewis*, 15 Kan. 181, a part of the service. But the filing of the affidavit in lieu of sending a copy of the petition and publication notice to the defendant, when that is done, is no part of the service. *Hemphill v. Hemphill*, 38 Kan. 222, 16 Pac. Rep. 457. The service in such a case is only by publication. We would therefore think the principles enunciated in the case of *Ogden v. Walters*, supra, must govern in the decision of this case. The affidavits filed for service by publication, and in lieu of sending a copy of the petition and publication notice to the defendant, are no parts or portions of the service itself. The service includes only the publication, and such a service is complete and sufficient when it is made, and it is the service which gives the court jurisdiction. Of course it is necessary that the affidavits should be filed, for they are the foundations for the service, and if they should not be filed the service would be void. *Shields v. Miller*, 9 Kan. 390; *Harris v. Claffin*, 36 Kan. 543, 13 Pac. Rep. 830. But where the affidavits are filed, and where they are sufficient upon their face, service may then be made by publication, and such service will be valid, and the affidavits cannot afterwards be impeached collaterally; and it is not necessary that they should be impeached in that mode, for the defendant in a divorce case has ample remedies, without attempting to impeach the affidavits collaterally. Take, for instance, the present divorce case. If the defendant in the present divorce case did, at any time before the judgment in such case was rendered, receive actual notice of the pendency of the divorce proceedings within time to appear in court and make defense, she could have done so. She could then have filed a motion to set aside the service, or she could have answered to the merits. But if she did not receive any such actual notice within such time, then she could, at any time within six months after the judgment was rendered, have appeared in court, and procured the judgment to be vacated or opened up under section 77 of the Civil Code, so that she could have made any defense to the action which she might have had. *Hemphill v. Hemphill*,

38 Kan. 220, 16 Pac. Rep. 457. Or if she did not receive any such actual notice within time to have had the judgment opened up or vacated under section 77 of the Civil Code, then she might have had the judgment opened up and vacated under some one of the provisions of section 568 of the Civil Code, as subdivision fourth or seventh; or she might, by an action in the nature of a suit in equity, have had it opened up or vacated because of the fraud practiced by the plaintiff in procuring it. But we do not think that she could treat the judgment as an absolute nullity, and void in a collateral proceeding, merely because of the falsity of the petition and the two affidavits. "A divorce granted by the court of the domicile of both parties is valid everywhere, under the constitution of the United States, and under the principles of international law, although the defendant has neither been summoned nor voluntarily appeared, provided that the laws of the parties' domicile as to notice by publication or otherwise have been complied with." 5 Amer. & Eng. Cyclop. Law, 759, and cases there cited. "Want of jurisdiction in the court passing it is the only cause which renders a decree of divorce absolutely void; fraud does not, nor does irregularity." Id. 843, and cases there cited. See, also, in this connection, *Simpson v. Kimberlin*, 12 Kan. 580. and as to collateral attacks upon judicial proceedings, see *Head v. Daniels*, 38 Kan. 2, 12, 13, 15 Pac. Rep. 911, and cases there cited.

But treating the judgment in the divorce case as not void, but, at most, as only voidable, then may it be set aside or vacated in this action because of the fraud perpetrated by the plaintiff in the divorce action in procuring his decree of divorce? Under the facts of this case, as alleged by Mrs. Knoyle in her pleadings, we would think not. Treating the divorce judgment as not void, but only as voidable, then it devolved upon Mrs. Knoyle to set forth facts sufficient in her pleadings to show that the judgment should be set aside and vacated. This we think she did not do. She did not state that she did not have actual knowledge of the divorce proceedings while they were pending in the district court of Pottawatomie county. This, we think, is fatal to her present case. Where a fraud is about to be perpetrated upon an individual by obtaining a wrongful judgment against him, and the court in which the judgment is sought has jurisdiction to hear and determine the matter, such individual cannot lie still, and permit the fraud to be perpetrated upon him, and afterwards complain. He must use reasonable diligence to prevent the fraud from being perpetrated upon him. This is indicated to a large extent by section 77 of the Civil Code relating to the opening up and vacating of judgments rendered upon service by publication; and it is also just what the authorities seem to hold in almost all kinds of cases. In the case of *Snow v. Mitchell*, 37 Kan. 636, 639, 15 Pac. Rep. 224, and 16 Pac. Rep. 737, it is held by this court that "no de-

fense can be set up against a judgment which might, with proper diligence, have been interposed in the action in which the judgment was rendered." See, also, *Boyd v. Huffaker*, 40 Kan. 634, 636, 20 Pac. Rep. 459, and cases there cited; also *Guinard v. Heysinger*, 15 Ill. 288. Also where a fraud is perpetrated upon an individual he must commence his action to defeat or avoid the same within two years next after he has knowledge of the same, or his action for this purpose will be barred by the two-years statute of limitations. Civil Code, § 18, subd. 3. Now the fraud in this case was consummated on June 13, 1885, when the plaintiff in the divorce action procured his decree of divorce; and Mrs. Knoyle, the defendant in that action, the plaintiff in this, never attempted to defeat or avoid the rendering of that decree, or the decree itself, by any motion, defense, or action, or other proceeding, until she filed her reply in the present action, on August 24, 1887; and she did not then allege in her reply that she did not have full knowledge of all the divorce proceedings while they were occurring, and of the decree of divorce at the time when it was rendered; or that she did not discover the fraud perpetrated upon her by her husband, in his procuring his decree of divorce, within less than two years next prior to the filing of her reply. This, we think, is also fatal to her case. For these reasons we think the plaintiff's reply was insufficient. To have made it good she should have stated that she did not have knowledge of the divorce proceedings within time, by the exercise of reasonable diligence, to appear in court and make her defense; and she ought also to have stated in her reply that she did not discover the fraud perpetrated upon her by her husband's procuring the divorce until within less than two years next preceding the filing of her reply. The reply being insufficient, the demurrer thereto should have been sustained by the district court. The judgment of the district court will be reversed, and cause remanded for further proceedings.

(43 Kan. 267)

BROWN v. HADLEY.*(Supreme Court of Kansas. March 8, 1890.)***BREACH OF CONTRACT — MEASURE OF DAMAGES.**

In a contract for the purchase of real estate, with a contemporaneous contract, that was an inducement to the purchaser, that the vendor was to furnish the purchaser with 20 cows and 20 sows for a period of 8 years, the purchaser to have all the benefit derived from the cows, but they were to be used exclusively for butter-making, and all the skim milk was to be fed to the undivided increase of the sows; as soon as the increase of the sows could be made to weigh 75 pounds apiece, they were to be equally divided among the parties; and the vendor of the real estate failed to furnish the cows and sows; and an action is brought by the purchaser to recover damages for this breach of the contract,—the measure of damages is such fair and reasonable profit arising from the use of the cows, for the purpose set forth in the contract, as the experience of dairymen in that locality shows can be estimated with reasonable certainty.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

H. C. Root, for plaintiff in error. *J. T. Ward* and *H. H. Harris*, for defendant in error.

SIMPSON, C. The defendant in error commenced this action in the district court of Shawnee county to recover damages for a breach of the following contract: "This writing, made this 8th day of December, 1884, between M. M. Brown, of Kansas City, Mo., party of the first part, and D. H. Hadley, Osseo, Mich., party of the second part, shall be evidence of a certain contract made and entered into this day between the parties hereto. The said party of the first part agrees to furnish said second party twenty good milch cows, for a period of three years from May 1st, 1885, and twenty good brood sows, for the same time. All of said stock, it is mutually agreed, shall be kept and remain on said second party's farm, situated about ten miles, more or less, west of Topeka, Kans., and described as the S. E. $\frac{1}{4}$ of sec. 12, town 12, range 13, Shawnee county, Kansas. Said second party agrees to keep said cows for butter-making purposes only, and to milk each and all of them while they give milk, or could be made to give milk, and to keep said sows for breeding purposes only, and to exercise reasonable diligence to make them produce as many pigs as possible, and to make them produce three litters of pigs per year, if it can be done. Said second party further agrees to skim all the milk gotten from said cows, and to feed the same to the undivided pigs after the cream is taken off. The said first party agrees to let said second have all the butter and increase of said cows in consideration that the skimmed milk shall be fed to the undivided pigs, half of which shall belong to said first party as soon as they can be made to weigh seventy-five pounds each. It is further mutually agreed that said cows and sows shall remain the sole property of said first party. Said second party agrees to feed and care for said stock as would be expected a good farmer would care for his own, and to keep them in a good, thrifty, and thriving condition; and he further agrees, that if he should fail to do this, to forfeit all claims under this contract, and also said first party to take said stock away without process of law. Said second party agrees to accept said stock at Topeka, Kans., and to deliver them there at the end of that time for which this contract is made. Said first party agrees to sustain all losses arising from the natural death of said stock, and that reasonable diligence on the part of the second party would not have prevented. **M. M. BROWN. D. H. HADLEY.**" Under this contract, only 7 cows and 7 sows were furnished by Brown, and these were taken away by Brown at the expiration of about 11 months. At the same time the plaintiff in error executed and delivered to the defendant in error a bond for a deed

for the following described land situate in the county of Shawnee, to-wit: S. E. $\frac{1}{4}$ of section 12, township 12, range 13. This land was to be paid for as follows: \$400, the receipt of which is hereby acknowledged; one note for \$600, due March 1, 1885; one note for \$400, due December 8, 1885; one note for \$600, due December 8, 1886; and one note for \$400, due December 8, 1887,—all with interest at 8 per cent. It is the same land described in the contract sued upon. These two contracts were entered into at one and the same time, and were parts of one agreement.

The case was tried to a jury, and they returned the following special findings: "*First.* Did the plaintiff go onto, and make a personal examination of, the premises described in plaintiff's amended petition, before he entered into the contract of December 8, 1884? Answer. Yes. *Second.* Was there anything to prevent the plaintiff from learning of the quality and character and value of the land in controversy before he entered into the land and stock contracts of December 8, 1884, and before the plaintiff made the first payment to Brown on this land? A. No. *Third.* When did the plaintiff make the second payment to Brown on this land; or how much, or what sum, did the plaintiff pay on the second payment? A. March 1, 1885; \$611.00. *Fourth.* If you find that the defendant made false and fraudulent representations to induce plaintiff to purchase this land, what were they? A. None. *Fifth.* Was the plaintiff prepared to feed and take care of the cows and sows on the premises in a good, husband-like manner? A. Yes. *Sixth.* If you find from the evidence that the plaintiff has sustained actual, not speculative, damages, by reason of the defendant's breach of the stock contract, how much do you find for the plaintiff on account of the defendant's failure to furnish the plaintiff the 20 cows? A. \$2,164.27. *Seventh.* If you find from the evidence that the plaintiff has sustained actual damages, not speculative damages, by reason of defendant's breach of the stock contract, how much do you find for the plaintiff on account of defendant's failure to furnish plaintiff the 20 sows? A. None. *Eighth.* How much is due on the 3 notes made by Hadley to Brown for purchase money to this land? I mean, what is due for the principal and interest? A. Note due December 8, 1885, principal, \$400, interest, \$92.75, total, \$492.75; note due December 8, 1886, principal, \$600, interest on same, \$139.31, total, \$739.31, note due December 8, 1887, \$400, interest to this date, \$92.75, total on this note, \$492.75. *Ninth.* How much interest has Brown paid for Hadley on the Topeka Loan & Investment Company's mortgage? A. \$82.24. *Tenth.* What amount of taxes has Brown paid on the land for Hadley? A. \$14.13. *Eleventh.* What was the consideration for which Hadley agreed to pay Brown the \$3,400? Was it

the land only, or was it the land and the use of the cows and sows for three years, as mentioned in the contract? A. Land and stock,—cows and sows. *Twelfth.* Did Hadley agree to pay Brown \$3,400 for the 160 acres of land alone? A. No. *Thirteenth.* What would have been the net profits to Hadley per year on 20 good milch cows from May 1, 1885,—three years,—under the contract, had Brown complied with his part of the contract. A. \$800, or \$2,400 for three years. *Fourteenth.* Did Hadley keep and take care of the cattle and hogs he received in a proper manner, as other farmers did, and according to his contract? A. Yes. *Fifteenth.* Did Brown comply with his part of the contract in delivering the stock? A. No. *Sixteenth.* Was the corral or yard prepared by plaintiff May 1, 1885, in which to inclose the 20 cows defendant was to furnish plaintiff at that time, made of posts and barb-wire? A. Yes. *Seventeenth.* If you answer the above question, 'Yes,' how many strings of barb-wire did the plaintiff use in the construction of said corral? A. 3. *Eighteenth.* Was the death of the cow and sow of defendant's, while the same was in the plaintiff's care, caused by plaintiff's negligence and want of care in providing for said stock? And, if 'Yes,' what were they worth? A. No. *Nineteenth.* Do you find from the evidence that the plaintiff negligently and carelessly kept and cared for the stock delivered to plaintiff by defendant. A. No. *Twentieth.* If you find that, by reason of plaintiff Hadley's want of care for Brown's stock in plaintiff's possession, this stock was depreciated, what damage do you find that Brown sustained by reason of the depreciation of this stock? A. None."

1. The principal contention is over the measure of damages for the breach of such a contract. The theory of the plaintiff in error is that the defendant in error is entitled to recover only actual damages caused by the breach; that in this case such damages would be 7 per cent. on the estimated value of the cows that were agreed to be furnished. The defendant in error contends that, having proved the number, kind, and quality of cows, the time for which they were to be furnished, the amount of butter such cows would produce, and the market price of butter, there can be no uncertainty as to damages; that, where a business is of such a character that its annual profits can be calculated with reasonable certainty, such profits are not speculative nor remote. We think that the case of *Hoge v. Norton*, 22 Kan. 374, furnishes the measure of damages in cases of this character. It is said by BREWER, J.: "The only other question we deem necessary to notice is that of damages. The property attached was a herd of cattle; and one of the items of damage as returned by the jury was the loss in the growth of the cattle, caused by the seizure, and improper care while under seizure. It appears that the cattle were

taken by the sheriff from the range where they had been kept for some time, and placed in charge of a herder on another range; and it is claimed that, by reason of such change, and the inferiority of the new range both in grass and water, the cattle failed to increase in weight as they otherwise would. The jury answered that they did not depreciate any in value, but that they did not grow as they would if they had not been removed; and this loss of expected growth is said by the one side to be mere matter of anticipated profits, which cannot be made the subject of award, and by the other to be actual and legitimate damages. It is not always easy to draw the line between profits that are a legitimate element of compensation and those that are too remote, contingent, or uncertain. The old idea that profits were never recoverable was long since exploded; and now, even in actions on contract, it is said that they may be recovered when proximate and certain. 'The general rule is that the party injured by a breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain, and such as might naturally be expected to follow the breach. It is only uncertain and contingent profits, therefore, which the law excludes.' *Griffin v. Colver*, 16 N. Y. 489. Now, it appears from the testimony that cattle kept through the winter as these cattle were, do not, ordinarily, during such time, increase any in weight, but are in good condition for summer feeding, and if kept where they are wonted, and free from worry, and where grass and water are abundant and good, will during the summer months gain in weight about a certain amount; that, during the time when the increase in weight is expected, these cattle were driven away to a new range, exposed to worry, and where both water and grass were limited and inferior, and at the end of their detention they were returned to the owner, not, it is true, deteriorated in value, or lessened in weight, but without having made the ordinary increase in weight and value. It is a case of gain prevented, rather than of loss sustained; and the questions are whether such gain prevented is proximate and certain,—i. e., directly the result of the removal and inferior care,—and the amount thereof susceptible of reasonably certain measurement. Both these questions the jury, by their verdict, answered in the affirmative; and we cannot say that the testimony did not fully warrant the answers. Of course, absolute certainty is not attainable, as in casting up the figures of an account; but, nevertheless, there are certain laws of feeding and growth well understood among cattle-men, and whose results work out with sufficient certainty for business calculations and judicial investigations. The raising of cattle for market has been an extensive and oftentimes profitable business in this state; and it would be strange if one

would wrongfully take from the owner a herd of cattle, remove them to a poorer range, feed them on inferior food, and so treat them that during the growing season they do not grow at all, and then, at its end, return them, saying, as did the unfaithful servant in the parable, who returned the single talent without increase, 'Lo! there thou hast that is thine,' and still be under no liability to respond in damages to such owner. We do not think the law so deficient. It seems clear that the owner is damaged; that the damages may be determined to a reasonable certainty; and that the wrong-doer is bound to make good the damages. In *Sewall's Falls Bridge v. Fisk*, 23 N. H. 171, it appeared that the plaintiff's toll-bridge was carried away through the fault of defendants, and the loss of tolls during the time reasonably necessary to rebuild was adjudged one element in the damages recoverable. In *Lacour v. Mayor, etc.*, 3 Duer, 406, the plaintiff's manufactory was injured, and compelled to stop running, through the fault of the defendant; and the profits which would have been realized during the period of necessary suspension were recovered. See, also, *James v. Adams*, 8 W. Va. 568; *Railroad Co. v. Coyle*, 55 Pa. St. 396; *Railroad Co. v. Butler*, 57 Pa. St. 335; *Railroad Co. v. Dale*, 76 Pa. St. 47; *Albert v. Railroad Co.*, 2 Daly, 389; *Moore v. Schultz*, 31 Md. 418; *Lawson v. Price*, 45 Md. 123; *Sturgis v. Frost*, 56 Ga. 188; *Morey v. King*, 49 Vt. 304. As this item of damages was recoverable, it was a matter of proof; and we think the testimony offered to prove it legitimate and competent." If damages of the character in question in that case can be recovered, this case presents an example of much more plain, definite, and easily ascertained damages. Butter making, to supply the local markets, has been extensively engaged in ever since the settlement of the state; and we have no doubt but that the experience of dairymen can furnish estimates of the profits of cows kept for that purpose that can be relied upon with the same degree of certainty that attends the result of all other ordinary business transactions of life. There is no error in the instructions of the trial court in this respect.

2. There can be no reasonable contention about the two contracts being supplemental to each other. The promise to furnish the cows and sows was an inducement to buy the land, and no doubt enhanced the price agreed to be paid for the real estate. Nor do we see that any material error was committed by allowing the jury to determine that they were measurably dependent upon each other. It strengthened the claim for damages when it was shown that the promise to furnish the stock was one of the inducing reasons for the purchase of the real estate; but, when that fact was fairly established by the preponderance of the evidence, we can see no reasonable objection why it should not be considered

by the jury as one of the elements of damage.

3. Complaint is made because a circular issued by Brown that set forth the location of the land, its advantages, the terms he proposed to sell it on, his proposition to furnish cows and sows to each purchaser of 80 acres, and some other things, was admitted in evidence, and was permitted to go to the jury. A copy of this circular was attached to the petition of the plaintiff below as an exhibit. Hadley saw it in Michigan. It induced a correspondence between Brown and himself. This resulted in a visit by Hadley to Brown in Kansas City, Mo. When Hadley began to talk with Brown about the land, a copy of the circular was handed to him by Brown, who told him that it contained the terms and conditions upon which he would sell the land. It embodied, in substance, the contract of the parties. It was not only an advertisement that stated the location of the land, and the terms upon which it would be sold, but it was the terms of this particular negotiation and sale; and the two contracts that were made and executed by the parties substantially recited the same terms and conditions that were enumerated in the circular. Brown referred Hadley to the circular, and gave him one when he had journeyed all the way from Michigan to see the land described in it, and, more than all this, said that his terms were all stated in the circular. Under these circumstances, we are very confident that it was admissible in evidence as showing the intention with which Brown sold and Hadley bought the land, coupled with the use of the cows and sows, and establishes rather conclusively that the land and stock contracts are one and the same transaction.

4. The special findings of the jury are not only consistent with the general verdict, but strongly support it; and there was no tenable ground upon which the motion of the defendant below for judgment on the special findings could be supported; and hence there was no error committed by overruling it. All questions of fraud and misrepresentation in the quality of the land, and its adaptation to the purposes for which it was sold, are eliminated from the case by the special findings. No claim for damages was insisted on by reason of a failure to furnish the sows. Claim for recovery of damages is based solely on the failure to furnish the cows, and only questions arising thereon are material now. Some criticism may be fairly indulged in at several rulings of the trial court, but we do not consider them material, or controlling enough to justify a reversal. This case has been tried three times by a jury, and two verdicts rendered in favor of the defendant in error. All the facts have been drawn out, and fairly presented, and we think substantial justice has been done between the parties. We recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

CHICAGO, K. & W. R. CO. v. BRUNSON.

(Supreme Court of Kansas. March 8, 1890.)

EMINENT DOMAIN — DAMAGES — EVIDENCE — INSTRUCTIONS.

1. Plaintiff's farm was in one inclosure, but the land taken for right of way for defendant's railroad was all in an 80-acre subdivision of the same, and that subdivision alone was named in the bond for appeal from the award of the commissioners condemning the land. *Held*, that evidence showing the damages to the entire farm is competent.

2. When a witness for a land-owner is asked and testifies, over the objection of the company, that his farm was damaged a certain sum per acre, naming it, by the taking of a right of way through it, this is erroneous; yet if it is shown that the objection made was also to the competency of the witness to testify as an expert, who was competent, and it is also shown that objections to like questions asked other witnesses were sustained, and also that in the course of the trial like evidence had been given to proper questions without any objection of defendant, and the defendant also, in cross-examination, repeatedly asked like questions, the error is not sufficient to compel a reversal of the judgment.

3. The defendant cannot complain of instructions given, when they are substantially the same as those it requested of the court.

(Syllabus by Holt, C.)

Commissioners' decision. Error from district court, Dickinson county; M. B. NICHOLSON, Judge.

Geo. R. Peck, A. A. Hurd, Stumbaugh, Hurd & Dewey, and J. G. Egan, for plaintiff in error. Burton & Moore, for defendant in error.

HOLT, C. This was an appeal to the district court of Dickinson county from the award of commissioners condemning a right of way for the Chicago, Kansas & Western Railroad Company over the E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 20, township 13, range 1 E., the property of plaintiff; 2.22 acres were taken off of the north end of said tract. Immediately north of the land so taken was the Union Pacific Railroad. North of that, the public highway. The plaintiff lived at Solomon City, about a mile distant. In order to get to the highway, both railroads had to be crossed, and there was no other means of getting to Solomon City from this land except by crossing the land of other parties by a circuitous and inconvenient route. There were several other farms in this immediate locality, situated, so far as the road was concerned, substantially like the tract of plaintiff, and the owners were compelled to cross both tracks in order to reach the public road. The entire farm of plaintiff consisted of 112 acres, under fence and nearly all tilled. A small house, with one room, a stable for six horses, a feed lot and hog lot, were near the river on the south line of the farm. The commissioners awarded plaintiff the sum of \$161 as damages. Upon the trial judgment was rendered in plaintiff's favor for \$441. The findings specially found by the jury were: "(1) How many acres of plaintiff's land did the defendant take for its right of way? Answer. Two and twenty-two one-hundredths. (2) What was the land taken worth per acre on the 3d

day of September, 1887? A. \$50. (3) Do you find from the evidence that the plaintiff has sustained any damage other than that occasioned by the loss of the land taken for the right of way, and the inconvenience and danger in crossing the track of the defendant's railroad in going to and from his farm. A. Yes. (4) If you answer the third question in the affirmative, state the character and amount of the other damage shown by the evidence,—depreciation in value of farm. A. \$380."

The bond for appeal from the award of commissioners named only the east half of said quarter. Testimony was admitted, however, for the purpose of showing the damage to the entire tract. Of this the company complains, and urges that damages should be confined solely to the land mentioned in the appeal-bond. The ruling of the court was correct in admitting this testimony, following the authority of *Reisner v. Railroad Co.*, 27 Kan. 382. It appeared from the evidence in that case that certain lots 13 and 14 were adjacent and occupied as one tract. A part of 13 had been appropriated by the railway company for its right of way, but no part of 14 had been taken, nor was the lot 14 mentioned in the bond for appeal. At the trial evidence was excluded tending to show that it had been damaged. In deciding this question the court, by Mr. Chief Justice HORTON, said: "We think evidence should go to the jury as to all actual damages sustained by the land-owner by reason of the right of way appropriated, as to all the premises used as one tract or piece of property, whether it consists of one or more lots,—of one or more quarter sections of land. In condemnation proceedings, the company is the party that sets in motion the steps whereby the owner is deprived of his land; and if such company only take a few feet from a tract of property consisting of more than one lot, and used together as one property, the damages are to be assessed with reference to the injury to the whole property, and not to the lot alone from which the right of way is taken." See, also, *Railroad Co. v. Merrill*, 25 Kan. 421.

The defendant further objects to the evidence of W. S. Hunsicker, witness for plaintiff, who was asked: "Question. Have you a judgment as to how much the land was damaged per acre by reason of the road crossing where it does? Answer. Yes, sir. Q. How much? (Objected to by the defendant as incompetent, irrelevant, and immaterial, and the witness is not competent to testify. Objection overruled, defendant excepting.) A. About three dollars an acre." The defendant says the same question substantially was asked of George A. Gould, and that he answered by saying the farm had been damaged five dollars per acre. This manner of introducing testimony falls within the rule enunciated in *Railroad Co. v. Ross*, 40 Kan. 605, 20 Pac. Rep. 197, and *Railroad Co. v. Kuhn*, 38 Kan. 677, 17 Pac. Rep. 322, and therefore ought not to have been permit-

ted. However, the only objection by the defendant to the question asked Gould was that he was not a competent witness to testify to the value of this land; the objection did not go to the competency and relevancy of the evidence. Substantially the same question had been asked during the trial of W. A. Pontius, witness for plaintiff, and upon objection by defendant that the question was incompetent, irrelevant, and immaterial the court refused to allow him to answer. All the plaintiff's witnesses were interrogated as to what the value of the land was immediately after the taking of the right of way by the company, and nearly all had testified that it had been damaged to a certain amount, naming it, per acre. No motion to strike out had been made by the defendant; in fact, the question objected to had been repeatedly asked in that form of the various witnesses in cross-examination by defendant itself. It is evident from the whole record, by its rulings upon the admission of testimony, that the court's attention was not called specially to the relevancy and competency of the testimony, but to the incompetency of the witness Hunsicker himself. From the introduction of the evidence generally, and the examination and cross-examination of other witnesses during the trial, we think this error in admitting Hunsicker's testimony is insufficient to authorize a reversal of the judgment.

The defendant further contends that the court erred in instructing the jury concerning the inconvenience of crossing and recrossing the defendant's road from the public highway. The defendant cannot complain of the instructions given, for they are on the same line as those asked by the defendant in the trial. Their eighth and ninth requests were as follows: "(8) If you find that the plaintiff has sustained any damage on account of the danger or inconvenience of crossing the track of the defendant's railroad, I instruct you to award him on that account only such damage as may arise from traveling between the plaintiff's land and the established county road by the nearest and most practicable route. (9) The plaintiff can recover in this action only such damages as are peculiar to himself and the land in controversy, and nothing on account of any injury or inconvenience which is common to the plaintiff and his land, and all the other land-owners and lands lying between Solomon City and Sand Springs, south of the railroad of the defendant and north of the Smoky Hill river." The court instructed the jury, of its own volition, that the jury could not take into consideration anything about the Union Pacific Railroad as to the damages he sustained by reason of the increased inconvenience and danger in crossing the tracks, and that he was entitled to recover only such damages as were peculiar to himself and to the land in controversy, and that they were not to take into consideration any damages that he might have sustained in common with the public. The instructions given by the court were substantially on the same line as

those asked by the defendant, and he is precluded from making objection to them for that reason. The other errors complained of require no mention. We therefore recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(18 Or. 546)

THOMAS v. HERRALL *et al.*

(Supreme Court of Oregon. March 18, 1890.)

MASTER AND SERVANT—NEGLIGENCE OF SERVANT—EVIDENCE.

1. In the employment of servants, a master must use due care; but the mere fact of the incompetency for the work upon which a servant was employed would not be enough to warrant a jury in finding a master guilty of negligence in employing him.

2. Where a complaint contains an immaterial averment which ought to have been stricken out on motion, but the party making such motion answered over, and the court made no declaration of law upon the trial respecting such immaterial averment, and it did not appear that the appellant was in any manner prejudiced by such error of the court in refusing to strike such immaterial matter from the pleading, the judgment will not be reversed.

3. The representations of a sick person of the nature, symptoms, and effects of the malady under which he labors at the time, are original evidence, and they may be received if made to a person other than a medical attendant; but such evidence must relate to the present, and not to the past. Anything in the way of narration must be excluded. It must be confined strictly to such complaints, expressions, and exclamations of a present existing pain or malady.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

The plaintiff brought this action to recover \$7,000 damages for injuries alleged to have been received through the negligence of a servant of the defendants, and she recovered a verdict and judgment for \$118. The complaint, among other things, alleges "that on the 31st day of May, 1889, the defendants were engaged in delivering beer from place to place in the city of Portland, with horses and wagons, by their agents and servants, and that they so recklessly, carelessly, and negligently managed and drove one of said wagons, and the two horses attached thereto, then driven by the defendants' employe and servant, one Joe F. Beier, [who was then and there a careless, negligent, and unskillful driver,] that on First street, in said city, near Main street, which was there and then a public highway, said horses and wagon ran against and over the plaintiff while she was in the act of entering a street-car in said place, throwing and casting the plaintiff down upon the ground with great force and violence, thereby dislocating plaintiff's right shoulder, and bruising, injuring, and wounding in the breast and shoulders, on the face, neck," etc. The defendant moved to strike out the words included in brackets, which being overruled, they answered, denying each material allegation of the complaint; and upon the issues thus formed a trial was

had before a jury. The other facts appear in the opinion.

E. Mendenhall, for appellant. U. S. G. Marquam, for respondent.

STRAHAN, J., (*after stating the facts as above.*) The defendants moved to strike out of the complaint the words included in brackets, immediately following the name "Joe F. Beier," to-wit, "who was then and there a careless, negligent, and unskillful driver." It is the master's duty to use due care—that is, ordinary care—in employing servants of sufficient care and skill to discharge the duties of their service, (Shear. & R. Neg. § 90;) and the mere fact of the incompetency for the work upon which he was employed is not enough to warrant a jury in finding a master guilty of negligence in employing him, (Id. § 91.) These citations show that the words of the complaint which were objected to by the defendants ought, as a matter of correct practice, to have been stricken from it, on defendants' motion, but the court seems to have treated them as immaterial at the trial,—gave no charge to the jury declaring any liability against the defendants by reason thereof; and we are clearly of the opinion that the defendants suffered no injury by reason of their retention. In actions at law, the safer and better practice, undoubtedly, is to allow nothing to remain in the complaint or other pleading except the ultimate fact upon which the right or liability depends; but where, after an unsuccessful motion, a party answers over, and the cause is tried on other issues as well as the immaterial one, unless the court has, as a matter of law, declared that the immaterial allegation gave the party some right, or created some liability, against the adverse party, we ought not to reverse the judgment on the sole ground that the complaint or other pleading contained such immaterial allegation. A party may always protect himself upon the trial against any supposed effect of such allegation by asking of the court a declaration of law that the same does not create any liability against such party. Of course, if it affirmatively appeared from this record that the immaterial matter objected to in any way prejudiced the appellants, we would feel constrained to give them a new trial; but we are satisfied that it did not, and therefore this assignment of error cannot be sustained.

2. An exception was taken to a question or two asked the witness Mrs. Louise Murphy, who testified on the part of the plaintiff. Mrs. Murphy testified, without objection, that she resided in Portland, on Hooker and Porter streets; that she saw Mrs. Thomas the next morning after she was injured; that she was in bed. Her face was bruised, and her right shoulder. "Question. Do you know anything about her side? Answer. No; I do not remember about her side, but she complained." Here counsel for the defendants objected to the witness stating what Mrs. Thomas complained of, as incompetent, ir-

relevant, immaterial, and not part of the *res gestæ*; but the court overruled said objection, to which an exception was taken. Q. "What did she say?" To this question the same objection and exception were taken, and the witness answered: "She said it hurt her there, under the right arm." The witness was also asked if Mrs. Thomas pointed out to her where it hurt her, and she answered: "Yes, sir." These several exceptions present but a single question, and that is the competency of this evidence. The ruling of this court in *Sullivan v. Navigation Co.*, 12 Or. 392, 7 Pac. Rep. 508, shows that this evidence is no part of the *res gestæ*; nor did counsel, upon the argument here, contend that it was. His contention is that the evidence excepted to was the expression of bodily feelings, and, inasmuch as they occurred near the time of the injury complained of, they may be received as original evidence. It seems to me this evidence is within the principle laid down in 1 Greenl. Ev. § 102. The author there says: "So, also, the representations by a sick person of the nature, symptoms, and effects of the malady under which he is laboring at the time are received as original evidence. If made to a medical attendant, they are of greater weight as evidence; but, if made to any other person, they are not on that account rejected." 1 Phil. Ev. *182, *183; *Bridge v. City of Oshkosh*, 37 N. W. Rep. 409; *Insurance Co. v. Mosley*, 8 Wall. 397; *Barber v. Merriam*, 11 Allen, 322; *Hatch v. Fuller*, 131 Mass. 574; *Quaife v. Railroad Co.*, 48 Wis. 513, 4 N. W. Rep. 658. What was said by this court in relation to *Insurance Co. v. Mosley*, supra, related more particularly to that part of it discussing the doctrine of *res gestæ*; and no reference was made to the other part of the opinion, nor was the same questioned. It was claimed upon the argument of *Sullivan v. Navigation Co.*, supra, that the statements and declarations of a party in relation to the facts and circumstances of a particular event, made a considerable time after such event happened, or at least not at the time it happened, or so near it as to be part of such transaction, might be given in evidence by the party making such declaration, in his own favor. It was an attempt to enlarge and extend the doctrine of *res gestæ*, and it was to that question this court referred in its comments on the case in 8 Wall., supra. But the principle involved here is in no wise connected with or dependent on the doctrine of *res gestæ*; nor is it believed that there is any difficulty in its practical application, if the limitations so carefully laid down by the court be carefully attended to. The court said: "Such evidence must not be extended beyond the necessity upon which the rule is founded. It must relate to the present, and not to the past. Anything in the nature of narration must be excluded. It must be confined strictly to such complaints, expressions, and exclamations as furnish evidence of 'a present, existing pain or malady.'" Within the principle of these authorities, I think the evidence

excepted to was competent. Counsel for appellants cite *Waldele v. Railroad Co.*, 95 N. Y. 274, and some others of similar import, which hold that declarations which are merely narrative of past transactions are not admissible as part of the *res gestæ*. The authority and force of these cases are conceded. This court held the same doctrine in *Sullivan v. Navigation Co.*, supra, but the class of authorities do not touch the principle involved in this case. For the reasons indicated the judgment appealed from is affirmed.

(18 Or. 385)

MOSES v. SOUTHERN PAC. R. CO.

(Supreme Court of Oregon. Feb. 11, 1890.)

RAILROAD COMPANIES—FENCES—KILLING STOCK—CONTRIBUTORY NEGLIGENCE.

1. The provisions of our statute (sections 4044 and 4045) providing that, if a railroad fails to fence its road against live-stock it shall be liable for the injuries resulting from such failure, etc., does not extend or apply to depot grounds; and, in the absence of negligence, the company are not liable for stock killed thereon.

2. In this state, the common-law rule requiring every man to keep his stock within his inclosure is not in force, and from its early settlement all kinds of stock have been allowed to run at large upon uninclosed lands.

3. In those jurisdictions in which the common-law rule prevails that the owner of cattle is bound to keep them in his own inclosure, it is generally held, though with some exceptions, that if he suffers them to go at large, and the cattle stray upon the railroad track, and are injured or killed, the company is not liable, unless the conduct of its agents in the management of the train was wanton or willful.

4. On the other hand, in those jurisdictions in which the common-law rule as to the duty of the owner of cattle to keep them within his own inclosure is not in force, it is held that a plaintiff, in allowing his stock to run at large, commits no unlawful act, nor is guilty of an omission of ordinary care, and if such stock stray upon an uninclosed railroad track, and are injured or killed, whether they are rightfully there or not, he is not guilty of contributory negligence, but the company is liable, unless it or its agents exercised ordinary care or skill, in the management of its train, to prevent their injury or destruction.

5. The principle is that a railway company is liable in damages for injuries to stock through its negligence, where the plaintiff contributed to the injury no further than permitting his stock to run at large. Such negligence, if it may be called negligence, is not the proximate cause of the injury, and, in the sense of the law, does not constitute contributory negligence.

THAYER, J., dissenting.

(Syllabus by the Court.)

Appeal from circuit court, Linn county;
R. P. BOISE, Judge.

E. C. Bronough, for appellant. J. K. Weatherford, for respondent.

LORD, J. This is an action to recover damages for negligence in the management of the defendant's railroad, whereby a horse owned by the plaintiff was killed. The answer, after making the usual denials, sets up separately, as a defense, that the injury and damages were caused by the contributory negligence of the plaintiff, all of which he denied in his reply. There was a trial had, resulting in a verdict and judgment for the plaintiff, from which this appeal is taken.

By his brief, the counsel for the defendant, who is the appellant, says that the appeal involves but one question: "What is the liability of a railroad company for an injury done by a moving train to a horse running at large, and seeking pasturage upon the depot grounds of the company, with the knowledge and permission of the owner?" This question arises out of an exception to a modification of an instruction asked, and is as follows: "If the jury believes from the evidence that the plaintiff voluntarily permitted his horse to run at large, and the horse was accustomed to pasture on the depot grounds of the defendant, and wandered on the railroad track, and was killed, such conduct by the plaintiff would not preclude a recovery in this case by the plaintiff, unless the defendant's servants exercised the ordinary care of prudent men in running the train at the time of the accident. In this case, if you believe from the evidence that the plaintiff was guilty of negligence in allowing his horse to be upon the depot grounds, and that such negligence contributed to the accident, still, if you believe that the accident could have been avoided by the exercise of ordinary care and diligence on the part of the defendant, the defendant is liable."

The facts upon which this instruction was based were to this effect: That the evidence tended to show that the horse was, at the time he was struck by the locomotive, running at large on the depot grounds of the defendant in the town of Tangent, and that the locomotive was attached to one of the regular passenger trains which passed through the town, north to south, at 1 o'clock P. M., and was upon the regular time; that the engineer signaled his approach to the station by sounding the whistle when about 300 yards distant therefrom, etc.; that the horse was, during all of said time, and prior to the first sounding of the whistle for the station, running at large at or near said depot grounds, and had, at different times previously to said day, been seen occasionally pasturing upon said depot grounds; that plaintiff resided in said town, and about 700 feet away from said depot grounds; that there is a conflict of evidence as to what the speed of the train was when said horse was first seen to go upon the track, and said alarm whistle was sounded, or as to whether or not said speed was slackened before the horse was overtaken by the locomotive, and as to whether or not the engineer endeavored to and could have stopped the train after the horse went upon the track, and before he was struck by the locomotive; the speed of the train when the horse went upon the track, and before he was struck by the locomotive, being variously estimated by witnesses at from 8 to 20 miles per hour, and some of the witnesses testifying that the speed of the train was constantly lessened before the horse was struck, while other witnesses testified that they could not perceive that the speed of the train was at all dimin-

ished between the sounding of the alarm and the striking of the horse. The engineer testified that, immediately upon sounding the alarm whistle, he applied the brakes, reversed the engine, and did all that was in his power to do towards stopping the train, which was running about 3 miles an hour when the horse was struck. Other witnesses testified—who were standing on the platform, some 300 yards distant—that the engineer did, and some that he did not, check the speed of the train before striking the horse.

These facts show (1) that the injury to the horse occurred on the track, on the depot grounds; and (2) that, as the horse had been seen prior to the day of the accident, occasionally, to pasture on the depot grounds, it is presumed that he was suffered to run at large with the consent of his owner, and strayed upon the track under the circumstances indicated; and (3) that there is a conflict of evidence as to whether the engineer endeavored to check the speed of the train before striking the horse, but none that he did not sound the alarm whistle, and turn the steam through the cylinder cocks, to drive the horse from the track. Upon this state of facts, the contention of the appellant is (1) that the depot grounds are not included within the intention of the law requiring railroads to be fenced; and (2) that the plaintiff, in allowing his horse to run at large, and stray upon the depot grounds and track, where he was killed by a moving train, was guilty of contributory negligence which precludes his right of recovery.

The language of the statute making railroad companies liable for killing stock "upon or near any unfenced track of any railroad in this state, whenever such killing or injury is caused by any moving train or engine or cars upon such track," is broad enough to include that part of the track which is contiguous to its stations or depots. Code Or. §§ 4044, 4045. Taking it literally, the statute would apply to the entire track of the railroad, which would necessarily include such parts of the track as lie upon its depot or station grounds, thereby rendering the railroad company absolutely liable to the owner of any stock injured for an omission to fence its track upon its depot or station grounds. But such a construction is not consistent with the reason of the statute, or the intention of its enactment. In view of the business transactions at depot grounds, it is as much for the public convenience that it should be opened and unfenced as public highways, to which, applying the strict letter of the law, the statute would also extend at the places where the railroad track crosses such highways. The purposes for which these are to be used, and the right of public convenience, are inconsistent with the obligations to fence at such places, or to incur the liability created by the statute, and cannot, therefore, be held to apply to depot grounds, nor to public road crossings, nor to

the streets of cities or villages. In *Davis v. Railroad Co.*, 26 Iowa, 554, *WRIGHT, J.*, said: "The language is, 'its road,' and we do not believe that this includes depot grounds. True, these grounds, including switches, side tracks, etc., may be a part of the road. This is not denied for many purposes, and, indeed, most purposes. And yet we cannot think that the legislature contemplated these as a part of the 'road' by the statute under consideration." Within the principle thus declared, on account of the impracticability of fencing such places, we do not think the statute applies to depot grounds; and so it has often been held by the courts. 1 *Rorer, R. R.* 622, 623, and note; *Railroad Co. v. Shaft*, 6 Pac. Rep. 908, 19 Amer. & Eng. R. Cas. 539, note. Nor is there anything in the complaint or record to indicate that a recovery in damage is sought, or any liability created by the statute, or other than the ordinary action to recover damages for negligence.

Upon the next question, namely, that the plaintiff, in allowing his horse to run at large, so that he strayed upon the track, was guilty of contributory negligence, and is precluded from a recovery, the authorities are not agreed. There seems, however, to be a line of distinction between them which accounts for this difference in principle, which, perhaps, would not exist without it; and this is, whether the common-law rule, which requires the owner of stock to keep them in his own close, at his peril, prevails in the jurisdiction or not. Of course, in any of them, this relates only to such cases as are not within the statutory obligation to fence, or such places as are excepted from its operation. In those jurisdictions in which the common-law rule prevails, that the owner of cattle is bound to keep them in his own inclosure, it is quite generally held that if he suffers them to go at large, and the cattle stray upon the railroad track, and are injured or killed, the company is not liable unless the conduct of its agents in the management of the train was wanton or willful. In such cases the cattle are regarded as unlawfully at large, and exposed to danger by the fault of the owner, which, in the event of their destruction by collision with the locomotive while on the track of the railroad, is considered as the direct consequences of his negligence, which will preclude a right of recovery in him for their loss, although it may have occurred through the negligence or want of care of the railroad company.

In *Railroad Co. v. Munger*, 5 Denio, 255, which was an action to recover damages for negligence in killing the plaintiff's oxen by running over them by a train while on the track of the defendant, the court, after reaching the conclusion that the oxen, when killed, were trespassing on the land of the defendant, under the common-law rule that the owner of cattle is bound, at his peril, to keep them off the land of other persons, says, (*BEARDSLEY, C. J.*;) "It is not pretended the act was done designedly by the

persons in charge, but simply that it occurred through their negligence and want of care. It is a well-settled rule of law that such an action cannot be sustained if the wrongful act of the plaintiff co-operated with the misconduct of the defendants or their servants to produce the damage sustained. I do not mean that the co-operating act of the plaintiff must be wrong in intention to call for the application of this principle, for such is not the law. The act may have been one of mere negligence on his part. Still, he cannot recover. * * * But injuries inflicted by design are not thus to be excused. A wrongdoer is not necessarily an outlaw, but may justly complain of wanton and malicious mischief. Negligence, however, even when gross, is but an omission of duty. It is not designed and intentional mischief, although it may be cogent evidence of such an act. Of the latter, a trespasser may complain, although he cannot be allowed to do so in regard to the former."

In *Bowman v. Railroad Co.*, 37 Barb. 519, it is held that one who voluntarily suffers his cow to go at large in the public street, with no one to take charge of her, and to stray upon a railroad track at a time when cars are passing, is guilty of carelessness, and cannot recover for injuries to the cow, happening through the negligence of the railroad company, not amounting to gross negligence; *MILLER, J.*, saying: "His own act and negligence contributed to produce the injury complained of, and caused the death of the cow; and there is no evidence of gross negligence on the part of the defendant."

In *Maynard v. Railroad Co.*, 115 Mass. 450, *GRAY, C. J.*, said: "If the horse had been rightfully upon the defendants' land, it would have been their duty to exercise reasonable care to avoid injuring the horse. But, it being admitted by the plaintiff that his horse was trespassing upon the railroad, they did not owe him that duty, and were not liable to him for anything short of reckless and wanton misconduct of those employed in the management of their train."

As the plaintiff is bound at common law to keep his cattle within his own inclosure, and liable for all damages done by them when they stray upon the lands of others, he is the party in fault; and it results, if he suffers them to stray upon the track of a railroad, they are there without right, and as trespassers, through his wrongful conduct, and, if injured or killed by the negligence of the railroad or its agents, in the management of its train, he must abide the consequences, upon the ground that the defendant company owes no duty of care to trespassing cattle on their tracks, except not wantonly or willfully to destroy them, and that, in permitting the cattle to be at large wrongfully or by his own fault, he has contributed to produce the injury of which he complains, and is precluded from a recovery. When such a state of facts exists, nothing but willfulness on the

part of the agents of the company, or, as the authorities sometimes put it, such negligence as would amount to willfulness, would make the company liable in damages for the killing of cattle upon their track, so exposed by the fault of their owner. *Railroad Co. v. Harter*, 38 Ind. 557; *Williams v. Railroad Co.*, 2 Mich. 265; *Stucke v. Railroad Co.*, 9 Wis. 202; *Halloran v. Railroad Co.*, 2 E. D. Smith, 257; *Railroad Co. v. Ballard*, 2 Metc. (Ky.) 177; *Bennett v. Railroad Co.*, 19 Wis. 145; *Tower v. Railroad Co.*, 2 R. I. 404; *Vandegrift v. Rediker*, 22 N. J. Law, 185; *Perkins v. Railroad Co.*, 29 Me. 307; *Woolson v. Railroad Co.*, 19 N. H. 267; *Railroad Co. v. Skinner*, 19 Pa. St. 298; *Spinner v. Railroad Co.*, 67 N. Y. 153; *Railroad Co. v. Stuart*, 71 Ind. 504. In some of the cases, and especially the older ones, the term "gross negligence" is used as the equivalent of "willful negligence," as used by the later authorities, which imports act or conduct that is willful or wanton, and to which the doctrine of contributory negligence has no application; for, when the injury done the plaintiff is occasioned by the willful and wanton act of the defendant, the negligence of the plaintiff is no defense; and so it is held by the cases referred to, with perhaps some slight exceptions as to cattle trespassing on the track of railroads. As a result of this class of cases, in the states in which the common-law rule prevails, it is generally considered that allowing cattle to run at large is such negligence as precludes a recovery. On the other hand, in those jurisdictions or states in which the common-law rule as to the duty of the owner of stock to keep them on his own inclosure is abrogated, it is generally held that a plaintiff, in permitting his stock to run at large, commits no unlawful act, nor is guilty of an omission of ordinary care; and if they stray upon the uninclosed track of a railroad, and are injured and killed, although they may be regarded as trespassers, he is not guilty of contributory negligence; but that the company is liable for their loss, unless it exercised ordinary care and skill in the management of its trains to prevent their injury or destruction. It is considered, as the act of the plaintiff in suffering his stock to run at large is not unlawful nor negligent, nor likewise the act of the defendant in leaving its track uninclosed, yet, when it is so, as the stock may stray upon it as other uninclosed places, the defendant takes the risk of such intrusion upon its track, and the owner the risk of injury to his stock by unavoidable accident, but not of negligence or want of ordinary care; hence the conclusion that railroad companies are not liable for the ordinary negligence of their servants. In all such cases and jurisdictions where the common-law rule is not in force, and the owner of stock may allow them to run at large without violating the law, or being guilty of negligence, if such stock stray on an uninclosed track, and are killed by the train, when, by the exercise of ordinary care, that loss or result might have been avoided,

the negligence of the railroad company is regarded as the proximate cause of the injury, and the act of the owner in suffering them to run at large as too remotely connected with the negligence of the defendant to constitute contributory negligence, or be operative as such a defense. Such acts are not the immediate cause of the injury or loss of property, nor do they concur and combine at the time with the negligence of the company, as the natural and probable consequence of it, but at most bear only a remote relation to it, which, when stock is on their track, does not release the company from their obligation of reasonable care to avoid injuring them, at least to the extent that the law requires, and common justice and humanity demands of others, when stock is trespassing upon their lands, not to injure or kill it, if by ordinary care they could prevent it. When the company is not bound to fence, the measure of liability is ordinary care; and, though stock have no right to be on the track, especially when required for use of its trains, yet the company enjoys no special privileges over other owners of lands, and is under the same obligation to exercise care to avoid injuring them, consistent with their duties in the management of the train.

In *Railroad Co. v. Finley*, 37 Ark. 569, it is held that it is the duty of an engineer of a train to keep a careful and constant lookout for stock upon the track, and, although such be wrongfully there, yet he must use ordinary care and diligence to discover it, and avoid injury to it, or the company will be liable for the injury done. The court say: "A very prudent person might not, perhaps, allow his stock to go at large in the immediate vicinity of a railroad, and one who does so may not be altogether free from negligence; yet he assumes only the risk of an accident which might not be avoided by ordinary care and watchfulness of the agents or employees of the railroad company."

In *Balcom v. Railroad Co.*, 21 Iowa, 103, where the action was for damages sustained by killing the plaintiff's cattle by running the cars over them at a point where the public highway crossed the defendant's road, it was held that, if the cattle were not on the track by the negligence of the plaintiff, the test of the defendant's liability is whether, at the time of the accident, reasonable and proper care was exercised to avoid the injury.

In *Searles v. Railroad Co.*, 35 Iowa, 491, which was an action for negligence in killing the plaintiff's ox by a freight train on a public highway crossing, error was assigned for refusal to give, among others, this instruction: "Railroad trains, when cattle are on the track, are not required to slacken their speed, or to make signals by blowing the whistle or ringing the bell at road crossings, or places where the road has not a right to fence;" and DAX, J., said: "It was held, at a very early period in the judicial history of this state, that the mere fact of permitting

cattle to go at large is not a ground of imputing negligence to the owner. * * * A railway company is liable for injuries resulting from the careless or negligent management of its trains, where the injured party does not by his own negligence contribute to the injury. It is a corollary of these two propositions that a railway company must respond in damages for injuries to stock through its negligence, where the owner has contributed to the injury no further than merely permitting it to run at large."

In *Railroad Co. v. Smith*, 22 Ohio St. 227, it was held that the servants of a railroad company in operating its trains are bound to use ordinary care to avoid injury to domestic animals trespassing on the track; and the court say: "If the servants of the company in charge of the train, having due regard to their duties for the safety of the persons and property in their charge, could, by the exercise of ordinary care, have seen and saved the horses, we think they were bound to have done so."

In *Blaine v. Railroad Co.*, 9 W. Va. 253, which was an action for negligence in killing a horse on a railroad track, the court, after remarking that the rule of the common law requiring the owners of animals to keep them on his own land had never been in force in West Virginia, being inconsistent with its legislation, among other things, said: "The remote negligence of the plaintiff will not prevent his recovering for an injury to his property immediately caused by the negligence of the defendant. The negligence of the plaintiff that defeats a recovery must be a proximate cause of the injury. Suffering domestic animals to run at large, by means whereof they stray upon an uninclosed railway track, where they are killed by a train, is not, in general, a proximate cause of the loss; and hence, although there may have been some negligence in the owner's permitting the animals to go at large, such negligence being only a remote cause of the loss, it will not prevent his recovering from the railroad company the value of the animals, if the immediate cause of their death or injury was negligence of the company's servants in conducting the train." The same language was used in *Railroad Co. v. Elliott*, 4 Ohio St. 475; and see, also, *Kerwhaker v. Railroad Co.*, 3 Ohio St. 172, in which the principles of the law under discussion were set forth with great ability, and much force and cogency of reasoning.

In *Railroad Co. v. Mulligan*, 45 Md. 493, a state in which it is the duty of owners of cattle to keep them within their inclosure, yet, in an action for damages for the loss of a cow run over by the cars of the defendant, *ROBINSON, J.*, in delivering the opinion of the court, says: "No one has the right to complain of injury to cattle or other stock which he has permitted to stray upon a railroad track, unless such injury can be avoided consistently with these higher and paramount duties resting upon the company, [not

to endanger its passengers.] What we mean to say and to decide is this: that it is the duty of the company to exercise reasonable care to avoid injury to cattle or stock found on its road, though such cattle and stock may be there through the negligence of the owner."

So, too, in *Trow v. Railroad Co.*, 24 Vt. 494, the court say: "When the negligence of the defendants is proximate, and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault. This seems now to be settled in England and in this country. Therefore, if there be negligence on the part of the plaintiff, yet if, at the time when the injury was committed, it might have been avoided by the defendant, in the exercise of reasonable care and prudence, an action will lie for the injury. So, in this case, if the plaintiff were guilty of negligence, or even of positive wrong, in placing his horse in the road, the defendants were bound to the exercise of reasonable care and diligence in the use of their road and management of the engine and train; and if, for want of that care, the injury arose, they are liable."

"The railroad," said *REDFIELD, C. J.*, "cannot justify either recklessness, want of common care at the time and after the cattle are discovered, or wanton injury." *Jackson v. Railroad Co.*, 25 Vt. 161.

"The negligence," said *BALDWIN, J.*, "which disables the owner to sue, must be negligence which directly or by natural consequences conduces to the injury. It is not easy for us to see, therefore, that the mere fact that a party suffers his cows to go at large near the line of a railroad, such negligence as to excuse the corporation from reasonable diligence and care to avoid injury to them when they happen to be on the track. The suffering them to go at large, certainly, is not the usual or natural cause of such an injury. Such a result would not probably happen once in a thousand, or perhaps ten thousand, times." The general conclusion to be deduced from this case is that the fact of merely permitting cattle to run at large near the line of a railway is not enough to excuse the company from the exercise of ordinary care and diligence to avoid injuring them when they may happen to stray upon its track, consistently with a due regard for the safety of its trains and passengers; that such acts upon the part of the owner of cattle are too remotely related to the negligence of the defendant to concur and combine with it as the proximate cause of the injury, and, in the sense of the law, do not constitute contributory negligence; but that the failure of the company to exercise ordinary care and diligence under the circumstances is the immediate or proximate cause of the injury or loss of property, and renders the company liable for its negligence. So manifest is the justice of this requirement, not to injure or kill stock which may happen to stray upon the track, if, by the exercise of ordinary care,

It can be prevented, that in some jurisdictions, as we have shown, in which the common-law rule prevails as to the duty of owners to keep their stock within their inclosures, it has been adopted and applied. So that, speaking generally, it may be said that a railroad company is liable in damages for injury to stock caused by its negligence, where the owner has contributed to the injury no further than merely permitting them to run at large. *Railroad Co. v. Patton*, 31 Miss. 188; *Gorman v. Railroad Co.*, 26 Mo. 441; *Trout v. Railroad Co.*, 23 Grat. 623; *Isbell v. Railroad Co.*, 27 Conn. 393; *Railroad Co. v. Williams*, 65 Ala. 74; *Railroad Co. v. Irish*, 72 Ill., 404; *Railroad Co. v. Lebus*, 14 Bush, 518; *McCoy v. Railroad Co.*, 40 Cal. 532; 1 *Thomp. Neg.* 498; *Beach, Contrib. Neg.* § 73.

Now, upon the facts, within which line of reasoning does the case before us come? It has been held that the common-law rule requiring every man to keep his stock within his inclosure is not in force in this state. *Campbell v. Bridwell*, 5 Or. 312. It is a matter of common knowledge that it is not only the general understanding but the custom of the people to allow their stock to run at large, and from the first settlement of the state until the present time all kinds of stock have been allowed to run at large on uninclosed lands. Besides, our legislation in relation to inclosures, estrays, and the marking and branding of stock are inconsistent with its existence in this state. It is not, then, a violation of law, nor a want of ordinary care, merely to allow stock to run at large in this state; and, unless some special circumstances exist, no one, individual nor corporation, may injure or kill them when they stray upon his uninclosed lands, or its railroad track, without incurring liability in damages therefor, unless ordinary care and diligence was exerted to prevent it.

As applied to the facts in hand, within the reasoning of the authorities, the plaintiff's horse was not a trespasser, in the common-law sense, when he strayed on the track near or on the depot grounds; nor, within the intention of the statute, as we have shown, was the defendant under any obligation to fence its depot grounds so as to exclude the horse or other stock. It is conceded that the defendant had a right to its track; and while, as was said in *Smith v. Railroad Co.*, 34 Iowa, 508, "while the plaintiff's cattle had no right there, though, negatively stated, they were not in the wrong for being there," yet that circumstance did not relieve the defendant of the duty to exercise ordinary care; and, if the horse was killed, while thus on the track, by its negligence, the defendant is liable. The original act being neither negligent nor unlawful, when the horse strayed upon the track, and was killed, the act of the plaintiff was not the direct nor proximate cause of the injury, and could not, therefore, be such negligence as would operate as a defense, and preclude a recovery. To effect

that result, there must have been mutual negligence, in the sense of equivalent acts simultaneously concurring to produce the injury. Before that can happen, the original act of turning loose the cattle or stock must have been done under such circumstances as indicated a want of ordinary care upon the part of the plaintiff that contributed directly to produce the injury. Ordinary care always has relation to the situation of the parties, and necessarily varies according to the particular circumstances under which it is exercised. An owner cannot turn loose his stock regardless of circumstances, or at a place where danger to them is constant and imminent, and, when an injury occurs to them as a consequence of his conduct, though the defendant may not have been free from fault, escape the charge of negligence, or a want of ordinary care. There is a marked difference between suffering stock to run at large upon uninclosed lands along the line of a railroad, or adjoining its depot grounds, from which they may stray upon the track, and turning them loose, uncared for, and directly upon the grounds of a depot or station covered with main and side tracks, switches, turn-outs and turn-tables, more or less constantly in use, with trains coming and going, where danger is known to exist, and where injury to them will probably happen as a consequence of the peril in which they have been voluntarily placed. In the former case, if they are killed by the negligence of the company, the act of the plaintiff is only the remote cause of the injury, while in the latter it is the proximate cause of the injury, co-operating with the negligence of the defendant to produce it. In such case, the act itself is equivalent to deliberately putting the stock in a place of danger, and where injury to them is a probable consequence. The stock do not stray into a place of danger, but they are turned loose into a place where danger is known to exist, or may be foreseen by the exercise of ordinary care; and the party cannot and ought not to recover for injuries which are the direct result of his own negligence. While, therefore, an owner may suffer his stock to run at large, and pasture upon uninclosed lands, if they should stray upon the track of a railway, and be injured or killed by the negligence of the company, it is not considered such negligence as directly conduces to the injury, and does not preclude a right of recovery, yet there may be circumstances under which to turn stock loose, uncared for, would indicate such recklessness or such want of ordinary care as would preclude a recovery.

Now, turning to the record, we have presumed, without any direct evidence of the fact, that the plaintiff suffered his horse to run at large, and that he wandered upon the depot grounds and the track where the accident occurred. The record shows that he was running back and along and upon the track, and away from the train, when he was struck, on the depot grounds, from 40 to 60 feet

from the place where he started on the track; that when the train was about 300 yards distant, and signaled its approach to the station by blowing its whistle, the horse then was either upon the depot grounds along-side of the track, or else was upon the public road, and soon thereafter was seen upon the track. Within the principles of the authorities where it is not unlawful to allow stock to run at large, "a railroad company must respond in damages for injuries to stock through its negligence when the owner has contributed to the injury no further than merely permitting it to run at large." Nor is there anything in the record to except the case from the operation of this principle. There is no suggestion upon the facts, or any special circumstances, which made the conduct of the plaintiff in the premises negligent, or to charge him with a want of ordinary care. The place where the injury occurred was not a railway station in a thickly-populated community, near to or adjoining some large and thriving town, netted with tracks and switches and turn-outs, at which a volume of business was done, requiring the constant use of its depot grounds for its trains passing and repassing, and where danger to roaming stock could be foreseen, and where to turn them loose would be voluntarily putting them where injury to them would be the natural and probable consequence.

We concur in the case of *Smith v. Railroad Co.*, 34 Iowa, 508, to which we have been referred, that "the owner of cattle may not turn them out, and enable them to frequent a place of great peril on the depot grounds or track of a railroad company, and then demand that the railroad company shall stop its trains, and drive off his cattle, or slacken the speed, or change the time-table, in order to deliver his cattle from the peril in which he has voluntarily placed them." But it must not be overlooked that the court immediately added that, "if the injury to the cattle was caused by the negligence of those having charge of the train, and which injury might have been avoided by the use of ordinary diligence and care, then, of course, the plaintiff might recover." The use of the words in the last clause of the instruction, "and that such negligence contributed to the accident," was not in the sense of such negligence as was the proximate cause of the injury, and operative as a defense, but only as a remote cause of the injury, and would not preclude a recovery. The instruction must be examined by the light of the facts to which it is applied, and the circumstance of allowing the horse to run at large, except under special circumstances not raised by this record, is not an omission of ordinary care; and the law is, when a railroad company has injured stock through its negligence, that it is liable, where the owner has contributed to the injury no further than merely permitting his stock to run at large.

There is a large class of cases, headed by

Davies v. Mann, 10 Mees. & W. 546,—a case much criticised, but which Judge THOMPSON shows has been approved by the great weight of authority, (5 South. Law Rev. 835,)—in which the principle is upheld as declared by Lord ABINGER, that, "as the defendant might by proper care have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there," and which, as applied to the present case, is conclusive of the result already reached. And it may be observed, further, that that case and others were subsequently reviewed and considered by the court of exchequer in *Tuff v. Warman*, 94 E. C. L. 573; and it was held that mere negligence or want of ordinary care on the part of the plaintiff would not disentitle him to recover, if the defendant might, by the exercise of ordinary care and caution, have avoided the neglect or carelessness of the plaintiff. And, in a still later and much discussed case, (*Radley v. Railway Co.*, L. R. 1 App. Cas. 759,) it was held error to instruct the jury, if there was contributory negligence in the plaintiff, they should find for the defendant, without adding the qualification, "unless the defendant could have avoided the mischief by the exercise of reasonable care." Lord PENZANCE said: "The first proposition is a general one, to this effect: that the plaintiff, in an action for negligence, cannot succeed if it is found by the jury that he has himself been guilty of any negligence, or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first; namely, that, though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet, if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." As applied to the facts in hand, the defendant is required to avoid the destruction of life and property, if by ordinary care it may be safely done, or else it will be liable, though the plaintiff may have been negligent. Whart. Neg. § 379, note 5. So cogently has this principle—that no person or corporation had the right to recklessly inflict wrong, or to destroy the property or animals of another, even when trespassing, if by the exercise of ordinary care it may be avoided, with due regard to the safety of the train—impressed itself upon the justice and humanity of courts, that it has been adopted and applied in some jurisdictions where the common-law rule prevails, which requires the owner to keep his stock within his inclosure. Within the doctrine of these cases, although the present case does not require us to invoke it, the instruction is incontestably sustained by the law. As no other question is presented by the record, or made at the argument, it follows that the judgment must be affirmed.

THAYER, C. J., (*dissenting.*) I am unable to concur in the result reached by the majority of the members of the court in this case. I cannot assent to the view that an owner of domestic animals can pasture them upon the depot grounds of a railroad company without being chargeable with such a degree of negligence as will preclude his right to a recovery of damages for their injury or destruction by moving trains of cars upon the track of the road, unless done intentionally. There is no stronger evidence to my mind of carelessness and negligence upon the part of such owner than to allow the animals to go at large, and wander about such places, where they are necessarily exposed to being run over and killed. My learned associate who prepared the majority opinion herein has with great care and research collated a large number of both English and American authorities upon the subject, and drawn as a conclusion therefrom that where the common-law rule, which required the owner of stock to keep it within his own inclosure, did not prevail, his permitting it to run at large would not, if it were to stray upon a railroad track, and receive injury, necessarily be such negligence as directly contributed to the injury; and he attempts to show that the common-law rule referred to does not obtain in this state. As an abstract proposition, I make no contention respecting that view; but, in the determination of all this class of cases, we must look squarely at the facts and circumstances, in order to make a just decision. Theories and distinctions, however specious and refined, cannot disprove a self-evident truth.

It appears from the bill of exceptions that the respondent has lost two horses, which have been run over and killed by rail-cars upon the road in question; and it is very evident that if he had a large band, and took no better care of them than he did of the one in question, as shown by the testimony, he would lose them all in the same way, unless the company ceased to operate its road, and turned its depot grounds into a horse pasture. The bill of exceptions states that "the evidence tended to show that said horse, at the time when he was struck by defendant's locomotive, was running at large on defendant's depot grounds in the town of Tangent, Linn county. * * * and had at different times previously to said day been seen occasionally pasturing upon said depot grounds; that plaintiff resided at all times in said town of Tangent, and 700 or 800 feet away from said depot grounds." This court knows judicially that the railroad in question constitutes a part of a line of road extending from Portland, Or., to San Francisco, Cal., a distance of more than 700 miles, and is the main avenue of transportation of passengers and freight between the two states; that, in operating it, a large number of trains of cars and rolling stock are employed; and that, at all such points as that in question, horses and cattle could not be permitted to pasture

upon its depot grounds with any degree of security, however vigilant and careful those having charge of the trains and rolling stock might be in regard to their management. Yet the respondent, living in said town of Tangent, within a few hundred feet of the place where his horse was killed, permits it to run at large upon the lands of the company adjoining the depot, which must necessarily be left open, in order to enable the public to transact business with the company. To conclude that such act, under the circumstances, is not the result of supine indifference and negligence upon the part of the owner of the animal would, it seems to me, be absurd, and to stultify reason. The respondent probably resided upon a town lot, and, having no ground to pasture his horse upon, concluded he might forage upon the company's land. He knew, of course, that he had no right to allow his horse to run there; knew that he was exposing the animal to imminent peril by doing so. But the opportunity was so favorable for nipping herbage from another's land free of expense that he was willing to take the risk of sacrificing the life of the horse. I can conceive of no carelessness more censurable than to allow horses and cattle to run at large in such a locality; and no prudent man would think of permitting it, out of regard for the beasts themselves. But there are other far more important considerations than the regard for the animals, and their value. These things are incomparable to the damage liable to accrue in consequence of running an engine and train of cars over such animals. Several employes upon railroads have lost their lives during the last year or two from such incidents, and thousands of dollars of damage done. Cars have been thrown from the track, and the lives of passengers jeopardized. A railroad company can ill afford to run its engine and cars over an animal, and will not do so, where it can possibly be avoided, whether liable for its value or not. The respondent had no legal or moral right to suffer his horse to be at large upon a railroad company's depot grounds. He was thereby doing the company and the public a positive wrong, and I am opposed to his being rewarded for his unjustifiable negligence in that particular. That his act in allowing the animal to go where it did directly contributed to the damage he seeks to recover, and which the jury graciously awarded to him, there can be no doubt, if viewed from a common sense stand-point. This is not a case involving the right of stock to run at large upon a range or open common. There the land is thrown open, or left open, by the voluntary act of the proprietor, which is construed to be an implied license to the owners of domestic animals to use the same for grazing purposes. But here the railroad company is compelled to leave its depot grounds open, for the accommodation of the public, for the purposes of receiving and delivering freight, and for the convenience of persons traveling

upon it. The grounds being left uninclosed, under such circumstances, cannot be construed into a license to pasture them, and the conditions are of such a character as to impliedly forbid it. Nor do I oppose the view expressed in the said opinion regarding the duty of employes of a railroad company to use reasonable effort at all times to prevent the injury or destruction of such animals when found upon the track of the road, although they are there wrongfully. Because cattle or horses go upon a railroad track through the negligence of their owner, it does not follow that the company has the right to kill them. Its employes should always avoid running them down, where they are able to stop the train without injury to it, or without endangering the safety of passengers. But I am decidedly opposed to a trial court referring such a question to a jury, unless there is evidence in the case tending to establish the fact that they could reasonably and safely have stopped the train.

The majority members of the court assume that the evidence in this case tended to prove that the managers of the train, by the exercise of reasonable diligence, could have obviated the casualty in question. I very much doubt, however, whether it warrants that assumption. The statement in the bill of exceptions in regard to that matter is as follows: "That said locomotive was at the time attached to one of defendant's regular passenger trains, which passed through said town and depot grounds, from north to south, about 1 o'clock P. M. of the day, which was the regular time for said train to pass said station at Tangent; that, upon approaching said station, and when about 300 yards distant therefrom, the engineer in charge of the train signaled his approach to said station by sounding the whistle; that said horse was at the time either upon the depot grounds along-side the track, or else was upon the public road, at the north boundary line of the depot grounds, and soon thereafter was seen upon the track of the railroad, on the depot grounds, which track, near the road, was elevated some ten or twelve feet, and at the place where the horse was struck was elevated six or eight feet above the surrounding ground; that soon after the whistle was sounded the horse was so seen upon the track between the last-named two points on the depot grounds, and was walking along towards the approaching train, as if intending to reach said county road, which crosses the railroad track at that point; that when the horse had progressed a few steps in that direction upon the track the engineer sounded the alarm whistle twice or oftener, and turned the steam through the cylinder cocks, to drive the horse from the track; that the horse was at that time from sixteen to sixty feet from said road, and the train was distant from the horse from one hundred and eighty to two hundred and fifty feet on the opposite side of the said county road; that when the engineer so sounded the alarm whistle the horse turned immediately around on

the track, and started running back along and upon the track, towards the south, and away from the train, but was overtaken and struck by the train within from forty to sixty feet from where he so turned around on the track; * * * that there is a conflict of evidence as to what the speed of the train was when said horse was first seen to go on the track, and said alarm whistle was sounded, and as to whether or not said speed was slackened before the horse was overtaken, and struck by the locomotive, and as to whether or not the engineer endeavored to and could have stopped the train after the horse went upon the track, and before he was struck by the locomotive, the speed of the train when the horse went upon the track being variously estimated by witnesses at from eight to twenty miles per hour, and some of the witnesses testified that the speed of the train was considerably lessened before the horse was struck, while other witnesses testified that they could not perceive that the speed of the train was at all diminished between the sounding of the alarm whistle and the striking of the horse. The engineer testified that immediately upon sounding the alarm whistle he applied the brakes, reversed the engine, and did all that it was in his power to do towards stopping the train, which was running about three miles per hour when the horse was struck. The other witnesses who testified were standing on the depot platform, some 300 feet distant from the point where the horse was struck by the locomotive, and nearly in a direct line with the length of the approaching train; and some of them stated that they did not, and some of them that they did, think the engineer endeavored to check the speed of the train before striking the horse."

I do not think the jury were justified in finding from the facts, under the most favorable construction to the respondent which they could reasonably give them, that the employes of the company in charge of the train were guilty of violating their duty in the particular referred to. I do not believe that the facts were sufficient to sustain an allegation that said employes, by the exercise of reasonable care and diligence, could have avoided striking the horse with the locomotive. A finding by the jury that a train was running at the maximum or minimum rate supposed by the witnesses, or any intermediate rate, per hour, when the alarm whistle was sounded, and that it was 250 feet from the horse at the time,—the greatest estimated distance,—and that the engineer was not endeavoring to stop it, and could have done so, after the horse went upon the track, and before it was struck by the locomotive, would not have been sufficient to establish such want of care or negligence; as it would have lacked the further essential fact that the train could have been stopped within the distance indicated, and upon that character of grade, without danger of wrecking it, and imperiling the safety of those on board. An en-

gineer of a railroad train is charged with a responsible duty, and he must be the judge, in the event of an emergency, as to the proper course to be pursued. He is often compelled, in cases of threatened danger from causes such as existed in this case, to accelerate instead of retarding the speed of the train, in order to save his own life, and the lives of others depending in a great measure upon his prudence and discretion. It would therefore be highly unjust to impute negligence to his conduct in the performance of his duty, without proof of all the facts necessary to constitute it. It could hardly be supposed that a person intrusted to so important a station as that of engineer upon a passenger train of cars would neglect to check the speed of the train in order to avoid running over a horse discovered upon the track, where it could be effectually and safely done. No one knows better than the engineer himself that his own life is in imminent peril whenever such an occurrence happens; and the law of self-preservation, if no other consideration, would prevent him from voluntarily taking such a risk. I think it may reasonably be claimed, as a rule of evidence in such cases, that the engineer is presumed to have performed his duty, unless the contrary is shown by direct and positive proof. In this case, however, no proof of any neglect on the part of the engineer, or of any of the employees of the company, was attempted to be established, except by remote inference, not deducible from the facts claimed. It seems to me, therefore, that when the circuit court gave the instruction: "In this case, if you believe from the evidence that the plaintiff was guilty of negligence in allowing his horse to be upon the depot grounds of defendant, and that such negligence contributed to the accident, still, if you believe the accident could have been avoided by the exercise of ordinary care and diligence on the part of the defendant, the defendant is liable,"—it committed error. Cases of this kind are too important to the public to be left wholly to the decision of a jury, who, in ninety-nine cases out of a hundred will determine them from sympathy, prejudice, and caprice. Courts have a responsibility to perform aside from announcing abstract propositions of law. It is the duty of a trial court, and of this court, to see that justice is administered; and it cannot be shirked by a pretext that the case was a proper one to be determined by the jury. In the trial of actions at law, where the testimony in support of the issue is conflicting, it is the province of the jury to determine the facts; but the court should always carefully scan the testimony, and ascertain upon what issues between the parties it is conflicting, and not shuffle the whole responsibility onto the jury. The instruction above set out left the jury, in this case, free to determine it according to their own notions of right, and without regard to the rules of law.

The court had refused to give the instruction requested by the appellant's counsel,—

that it was negligence in the owner of a horse to voluntarily permit it to run at large, and seek pasturage upon railroad depot grounds, and, if it were unintentionally injured by the employes of the railroad, through negligence in operating its cars, while the horse was so trespassing upon such grounds, the owner of the horse could not recover damages from the railroad company for such injury,—and after such refusal proceeded to tell the jury that, if they believed from the evidence that the plaintiff was guilty of negligence in allowing his horse to be upon the depot grounds of defendant, and that such negligence contributed to the accident, still, etc. By this instruction, the question as to whether or not the plaintiff was guilty of negligence in allowing his horse to be upon the depot grounds of defendant, and that such negligence contributed to the accident,—a very important question of law, indeed,—was left entirely to the belief of the jury from the evidence. Yet this part of the instruction is less objectionable than the latter clause thereof, as it restricts the jury in their finding, whether the plaintiff was guilty of negligence on account of the act referred to, and whether such negligence contributed to the accident, to their belief from the evidence, while the latter clause, to the effect that, if they believed that the accident would have been avoided, etc., would indicate that they might find the defendant liable from general belief, or belief derived from any source. The rule that a railroad company may be liable for killing stock upon its road, although wrongfully there, does not arise out of any new principle. It has always been recognized as a wholesome doctrine that an owner of property had no right to destroy or mistreat another's cattle found trespassing upon the property, but must exercise reasonable care and prudence in removing them. The issue in this case was to this effect: The plaintiff said to the defendant: "My horse, without any fault of mine, went upon your railroad track; and your agents and servants so carelessly and negligently ran and managed your locomotive and cars upon said track that the same were run against the horse, and thereby killed it, to my damage," etc. The defendant said, in answer thereto: "My agents and servants were not guilty of the alleged carelessness and negligence, but the damage of which you complain resulted from your own carelessness and negligence." Now, the plaintiff having failed to charge an intentional injury to his animal, should, in order to avail himself of the rule which allows a recovery, in such cases, in favor of a party guilty of contributory negligence on his part, have averred in the reply that, notwithstanding the alleged carelessness and negligence charged against him in the answer, he was still entitled to recover the value of his horse, for that the agents and servants of the defendant might and could, by the exercise of reasonable efforts, have avoided running the locomotive against the animal, and that they wholly failed to make such efforts.

This would have presented the real issue in the case,—an issue tendered by the plaintiff, and which he would have been compelled to maintain by a preponderance of evidence; but he tendered no such issue in his reply. Upon the contrary, he merely denied the allegation of his own carelessness and negligence in the affair. The court, however, cast the burden upon the defendant of proving, not only that the plaintiff was guilty of carelessness and negligence which contributed to the injury, but virtually required the defendant to show that it could not have avoided the accident by the exercise of ordinary care and diligence. The said instruction, substantially, went to that effect. It was to the effect that, if the jury found the plaintiff was guilty of negligence in the affair, "and that such negligence contributed to the accident, still the defendant was liable, if the jury believed that it could have been avoided by the exercise of ordinary care and diligence on the part of the defendant." Under that view, a plea on the part of a defendant, in an action against him for negligence, that the plaintiff was also guilty of negligence which contributed to the injury, would not be good unless it were averred in the plea, also, that the result could not have been avoided by the exercise of ordinary care and diligence on the part of the defendant. Nor would the defendant's proof in support of his plea be of any avail unless it incontestably established that the occurrence could not have been avoided by the exercise of such care and diligence on his part. The logical aspect of the instruction is far beyond my comprehension. If the plaintiff's negligence contributed to the accident, and the defendant was so guilty of negligence in the affair, then it was necessarily the result of their joint wrong; and it certainly could have been avoided by the exercise of ordinary care and diligence on the part of the plaintiff. Why, then, should the defendant be liable to the plaintiff for its wrong, when the plaintiff's wrong was at least equally as instrumental in producing the result? This will be the first case on record, I imagine, where contribution between wrong-doers has been enforced by a court of justice. If there had been evidence in the case tending to show that the conduct of the agents and servants of the appellant was reckless in the transaction which resulted in the destruction of the respondent's horse, or which indicated a total indifference and disregard of the respondent's rights of property, and such fact had been alleged in the complaint, or set forth in the reply, the trial court might very properly have instructed the jury that, if they found that such had been the conduct of the agents and servants of the appellant, they would be authorized to find him liable, although the plaintiff was guilty of negligence which contributed to the accident; but, in order to admit of a recovery in such a case, the conduct of the defendant must be proven to have been something more than negligent. It must be shown to have been

willfully done; for upon no other ground can a plaintiff recover damages against a defendant for an injury resulting from the joint act of both parties. The law will not tolerate so illogical a sequence as the allowance of a recovery of damages by one party against another on account of a transaction in which they are *in pari delicto*. But to submit to a jury questions of fact where there is no evidence in the case which will warrant them in making a finding thereon, or to submit to them questions involving both law and fact in a confused mass, and then send them out to guess at a verdict, is a travesty upon justice.

I do not think the respondent was entitled to recover the judgment appealed from, nor see how it can legally be upheld. It is unjust in principle, and pernicious in its consequences, and was evidently obtained by sham and pretense. The idea that those in charge of the train of cars in question ran it against the horse purposely, or failed to do all in their power which could safely be done to avoid the collision, is too absurd and preposterous to be credited for a moment. The courts of this state cannot afford to tolerate a sentiment which ignores the rights of any parties litigant, whether belonging to natural or artificial persons. Because the appellant is a wealthy railroad corporation, and possibly arbitrary, extortionate, and exacting in its dealings with the public, it does not follow that its rights should be ignored. Nor is it good policy on the part of the community to countenance or encourage such practice. We must deal honestly and fairly by railroad companies, whether they do so by us or not. Such a course will be found to be by far the best in the long run. We may succeed in compelling them to pay for a few horses and cattle belonging to thriftless owners, who would probably prefer to have them run over and killed, if they could get anywhere near their estimate of value of the animals, than to exert the slightest effort to prevent the occurrence; but the advantage will be very inconsiderable as compared to the injury which retaliatory measures, if resorted to on the part of the railroads, would occasion, and it would be very unwise to incite any such antagonism. Railroad companies should be required to do their full duty to the public, and, if it need legislation to enforce it, stringent measures should be adopted; but to allow a petty system of illegal and unjust plundering of them will prove to be an indiscreet and short-sighted policy.

(20 Nev. 446)

FORD *et al.* v. MCGREGOR. (No. 1,315.)

(Supreme Court of Nevada. March 3, 1890.)

TAXABLE PROPERTY—ERRONEOUS TAXATION.

1. Live-stock driven from the home ranch of the owners into another county, to be herded therein temporarily, and then returned to the ranch in the home county, is not assessable for taxes in the former county. *Barnes v. Woodbury*, 17 Nev. 883, followed.

2. In assessing property not taxable the assessor acts ministerially, and not judicially, and is personally liable.

Appeal from district court, Nye county; THOMAS H. WELLS, Judge.

A. E. Cheney, for appellants. *Rives & Beatty*, for respondent.

MURPHY, J. Appellants Ford & Merritt are copartners in the business of stock-raising. They are the owners of real estate and personal property, consisting principally of sheep, in Eureka county. They have no real estate in Nye county. Merritt resides in California. The home ranch, where appellant Ford resides, is in Eureka county, and is the principal place of business of the copartnership. The sheep are controlled, cared for, and managed at their home ranch. In the early spring the sheep have been annually driven away from the home ranch, in charge of herders, into Nye county, to graze upon the public domain of said county for a period of about two months, and were then returned into the county of Eureka, where they remained in the vicinity of the home ranch. In January, 1889, 14,000 head of the sheep were so driven into Nye county temporarily, and there grazed upon the public domain until the early portion of March, when the herders, as was the usual custom, commenced to drive them back into Eureka county; and, while the herders were so driving them, the respondent, assessor of Nye county, finding them at the commencement of the assessment season,—which begins on the first Monday in March, and ends on the first Monday of September in each year,—assessed them as personal property subject to taxation in Nye county for the year 1889. He demanded immediate payment to him of the amount of taxes on said personal property; and appellants refused to pay the same, or any portion thereof, and notified respondent that said property belonged in, and was assessable in, Eureka county, and was not assessable in Nye county. Thereupon the respondent seized upon and took possession of 1,400 head of said sheep, and sold sufficient thereof to satisfy the claim for taxes, and the costs and expenses of the assessment, levy, and sale. Appellants, in order to regain the possession of said sheep, were compelled to pay and did, under protest, pay the sum of \$801; that being the amount of the tax, costs, and expenses. The sheep were immediately driven into Eureka county, and were, thereafter, there assessed, and the taxes due thereon made a charge against the real estate of appellants in Eureka county. This suit was instituted to recover the money paid under protest to respondent. The district court granted a nonsuit, and gave judgment in favor of the respondent upon the grounds: (1) That, upon the facts stated, the property was subject, under the law of this state, to taxation in the county of Nye; (2) that the respondent, in assessing the property and col-

lecting the tax, acted judicially, and could not, therefore, be held liable in this action.

This case cannot, in our opinion, be distinguished in principle from that of *Barnes v. Woodbury*, 17 Nev. 388. The rule therein announced as to the *situs* of personal property of the character of live-stock must govern and control this case. The fact that, in the *Barnes* Case, the cattle were permitted to roam at will, and that they wandered from the home ranch in Eureka county into the county of White Pine, and there grazed upon the public domain, at various times during the assessing period, while in this case the sheep were driven into the county of Nye, and there herded for a short period of time, does not make any difference in the application of the principles upon which the *situs* of the property for the purpose of taxation is to be determined. The reasons stated in the *Barnes* Case in support of the conclusions reached as to the *situs* of the property apply with equal force to this case, and are conclusive upon the question. The court erred in deciding that the property was assessable in Nye county.

The court also erred in holding that respondent acted judicially, and could not be held personally liable. In support of the views expressed by the court, counsel for respondent cites several New York cases, including, among others, *Barhyte v. Shepherd*, 35 N. Y. 238, and *Swift v. City of Poughkeepsie*, 37 N. Y. 511. The cases cited by counsel were reviewed at length in *Bank v. City of Elmira*, and it was therein declared that the doctrine announced in those authorities applied only to cases where the assessor had jurisdiction over the persons and property assessed, and erred, for instance, in assessing the property at too high a rate, which was simply an error in a matter to be judicially determined by them, and that the opinions referred to, in holding that the assessor acted judicially and not ministerially, could not be considered as authorities in protecting assessors in the assessment of property where they had no jurisdiction, and that, if such a doctrine was inferable from them, they should not be followed. CHURCH, C. J., in delivering the opinion of the court, said: "The distinction is between an erroneous and an illegal assessment. The former is when the officers have power to act, but err in the exercise of the power; the latter, where they have no power to act at all, and it does not aid them to decide that they have. It is argued that they have jurisdiction to determine what property is taxable in the town. This is a mistake. The legislature determines that question, and the officers have no power over it. The statute requires the assessors to 'ascertain by diligent inquiry' two things: (1) The taxable inhabitants; (2) the taxable property. Where they decide erroneously as to a taxable inhabitant, it is conceded, and the *Mygatt* Case, 15 N. Y. 321, holds, that they are liable as trespassers. Why not when they err as

to taxable property? The duty is precisely the same, and the power conferred in the same language. Assessors must have jurisdiction over the person and subject-matter, * * * otherwise, the assessment is illegal, and void." 53 N. Y. 58. It may be admitted that the New York cases are not entirely uniform in respect to the question as to what acts of the assessors are judicial, and what are ministerial; but, when the direct question is discussed, they have repeatedly held that whenever the assessors exceed their jurisdiction in assessing property and collecting taxes they are personally liable. *People v. Supervisors*, 11 N. Y. 573; *Mygatt v. Washburn*, 15 N. Y. 321; *Clark v. Norton*, 49 N. Y. 246; *Dorwin v. Strickland*, 57 N. Y. 495. The authorities in other states uniformly declare that the acts of the assessors in assessing property and collecting the taxes are ministerial, and that if, as in the present case, he exceeds his powers, he is not protected, and is held personally liable. *San Francisco v. Talbot*, 63 Cal. 486; *Fairbanks v. Kittredge*, 24 Vt. 12; *Baldwin v. Shine*, 84 Ky. 513, 2 S.W. Rep. 164; *Henry v. Sargeant*, 13 N. H. 333; *Hays v. Steam-Ship Co.*, 17 How. 600.

As long as the assessor acts within the scope of his authority, he is protected by the law; but, to bring him within this rule, he must be careful not to assume a jurisdiction which the law does not confer upon him. If he assumes an authority to decide upon the rights of others in cases which the law has not confided to his judgment, he is in general responsible to the same extent as if he possessed no official character whatever. "The office protects him only when he keeps within the limits which have been prescribed for his official action. When he exceeds those, he lays aside his official character, and must rely for his protection on the same principles behind which citizens in private life must defend themselves." *Cooley, Tax'n*, 553. The judgment of the district court is reversed, and the cause remanded; and the court is directed to enter judgment in favor of appellants for the sum of \$801 and costs.

(20 Nev. 451)

WHITMORE v. MCGREGOR. (No. 1,318.)

(*Supreme Court of Nevada.* March 3, 1890.)

Appeal from district court, Eureka county; A. L. FITZGERALD, Judge.

Rives & Beatty, for appellant. *Peter Breen* and *A. E. Cheney*, for respondent.

MURPHY, J. A number of persons named in the agreed statement of facts are residents of Eureka county, and are the owners of real estate and personal property in said Eureka county. They are engaged in teaming and freighting in said Eureka county, and have been so engaged for a number of years. It has been their custom, at the close of the teaming and freighting season of each year, to send their horses and mules into Nye county, to be fed and cared for during the winter months, or until the reopening of the teaming and freighting season in the spring. As was their usual custom theretofore, in the month of December, 1888, the owners thereof had a number of horses and mules

driven from Eureka into Nye county, there to be fed and cared for until the opening of the teaming and freighting season in Eureka county in 1889. On the 15th day of March, 1889, the assessor of Nye county assessed said horses and mules, claiming that said property was subject to taxation in said county for that year, and demanded immediate payment of the taxes. The owners of the property protested against the property being assessed in Nye county, and the payment of the taxes therein, and claimed that the property belonged in, and was assessable in, Eureka county. The owners of said property paid to the appellant the sum of \$219.76 to prevent him from selling the same. It is admitted that the horses and mules were driven back into Eureka county on the 15th day of April, 1889, and that the assessor of Eureka county would assess said property to the owners thereof in Eureka county for the year 1889, if not restrained by legal process. The several claims were duly assigned to respondent, and he brings this action to recover the money paid under protest.

The questions of law presented in this case are the same as in the cases of *Barnes v. Woodbury*, 17 Nev. 383, and *Ford v. McGregor*, ante, 508, (No. 1,315;) and on the authority of those cases the judgment appealed from is affirmed.

(9 Mont. 238)

ST. LOUIS MINING & MILLING CO. v. MONTANA CO., Limited.

(*Supreme Court of Montana.* Feb. 4, 1890.)

MINING CLAIMS—INSPECTION AND SURVEY.

Code Civil Proc. Mont. § 376, giving district courts power to make an order for an inspection or survey of a mining claim whenever any person shall have any right to or interest in any lead, lode, or mining claim which is in the possession of another, and an inspection or survey shall be necessary for the protection of such rights or interest, is not unconstitutional, as being unjust and oppressive, though the interest of petitioner is not defined, and though the order may be issued without requiring bond, and before suit, and no provision is made for appeal, as the order may be reviewed on *certiorari*.

Appeal from district court, Lewis and Clarke county; HUNT, Judge.

Cullen & Sanders, for appellant. *Wade, Toole & Wallace*, and *McConnell & Clayberg*, for respondent.

BLAKE, C. J. The St. Louis Mining & Milling Company of Montana filed its petition in the district court of Lewis & Clarke county, and alleged that the petitioner is a corporation under the laws of Montana; that the Montana Company, Limited, is a corporation under the laws of Great Britain; that the petitioner is the owner of the St. Louis Quartz Lode Mining Claim, situated in said county; that the Montana Company, Limited, is the owner of the Marble Heart, the Maskelyne, and the Nine Hour Quartz Lode Mining Claims; "that being anxious of, and it being necessary for your said petitioner * * * to have an inspection, examination, and survey made of, the premises last aforesaid, in order to enable it to institute its action to recover the possession of the said property, so owned by it, and for the recovery of such damages as it may have sustained by reason of the taking, extraction, and conversion of the quartz rock, ore, and mineral, taken by the said Montana Company, Limit-

ed, from the mining claim and premises, so owned by your petitioner, and for the purposes of enabling it to have such inspection, examination, and survey made of its said premises, and of all veins or deposits of mineral bearing quartz rock or earth in place, the apices of which are within the surface boundaries of the St. Louis Mining Claim, * * * a notice was served upon the Montana Company, Limited, which is made a part of the petition; that the Montana Company, Limited, is in the possession of certain tunnels, shafts, stopes, winzes, drifts, and excavations within the plains of the exterior boundaries of the said Marble Heart, Maskelyne, and Nine Hour Lode Mining Claims, extending vertically downward, and beneath the surface of the said claims, and from veins or deposits of ore, the apices of which are within the exterior boundaries of the St. Louis Quartz Lode Mining Claim" and has been extracting large quantities of ore belonging to the petitioner; that the said tunnels, shafts, stopes, winzes, drifts, and excavations of the Montana Company, Limited, connect with the said St. Louis Mining Claim, and are the only means for entering into the same; "that the inspection, examination, and survey thereof was and is absolutely requisite and necessary in order to determine the rights of the respective parties, and to ascertain the extent of the trespass, damage, and injury occasioned by the said wrongful and unlawful acts of the said Montana Company, Limited, in so entering the premises of your petitioner, and extracting the quartz, rock, ore, and mineral from same, and in constructing their said tunnels, shafts, stopes, winzes, drifts, and excavations thereon; that for said purpose it was and is necessary that your petitioner, and such persons as may be designated by this court, shall have access to and in the shafts, works, and machinery, convenient or necessary to make the inspection, examination, and survey aforesaid," of which the Montana Company, Limited, is in the possession. The prayer of the petitioner is as follows: "Wherefore, your petitioner prays that your honor appoint a time and place for hearing this petition, and that an order for service of notice thereof upon the said Montana Company, Limited, be made; that such proceedings be had and done under section 376, aforesaid, as will secure to your petitioner the rights to which it is entitled in pursuance thereof, and that upon such hearing an order be made for the inspection, examination, and survey, so refused to your petitioner, and that the persons appointed by your honor shall have free access to the premises aforesaid." The notice which is mentioned contained recitals of facts similar to those of the petition, and was a demand for an inspection, examination, and survey of the under-ground works of the said lode mining claims of the Montana Company, Limited. The petition was filed November 6, 1889, and the judge ordered that the hearing be had five days thereafter. The Montana

Company, Limited, appeared and filed an answer, which denied the allegations of the petitioner.

The court below made an order "that an inspection, examination, and survey of the shafts, tunnels, levels, works, and stopes be made as prayed for," continuing twenty days, and designated eight persons to make the same; that "said party shall have the right to pass in and out the mouths of the tunnels of the defendant without hindrance;" that "said work shall be completed within said twenty days, unless for good cause the court shall order a longer time to be used;" the survey by the said petitioner to be confined within the vertical planes of the end lines of the Saint Louis Mining & Milling Company's claim, except so far as it may be necessary to run lines in the tunnels, levels, stopes, drifts, or winzes outside of such planes, in order to complete an accurate survey of said workings within the said end lines; " * * * the petitioner's survey to be conducted, so far as possible, without interference with the regular and orderly working and operation of the mine, or the employes of defendant in the discharge of their various duties; and the engineer of the party of petitioner shall not dispose of or sell to any one any plan or section of said mine, or any matter or data obtained during or resulting from this survey except to the petitioner, its agents and attorneys. Petitioner's surveyors are not to enter said mine unless accompanied by three representatives appointed by the defendant to accompany them, unless after reasonable notice, not to exceed one hour, such persons shall fail to attend. The persons so hereinbefore authorized to make such survey shall not take or remove from said mine any samples of ore or minerals at any point therein, but they shall be allowed to examine and trace the walls of the vein or fissure, and for this purpose they shall be allowed to use the pick, and remove such material as shall enable them to make such examination." Afterwards, R. B. Bayliss, the general manager and superintendent of the Montana Company, Limited, and who was in the control of the property which is described in the foregoing order, refused to comply therewith, or permit said persons to make the survey. Upon proper proceedings had in the premises, Bayliss was arrested, and pleaded guilty to the charge of contempt of the court, and was punished by a fine. The Montana Company, Limited, appeals to the court from the "final judgment and order * * * allowing an inspection, examination, and survey of the Marble Heart, Maskelyne, and Nine Hour Quartz Lode Mining Claims, * * * duly made and entered in said action * * * in favor of the above-named petitioner, and against this defendant, and from the whole and every part thereof." Upon the application of the Montana Company, Limited, a writ of *certiorari* was issued out of the court to the district court commanding it to certify fully to this court, and annex to the writ a

transcript of the record and proceedings referred to, that the same might be reviewed.

The argument upon this hearing has been restricted to one question. Counsel concede that all the proceedings in the court below have been regular in form, and derive their validity from the following section of the Code of Civil Procedure: "Whenever any person shall have any right to or interest in any lead, lode, or mining claim which is in the possession of another person, and it shall be necessary for the ascertainment, enforcement, or protection of such right or interest that an inspection, examination, or survey of such mine, lode, or mining claim should be had or made; or, whenever any inspection, examination, or survey of such lode or mining claim shall be necessary to protect, ascertain, or enforce the right or interest of any person in another mine, lead, lode, or mining claim, and the person in possession of the same shall refuse, for a period of three days after demand therefor in writing, to allow such inspection, examination, or survey to be had or made, the party so desiring the same may present to the district court, or a judge thereof, of the county wherein the mine, lead, lode, or mining claim is situated, a petition, under oath, setting out his interest in the premises, describing the same; that the premises are in the possession of a party, naming him; the reason why such examination, inspection, or survey is necessary; the demand made on the person in possession, so to permit such examination, inspection, or survey; and his refusal so to do. The court or judge shall thereupon appoint a time and place for hearing such petition, and shall order notice thereof to be served upon the adverse party, which notice shall be served at least one day before the day of hearing. On the hearing, either party may read affidavits; and, if the court or judge is satisfied that the facts stated in the petition are true, he shall make an order for an inspection, examination, or survey of the lode or mining claim in question, in such manner, at such time, and by such persons as are mentioned in the order. Such persons shall thereupon have free access to such mine, lead, lode, or mining claim for the purpose of making such inspection, examination, or survey, and any interference with such persons while acting under such order shall be contempt of court. If the order of the court is made while an action is pending between the parties to the order, the costs of obtaining the order shall abide the result of the action; but all costs of making such examination or survey shall be paid by the petitioner." Section 376.

It is contended that this statute is unconstitutional, and authorizes the inspection, examination, and survey of the mining property of the Montana Company, Limited, upon the petition of the St. Louis Mining & Milling Company of Montana, and before the commencement of any action by the parties. The obnoxious features are pointed out in the brief, and may be summarized under the fol-

lowing heads: This law may be made an instrument of oppression and injustice. The quality of the interest of the petitioner is not defined. No bond is required to be given to secure the payment of the damages which may result to the owner of the property which is invaded. No appeal is allowed from the order of the court or judge in granting the prayer of the petitioner. The power of the court or judge is vast, and can practically confiscate any mine in the state. The innocent owners of mining property are injured without "due process of law," and arbitrarily deprived of the right of trial by a jury. The commanding position of the mineral interests of this state, and the importance and extent of this remedy which is applicable to them, demand the careful study of the principles which have been invoked by counsel.

Before we investigate the propositions which have been announced, it will be instructive to ascertain the origin of this provision of the Code, and thereby discover its purpose. The source is unquestionably found in the chancery practice of England, and we must review the cases, which are generally controversies affecting coal-lands. In the *Earl of Lonsdale v. Curwen*, 3 Bligh, 170, an order was made in the year 1799 that the plaintiff and his servants "should be at liberty to inspect the workings of the defendant under the plaintiff's inclosures." It is shown by affidavits that an inspection of the premises was then prevented "because the pipe or air-course which conveyed the pure air had been broken down or taken away, and certain earth, rubbish, and other impediments were lying at the ends, roads, or passages leading to the workings." It was therefore further ordered that "the defendant should cause the obstructions to be removed, and open the air-courses, as the viewers should think necessary for such inspection; and that the viewers, and such other persons as they should appoint, should be at liberty, as often as should be necessary, to make from time to time inspections into the workings of the defendant under the premises of the plaintiff, so as to enable the viewers to make a perfect and complete report of the workings." In *Walker v. Fletcher*, 1d. 172, the same proceedings were had in the year 1804, and it was also ordered that the defendant should remove certain dams and obstructions in their works as the inspectors should direct, so that the plaintiff might view the pit of the defendants. In *Blakesley v. Whieldon*, 1 Hare, 176, the parties entered, in the year 1838, into a contract for the sale of minerals situated on certain tracts of land. Differences arose as to whether the plaintiff should have power to go down into any of the mines comprised in the contract, or whether the power, if granted, should not be confined to the right to descend any pits or shafts sunk on the land over the demised mines. In pursuance of the opinion of the vice-chancellor, a decree was entered, "empowering the plaintiff and his agents, at all reasonable

times, and upon reasonable notice, to enter the mines in the pleadings mentioned, and to inspect and measure the same, so far as from time to time may be necessary." The vice-chancellor observed that the evidence proved "that the power of inspection was an usual reservation in cases like the present." In *Lewis v. Marsh*, 8 Haro, 97, a bill was filed by the lessors of a colliery against the lessees, and heard in the high court of chancery in the year of 1849. It appears that "there was no provision for inspection in the lease, and the defendants had worked the coal through a shaft in an adjoining mine belonging to themselves, so that the demised mine could only be entered through the defendants' mine." Counsel "moved that the defendants might be ordered to permit the plaintiffs, and certain persons mentioned in the notice of motion, all or any of them, with workmen, and other necessary assistants, at all reasonable times, and from time to time, to have access to the coal-works of the plaintiffs in and through the adjoining coal-works of the defendants, to inspect and examine the said coal-works, the property of the plaintiffs, and to ascertain the real extent, state, and condition thereof, and the real weight of the coal from time to time worked by the defendants therefrom." They submitted that they "were entitled to the means of proving the fact that the defendants had worked beyond their boundary." The defendants opposed the motion, upon the ground that "the plaintiffs might, if they had desired any such power of inspection, have reserved it in their lease; but they had made no such contract. * * *

The plaintiffs sought not only to inspect the demised coal-works, but also to pass, for that purpose, into and through the property of the defendants. No implied contract gave the plaintiffs such a right. Admitting that a power of inspecting their own mine might be impliedly reserved, it must be exercised in a lawful way, at their own expense. The plaintiffs might open a shaft, and descend into the mine, upon their own property; that must be the extent of their legal right under the contract." The vice-chancellor in the opinion says: "I think the case is one in which there is a necessity that the party should be allowed what he asks, in order to prove his case. That is the meaning of necessity. A party cannot get his rights without proving what his rights are; and it is inherent in the case that the plaintiffs should have an opportunity of ascertaining that the defendants do not work more coal than they are entitled to do." The order of the court is similar to that in *Blakesley v. Whieldon*, supra. The defendants objected to the admission into their mine of certain persons mentioned in the notice of the motion, and the plaintiffs consented to withdraw them; "and it is ordered that the defendants do permit the said plaintiffs, and the persons so to be appointed, * * * to have access to, and to view and inspect, the said mine and workings; but this order is not to entitle the

plaintiffs to view or inspect any part of the defendants' mine except for the purpose of ascertaining the boundary of the plaintiffs' mine." In *Bennitt v. Whitehouse*, 28 Beav. 119, the master of the rolls says, in the opinion: "It is established by the cases that, if a person is making use of his property to the injury of the property of his neighbor, the latter is entitled to an inspection, in order to ascertain the extent of the injury; and this court only requires him to show a *prima facie* case. * * * If it were a question depending only on the balance of testimony, I should, in this case, be in favor of the defendant. But the court requires the best evidence of the fact, and the best evidence here is by an examination of the workings in the defendants' mine. Suppose a man had a right to the surface, and that another person was entitled to the minerals; if the latter insisted that the former had sunk a shaft, and was obstructing his minerals, would not this court allow an inspection, in order that the facts in dispute might be ascertained? I have acted upon that principle in *Adshead v. Needham*, in which I allowed the plaintiff to go through a gallery in the defendants' mine in order to inspect it. * * *

Whenever it appears that a person has power to make use of his land to the injury of another, and there is *prima facie* evidence of his doing so, though it is contradicted, still, as the only way of ascertaining the fact is by an inspection, the court always allows it, if it can be done without injury to the defendants." In *Bennett v. Griffiths*, 30 Law J. Q. B. 98, the judgment of the court was delivered by *COCKBURN, C. J.*, who said: "The power to order an inspection of real or personal property has long existed in the courts of equity, and we find that, as ancillary to that power, the courts of equity have ordered the removal, where necessary, of obstructions to the inspection. In the notes to the *East India Co. v. Kynaston*, 3 Bligh, 153, 168, two cases are reported in which, under circumstances very similar to the present, such orders were made." The learned judge then cites and approves the cases of *Earl of Lonsdale v. Curwen*, supra, and *Walker v. Fletcher*, supra, and adds the following observation: "This latter case, which was decided in the time of Lord *ELDON*, is a strong assertion of the power to remove obstructions to inspection." See, also, *Whaley v. Branker*, 10 L. T. (N. S.) 155.

The English authorities which have been collected will be considered further, and we will now notice the American cases to which our attention has been invited. The earliest that we have read is *Thornburg v. Mining Co.*, 1 Pac. Law Mag. 267, which was decided in the year 1867, in the circuit court of the United States of the district of Nevada. The main issue was whether the property claimed by the plaintiff was a separate and distinct quartz lode from the vast mineral vein, which is known as the "Comstock Lode," and a petition was filed praying for

an inspection of the premises. After a full statement of the facts, which it is needless to repeat, Mr. Justice BALDWIN delivered this opinion: "Ought a court of equity, in a mining case, when it has been convinced of the importance thereof, for the purposes of the trial, to compel an inspection and survey of the works of the parties, and admittance thereto by means of the appliances in use at the mine? All the analogies of equity jurisprudence favor the affirmative of this proposition. The very great powers with which a court of chancery is clothed were given it to enable it to carry out the administration of nicer and more perfect justice than is attainable in a court of law. That a court of equity, having jurisdiction of the subject-matter of the action, has the power to enforce an order of this kind will not be denied; and the propriety of exercising that power would seem to be clear, indeed, in a case where, without it, the trial would be a silly farce. Take, as an illustration, the case at bar. It is notorious that the facts by which this controversy must be determined cannot be discovered except by an inspection of works in the possession of the defendant, accessible only by means of a deep shaft, and machinery operated by it. It would be a denial of justice, and utterly subversive of the objects for which courts were created, for them to refuse to exert their power for the elucidation of the very truth,—the issue between the parties. Can a court justly decide a cause without knowing the facts; and can it refuse to learn the facts? But one adjudication of this subject can be found in the books, and this is in conformity with the views here expressed, viz., *Bainbridge on Mines*." The next case in point of time is that of *Stockbridge Iron Co. v. Cone Iron-Works*, 102 Mass. 80, which was heard in the year 1869. Chief Justice CHAPMAN, in the opinion, says: "The plaintiffs complain that the defendants dug a shaft on their own land, near the line of the plaintiffs' land, and thence excavated drifts, extending underground, into the plaintiffs' land, and took out the ore which they found there. They ask that these drifts may be viewed. The order directs not only that the drifts may be examined by pumping the water out of the shaft, and going into it, and that the drifts may be examined which leads towards the plaintiffs' land, and also those which are under it, but that they may be cleared, so far as may be necessary, in order to ascertain what iron ore or other mineral has been taken from the land of the plaintiffs, and under the surface thereof, and that the viewers may do all acts that may be reasonably necessary to be done to effect the purposes of the decree." The expenses of the explorations amounted to the sum of \$4,841.07, and were taxed against the defendants, with the costs. Upon this matter, the opinion says: "But courts of law have power to allow the reasonable expenses of surveys and views in proper cases, and the fee-bill does not apply

to the expense of such proceedings. Mines are so situated that special and peculiar proceedings are sometimes necessary in order to attain the reasonable ends of justice in regard to the under-ground passages by which access to them may be obtained by trespassers." In the cases of *Thornburg v. Mining Co.*, supra, and *Stockbridge Iron Co. v. Cone Iron Works*, supra, no authorities relating to this discussion are cited in the opinions, and the briefs of the counsel are not reported. In the year 1877, the case of *Thomas Iron Co. v. Allentown Mining Co.*, 28 N. J. Eq. 77, was determined. An order for the inspection of a certain mine was made upon the *ex parte* application of the complainants, and the defendants insisted that they should have had notice thereof, and an opportunity to be heard. The chancellor says: "In a case like the present, where the application is for the inspection of a worked out and almost abandoned mine, to ascertain the extent of the workings merely, and it appears that leave has been refused, the granting of the order for inspection is, on the making out of a *prima facie* case entitling the complainant to it, almost a matter of course." After quoting from *Bennitt v. Whitehouse*, supra, and *Lewis v. Marsh*, supra, he concludes: "If the granting of the order for inspection is a matter of course on a *prima facie* case, notwithstanding the sworn denial of the defendant, it would seem that it might, at the discretion of the court, be made without notice to the defendant. It is undoubtedly, however, the better practice to require notice, enjoining, in the mean time, so far as may be necessary to preserve the *status quo*."

It will be seen that the order of the court below followed an unbroken line of precedents. The rule of equity which has been enforced by the courts of England and America is not of statutory growth. In this state the legislative department has indorsed the chancery practice involved in this hearing with the form of law. We are not called upon to decide that the district courts of the state may make the order complained of, in the absence of any requirement of the Code of Civil Procedure. We can vindicate with absolute certainty the existence of the right to make an order for the inspection and survey of a lode mining claim, where the appropriate steps have been taken by interested parties. The authorities treat the proceedings as the proper mode of securing "the best evidence of which the case in its nature is susceptible." There is not an assertion or suggestion by any jurist that rights of property are impaired or transgressed by the making of the orders for an inspection and survey. For this reason, a bond to indemnify the persons whose property may be inspected is not asked for or required. But in *Bennett v. Griffiths*, supra, when authority was given for the destruction of a wall, to enable the viewers to perform their duty, the defendants testified that "it would be injurious to the mines if a gate road was driven through

the wall; that the wall which had been erected was only the usual and proper wall, erected for the purpose of strengthening the gate road in that portion of the mine." Under these circumstances, the plaintiff was ordered to give security to save the defendants from any loss or damage resulting from the inspection.

We have stated that the power of the courts of England over this matter was exercised as a branch of their chancery jurisdiction. In 1854 the common-law procedure act was created, and the fifty-eighth section provides that "either party shall be at liberty to apply to the court or a judge for a rule or order for the inspection by the jury or by himself, or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute; and it shall be lawful for the court or a judge, if they or he think fit, to make such rule or order." In the interpretation of this statute, the learned Chief Justice COCKBURN, in *Bennett v. Griffiths*, supra, said: "The fifty-eighth section of the common-law procedure act does not regulate the jurisdiction given to the courts of law by reference to that already exercised by the courts of equity; but we think that, as ancillary to the power of inspection given to the courts of common law, there is the same power given to remove obstructions, with a view to inspection, which was exercised by the courts of equity as ancillary to their power of ordering inspection." The section of the Code under review does not empower any court or judge to grant an order that is fruitful of injustice or oppression. Whenever this is done, such action will exceed the authority that has been bestowed, and can be rightfully set aside. The bare fact that the St. Louis Mining & Milling Company of Montana petitions for an inspection and survey of the mining property referred to before its complaint has been filed is immaterial. The same object is to be attained at all times, regardless of the commencement of the suit, and that is the best evidence for the trial. In *State v. Seymour*, 35 N. J. Law, 53, the court holds that the surveying and mapping of lands by legislative authority is not a taking thereof, and that it is not a trespass to go thereon for these purposes. In *Winslow v. Gifford*, 6 Cush. 327, it is held that an act of the legislature is not unconstitutional which authorized certain parties to enter upon private lands, and make surveys and establish boundaries; and Mr. Justice DEWEY, in the opinion, says: "In effecting such an object, there may be, and often is, a brief, and, as it were, momentary, interference with the absolute right of the owner of real estate. This exercise of power, in its various forms, is one of every day's occurrence; indeed, so common as to be acquiesced in without remonstrance, or even a question as to the right so to do." This statute does not provide for an appeal from the order, which has been reviewed, and the writ of *certiorari* has been properly

issued upon the application of the Montana Company, Limited.

We are of the opinion that the district court has not exceeded its jurisdiction in determining and granting the petition of the St. Louis Mining & Milling Company of Montana. It is therefore adjudged that the order and proceedings of the district court be affirmed, with costs.

HARWOOD and DEWITT, JJ., concur.

(9 Mont. 201)

MING v. FOOTE *et al.*

(*Supreme Court of Montana. Jan. 28, 1890.*)

TOWN-SITE LOTS—DEED FROM PROBATE JUDGE—EJECTMENT.

1. Act Mont. Dec. 12, 1867, §§ 11, 12, passed to carry out Act Cong. March 2, 1867, (relating to grants of town-sites to probate judges in trust for the inhabitants,) requiring the judge to hear testimony and adjudicate between contestants, and allowing an appeal from his decision to the district court, vests him with *quasi* judicial powers, and a deed from him cannot be collaterally assailed in ejectment by showing that the preliminary steps required to give authority to convey a lot were not taken, though the act of congress provides that any act of the trustee not in conformity to the rules made by the state or territory shall be void.

2. That the consideration named in a deed by a probate judge of a town-site lot is less than is allowed by law is immaterial, as the sum stated is not conclusive.

3. Where the grantor describes himself as "N. H., probate judge of" a county named, and executes the deed as "N. H., probate judge," he executes it as probate judge.

4. A town-site plat made under authority of the probate judge, trustee, and duly approved by the county commissioners, is admissible in evidence, though incomplete in not being accompanied by any field-notes.

5. Under an answer admitting possession of the premises demanded, described by lots and block, and alleging title in defendants, it cannot be shown that the lots demanded are not coincident with those held by defendant, by reason of variance between different plats of the town-site.

Appeal from district court, Lewis and Clarke county.

Comly & Foote, for appellants. *Carpenter, Buck & Hunt*, for respondent.

DE WITT, J. This action is in the nature of ejectment. The respondent, as executrix of the estate of John H. Ming, deceased, seeks to recover from appellants lots 1, 2, and 3, in block 417, of the town-site of the city of Helena, alleging title in herself, and ouster by the appellants. Appellants' answer admits that they are in possession of the premises demanded, and alleges title in themselves, which title they seek to establish as herein-after treated of. The action was tried before the court without a jury. Findings of fact and conclusions of law were made, and filed by the court, and judgment thereon entered in favor of respondent for possession of the lots. A motion for a new trial, made by appellants, was denied. From that order and the judgment this appeal is prosecuted.

The facts, as we obtain them from the record, are as follows: In 1869, Helena was an unincorporated town in Lewis and Clarke

county, Montana territory. In that year Miers F. Truett, probate judge of that county, made due application to the United States for patent for the land on which the town was situated; and afterwards, June 15, 1872, the patent was duly issued by the United States to such probate judge, in trust for the inhabitants of the town, under the provisions of the act of congress approved March 2, 1867, entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," and the acts amendatory and applicable thereto. The land in controversy is within said patent. On December 20, 1872, N. Hilger, then probate judge of said county, made, executed, and acknowledged a bargain and sale deed to John H. Ming and Charles K. Wells of lots 1, 2, and 3, in block 417, a portion of the town-site of Helena, granted to the probate judge as above described, and which is the ground in controversy in this action. The grantor in that deed is described as "N. Hilger, probate judge of Lewis and Clarke county, Montana territory;" and executes it as "N. Hilger, probate judge." The lots were described as bounded on the south by Eighth avenue, on the north by lot 10, and on the east by Hoyt street. Twelve other lots were included in the deed. The total consideration was \$50. By mesne conveyances, the title so conveyed by the probate judge became and was vested in John H. Ming, by whom this action was commenced, prior to the initiation thereof. During the pendency of the case the original plaintiff died, and respondent, as executrix of his estate, was duly substituted, and the cause thus proceeded. A plat of the said Helena town-site was prepared by one A. C. Wheaton, by order of the probate judge, in 1868, and was accepted and approved January 7, 1869, by the board of commissioners of the county, and duly filed at the same time in the office of the county clerk and recorder. On the Wheaton plat are designated lots 1, 2, and 3, in block 417, bounded as above described. It does not appear that there were any field-notes made or filed with the Wheaton plat. That in pursuance to the act of the legislative assembly of the territory approved March 1, 1883, entitled "An act relating to the official survey of the town-site of Helena," a plat and field-notes of a survey of such town-site were made by one McIntire, and accepted and approved on September 12, 1885, by the board of county commissioners, and on the same day filed in the office of the county clerk and recorder. That on said plat and in said field-notes appear lots 1, 2, and 3, in block 417, bounded on the south by Eighth avenue, on the north by lot 10 of said block, and on the east by Hoyt street. On May 10, 1887, the appellant George B. Foote entered upon the land in controversy, claiming under a deed from Harry H. Thale and George Orth, and engaged in fencing it; and that before the fence was finished said John H. Ming was upon the premises claiming the same. That since said day George B. Foote has been and now

is in possession of the premises. That he at no time prior to May 10, 1887, made any improvements thereon. It does not appear that when Ming and Wells received their deed from Probate Judge Hilger they were occupants or in actual possession of the lots, or made any proof to the probate judge of their right to such possession or occupancy of the same. To almost all of this evidence objections were made by the appellants, the reasons for which we will review hereinafter in discussing the specifications of error. In addition to the above facts, appellants offered to prove on the trial, and were precluded therefrom by the ruling of the court, the following facts: That lots 1, 2, and 3, in block 417, as the same are described in the Wheaton plat, would occupy a different portion of the surface of the earth than lots 1, 2, and 3, block 417, as described in the plat and field-notes of the McIntire survey. Appellant offered in evidence a quitclaim deed from one Anton Emueller to himself, dated May 9, 1887, acknowledged May 11, 1887, and recorded May 12, 1887, in which the ground purporting to be conveyed is described as lots 1, 2, and 3, block 417, of the town-site of Helena; also a deed from Probate Judge Clements to Harry H. Thale and George Orth, dated May 10, 1887, recorded May 11, 1887, and a deed from said Thale and Orth to appellant Foote, dated May 10, 1887, and recorded May 11th,—in which deeds the premises purporting to be conveyed are described by lots and block, as above. Appellant then offered to prove by the then probate judge an application to purchase said lots by said Thale and Orth. The above evidence, so proffered by appellant, was heard by the court under objections, but was stricken out, and not considered. It was, however, in evidence that Emueller, mentioned above, had once a sort of transitory floating possession of the premises for placer mining purposes, and with a cabin, but not since the year 1873.

The district court found the facts as above recited, and upon such findings, and upon the exclusion of appellants' proposed testimony, reached the following conclusions of law: (1) The answer of the defendant does not allege that the premises claimed by the defendant are located elsewhere than the premises described in the complaint, and the pleadings relate to the same parcels of ground. (2) That the Wheaton plat was, from and after its approval in 1869 until 1885, the official plat of the said town-site of Helena, under the laws of the United States and said territory. (3) That the said McIntire plat and field-notes of survey of said block 417, from and after the 12th day of September, 1885, became and are the official survey of said block No. 417, and confirmed all the rights and interests of plaintiffs therein, as shown by the conveyances of title to the plaintiffs and their predecessors in interest from the said probate judge of said county, and cured the alleged incompleteness and inaccuracy of the said Wheaton plat. (4) That

the issuance of said deed by said Hilger, as the probate judge of said county, conveyed to said Ming and Wells the legal title to said lots 1, 2, and 3, in said block 417, and that the said J. M. Clements, the probate judge of said county, had no authority, as the said trustee of the said town-site of Helena, to issue said deed to the grantors of the defendant. (5) That the deeds issued to the said defendant by his grantors conveyed no title, right, or interest to the premises in controversy in this action. (6) That as between the parties to this action the defendant cannot question the validity of the acts of the probate judge of said county in conveying the property in controversy to said Ming and Wells. (7) That the defendant and his grantors had notice of the title of plaintiffs, and the approving and filing of the said McIntire plat, about two years before the construction of the fence by the defendant. (8) That defendant upon the 10th day of May, 1887, entered upon said premises, and has ever since held the possession thereof, without any right or title thereto. (9) That the plaintiffs have suffered damage in the sum of one dollar.

The appellants, on motion for a new trial, made 20 specifications of error, which are now brought before us for review. They can, however, be much reduced in number, many of them depending on one point. For instance, the first error urged which we will consider is the conclusion of the court below that Ming and Wells, so far as the purposes of this action and the position therein of the plaintiffs are concerned, acquired good title to the premises in controversy, by virtue of the deed from Probate Judge Hilger to them. Upon the decision of this point depends a large portion of appellants' position. This, determined in either way, disposes of the objection to the exclusion of the deed from Probate Judge Clements to Thale and Orth, the deeds from the latter to the appellants, the exclusion of evidence of occupancy by Thale and Orth, and their application to purchase from the probate judge, the exclusion of the deed from Emueller to Foote, and the admission of the chain of title from Ming and Wells to the respondent.

Again, the district court found that the pleadings admitted that the premises demanded in the complaint and claimed in the answer were identical; in other words, that the matter of non-identity was not raised by the pleadings, but the contrary admitted. Upon the decision of this specification depends all of appellants' objections as to the exclusion of their proffered testimony that lots 1, 2, and 3, block 417, in the Wheaton survey, were entirely wanting in geographical coincidence with the same named lots in the McIntire survey. The errors thus complained of reduce themselves to few in number, which we will examine in order.

The principal error complained of by the defendants is the action of the court in admitting in evidence the deed from Probate Judge Hilger to Ming and Wells, which deed

is the foundation of the respondent's title. Appellants objected to said deed, because it does not show upon its face the authority by which the officer acted; because the consideration named in the deed is less than that required by law; because the deed does not show the trust capacity of the grantor; because the deed does not itself show, nor is it elsewhere in the evidence offered to be shown, that the grantees were the legal beneficiaries of the trust held by the probate judge; because the deed shows that it was obtained for speculative purposes, (presumably by reason of the alleged inadequacy of the consideration;) because its issuance was beyond the powers of the probate judge,—for all which reasons the deed was void, and not voidable only. The laws of the United States and the territory, in reference to obtaining title from the government for town-sites upon the public domain, so far as they are applicable to this case, are as follows: "An act for the relief of the inhabitants of cities and towns upon the public lands," approved March 2, 1867, (14 U. S. St. at Large, 541,) enacts, among other things, as follows: "That whenever any portion of the public lands of the United States have been or shall be settled upon or occupied as a town-site, and therefore not subject to entry under the agricultural pre-emption laws, it shall be lawful, in case such town shall be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town may be situated, to enter at the proper land-office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the state or territory in which the same may be situated: * * * provided, further, that any act of said trustee, not made in conformity to the rules and regulations herein alluded to, shall be void." The legislative assembly of the territory of Montana passed laws to give effect to the above act. Such laws, as they were in force at the time of the deed from the probate judge to Ming and Wells, are compiled in the Laws of 1872. Codified St. p. 547, § 1, provides for the entry of the land occupied as a town, in the land-office, by the corporate authorities of the town, or the probate judge of the county, in trust for the several use and benefit of the occupants of such land, according to their respective interests. Section 2 empowers the corporate authorities of the probate judge to perform the several acts and things necessary and appertaining to the entry of such land in the proper land-office. Section 3 provides for the survey of such town-site, which shall conform as near as may be to the existing rights and claims of the occupants. Section 4 designates what

the plat and survey shall contain; and sections 5 and 6 are as follows: "Sec. 5. Immediately after such survey and plat has been made, or, if a survey and plat has been made previous to the entry, according to the provisions of section 3 of this act, then immediately after the entry of the lands at the proper land-office, as provided in the first section of this act, the corporate authorities or the probate judge, as the case may be, shall cause a notice to be published in all the newspapers published in such town, or, if no newspaper be published in such town, then by advertisement posted up in twelve of the most public places in such town for at least two months, giving notice of such entry, and requiring every claimant or claimants of any town lot or lots to file in the office of such incorporate authorities or probate judge, as the case may be, a statement of his or their claim, within two months from the date of the first publication of such notice. Sec. 6. Such statement shall be made in writing, signed by the party or parties making the same, and verified by the affidavit of such party or parties, and shall be recorded at length in a well-bound book, to be provided and kept for such purpose by such incorporate authorities or judge of probate, as the case may be. Such statement shall specify the grounds of such claim, particularly describing the lot or lots claimed; the date, as near as may be, of the occupation of said lot or lots, and by whom; what improvements have been made on said lot or lots, and the value thereof; and that such lot or lots are now actually possessed and occupied by such claimant, or that the right to such occupation is in the claimant, if such lot or lots are occupied by another." The two preceding sections are originally found in the act of December 12, 1867, (Laws 4th Sess. 61.) Other sections follow, providing for the execution of said trust confided to the probate judge, and, among them, section 16: "The residue of lots (after conveying to actual occupants as aforesaid) in the possession of the corporate authorities or probate judge, as the case may be, and unclaimed after the expiration of sixty (60) days, it shall be the duty of the probate judge or corporate authorities, as the case may be, to post up notices, or cause the same to be done, in at least four public places in the county in which such town-site is located, at least ten days before sale, that he will offer and sell at public sale all of, or so many as he may think proper of, the lots that may remain unclaimed at the time advertised; and that all lots, having been thus advertised and offered for sale, not bringing at least the minimum price, etc., shall be subject at any time thereafter to private entry at the minimum price." Originally Act Jan. 6, 1870, (Laws 6th Sess. 67.)

It is admitted by the record that the respondent, plaintiff in the action, did not prove what may be called the "jurisdictional facts" authorizing Probate Judge Hilger to make the deed to her predecessors, February 20, 1872; that is, she did not prove that the acts

required by the statutes cited above, as preliminary to and conditions of the issuance of such deed, had been performed. Appellants contend that the probate judge was a ministerial, and not a judicial, officer, and that consequently all acts by virtue of which came his authority to make the grant must be affirmatively proved by the party relying upon such grant, and cannot be presumed. Whether such probate judge were strictly a ministerial officer, or whether he were endowed with *quasi* judicial functions of a limited nature, is, in the view we take of this case, a vital matter; and we will pursue the investigation with the ultimate solution of this proposition constantly in view. The appellants rely upon *Ming v. Truett*, 1 Mont. 325; *Edwards v. Tracy*, 2 Mont. 49; *Schnepel v. Mellen*, 3 Mont. 118; and *City of Helena v. Albertose*, 8 Mont. 499, 20 Pac. Rep. 817. We will review these cases.

In the first, the court (KNOWLES, J.) say: "The law conferring upon the probate judge the power to enter public lands upon which any town is located, and awarding to its citizens town lots under the provisions of law, does not purport to confer upon him any judicial powers. The power is conferred upon him, and not upon his court. He is simply designated as the trustee for the benefit of the citizens of the town. His duties in allowing entries of lots are prescribed by law, and he acts in a ministerial capacity." True, the "law conferring upon him the power to enter public lands" does not give him judicial authority. The law referred to is the law of congress authorizing the grant to the probate judge. It is not objected by appellants that respondents failed to prove the successive and necessary steps to be taken by the probate judge to obtain patent from the United States, and, in fact, these steps were proved on the trial. But the same act of congress creating the trust in the probate judge provides that the execution of such trust shall be in accordance with rules and regulations to be prescribed by the legislative authority of the territory; and when the case of *Ming v. Truett* was tried in the district court, and heard in the supreme court, the legislature of Montana had provided for the execution of such trust, among other things, as follows: "In all cases where there is a dispute or contest in regard to the right to the deed to any lot or lots, the probate judge shall hear the testimony relating thereto; and, after two days' notice of such time and place of hearing given to each and every contestant, he shall proceed to hear and determine such claims, in accordance with the principles of right and justice, and the provisions of this act: * * * provided, the judge may adjourn from time to time, as he may deem just for the fair adjudication of said claim or claims." Section 11, Act Dec. 12, 1867, (Laws 4th Sess. 62.) Section 12 of the same act goes on to provide fully for an appeal to the district court by any person feeling aggrieved by "such decision;"

and provides further: "And in all cases the pleadings and proceedings thereafter shall be governed by the same rules applicable to actions originally commenced in the district court." Therefore, although the act of congress conferred no judicial functions upon the probate judge, as held in *Ming v. Truett*, supra, the act of the legislative assembly of the territory, passed for the purpose of giving effect to the act of congress, and carrying out the grant for the benefit of the inhabitants, defines the position and character of the probate judge in terms which would be peculiarly misapplied to a strictly ministerial officer. Our views as to the judicial or ministerial character of the probate judge, as to the subject-matter, will be fully developed later in this opinion.

Passing to the case of *Edwards v. Tracy*, supra, we find a contest between two claimants of a town lot in the town of Bozeman. The plaintiff, Edwards, claimed by virtue of a deed from the probate judge dated about July 1, 1870. He voluntarily, and without objection by the defendant, offered in evidence an application made by him to the probate judge, for the purchase of the lot, which application says: "That said lot is vacant and unclaimed by any other party; that the improvements upon said lot consist of ———, of the value of ——— dollars; that the value of said lot is about \$100; that the same is now occupied by ———; that the right to the possession and occupation is in the said Thos. B. Edwards." The deed, which was made in pursuance to this application, was offered in evidence, and admitted; for which action of the court the defendant assigned error, which assignment was by the supreme court sustained. It will be observed that the applicant therein based his claim to a deed from the probate judge upon his alleged right to the possession and occupation of the lot, and not upon an actual possession and occupation; and he states his reason for his alleged right to possession, viz., that "no one else occupies the same, and that it is vacant." He thus deliberately, by his own affirmative testimony, in introducing the application to purchase, confessed himself out of court; and the court (KNOWLES, J.) properly say: "The claim to enter a lot by one out of possession, or without the right to the possession, does not come within the purview of this section, [referring to section 6, above cited.] The applicant in this case bases his right to the possession upon the fact that no one else occupies the same, and that it is vacant. These give no such right. There was no right vested in the trustee, who was in this case Noble, [probate judge,] to make a conveyance of a lot upon such an application as the one presented by the plaintiff in the case." The opinion up to this point is sufficient to sustain the decision of the supreme court. What was afterwards said by the learned judge is *obiter dicta*, and we do not feel that, in the case at bar, we are controlled thereby, although he did practically say, in that case,

obiter, that a plaintiff in ejectment, relying upon such probate judge's deed, must affirmatively prove all facts giving such grantor authority to make the conveyance.

The case of *Schnepel v. Mellen*, supra, was a contest between rival claimants to a deed from the probate judge,—a contest originally heard and determined by the probate judge, and thence appealed, through the district court, to the supreme court. The action assumed the nature of one to quiet title. It was tried upon an agreed statement of facts. The question was not raised as to whether a party in ejectment, holding a probate judge's deed, and thereon relying, must prove the authority of his grantor to make the deed. The matter before the court was the construction of the acts of the respective claimants, as those acts were presented to the probate judge, and as to which claimant was entitled to the deed from the probate judge, by virtue of the facts. The point under discussion in the case at bar was not involved in *Schnepel v. Mellen*. In that case the defendant exhibited in evidence the facts constituting his alleged possession as a foundation for his alleged right to a deed. These facts were digging some post-holes in the night without the knowledge of any one save himself, and the court held that the alleged possession of the defendant was not of that open, actual, and unequivocal character which entitled him to enter the lot, as against an eight-years uninterrupted possession by the plaintiff, his adverse claimant to the premises.

In *City of Helena v. Albertose*, supra, the court (BACH, J.) say: "When the probate judge undertook to establish by that map [the town-site map] a street over lands actually occupied by individuals as a residence when the entry was made by the probate judge, his act was in conflict, * * * and the public had no right as against such an occupant." The court elsewhere in that opinion says: "Neither the laws of this territory, nor the act of the probate judge, could deprive any person of the land occupied by him at the time when the probate judge made entry for the town-site, and give such land to one who was not an occupant thereof." With these views we concur. The appellants seem to rely upon this case to sustain some rights claimed to be acquired by virtue of the ancient, transitory, placer-mining possession of Emueller,—a possession which ceased in 1873, was always of a floating character, without any certain local habitation, and which was sought to be resurrected in 1887, by the deed from him to Foote. It does not appear that Emueller ever made any application to purchase the premises from the probate judge, but that he abandoned all possession and claim thereto for 14 years. This matter we dispose of later; but, in passing, *quære*, had he not forfeited all claim by his laches? Section 2017, div. 5, Comp. St.

We have received the former utterances of this court upon the matters urged in appellants' first specification of error, because they

have zealously pressed these four cases upon our consideration, and because there are contained in them some *dicta*, and, in *Ming v. Truett*, a decision which is in conflict with the conclusion we have reached as to the alleged error of the lower court in holding that the deed of Probate Judge Hilger to Ming and Wells conveyed title to those grantees, as far as the purposes of this action, and the position of defendants therein, are concerned. We will say, however, before going into that matter, that the plaintiff did not, in the case at bar, voluntarily put herself out of court by showing, in her own affirmative testimony, that she had no right whatever to the premises, as did the plaintiff in *Edwards v. Tracy*, and the defendant in *Schnepel v. Mellen*. As to the nature of the functions of the probate judge, in the execution of a town-site trust, the supreme court of Colorado (*BECK, C. J.*) say: "The government, instead of issuing patents to the several claimants, and instead of granting the tract to the territorial organization, transferred the title of the entire tract to the judge of the probate court of Arapahoe county, in trust for the parties entitled to conveyances. By the terms of the grant the probate judge was the officer and representative of both the federal and the territorial governments in the disposal of these lands. He was invested with functions analogous and similar in character to those of the land department of the general government, or of the officers of a state, charged with the same class of duties. His duties involved the hearing and consideration of testimony concerning the rights of claimants, and passing upon its competency, credibility, and weight. It also involved judicial trials before him, in certain instances, wherein he was required to render judgments, from which appeals might be prosecuted to the supreme court of the territory." *Anderson v. Bartels*, 7 Colo. 265, 8 Pac. Rep. 225. This language might have as appropriately been written of the character of the probate judge of Montana, under the provisions of sections 11, 12, Laws 4th Sess. 62, *supra*. We believe that the correct and logical construction of the trust position of the probate judge in these matters is that it is *quasi* judicial in its character. It was so recognized by this court in *Schnepel v. Mellen*, *supra*, in which case this court held an appeal from an adjudication originally made by the probate judge under the town-site laws. If the probate judge originally had no jurisdiction, the supreme court had none. The term "jurisdiction" suggests the idea of a judicial tribunal in which it is to be exercised. It is not material whether the judicial function be deemed to reside in the probate judge individually, or in him as the probate court of the territory. The probate judge "must hear the testimony." "He must give notice of the hearing to each and every contestant." "He shall hear and decide in accordance with the principles of right and justice." "His action is called an 'adjudication.'" "An appeal to the district

court is provided for." "The pleadings and proceedings shall be governed by the same rules applicable to actions originally commenced in the district court." These are the expressions in the last-cited act *supra*. They all point irresistibly to the intent to invest the probate judge with *quasi* judicial functions, as to a limited subject-matter. This conclusion, arrived at, brings promptly to our aid the rule of law that the judgment of a special judicial tribunal, with jurisdiction to hear and determine questions of fact presented to it, such as the United States land-office, is conclusive, when brought to notice in a collateral proceeding. Mr. Chief Justice MARSHALL, early in the history of the supreme court of the United States, in speaking of acts of the land-office of the state of North Carolina, said in the case of *Polk's Lessee v. Wendal*, 9 Cranch, 87: "The law for the sale of public lands provides many guards to secure the regularity of grants, to protect the incipient rights of individuals, and also to protect the state from imposition. Officers are appointed to superintend the business, and rules are framed prescribing their duty. The rules are, in general, directory; and, when all the proceedings are completed by a patent issued by the authority of the state, a compliance with these rules is presupposed. That every prerequisite has been performed is an inference properly deducible, and which every man has a right to draw, from the existence of the grant itself. It would therefore be extremely unreasonable to avoid a grant in any court for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title from its commencement to its consummation in a patent." In *Smelting Co. v. Kemp*, 104 U. S. 640, the same court (*FIELD, J.*) says: "In the course of their duty the officers of that department [the land department] are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and therefore it has been held in various instances by this court that their judgment, as to matters of fact properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable, except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with.

The presumptions thus attending it are not open to rebuttal in an action at law." We cite these cases, not so much to illustrate the rule laid down, which is familiar as a household word, as to make manifest the reason on which the rule rests,—a reason which logically results in our conclusion that the probate judge, under the territorial laws, was invested with the judicial powers, as above indicated. Therefore, when a deed from him is relied upon for title in an action of ejectment, it is entitled to the presumptions of regularity in its favor, as against a defendant such as the appellants herein, claiming under an alleged deed from the same common source of title, issued 15 years later, without requiring from the elder grantee affirmative proof of the preliminary steps conferring authority to make the grant.

But the appellants urge that they are within an exception to the rule. They cite the portion of the law "that any act of said trustee, [probate judge,] not made in conformity to the rules and regulations herein alluded to, shall be void." We recur again to the opinion of Chief Justice MARSHALL, supra: "But there are some things so essential to the validity of the contract that the great principles of justice and of law would be violated did there not exist some tribunal to which an injured party might appeal, and in which the means by which an elder title was acquired might be examined." The opinion then goes on to state how and why such investigation should be in a court of equity, and concludes: "In general, then, a court of equity is the more eligible tribunal for these questions, and they ought to be excluded from a court of law. But there are cases in which a grant is absolutely void; as where the state has no title to the thing granted, or where the officer had no authority to issue the grant." The italics are ours. Upon this exception appellant rests. The case of Polk's Lessee v. Wendal was exhaustively reviewed in the opinion of Mr. Justice FIELD, cited supra, (*Smelting Co. v. Kemp*), and this exception there treated by him as follows: "So, also, according to the doctrine in the cases cited, if the patent be issued without authority, it may be collaterally impeached in a court of law. This exception is subject to the qualification that when the authority depends upon the existence of particular facts, or upon the performance of certain antecedent acts, and it is the duty of the land department to ascertain whether the facts exist, or the acts have been performed, its determination is as conclusive of the existence of the authority against any collateral attack as is its determination upon any other matter properly submitted to its decision." See, also, cases there cited. This last utterance concludes us, in our opinion. The authority of the probate judge did depend upon the existence of certain facts. It was his duty to ascertain whether these facts existed. His determination is evidenced by his deed, and the same is conclusive against collateral attack. Smith

v. Pipe, 3 Colo. 187. It was therefore not error to admit in evidence the deed from Probate Judge Hilger to Ming and Wells, and the district court correctly found that said deed vested a legal title, which had come by mesne conveyances to the plaintiff, good as against the defendant, for the purposes of this action of ejectment. See, also, *Sherry v. Sampson*, 11 Kan. 611.

That the consideration named on the face of the deed is less than the legal one is not material. The consideration upon the face of a deed is not conclusive. *Polk's Lessee v. Wendal*, supra.

The objection that the deed was not made by N. Hilger as probate judge is not well founded. He described himself in the deed as "N. Hilger, probate judge of Lewis & Clarke county, Montana territory," and executed it, "N. Hilger, probate judge." See *Smith v. Pipe*, 3 Colo. 187.

Our conclusion above reached, as we have hereinbefore intimated, disposes of the major part of appellants' assignments of error. It also disposes of the objection to the original town-site plat,—the Wheaton plat. That plat was incomplete, in the absence of its field-notes; but it amply appears from the evidence that it was the official plat, and the only official plat, of the town-site, from its due approval and filing, in 1869, until it was superseded by the McIntire plat in 1885. It appears that the deed in question was made by it, as were all deeds in the town-site for a period of 17 years. If the plat were insufficient and incomplete, there would seem to be here an opportunity for the application of the maxim, *communis error facit jus*.

The testimony proffered by appellant, that the portion of the earth's surface indicated in the Wheaton plat as lots 1, 2, and 3, in block 417, is geographically different from the premises described by the same designation in the McIntire plat, was properly excluded, as the pleadings admit that the ground demanded by plaintiff, and claimed and held by the defendants, is the same. The answer does not allege that the premises claimed by defendant are located elsewhere than those described by the complaint. A description of lots in a town-site which has been officially platted and surveyed by the number of lots and block is a sufficient description of the *locus in quo*. 2 Devl. Deeds, § 1020, note 2. If we be correct in the conclusion expressed, then the deed from Probate Judge Clements to Foote's predecessors, May 10, 1887, was a nullity, the predecessor of the grantor having years before parted with the whole title, and that deed was properly excluded. The deed from Emueller to Foote, May 10, 1887, and the evidence of Emueller's floating and abandoned possession 14 to 16 years prior to said deed, shares the same fate. This disposes of the errors as specified.

Be it understood that we do not hold that the deed from Probate Judge Hilger to Ming and Wells is above or beyond attack, but that

such attack must be made in an equitable action for that purpose, and not in the law action of ejectment. We draw once more from the wealth of learning in Polk's Lessee v. Wendal, supra: "On an ejectment, the pleadings give no notice of those latent defects of which the party means to avail himself; and, should he be allowed to use them, the holder of the elder grant might often be surprised. But in equity the specific points must be brought into view; the various circumstances connected with those points are considered; and all the testimony respecting them may be laid before the court. The defects in the title are the particular objects of investigation, and the decision of a court in the last resort upon them is decisive. The court may, on a view of the whole case, annex equitable conditions to its decree, or order what may be reasonable, without absolutely avoiding a whole grant." The defendant below did not set up an equitable defense in the nature of a cross-complaint, nor did he change the strict legal character of the action. We may take his own expressive, if not altogether elegant, language used on the argument, and let him abide by the position as he announces it, that "the action is a square-toed one of ejectment." If he desired to avail himself of the equitable defense suggested, he should have set up the same in his answer with as much detail as if it were an original bill in equity. *Lestrade v. Barth*, 19 Cal. 671; *Davis v. Davis*, 26 Cal. 39, and cases there cited; *Miller v. Fulton*, 47 Cal. 146; *Kentfield v. Hayes*, 57 Cal. 410; *Lamue v. Dodson*, 4 Mont. 560. Not having done so, the judgment of the lower court is correct, and that judgment and the order denying a new trial are each affirmed.

HARWOOD, J., concurs. BLAKE, C. J., did not sit in the case, or participate in the decision, for the reason that he had acted as judge on the trial of the case below.

(83 Cal. 566)

SAN JOSE & A. R. Co. v. MAYNE. (No. 12,059.)

(*Supreme Court of California*. April 21, 1890.)

EMINENT DOMAIN—DAMAGES—EVIDENCE.

1. In condemnation proceedings it is error, under Code Civil Proc. Cal. § 1249, making the value of the land at the date of the summons the measure of damages, to permit a witness to answer as to the present value.

2. The admission of evidence as to the benefits to defendant by the location of a railroad on his land, and an instruction thereon, though error, is not prejudicial, where the jury finds that there are no benefits.

3. Written statements describing property for the purpose of assessment for taxation, (Pol. Code Cal. §§ 3629-3633,) signed by the owner, but in which the value is fixed by the assessor's clerk, are inadmissible on the question of value in condemnation proceedings.

4. A land-owner cannot recover the value of his counsel fees as part of his compensation.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

Hiram D. Tuttle, John Reynolds, and C. D. Wright, for appellant. *J. B. Lamar*, for respondent.

FOOTE, C. This action was instituted for the purpose of condemning a right of way for a railroad through the lands of John Mayne, the defendant and appellant. The cause was tried with the intervention of a jury, to whom were referred special issues of fact for determination. Upon the verdict of the jury on the special issues—adopted by the court—judgment was entered, and a final order of condemnation made by the trial court. The amount of money awarded by the jury as compensation for the land taken, and also that awarded for damages to the land not taken, was paid into court by the plaintiff, and accepted by the defendant upon the following terms: "And I hereby abandon all defense to this action, except as to the amount of damages that I may be entitled to in the event that a new trial shall be granted herein;" signed by the defendant and his attorneys of record. This last proceeding is in accordance with the provisions of section 1254 of the Code of Civil Procedure. A motion for a new trial was made and denied. From the order made in the premises and the judgment the defendant appeals. He claims that the court erred in deciding that the defendant was not entitled to prove the value of the land proposed to be taken at the date of the summons issued in the case. From the transcript it appears that John Ryan, a witness for the plaintiff, was asked what would be a fair price for the defendant's land, taking it all together. He was allowed to answer over the defendant's objection, one of the grounds of which was that the question related to the present value of the land, and not to its value at the date of the summons. The court overruled the objection, on the ground, as stated, that the present value of the land, and not the value at the date of the summons, must be ascertained; to which ruling the defendant excepted. Again, the defendant proposed to prove, by competent evidence, "what the value of the land proposed to be condemned was at the date of the summons in this case, to which plaintiff objected, on the ground that the present value, and not the value at the date of the summons, must be taken in determining the value by the jury." The court sustained the objection, and the defendant duly excepted.

It appears, therefore, that the question decided was, at what specific time, for the purpose of assessing compensation and damages, the right thereto shall have accrued, and at what date its actual value shall be proven as a measure of compensation? This contention seems to be settled by section 1249 of the Code of Civil Procedure, which declares that the right to the assessment of compensation and damages accrues at the date of the summons, and that the actual value at that date shall be the measure of compensation and damages. This statute was held to be

constitutional in *Railroad Co. v. Kimball*, 61 Cal. 91. In *Tehama Co. v. Bryan*, 68 Cal. 57-65, 8 Pac. Rep. 673, a similar decision was rendered, and the principle determined that the true measure of damages is to be that fixed by the statute, *supra*. The ruling of the court below, being in opposition to the plain terms of the law above referred to, was erroneous.

It is also urged that the witness Spencer was unlawfully permitted by the court to give evidence in favor of the plaintiff as to "benefits" which might result to the defendant by reason of the location of the railroad on his premises. In this connection it is proper, also, to notice the objection which is made to the fourth instruction given by the court, which is: "The jury must find separately how much the portion of defendant's said land not sought to be condemned in this action will be benefited, if at all, by the building of the railroad proposed by plaintiff." It was said by the appellate court in *Railway Co. v. Porter*, 74 Cal. 262, 15 Pac. Rep. 774: "(1) It is argued for the appellant that evidence should have been admitted of the benefits accruing to the remaining land, and that such benefits should have been deducted from the amount of damage assessed. But the constitution expressly provides that 'no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation.' Article I, § 14. (2) Under this provision, the benefits supposed to result to the remainder of the land cannot be considered. An exception to this rule is provided when the corporation for whose use property is taken is a 'municipal corporation.' The cases of *Butte Co. v. Boydston*, 64 Cal. 110, and *Tehama Co. v. Bryan*, 68 Cal. 57, 8 Pac. Rep. 673, fall within this exception; for, as is well said by respondent's counsel, the word 'municipal,' as used in the provision, refers to such corporations as are for public government, and therefore includes counties. Unless the cases mentioned proceed upon this ground, we do not see how they can be sustained." But while it is clear that the evidence admitted was improper, as also the instruction, it appears that the jury, in answer to the question of "benefits" submitted to them, declared there were none accruing to the defendant, so that the error worked no prejudice to him, and the matter is only discussed here in view of the retrial of the cause.

The court allowed the plaintiff, against the objection of the defendant, (that the same were incompetent and irrelevant,) to introduce in evidence certain statements signed by the defendant for the years 1884, '85, '86. The assessor who had them in charge, as a witness on the trial, stated: "The deputy who made the assessment fixed the values, and returned the statements with the values

as fixed by him, and, if the values fixed by him were not satisfactory, they were changed at the office; and that was the general custom in his office, but he could not remember what was done with reference to these particular statements." The statements were evidently those required under sections 3629-3633 of the Political Code. Nowhere in them, or in any other sections of that Code which have been called to our attention, is there any provision which requires the person whose property is to be assessed to fix the value thereof. The record here shows that such fixing of value, if made, was by the assessor, and not by the defendant. We cannot, therefore, perceive what relevancy the statements had to the question of value of the land to be taken. They were not in any way declarations by the defendant as to the value of his land, and, even if they have the same force and effect as an assessment roll made by the proper officer, they are inadmissible. "The assessment of property for taxation being made for another purpose, and not at the instance of either party, and not usually at the market value of the property, is not admissible as evidence of value in condemnation proceedings." *Lewis, Em. Dom. § 448; Railway Co. v. Eddy*, 42 Ark. 527; *Brown v. Railroad Co.*, 5 Gray, 35.

The contention of the defendant that he was entitled to put in evidence the value of counsel fees, and to recover for the same as part of his compensation or damage, is untenable. There is no statute in this state which establishes any such rule.

Neither was he entitled to have included in the judgment the sum of \$40 allowed by the jury for "cross-fences, fruit-trees, and inconvenience of the curve," and appended to their answer to the fourth special issue. The jury had determined the special issue by their verdict, "No damage on the east side to lands," and the allowance made after that was not in response to the issue tendered, or in accordance with the finding first quoted, and the court acted properly in not including it in the judgment.

No further prejudicial error is shown, but for the reasons heretofore stated we advise that the judgment and order be reversed.

We concur: BELCHER, C.C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

(83 Cal. 438)

STEPHENS v. SOULE *et al.* (No. 13,313.)
(*Supreme Court of California*. March 12, 1890.)

SPECIFIC PERFORMANCE—PLEADING.

A demurrer is properly sustained to a bill for specific performance which alleges that defendant authorized a firm of brokers to sell his land at \$45 net per acre if sold without the growing crops, and for \$47.50 net if sold with the growing crops, and further alleges that the brokers sold to plaintiff for a lump sum, without showing the number of acres, or whether it was sold with or without the growing crops.

Commissioners' decision. Department 2. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

J. C. Ball and Craig, Harding & Hawkins, for appellant. *Charles W. Thomas and G. P. Hurst*, for respondent.

HAYNE, C. This was a suit for specific performance. The trial court gave judgment for the defendants upon demurrer to the sixth amended complaint, and the plaintiff appeals.

Instead of alleging the ultimate fact that the contract relied upon was made by the owner, the complaint alleges secondary facts tending to show it. It is alleged that the property was the community property of the defendants W. H. Soule and Mary Soule; that W. H. Soule gave written authority to a certain firm of real-estate brokers to sell it for the "net price of not less than \$45 per acre if sold without the crop then growing thereon, and at a net price of not less than \$47.50 per acre if sold with the crops then growing thereon;" that said brokers had authority to agree upon the other conditions of sale, "subject to the limitations above stated." The agents being limited as to price, it is plain that, in order to show that the contract made by them was within their authority, the complaint must show that the sale was for not less than the required price. *Holbrook v. McCarthy*, 61 Cal. 216. But the complaint did not show this. The allegation is that the agents "bargained and sold the said land, and the whole thereof, to this plaintiff for the sum of \$29,100." This does not show that the contract was within the agents' authority. What was the price per acre? Was such price, whatever it was, the "net" price? Was the land sold with or without the growing crops? We have tried to figure out what was the price per acre by comparing the lump sum above mentioned with the number of acres. It is doubtful, however, what the number of acres was. The complaint first gives the general boundaries of a tract owned by W. H. Soule, "containing about 600 acres of land," and then proceeds to give a specific description of this tract by courses and distances. Then follows a specific description of "that certain other parcel of land adjoining the above," "containing 234 acres, more or less." It is a matter of some uncertainty whether this piece of 234 acres, "more or less," is a part of the piece of "about" 600 acres first described. Assuming, however, that it is, and that this was what was sold to the plaintiff, we might, perhaps, arrive at the fact that the price per acre was \$47.50. Was this with or without the growing crop? If it was without the crop, there would be a margin to cover the brokers' commission and other expenses of sale, though we are left to guess at the amount of these. But, if it was with the crops, there would be no such margin. We are therefore unable to ascertain from the complaint that the contract made by the brokers was within their authority.

Whatever the word "net" may mean, it was incumbent upon the pleader to show that the condition imposed by it was fulfilled.

There are other objections to the complaint, but it is unnecessary to consider them. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(83 Cal. 445)

ROVEGNO v. HUNT, Judge. (No. 13,609.)

(*Supreme Court of California*. March 14, 1890.)

EQUITY—CONSENT DECREE—ASSISTANCE.

1. Where, under an interlocutory decree entered by consent, a referee is appointed to sell land, the sale is confirmed, and a deed executed, a writ of mandate will not issue directing the judge of the superior court to fix the amount of a bond staying the execution of a writ of assistance in the purchaser's behalf.

2. An order directing the issuance of a writ of assistance, made before final judgment in the cause, is interlocutory, and not appealable.

In bank. On petition for a writ of mandate.

A. D. Spitalo, for petitioner. *T. M. Osmont*, for respondent.

PATERSON, J. This is an application for a writ of mandate commanding the respondent herein, Hon. John Hunt, judge of the superior court in and for the city and county of San Francisco, to forthwith proceed to fix the amount of a bond to be given by the petitioner herein in an action pending in said superior court entitled *Levins et al. v. Rovigno et al.*, sufficient to stay the execution of the writ of assistance issued in said action. Upon the petition filed an alternative writ was issued herein, returnable on the 13th day of January, 1890. On that day respondent filed an objection to the sufficiency of the petition, and at the same time set up certain matters, most of which, however, appear in the petition. The objection to the sufficiency of the petition is well taken.

1. The interlocutory decree mentioned in the petition was given, made, and entered by consent of all the parties to the action, including petitioner. No appeal therefrom was taken by any party to the action, and the time for appeal has expired. Under that decree, which was entered under a stipulation of all the parties, Cerf was appointed sole referee to make a sale of the premises, and report the same to the superior court. The sale was confirmed, and he was required to execute and deliver to the purchaser a deed of the premises, and to let the purchaser into possession thereof. The sale was confirmed on the 17th day of May, 1889, and the decree of confirmation required the referee to make, execute, and deliver to the purchaser his deed to the premises, and upon the delivery of the deed to put the purchaser, Ferroggiaro, into possession thereof. The purchaser received

his deed on May 24, 1889. No further proceedings were had in the case until December 3, 1889, when said superior court ordered a writ of assistance to issue to place said Ferraggiaro, the purchaser, in possession of the premises. On the 9th of December, 1889, the petitioner and his co-defendants in said action of *Levins v. Rovegno* appealed from said order granting a writ of assistance; and on the following day they applied to respondent for an order fixing the amount of a bond to be given on appeal sufficient to stay the execution of said writ. The interlocutory decree having been entered upon written stipulation of the parties, and in accordance with its terms, and no appeal therefrom having been taken, there is no merit in this application.

2. The order directing the issuance of a writ of assistance was not an order made after final judgment in the cause, and therefore is not appealable. The decree was interlocutory, and not final. Application denied.

We concur: BEATTY, C. J.; FOX, J.; MCFARLAND, J.; SHARPSTEIN, J.

THORNTON, J. I concur in the denial of the application herein.

(83 Cal. 432)

ROMINE v. CRALLE *et al.* (No. 13,117.)
(Supreme Court of California. March 13, 1890.)

APPEAL—PRACTICE—SUPERSEDEAS.

Where, after notice to and a hearing of respondent, the supreme court permits the appellant to file a bond staying proceedings on a judgment pending an appeal from both judgment and an order denying a new trial, the dismissal of the appeal from the order does not justify the respondent in issuing execution on the judgment, though the proceedings on appellant's application for leave to file the stay-bond may not have been strictly regular, and though respondent may not have known of the making of the order permitting the bond to be filed.

In bank. On motion to punish for contempt, and to compel the repayment of money collected on an execution in violation of an order of the supreme court.

John F. Burris, (*Carroll Cook* and *R. M. Swain*, of counsel,) for appellants. *Laughlin & Thompson*, for respondent.

WORKS, J. Several appeals have been taken in this case by the defendant Hirschler, one of which is still pending, the others having been dismissed. *Romine v. Cralle*, 80 Cal. 626, 22 Pac. Rep. 296.

On the 25th day of April, 1889, the attorney for said Hirschler filed in this court a petition for leave to file a stay-bond, and for an order of stay, in which it was alleged, in substance, that a bond had been given in the court below, but that, for technical reasons, the judge of that court had declined to receive the justification of the sureties, or approve the bond. At the time this application was made there were at least two appeals pending,—one from the judgment, and one

from the order denying a new trial. It is also claimed by the respondent in this proceeding that there had been two appeals from the judgment, and that, because the first was undisposed of, the second one, which was the one relied upon by the appellant, and the one then being prosecuted by him, was void. The petition for leave to file a stay-bond did not designate in which appeal it was desired to file the same, but it was recited as a fact that an appeal from the order denying a new trial had been taken, and that the transcript was then ready to be filed. On the filing of this petition the following order was made: "On reading and filing the verified petition of John F. Burris herein, showing that a judgment had been heretofore entered in the above-entitled action in the superior court of the county of Sonoma, in favor of the above-named defendant, Ed. Hirschler; that said Hirschler had appealed therefrom to this court; that said judgment is a money judgment; that, in order to secure a stay of execution on said judgment, said Hirschler filed an undertaking under and in pursuance of the provisions of section 942 of the Code of Civil Procedure of this state, with sureties sufficient in fact to comply with said provisions; that, on exception being taken to their sufficiency as such sureties, said sureties attempted to justify before the county clerk of said county of Sonoma, and before the judge of said superior court; that for technical reasons the said undertaking has been rejected by the judge of said court; that in consequence thereof an execution has been, or is about to be, sued out on said judgment, and placed in the hands of the sheriff of the city and county of San Francisco, and thereupon by him extended against the appellant's property now being in said city and county; and praying for leave to file in this court a new undertaking on appeal, under section 942 of the Code of Civil Procedure, staying all proceedings on said judgment, as allowed by law, in the sum of \$3,743.02, with John F. Burris and Martin Sachs, both of said city and county, as sureties. Now, the premises considered, ordered that the above-named respondent show cause before the chief justice of this court, at his chambers, No. 121 Post street, in said city and county, on Tuesday, 2d day of May, 1889, at 10 o'clock A. M. of that day, or as soon after as the matter can be heard, why the said appellant should not be allowed to file said undertaking in this court, and why said sureties, or others in their places, should not be then and there permitted to justify as to their sufficiency on said undertaking; and why, thereupon, an order of this court should not be made staying all proceedings on said judgment, and superseding any execution already issued on said judgment, during the pendency of this appeal. Further ordered, that all proceedings on said judgment, and the extension of any execution or executions, if any, already issued on said judgment, be, and they are, in the mean time stayed. Also, that a copy of

this order be served on said respondent, or her attorneys, three days at least before said 2d day of May, 1889."

The respondent, by her attorney, W. R. Thompson, appeared at the time named in this order, and resisted the petition, contending that the appeals had not been properly taken; that no proper efforts had been made to justify the sureties in the court below; and that the appeals were taken for delay. These facts were set out in an affidavit made and filed by Mr. Thompson. The objections to the filing and approval of the bond were overruled, and the bond allowed to be filed. The sureties justified, and the following order was made by the court: "The defendant and appellant Ed. Hirschler, having been allowed, on application therefor, to file in this court a new undertaking on his appeal herein, with sureties, who have satisfactorily justified as to their sufficiency: Now ordered that all proceedings on the judgment herein be stayed till the determination of said appeal, and that the execution now in the hands of the sheriff of the city and county of San Francisco, issued upon said judgment, be, and the same is hereby superseded." The bond given was to stay proceedings under both the appeal from the judgment and from the order denying a new trial. This bond was never indorsed "Filed" by the clerk; but it was received and accepted by the court, placed with other papers in the case in the clerk's office, and acted upon by the court as shown by the above order. Subsequent to these proceedings a motion was made to dismiss the appeals. The motion to dismiss the appeal from the order denying a new trial was allowed, and the appeal dismissed, and the motion to dismiss the appeal from the judgment was denied; leaving but the latter appeal pending. Thereupon the attorney for respondent, above-named, applied to the clerk of this court for, and procured to be sent down, a *remittitur* upon the order dismissing the appeal from the order denying a new trial. He then caused an execution to issue from the court below on the judgment and enforced payment thereof, notwithstanding the giving of the stay-bond and the proceedings and order of this court above recited. The attorneys for said Hirschler have filed in this court a petition for an order requiring the said Thompson to repay the money collected on said execution, and that he be punished for contempt for having caused the issuance and enforcement of said execution in violation of the order of this court staying proceedings. The said Thompson has filed his answer to said petition, in which he renews his claim, made in opposition to the stay of proceedings, that the appellant was not entitled to such stay, and attempts to show that the proceedings and order of this court only stayed proceedings on the appeal from the order denying a new trial, and did not affect his right to enforce the judgment after said appeal was dismissed; avers that he believed his client had the right to issue

execution notwithstanding the giving of the bond; that the bond was never in fact filed; that he acted in good faith, and did not intend to violate any order made by this court. He further alleges that he was present at the application to be allowed to justify the sureties in this court, but says that he "denies that he at that time, or at any time subsequent thereto, until the commencement of this proceeding, knew, or suspected, or had reason to suspect, that any such order of this court in that behalf was made, and that no copy of the order was ever served on him." He also denies that he knew that execution on the judgment was stayed.

We think none of these allegations can avail the respondent. We cannot, in this proceeding, stop to inquire whether the steps taken in this court which resulted in the order staying the execution were strictly regular or not. Nor can the respondent be allowed to question their regularity in justification of his conduct in causing the enforcement of the judgment. It is enough to say that this court had jurisdiction to make the order, and that it was made. Having been made, it should have been respected and obeyed until set aside. Nor can the respondent excuse himself by showing that he had no notice of the making of the order. He had notice of the application therefor, and was present, and resisted it. No further notice to him or his client was necessary. Considering the respondent's good standing in the profession and his claim that he acted in good faith in this matter, we are not inclined to inflict any penalty upon him in case the money wrongfully collected is repaid. But, conceding his good faith, and that he believed he could avoid the effect of the order on technical grounds, his conduct cannot be excused or overlooked. The order of the court is that the said W. P. Thompson repay to the appellant, Hirschler, within 30 days, the amount collected on said judgment, with legal interest, from the date the same was collected, and that he furnish to this court satisfactory evidence that such payment has been made.

We concur: BEATTY, C. J.; FOX, J.; McFARLAND, J.; THORNTON, J.

(3 Cal. Unrep. 250)

KELLOGG v. COLGAN. (No. 12,895.)

(Supreme Court of California. March 25, 1890.)

APPEAL—EVIDENCE.

Where the evidence is conflicting, an order granting a new trial will not be disturbed on appeal.

Department 2. Appeal from superior court, Sonoma county; JOHN G. PRESSLEY, Judge. S. K. Dougherty, Albert G. Burnett, and R. F. Crauford, for appellant. E. S. Lip-pitt, for respondent.

SHARPSTEIN, J. This is an appeal from an order granting plaintiff a new trial in an action for the conversion, by the defendant,

of a mare alleged to belong to plaintiff. The answer of the defendant denies all the allegations of the complaint, and for a further defense alleges that the mare was taken by him as sheriff of Sonoma county upon an execution against one Merchant, in whose possession the mare then was. The verdict of the jury was in favor of the defendant. Plaintiff moved, upon a statement of the case, for a new trial, which was granted, and, as before stated, this appeal is from that order. We cannot disturb the order. The evidence is conflicting. Order affirmed.

We concur: MCFARLAND, J.; THORNTON, J.

(83 Cal. 450)

MAZKEWITZ v. PIMENTEL et al. (No. 12,792.)
(*Supreme Court of California*. March 18, 1890.)

APPEAL—RECORD—EXCEPTIONS.

1. When the transcript on appeal fails to show any exception by either party on the trial, an order granting a new trial for "errors of law occurring at the trial, and duly excepted to by the defendant," will be set aside.

2. A motion for a new trial on the grounds that the evidence is insufficient "to support the judgment," and that "the judgment is against law," is not equivalent to a motion for a new trial for the "insufficiency of the evidence to justify the verdict or other decision, or that it is against law," as specified in Code Civil Proc. Cal. § 657, subd. 6.

3. The supreme court cannot assume, in the face of a bill of exceptions containing a copy of the notice of intention to move for a new trial, that another notice was given, designating other causes of motion than those contained in the notice brought up by the bill.

Department 2. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Herrmann & Soto, for appellant. *Alex. Campbell* and *O. F. Meldon*, for respondents.

SHARPSTEIN, J. This is an appeal from an order granting a motion for a new trial. It appears, by a bill of exceptions on the order granting the new trial, that the grounds designated in the notice of intention as those upon which the motion would be made were: "(1) Insufficiency of the evidence to support the judgment; (2) the judgment is against law; (3) errors of law occurring at the trial, and duly excepted to by the defendants."

The last is the only one of the designated grounds above stated upon which the court could grant the motion. Neither of the other designated grounds are by the Code¹ made a cause for granting a new trial. We are unable to discover in the transcript that any error in law occurred at the trial to which defendants, or either of them, excepted. In fact, we do not find that anything that occurred at the trial was excepted to by either party. It was, therefore, error to grant the

¹ Code Civil Proc. Cal. § 657 provides that a new trial may be granted for either of the following causes: "Subd. 6. Insufficiency of the evidence to justify the verdict or other decision, in that it is against law. Subd. 7. Error in law occurring at the trial, and excepted to by the party making the application."

motion for a new trial on this ground, and *a fortiori*, on either of the grounds designated in the notice of intention to move for a new trial. *Sawyer v. Sargent*, 65 Cal. 259, 3 Pac. Rep. 872; *Martin v. Matfield*, 49 Cal. 42; *Quinn v. Smith*, Id. 165; *Kelly v. Mack*, Id. 524; *Coveny v. Hale*, Id. 555; *Little v. Jacks*, 67 Cal. 165, 7 Pac. Rep. 449; *Young v. Wright*, 52 Cal. 407. In the face of these decisions, we cannot feel at liberty to hold that the first and second causes designated in this motion are equivalent to the sixth cause enumerated in the Code. Nor can we, with a bill of exceptions in the record which contains what purports to be a copy of the notice of intention given in this case, presume that there was another notice given which designated other causes than those designated in the notice brought here in such bill of exceptions. We are, therefore, constrained to reverse the order appealed from in this case. Order reversed.

We concur: THORNTON, J.; MCFARLAND, J.

(83 Cal. 559)

NORTON et al. v. STURLA. (No. 12,691.)
(*Supreme Court of California*. April 10, 1890.)

LANDLORD AND TENANT—SALE.

Where a sale of the leased premises is made by a landlord to his tenant, and time is of the essence of the contract, the refusal of the tenant to make payment when due, and accept the deed, puts an end to the contract, at the option of the landlord, and he may bring his action for unlawful detainer.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

A. D. Spilvalo and *Chas. E. Nougues*, for appellant. *E. F. Preston*, for respondent.

BEATTY, C. J. Action for unlawful holding over after rent due. Judgment for plaintiffs, motion for new trial denied, and defendant appeals. There are two, and only two, material questions in this case: *First*. What was the character of defendant's holding of the demanded premises subsequent to June 21, 1887? Did she hold as vendee in possession under contract of sale, or as a lessee under a verbal lease? *Second*. What extension of time did plaintiffs give her to make payment of the agreed price of the premises,—one year from June 21, 1887, as she claims, or one month, as they claim? There is a substantial conflict in the testimony on both points, and the findings of the superior court, which are against the defendant, cannot be set aside. Time was expressly made of the essence of the contract of sale, and the time of payment expired June 21, 1887. We must accept the finding of the superior court that it was extended only until July 21st,—one month. When the deed was tendered August 15, 1887, and payment demanded, the defendant distinctly refused to pay before June 21, 1888, and she persisted in this attitude when the offer of the deed

was renewed on the trial; at least she did not at that time offer or agree to accept it and make payment. This refusal to perform upon her part put an end to the contract of sale at the option of the plaintiffs, and left them at liberty to pursue their remedy as landlords. Judgment and order affirmed.

We concur: PATERSON, J.; FOX, J.

(84 Cal. 107)

In re GRIFFITH'S ESTATE. (No. 13,528.)

(*Supreme Court of California.* March 31, 1890.)

ADMINISTRATOR—APPOINTMENT—REMOVAL.

1. An order granting letters of administration is an adjudication that all facts existed that were necessary to give the court jurisdiction of the decedent's estate, and that all steps had been taken that were necessary to the issuance of such letters.

2. Code Civil Proc. Cal. § 1373, provides that upon the filing of a petition for letters of administration the clerk must post notices thereof in certain public places 10 days before the hearing. *Held* that, on an application to remove an administrator, the plaintiff, in the absence of averments that such notices were not posted, will not be permitted to deny that he had notice of the application.

3. In a proceeding to remove an administrator, six affidavits that the deceased was not a resident of the county where the appointment was made were filed with the petition, but were not refuted with the amended petition. Four affidavits to the contrary were filed upon the amended petition, and the fact was found for the defendant. *Held*, that there is no ground for disturbing the finding.

4. The fact that an applicant for letters of administration "offered" to divide commissions with a relative of the deceased if the latter would allow him to procure the appointment, and that he knew deceased was not a resident of the county in which the application was made, and failed to so inform the court, is not sufficient to maintain an action to set aside the appointment on the ground of fraud.

5. Where the deceased had property in two counties, a valid appointment of an administrator in one rendered void a subsequent appointment in the other.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county; JOSEPH H. BUDD, Judge.

Louttit, Woods & Levinsky, Hall & Earl, and Morrow & Stratton, for appellant. *Baldwin & Campbell*, for respondent.

HAYNE, C. This was an application by James Stanley, public administrator of Alameda county, to the superior court of San Joaquin county, for the revocation of the appointment of John Gambetta, the public administrator of San Joaquin county, as administrator of the estate of Richard Griffith, deceased. The amended petition showed, substantially, the following facts: Richard Griffith died intestate in San Joaquin county, leaving estate therein and also in Alameda county, and being at the time of his death a resident of Alameda county. The petition of Gambetta for administration was filed in the superior court of San Joaquin county on June 24, 1889. Two days afterwards, Stanley filed his petition for administration in the superior court of Alameda county. The petition first filed came on to be heard first, and on July 6th the San Joaquin court appointed Gambetta administrator of the estate, and is-

sued letters to him. Two days afterwards the Alameda court appointed Stanley administrator, and issued letters to him. The two courts, apparently, were in ignorance of each other's proceedings; and Stanley "did not know, or receive any notice, or have any knowledge, of the said petition of John Gambetta, or of the hearing of the same, and only first heard of the same on the 9th day of July, 1889." The petition for revocation also alleges certain facts for the purpose of showing fraud on the part of Gambetta, which will be considered below. Gambetta filed a demurrer to the petition for revocation, and also certain affidavits. The court sustained the demurrer, and afterwards made an order denying the petition; and Stanley appeals.

The petition for revocation does not allege that the notice required by law was not given. It alleges, merely, that Stanley received no notice and had no knowledge of the proceeding. But the law does not require that he should receive notice, or that any should be sent to him. It requires, merely, that a certain notice should be posted. Code Civil Proc. § 1373. That was all the notice that was necessary; and, as the petition does not allege that it was not posted, it must be presumed that it was. Nor does the petition for revocation allege that Gambetta's petition for administration was in any way defective; and, therefore, it must be presumed that such petition for administration set forth all the facts necessary to give jurisdiction, among which was the fact of residence in San Joaquin county. And the order made upon such petition was an adjudication that such fact existed. And, while such residence was jurisdictional, it was one of those jurisdictional facts which the court must determine from evidence produced before it, and whose determination is valid until set aside in some proper manner, notwithstanding that it was mistaken in its view of the evidence, or that other evidence could have been produced which would have required a different determination. The judgment cannot be attacked collaterally. This precise point was decided in *Irwin v. Scriber*, 18 Cal. 500, (see, also, *Freem. Judgm.* § 608,) and seems clear upon principle.

The appointment of Gambetta being valid until set aside, it follows that the subsequent appointment of Stanley, upon a petition filed after Gambetta's was void; for there cannot be two valid administrations at the same time in this state. Compare *Estate of Hamilton*, 34 Cal. 468. And, in a case like this, the court which first gets jurisdiction by proper proceedings has the authority to act. The proceedings of the Alameda court, therefore, do not aid the petitioner. This is conceded by the counsel for the appellant. But, as they proceed to remark, he "is in no worse position by virtue of a void appointment than if the latter had never been made;" and the question arises whether the first appointment, which, as we have seen, is not void, can be set aside in this proceeding.

In this regard it is to be observed that there is no provision in the part of the Code relating to probate practice which authorizes the proceeding. There is a provision which authorizes certain specified persons to file a petition for the revocation of letters of administration granted to other persons. Code Civil Proc. § 1383. But the appellant is not one of the persons therein specified, and his counsel concede that the provision does not apply to the case. If, therefore, relief is to be had under any provision of statute, it must be by virtue of some general provision of the Code of Civil Procedure; and, as the proceeding is certainly not a motion for new trial, the only provision which can possibly apply is section 473 of the Code of Civil Procedure, which provides, among other things, for relief against judgments by default. We do not think it necessary to express an opinion as to whether that section applies or not. If it be assumed in favor of the appellant that it applies, and, further, that the petition here can be considered as a proceeding under it, we are not prepared to say that the order should be reversed upon the evidence. The petition first filed was accompanied by the affidavit of six persons, which stated, in a somewhat general way, that the deceased was a resident of Alameda county, and had his home and place of business there. These affidavits were not renewed with the amended petition. The counsel for the appellant expressly state that they "were not renewed with the amended petition," and it is impossible to say that they were considered as before the court upon the amended petition. The respondent, however, filed four affidavits upon the amended petition tending to show that the deceased was a resident of San Joaquin county. In this condition of affairs, even if it be assumed that the proceeding is an application for relief under section 473, it cannot be said that the decision of the court was wrong upon the evidence. In order to avoid this, the counsel for the appellant treat the petition as a pleading whose allegations are admitted by demurrer. They refer to the affidavits as "seemingly being filed to give moral support to the application" and say: "The affidavits never should have had a place in the case; and, both by reason of the action of the court, and upon principles of law, they must pass out of consideration. The demurrer, however, admits the facts as charged to be true, and it is upon this showing that the appellate court must pass."

Now, since there is no provision in the probate procedure authorizing the proceeding, the only theory upon which the allegations of the petition could be admitted by a demurrer is that the petition is, in effect, a complaint in a separate proceeding; and upon this theory the application could not be under section 473, for that section contemplates a motion in the cause in which the default was taken, and not a separate suit, with separate pleadings, and all the attendant machinery and delay. Upon the theory of counsel,

therefore, the petition is to be passed upon as if it were a complaint in a separate suit to set aside a judgment. Then, does the petition set forth facts upon which a suit to set aside a judgment could be maintained? We do not think that it does. It is entirely clear that a separate suit cannot be maintained by reason of mere errors of law or fact in a matter which was examined in the first suit. *Collins v. Butler*, 14 Cal. 226. The petition, however, attempts to show more than this. Aside from want of jurisdiction, which we have already considered, it seems to proceed upon the ground of fraud. But the only circumstances which can possibly be claimed to constitute fraud are two. In the first place, it is alleged that before Gambetta applied for letters he offered to divide his commissions with a nephew of the deceased, if such nephew "would allow said Gambetta to procure administration upon said estate in San Joaquin county." But, if it be assumed that such an arrangement, if carried into effect, would constitute fraud against the petitioner, it is not alleged that it was carried into effect, or that it was agreed to be. The petition is silent as to whether the proposal was accepted or rejected. In the second place, it is alleged that Gambetta knew that the deceased was not a resident of San Joaquin county, and knew that his name appeared on the Great Register of Alameda county, and did not disclose the same to the court. But the failure of a party to give evidence, known to him to exist, tending to overthrow his case, is not ground for a suit to set aside the judgment. *Allen v. Currey*, 41 Cal. 318. It is not a fraud which is extrinsic or collateral to the matter examined in the first suit. The rule in this regard was laid down in the important case of *U. S. v. Throckmorton*, 98 U. S. 61. There it was held that a suit could not be maintained to set aside a judgment confirming a Mexican grant, although it appeared that the confirmer had procured the grant to be falsely and fraudulently antedated, and had supported it by perjured testimony suborned by himself; and *MILLER, J.*, delivering the opinion, said: "The acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds extrinsic or collateral to the matter tried by the first court, and not to a fraud in a matter upon which the decree was rendered." The principle laid down in this case is in accordance with the weight of authority, and is required by far-reaching considerations of public policy. In the case before us, the question as to the residence of the deceased was alleged in the petition and passed upon by the court; and the decision in the *Throckmorton* case applies. It makes no difference that the petitioner did not know of the proceeding in the San Joaquin court. If the notice required by the statute was given, the judgments of probate courts bind everybody, whether they had actual knowl-

edge or not, except where it is otherwise expressly provided; and, as we have seen, it must be held, upon the allegations of the petition, that the notice required by the statute was given. We therefore advise that the order appealed from be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(83 Cal. 447)

BALLERINO v. MASON et al. (No. 13,239.)
(*Supreme Court of California*. March 14, 1890.)

ASSESSMENT FOR TAXES—VALUATION.

1. Pol. Code Cal. § 3637, provides that "all taxable property must be assessed at its full cash value," and defines this to be "the amount for which the property would be taken in payment of a just debt due from a solvent debtor." Held that, in a suit against an assessor for damages for excessive valuation of lands, an averment that their "actual value for agricultural purposes" never exceeded a certain lesser amount, states no cause of action, as it expresses a standard of valuation different from that of the statute.

2. The presumption is that official duty has been regularly performed; and, in a suit against an assessor for damages for breach of official duty, an averment that he "willfully and against law" overvalued certain property, does not charge that intent to injure the owner which is necessary to sustain the action.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; A. BRUNSON, Judge.

Horace Bell and Horace Allen, for appellant. *Chapman & Hendrick, Allen & Miller*, and *Stephens & Eldridge*, for respondents.

BELCHER, C. C. This is an action to recover damages for alleged violation of official duty. The facts stated in the complaint are, in substance, as follows: The plaintiff, for 20 years, has been the actual occupant and sole owner of a tract of land in Los Angeles county containing 134 acres. During the time plaintiff has been such owner, the said tract of land "has never been of a higher actual value for agricultural purposes than from \$150 to \$250 per acre," and "said tract of land has never been of higher actual aggregate value for agricultural purposes than from \$20,100 to \$33,500." At the general election held in November, 1886, the defendant Mason was duly elected county assessor in and for Los Angeles county, and thereupon, as such officer, he took the oath and executed the bond required by law, and the other defendants became his sureties on the bond. For the fiscal year 1887, Mason, as such assessor, "did willfully, and against law, levy an assessment on the said tract of 134 acres of land, property of this plaintiff as aforesaid, at the unlawful and false valuation of \$96,200," which was \$62,700 above the actual and lawful valuation of said property; and the said Mason "did thereby extort from this plaintiff unlawfully the sum of \$940.50, by way of taxes, in violation of law, and to this

plaintiff's damage of the sum of \$940.50." Then follows a similar averment, that, for the fiscal year 1888, defendant Mason willfully, and against law, assessed the plaintiff's said tract of land "at the false and unlawful valuation of \$100,500, and that this valuation was \$67,000 above the actual and lawful value of the said tract of land, and that said defendant C. C. Mason, in his official capacity as such assessor, did thereby extort from this plaintiff the sum of \$804, by way of taxes, in violation of law, to this plaintiff's damage of \$804." The prayer is that plaintiff have "judgment upon the said official bond of the defendant C. C. Mason as assessor, and that plaintiff do have and recover of and from defendants thereupon the sum of \$1,744.50 damages, and plaintiff's cost of this action." A general demurrer to the complaint was interposed and sustained; and, plaintiff declining to amend, judgment was thereupon entered dismissing the action. From that judgment the appeal is prosecuted.

1. The Code provides that "all taxable property must be assessed at its full cash value," (Pol. Code, § 3627,) and it defines the meaning of "full cash value" to be "the amount at which the property would be taken in payment of a just debt due from a solvent debtor." Id. § 3617. The words "actual value for agricultural purposes" are not the equivalent of "full cash value." This is evident, for the reason that the value of property for the purposes named may be, and often is, less than its value for other purposes, and less than it would be taken for in payment of a just debt from a solvent debtor. The averment as to the value of plaintiff's property was, therefore, insufficient to sustain his contention.

2. The county assessor is a public officer, and the assessment complained of was made in the discharge of official duty. An assessor is required to exercise his best judgment in determining as to the value of property to be assessed, and the presumption is that official duty has been regularly performed. Code Civil Proc. § 1963, subd. 15. The averment that Mason "willfully, and against law," assessed plaintiff's property at too large a sum, does not imply that he acted maliciously, or with intent to wrong or injure the owner; and, in the absence of some averment to this effect, we must assume that he simply erred in his judgment. But for such an error the only remedy is by application to the board of equalization. *Gas Co. v. January*, 57 Cal. 614. The law applicable to the case as made, was, in our opinion, correctly stated in *Kendall v. Stokes*, 3 How. 98, by Chief Justice TANEY, as follows: "A public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion, even although an individual may suffer by his mistake." In our opinion, the demurrer was properly sustained, and the judgment should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(83 Cal. 490)

FITZPATRICK v. FITCH *et al.* (No. 12,686.)
(*Supreme Court of California.* March 31, 1890.)

APPEAL—TRANSCRIPT.

The certificate of the clerk to the transcript is not a sufficient identification of papers therein as those on which the court below based its action, when it does not so appear by a bill of exceptions or certificate of the judge.

Commissioners' decision. Department 2. Appeal from superior court, San Mateo county; E. F. HEAD, Judge.

Geo. C. Ross, for appellant. *Mastick, Belcher & Mastick*, for respondent.

FOOTE, C. This is an appeal from an order changing the place of the trial of an action. The papers in the transcript upon which the action of the court below is alleged to have been based are not shown, either by bill of exceptions or certificate of the judge, to have been used on the hearing of the motion, which was granted. The certificate of the clerk appended to the transcript is in no sense such identification as is necessary, (*Von Glahn v. Brennan*, 81 Cal. 261-264, 22 Pac. Rep. 596; *Walsh v. Hutchings*, 60 Cal. 228, 229; *Nash v. Harris*, 57 Cal. 243, 244; *Larkin v. Larkin*, 76 Cal. 323, 324, 18 Pac. Rep. 396,) and the presumption is that the action of the court below was correct. We therefore advise that the order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

(83 Cal. 452)

O'CONNOR v. ELLMAKER *et al.* (No. 12,322.)

(*Supreme Court of California.* March 19, 1890.)

JUDGMENT—DEFAULT—DISCRETION.

Plaintiff's attorney answered "Ready" on call of the calendar, but when the case was reached for trial both plaintiff and her attorney were absent, and it was continued to a later day. When then reached, both being again absent, judgment by default was entered. Held not an abuse of discretion to refuse to set aside the default on the ground that the attorney had mistaken the date of the number of a journal in which the calendar was published.

Department 2. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Frank O'Connor, (*Sullivan & Sullivan*, of counsel,) for appellant. *W. T. Baggett*, for respondents.

McFARLAND, J. This is an appeal from an order of the superior court denying a motion of plaintiff to vacate and set aside a judgment rendered in favor of defendants on the ground that said judgment was taken

against defendants through their mistake, inadvertence, surprise, and excusable neglect. It appears from the certificate of the judge of the superior court that the trial calendar of said court was regularly called on August 30, 1886; that the case at bar was on said calendar, and being regularly called, was answered "Ready;" that, by order of the court then made, five cases were set for each day; that the case at bar was regularly reached on September 16, 1886, and that, neither plaintiff nor her attorney being present, the trial was continued to September 20, 1886, and that on said last-named day, plaintiff and her attorney being again absent, the case was taken up and heard, and judgment rendered for defendants. The excuse set forth in the affidavit of appellant's attorney is that he did not think that the case would be reached so soon; that he was deceived by mistaking the date of a certain number of the *San Francisco Law Journal*, in which the calendars of the various courts of the city are published daily; and that he did not think that the case at bar would be heard on the said day when judgment was rendered. Under these circumstances, we cannot say that the court below abused its discretion in denying the motion. The facts are essentially different from those of *Dodge v. Ridenour*, (62 Cal. 263,) and the other cases cited by appellant. Order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

(83 Cal. 457)

COTTRELL v. COTTRELL. (No. 12,310.)

(*Supreme Court of California.* March 21, 1890.)
DIVORCE—VACATION OF JUDGMENT—ABSENCE OF DEFENDANT.

1. Where, after issue has been joined in a divorce suit, the cause is removed from one department of the superior court of San Francisco to another, without notice to defendant, a judgment therein rendered against him on the same day, and in his absence, should be set aside on his motion.

2. It is not necessary, in setting aside a judgment obtained by default in divorce proceedings, to impose costs on defendant as a condition of relief.

3. Nor need the motion be supported by an affidavit of merits. Following *McBlane v. McBlane*, 20 Pac. Rep. 61.

4. No affidavits are required in such case.

In bank. Appeal from superior court, city and county of San Francisco; F. W. LAWLOR, Judge.

Robt. Ash and *Ash & Mathews*, for appellant. *Taylor & Craig*, for respondent.

McFARLAND, J. This is an appeal by plaintiff from an order setting aside a judgment in her favor. The action was for divorce, and the defendant had filed a verified answer denying all the averments of the complaint. On May 24, 1887, the presiding judge of the superior court of San Francisco made an order transferring the case from department No. 1 of said court, in which it was pending, to department No. 8 of said court. On the same day the case was taken

up for trial in department 8, in the absence of defendant or his counsel, and judgment was on said day entered for plaintiff. Notice of the judgment was immediately served on defendant's counsel, who on the same day (May 24, 1887) gave notice to plaintiff's counsel of a motion for an order to set aside the proceedings "on the ground that the transfer of said cause from department No. 1 to department No. 8 was made without notice to or the consent of said defendant, and all proceedings had in said department No. 8 were without notice or knowledge of defendant or his counsel." On the day set for the hearing the order was granted, and from this order plaintiff appeals.

Matters such as that involved here are largely in the discretion of the trial court, and we see in this case no abuse of discretion. While the various departments of the superior court of San Francisco constitute, theoretically, one court, still, practically, for the purpose of trial of causes, they are distinct as are other superior courts; and to transfer a case from one department to another, and try it on the same day, without any notice whatever to the opposite party, is a very abrupt proceeding, from which, in a divorce case at least, it is not improper to relieve the absent party.

The order was not erroneous because no costs were imposed on the moving party. The cases cited by appellant on that point were made when section 473 of the Code of Civil Procedure and section 68 of the former practice act expressly required the payment of costs as a condition of the relief. There is no such requirement now.

No affidavit of merits is required on a motion of this character in a divorce suit. *McBlain v. McBlain*, 77 Cal. 507, 20 Pac. Rep. 61.

The order was not erroneous because "no affidavits were made or used." As above stated, no affidavit of merits was necessary; and there is no statutory provision requiring that proof of any other fact shall be made by affidavit, nor is there any decision of this court to that effect. The bill of exceptions states that "it was then and there shown that on the 24th day of May, 1889, there were on the trial calendar of that day, in department No. 1 of this court, twenty-five cases ahead of this cause; that on that day this cause was reassigned to department 8 of this court, and then brought to trial by plaintiff without notice to defendant or his counsel, and in the absence of defendant and his counsel." This, as before said, is an action for divorce; and the following language of Mr. Justice PATERSON in delivering the opinion of the court in *McBlain v. McBlain*, supra, may well be restated here: "The parties to the action are not the only people interested in the result thereof. The public has an interest in the result of every suit for divorce. The policy and the letter of the law concur in guarding against collusion and fraud, and it should be the aim of the court to afford the fullest pos-

sible hearing in such matters." The order appealed from is affirmed.

We concur: BEATTY, C. J.; PATERSON, J.; FOX, J.; SHARPSTEIN, J.; THORNTON, J.

(83 Cal. 468)

CHASE *et al.* v. SOUTH PAC. COAST R. CO.
(No. 12,319.)

(Supreme Court of California. March 25, 1890.)

VENUE—SUIT AGAINST CORPORATIONS.

1. Under Const. Cal. art. 12, § 16, providing that a corporation may be sued in the county where the obligation or liability arises, or where its principal place of business is situated, a railroad company may be sued for damages for its wrongful refusal to receive and transport plaintiffs' lumber, in the county where there was a tender and refusal, though the complaint alleges that such refusal was due to a conspiracy, not shown to have been entered into in the county, between the company and other lumber dealers, who do not reside in the county, and are not made parties defendant to the suit. The action, in such case, is for damages for the wrongful refusal, and not for the conspiracy.

2. Where the court in which an action is brought has jurisdiction of the subject-matter, the burden is on defendant to show that the cause of action did not arise within its jurisdiction.

Commissioners' decision. Department 2. Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

Pillsbury & Blanding, for appellant. D. M. Delmas, for respondent.

GIBSON, C. This is an appeal from an order of the superior court of the county of Santa Cruz denying the defendant corporation's motion for a change of venue to the city and county of San Francisco. The grounds of the defendant's motion are that the obligation or liability sued upon did not arise in the county of Santa Cruz, and that the defendant's principal place of business is in the city and county of San Francisco. Article 12, § 16, of the constitution of this state, declares: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs, or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." The appellant contends that the action is upon a tort arising from a conspiracy between it and certain lumber dealers, which prevented plaintiffs from carrying on their business, and could only be properly brought in the county where the liability arose, or where the defendant's principal place of business is situated; and, as the complaint does not show where the conspiracy was formed, and the defendant, by the affidavit of its president, having shown that none of the defendant's alleged co-conspirators reside, or ever have resided, in the county of Santa Cruz, and that defendant's principal place of business is at the city and county of San Francisco, the court erred in denying its motion for a change of venue to the city and county where it has its principal place of business.

Counsel for respondent concedes that the principal place of business of the defendant is correctly set forth in the affidavit, but argues that the cause of action is misconstrued by counsel for appellant; that it is for damages resulting from defendant's wrongful refusal to receive and transport plaintiff's lumber upon and over its railroad; and that as defendant's affidavit does not show that such refusal was not made in the county where the action was brought, the motion was properly denied.

The question arising on this contention is, what is the cause of action? The allegations of the complaint are, in substance, as follows: That plaintiffs, who were and are partners under the firm name of S. H. Chase & Co., on July 7, 1886, and for more than a year prior thereto, have since been, and still are, the lessees of certain timber lands and the owners of certain saw-mills, known as the "Day Mills," located in the Santa Cruz mountains, and were engaged in the business of manufacturing sawed lumber at said mills, and selling the same along the line of the defendant's railroad; that the said railroad, at all times mentioned and referred to, extended from the Santa Cruz mountains to San José, and was owned and operated by the defendant, which was during all said times a railroad corporation organized and existing under the laws of this state, and was a common carrier of goods for hire to and from any point on its railroad; that, in order for plaintiffs to carry on their business profitably, it was indispensable for them to transport their manufactured lumber to market upon defendant's railroad, and from the beginning of the lumber season of the year 1886, to-wit, May 1st, until the 7th of July of the same year, they shipped their manufactured lumber upon the said railroad, and defendant had carried the same for them to all points along the line designated by them; that on or about July 1, 1886, defendant entered into an illegal combination and conspiracy with certain manufacturers and vendors of lumber for the purpose of inflating the prices of lumber upon the market, and to give the parties to the conspiracy a monopoly of the lumber trade; and it was agreed by and between the conspirators, including the defendant, that unless the plaintiffs should enter into the conspiracy the defendant should refuse to carry any of their lumber; that on the 7th day of July, 1886, after the formation of the conspiracy against plaintiffs, they brought a load of lumber containing 2,000 feet to the station on the line of said railroad known as "Boulder Creek Station," and which is the nearest station to their saw-mills, and during the day-time of said day, while the office of the defendant at the station was open for the transaction of business, the plaintiffs offered the lumber to defendant for the purpose of having the same carried thence to San José, upon the line of the said railroad, and made a demand of defendant that it should so carry the same, and the

plaintiffs at the same time offered to pay, and were ready and able to pay, to the defendant, the customary and reasonable charges for such transportation; although the defendant was then able to carry the lumber, and then and there had the necessary engines, cars, and other appliances for such purpose, it refused to carry the lumber on account of the conspiracy aforesaid, and then and there declared to plaintiffs that it would not carry the lumber unless the plaintiffs joined and became members of the conspiracy aforesaid, which they then and ever since have refused to do, and the defendant has ever since refused to carry any lumber for plaintiffs; that, by reason of the aforesaid refusal of said defendant to carry said lumber, and its expressed determination not to carry any for the plaintiffs, it became and was, and has continued to be, impossible for them to profitably carry on their business of manufacturing lumber at their mills, and, as a result of their business being thus rendered unprofitable, and of their inability to ship lumber on defendant's railroad, they have been compelled to shut down their mills, discharge the men whom they had employed in connection therewith, and to forfeit contracts which they had entered into for the sale of lumber, and also the good-will of their business, whereby they suffered general and special damages.

These allegations, we think, clearly show that the gist of the action is the injury resulting from the defendant's wrongful refusal to carry plaintiffs' lumber to market, because by such refusal plaintiffs were unable to sell their lumber, and consequently could not profitably operate their mills. It is to be observed, also, that the action is not prosecuted against any of the alleged conspirators, except the defendant, who committed the wrong by which plaintiffs claim to have been injured. The conspiracy, it is true, led up to the refusal which caused the injury; but it is merely stated, as introductory matter, to show how the refusal originated, and therefore consists of mere matter of inducement. Gould, Pl. § 9, c. 3; 1 Chit. Pl. 296. And the employment of it in this case seems to be peculiarly appropriate as showing that the refusal of defendant to carry plaintiffs' lumber to market was not an unexplained act, but one performed in the furtherance of an illegal combination, of which the plaintiffs became the victims because they refused to join it.

The only venue laid in the complaint is in the title thereof; there is nothing in the body of it to show within what county the defendant refused to perform its duty as a common carrier towards plaintiffs; but, as the court has jurisdiction of the subject-matter of this action, (Const. Cal. art. 6, § 5; Code Civil Proc. § 76,) and as an action upon the breach of such an obligation may be brought in the county where the breach occurred as well as in the county where the defendant has its principal place of business, (article 12, § 16,

Const., supra,) the action was presumptively brought in the proper county, and it devolved upon the defendant to show, upon its motion, that the breach of its obligation as a common carrier declared upon by plaintiffs did not occur in Santa Cruz county. Having failed to do this, the motion was properly denied; and we therefore advise that the order be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in foregoing opinion the order is affirmed.

(83 Cal. 473)

CASE V. SUN INS. CO. (No. 12,598.)

(Supreme Court of California. March 26, 1890.)

INSURANCE—CONDITIONS OF POLICY—LIMITATION OF ACTION.

Where a policy of insurance against fire provides that the loss shall not be payable until 60 days after the assured shall have completed all requirements of the policy, and also that suit must be brought thereon within 12 months after loss, the 12-months limitation does not begin to run until the expiration of the 60 days.

Department 2. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Rhodes & Barstow, for appellant. *Haggin, Van Ness & Dibble*, for respondent.

SHARPSTEIN, J. The policy upon which this action is based contains, among others, the following clause: "It is mutually agreed that no suit or action for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until appraisalment shall be had, if demanded by this company, and in accordance with the printed conditions of this policy, nor unless such suit or action shall be commenced within twelve months next after the fire shall occur." The fire is alleged to have occurred on the 12th day of September, 1884; and this action was commenced on the 22d day of November, 1885, more than 12 months next after the fire occurred.

The contention of appellant is that at the time of the commencement of the action it was barred by the terms of said stipulation. That contention must prevail unless the clause upon which it is based is modified by some other clause or clauses of the policy. One clause reads as follows: "The amount of loss or damage to be estimated according to the actual, cash, marketable value of the property at the time of the loss, which in no case shall exceed what it would then cost to replace the same, deducting therefrom a suitable amount for any depreciation of such property by reason of age, wear and tear, location, change of style, lack of adaptation to profitable use, or other causes. The adjusted claim under this policy shall be due and payable at the company's office in San Francisco, Cal., sixty days after the full completion by the assured of all the requirements herein contained." Among the requirements therein

contained were the following: "The assured, his, her, and their agents and servants, shall, whenever required, submit to an examination or examinations, under oath, by any person appointed by this company, and subscribe to such examinations when reduced to writing, and shall also produce their books of account and other vouchers, and exhibit the same for examination at the office of this company in San Francisco as often as required, and permit extracts and copies thereof to be made. The assured also shall produce certified copies of all bills and invoices the originals of which have been lost, and shall exhibit all that remains of the said property, damaged or not damaged, for examination, to any person or persons named by this company, and shall also furnish such further particulars, and such certificates of a magistrate or officer charged with the duty of investigating fires, as may be required. The proofs of loss shall be made by the party insured in regular form." It is alleged and proven that appellant exacted a compliance by the assured with all of these requirements, and that the insured complied therewith as rapidly as he was able to, and that he was unable to fully comply therewith before the 16th day of October, 1885,—more than 12 months after the fire occurred, and more than 1 month after the expiration of the time within which an action could be commenced, according to the construction which the appellant's counsel insist should be given to the policy. The adjusted claim under the policy was payable 60 days after the full completion by the assured of all the requirements contained in the policy. No right of action accrued until more than 3 months after it was barred by the 12-months limitation clause, unless that clause is modified by some other clause.

In *Spare v. Insurance Co.*, 9 Sawy. 142, 17 Fed. Rep. 568, the court, DEADY, J., said: "On the authority of adjudged cases (*Davidson v. Insurance Co.*, 4 Sawy. 594; *Riddlebarger v. Insurance Co.*, 7 Wall. 389; *May, Ins.* § 478) it is admitted by counsel for the plaintiff that this clause in the policy limiting the time within which a suit may be commenced thereon against the defendant is valid, but they contend that it must be read in connection with that other clause which provides that a loss does not become payable until 60 days after the proof of that fact is made; and that, taken together, the reasonable construction of them is that, the right to sue on the policy being postponed until the loss is payable, namely, sixty days after proof thereof, the twelve-months limitation upon such right does not commence to run until that time. This construction is supported by the decided weight of authority, and, in my judgment, is correct on principle." *Mayor, etc., v. Insurance Co.*, 39 N. Y. 45; *Hay v. Insurance Co.*, 77 N. Y. 241; *Barber v. Insurance Co.*, 16 W. Va. 658; *Chandler v. Insurance Co.*, 21 Minn. 85; *Steen v. Insurance Co.*, 89 N. Y. 315; *Killips v. Insurance Co.*, 28 Wis. 472; *May, Ins.* § 479. "In

Steen v. Insurance Co., supra, 323, the policy contained two similar conditions; and the court, in construing them, said: "We think the intention of the defendant was to give the insured a full period of 12 months, within any part of which he might commence his action; and having, by postponement of the time of payment, secured itself from suit, it did not intend to embrace that period within the term after the expiration of which it could not be sued. In other words, the parties cannot be presumed to have suspended the remedy and provided for the running of the period of limitation during the same time. Indeed, the actual case is stronger; not only was the remedy postponed, but the liability even did not exist at the time of the fire, nor until it was fixed and ascertained according to the provisions of the policy. Having thus made the doing of certain things, and a fixed lapse of time thereafter, conditions precedent to the bringing of an action, the parties must be deemed to have contracted in reference to a time when the insured, except for that contract, might be in a condition to bring an action. Under any other construction the two conditions are inconsistent with each other." This case is distinguishable from Garido v. Insurance Co., 8 Pac. Rep. 512, in which the plaintiff had ample time after his right of action accrued to have commenced it within 12 months after the loss occurred. In this case it was more than 12 months after the fire before an action could be commenced. We must concede, however, that Garido v. Insurance Co., supra, is not altogether in harmony with the cases which we follow in this case. Under the construction which we give to the policy, we think the complaint states a cause of action not barred by the provisions of the policy; and the evidence is sufficient to justify the verdict of the jury. Judgment and order affirmed.

We concur: MCFARLAND, J.; THORNTON, J.

Hearing in bank denied.

(2 Idaho [Hast.] 662) —

FURY, Sheriff, v. WHITE et al.

(Supreme Court of Idaho. Feb. 24, 1890.)

ATTACHMENT—INDEMNIFYING BOND—LIABILITY OF SUBSEQUENT ATTACHING CREDITOR.

Where a sheriff levies on personal property under attachment, and, holding under such levy, receives a second attachment, and levies on the same property under the second attachment, and afterwards, but before sale on either, a third person claiming the property, the second attaching creditor indemnifies the sheriff against loss under the second attachment, and the sheriff sells under execution in the first attachment suit, and pays all the proceeds to the first attaching creditor, the claimant of the property having recovered of the sheriff the value of the property sold, held, (1) that the sheriff cannot recover on the indemnifying bond of the second attaching creditor; (2) the complaint not claiming, nor the proof showing, that after the levy the sheriff did any act under the second attachment, the second attaching creditor is not liable, (BRATTY, C. J., dissenting;) (3) in such case, when the plaintiff has rested, it is not error for the court to instruct the jury to find for the defendant; (4) in such case,

also, the effect of an indemnifying bond must be determined by its own conditions.

(Syllabus by the Court.)

Appeal from district court, Alturas county. Angel & Sullivan, for appellant. Kingsbury & McGowan, for respondents.

BERRY, J. Previous to June 21, 1883, the plaintiff, as sheriff of Alturas county, holding two writs of attachment from the probate court of that county,—one in favor of Donaldson and Young, and another in favor of Bartch and Mills,—both issued against one Bolton, levied upon and took into his possession certain personal property as the property of Bolton. After such levy, and while such property was in his possession, the defendant White, on the 21st day of June, placed in the hands of the sheriff a third writ of attachment in his favor, against said Bolton. The answer of White alleges that the sheriff, having such property in his possession, attached to this said writ a schedule of such property, and indorsed thereon that he had levied on the property under said attachment. Aside from this admission by White, there is no evidence of such levy under White's attachment.

It appears that afterwards, the property being claimed by one Braden, an assignee for the creditors of Bolton, a bond of indemnity, dated June 22, 1883, was given to the sheriff by the defendant White as principal, with the defendants Riley and Fox as sureties. That bond is the subject of the action at bar. Its conditions are "that if the obligors shall well and truly indemnify and save harmless the said Fury, sheriff," etc., "of and from all damages, expenses, costs, and charges, and against all loss and liabilities, which he, the said Fury, as sheriff," etc., "shall sustain, or in any wise be put to, by reason of attachment, seizing, levying, taking, or detention by the said sheriff, in his custody, under said attachment [the attachment of White against Bolton] of said property claimed [by said Braden] as aforesaid, then the above obligation to be void."

The case is presented on bill of exceptions; the only exception being to the charge or direction of the court to the jury to find a verdict for the defendant. The appellant, in his brief, states "that on the 6th day of December, 1887, this cause came on for trial before a jury, and the evidence showed that the property described in said indemnity bond had been levied upon under prior attachments which had been served by the plaintiff as sheriff, and was sold under said prior attachments, and not under the attachment in the case in which said indemnifying bond was given, and the appellant admitted that the defendant E. A. White received no part of the money for which said property was sold; that thereupon the defendants moved the court to peremptorily instruct the jury to bring in a verdict for the defendants, which motion was sustained by the court, and the jury was thereupon instructed to, and did,

bring in a verdict for the defendants." To this ruling and instruction the plaintiff excepted.

The arguments upon the hearing in this court have been mainly based on the decision in *Davidson v. Dallas*, 8 Cal. 227, holding that where property is seized under two attachments, and the property is claimed by a third person, and both attaching creditors indemnify the sheriff, who goes on and sells it, and pays the proceeds to the first attaching creditor, the amount not equaling his judgment, and afterwards the party claiming the property recovers judgment against the sheriff for the value of the property, the recourse of the sheriff is only against the first attaching creditor, for whose benefit the property was sold; and the same case, 15 Cal. 75, in which, while the former decision is affirmed for that case, its doctrine is commented upon and doubted. But we do not find it necessary, in this case, to enter into that question. The case at bar is widely different from that, and the action of the court below may well have been based on other grounds than upon the doctrine of that case. A review of this case makes the distinction apparent.

The issue in the court below was as follows: In the probate court the complaint, in substance, sets up: (1) The official character of the plaintiff. (2) Alleges the making of the bond, setting it out in full. (3) "That defendants have failed, neglected, and refused, and still fail," etc., "to comply with the conditions of said bond, and to save harmless this plaintiff, to-wit, that on," etc., "said Braden, [the assignee of said Bolton,] mentioned in said bond, assigned to T. E. Picotte all his rights in and to said personal property, * * * and all claims for damages for taking and seizing said property by the plaintiff that had accrued to said Braden, * * * and that said Picotte was entitled to said personal property, and to all damages accruing to said Braden for taking and detention thereof by the plaintiff; that said Picotte, as successor in interest as aforesaid, and as assignee for the benefit of creditors of the said Bolton, on the 24th day of March, 1884, commenced an action in the district court of said Alturas county, against the plaintiff, to recover the sum of \$2,500, claimed as damages for the taking and detention of said personal property under and by virtue of said writ of attachment." And (4) that said Picotte, as such assignee and successor of Braden, recovered judgment against the defendant for damages and costs, \$1,580. (5) That the plaintiff has paid the judgment, and in addition the sum of \$212 in defending the suit. (6) That the plaintiff has demanded of these defendants payment of the penal sum of the bond, which was refused,—and closes with a demand for judgment.

The complaint is silent as to any act done, either by seizure, detention, or sale of the property, in the suit of White against Bolton, or under either of the senior attach-

ments. The defendants answered, putting in issue each allegation of the complaint; and on this issue a trial was had in the probate court, and judgment had for the plaintiff. From that judgment an appeal was taken to the district court in Alturas county, and a retrial was had. Before trial in the district court the complaint was amended by adding thereto the following allegations, to-wit: "(1) That the damages in said complaint alleged to have been sustained by the plaintiff were sustained by reason of the plaintiff's levying upon and holding the property described in Exhibit A, which was the bond in suit. (2) That the judgment in the district court, referred to in the complaint, by T. E. Picotte, as assignee of C. E. Bolton, was recovered against this plaintiff by reason of his having levied upon and detained the property described in said Exhibit A." The levying and detention is not alleged to have been under White's attachment. No sale of the property is alluded to, nor do the defendants appear to have had notice, or to have taken any part in the action by Picotte against this plaintiff. For all that appears, previous to the trial in the district court, the property was still held, as at first taken, by the sheriff, under process "of prior attaching creditors." It is not alleged, nor does it anywhere appear, that there was any privity between those "prior attaching creditors" and the defendant White. The answer puts all the allegations of the amended complaint in issue, and upon these issues the case was tried in the district court, and judgment was rendered for the defendants.

We may here inquire: (1) What were the contract obligations of the defendants to the plaintiff? (2) Was that contract broken by the defendants? And in what manner was it broken? And (3) in what, if anything, was the error of the court in its charge to the jury?

And first: What were the obligations of the defendants? This bond was not strictly statutory, hence its effect is not the subject of statutory construction. It was voluntary, and its effect must be gathered from its own conditions. The statute in view of which a bond might be given, and by reason of which, presumably, this was given, is section 240 of the Revised Laws (8th session) of Idaho, which provides: "If the property levied on be claimed by a third person as his property, the sheriff shall summon from his county six persons qualified as jurors between the parties, to try the validity of the claim. He shall also give notice of the claim and of the time of trial to the plaintiff, who may appear and contest the claim before the jury. * * * If their verdict be in favor of the claimant, the sheriff shall relinquish the levy, unless the judgment creditor give him a sufficient indemnity for proceeding thereon." This is, of course, after judgment has been rendered for the creditor, and execution is issued. But when attached, and before judgment, section 191, Id., provides that, "if any personal prop-

erty attached be claimed by a third person as his property, the sheriff may summon a jury of six men to try the validity of such claim; and such proceedings shall be had thereon, with the like effect, as in case of claim after levy upon execution." As to the validity of these provisions as a means of determining the ownership of property levied upon, or how far such proceedings will protect the sheriff, is a question not here in issue; and we do not intend to intimate any opinion upon it. Yet the statutory preliminary conditions for calling a sheriff's jury seem to have arisen by claim of Braden to the property as assignee of Bolton. But if, under any of the attachments, such conditions existed, it was optional with the sheriff to call or not to call a jury. Had they existed under White's attachment, they must have existed as well under the senior attachments, and the sheriff must have released the liens of such prior attachments, or taken indemnity under them. If he did not dismiss or take indemnity, it was his own fault. In no event, however, as the case stood, did the sheriff have right to demand indemnity from the defendant White. But if he had such right, and had done so, the statute prescribes no form for the bond, and only, if it be under the statute, that it must be "sufficient." The question of sufficiency is left entirely between the creditor and the sheriff. If there were any doubt as to the nature of the instrument in question, the brief of the appellant settles it for this case. It says: "We maintain that the liability of the defendants depends simply upon the terms of their contract with the plaintiff." The bond was then purely voluntary, and must be construed by its own conditions. Those conditions are, simply, that the defendants shall save the sheriff harmless from loss or liability which he may incur "by reason of attaching, seizing, levying, taking, or retention by said sheriff in his custody, under said attachment, of said property," or under the attachment in favor of White. The acts, then, for which the sheriff was indemnified, were only those done under and by virtue of White's attachment. The defendants, in terms, guaranteed against nothing that was not to be for White's benefit, or acts done by the sheriff on his account. If, then, the sheriff did no act under that attachment causing loss or damage to himself, the defendants incurred no liability.

It must be noticed that there is no allegation in the complaint, nor any evidence alleged as given on the trial, that White's attachment was the reason for anything which the sheriff did. The plaintiff's bill of exceptions avers that on the trial in the district court the evidence showed that the property involved had been levied upon under prior attachments which had been served by the plaintiff as sheriff, and was sold under said prior attachments, and not under White's attachment. The allegation in the answer of White "that plaintiff, as such sheriff, under said writ of attachment, did no act to or

with any of said property, nor did the defendant White, or either of the defendants, receive any part of the proceeds of the property," seems to be fully sustained. The appellant contends that it could make no difference whether he did or did not receive benefit. We are not prepared to go so far as that. Were it shown that defendant White did receive benefit, that question might arise; but it does not arise as the case stands.

It is also to be noted that the claim of the plaintiff that he had suffered damage is controverted, and the bill of exceptions refers to no proof that he had sustained damage, or that the judgment alleged in the complaint in favor of Picotte, which is put in issue, was ever, in fact, rendered; nor was there any offer made by the plaintiff to show that fact, or to show any other fact which was not shown on the trial.

At what stage of the trial the request was made by the judge to instruct the jury to find a verdict for the defendants, does not affirmatively appear. Presumably, it was under section 4354, subd. 5, and section 4385, Rev. St. Idaho, and when the plaintiff had rested his case, and on statutory motion for nonsuit. The presumption is that the proceedings in the court below were regular till the contrary appears. It was, presumably, a "special instruction," having the effect of a judgment of nonsuit; and given on the ground that "the plaintiff had failed to prove a sufficient case for the jury." It is not apparent to the court that there was any breach of covenant on the part of the defendants. As the case stood, when the court was requested to instruct the jury the judge was fully justified in giving the instructions demanded by the defendants; and the assignment of error on that account cannot be sustained. Judgment affirmed.

BEATTY, C. J. I do not concur in any part of this opinion which may be construed as holding that a subsequent attaching creditor is not liable on his indemnity bond when he received none of the proceeds of sale of the attached property; but, for other reasons stated therein, I agree the judgment should be affirmed.

SWEET, J. I concur in affirming the judgment of the court below. The failure of respondent to tender certain proofs renders it impossible for this court to consider or pass upon the legal questions involved at the trial in the lower court. My concurrence, therefore, is based upon the failure of the record to present the real issues involved; and beyond this I express no opinion.

(2 Idaho [Hasb.] 614)

TERRITORY v. NEILSON.

(Supreme Court of Idaho. Jan. Term, 1890.)

CRIMINAL LAW—APPEAL—RECORD—INSTRUCTIONS—WAIVER.

1. A conviction will not be disturbed on appeal though the evidence for the prosecution, as it ap-

pears in the record, is not sufficient to justify a conviction, when defendant introduced testimony which is not given in the record.

2. Under Rev. St. Idaho, § 7877, providing that the court may advise the jury to acquit, and section 7855, subd. 6, providing that the court must not charge the jury in respect of matters of fact, the court properly refuses to instruct the jury peremptorily to acquit.

3. By introducing testimony after an order overruling his motion for a peremptory instruction to acquit, defendant waives his right to assign such order as error.

SWEET, J., dissenting.

Appeal from district court, Bear Lake county; BERRY, Judge.

Smith & Smith, for appellant. *R. Z. Johnson*, Atty. Gen., for respondent.

BEATTY, C. J. The appellant was indicted for unlawful fishing alleged to have been done in Bear Lake county. At the close of the people's testimony the appellant moved the court to instruct the jury to render a verdict of acquittal, which motion was overruled. The appellant then introduced testimony in his behalf, and thereafter the jury found a verdict against him, upon which judgment was rendered, from which he has taken his appeal to this court.

The appellant has assigned numerous alleged errors based upon the ruling of the court on the introduction of the evidence. All such alleged errors must be considered in the light of our statute, adopted from the California Code, which is to the effect that all errors and mistakes in proceedings which do not prejudice the party in his substantial rights must be disregarded. Under this statute, which seems without ambiguity, it has frequently been held that errors which are not shown to have damaged the party complaining must be disregarded. The criticisms are largely to the admission of questions to which answers were not made, or were not against appellant, or were stricken out. There was also testimony to the effect that appellant had the reputation of being a fisherman. It is not conceded that a party can be convicted of an offense by testimony of general reputation that he has committed it; but the appellant was not charged with any offense of being a fisherman, nor is it an offense, nor does testimony of his reputation as such damage him. We do not think any of the alleged errors based upon the introduction of the testimony are shown to have damaged the appellant. That he was prejudiced in any of his substantial rights will not be presumed when not shown.

It is also claimed the testimony is not sufficient to justify a conviction. The only testimony before us is that introduced by the people, and, as it appears in the record, it is not sufficient. Had appellant rested upon that testimony, and brought it before us in the proper mode for its consideration, a reversal, probably, would be justified; but, instead, he proceeded with the introduction of testimony in his defense. That is not here. We do not know what it was. He may have convicted

himself, as has frequently happened with defendants. At any rate, the jury, upon all the evidence, found him guilty, and we cannot interfere.

At the close of the people's testimony, appellant moved the court to instruct the jury to return a verdict of not guilty, which motion the court overruled; and this is assigned as error. Our statute (section 7877) is adopted from the California Code, and provides the court may advise the jury to acquit. By another section (7855, subd. 6) it is directed the court "must not charge the jury in respect to matters of fact." Had the court given the peremptory instruction asked, it would, in violation of this provision, have taken the facts from the jury. It is held in *People v. Horn*, 70 Cal. 18, 11 Pac. Rep. 470, that this the court cannot do, and that it can only advise the jury. Whether, when the court is satisfied the testimony is not sufficient, it must advise the jury to acquit, regardless of the form of defendant's motion, or whether, when there is any evidence tending against the defendant, the court may, in its discretion, leave the question to the jury, we need not now consider nor decide.

After appellant's motion for the peremptory instruction was overruled, he, by introducing his testimony, waived his right to assign as error the order overruling his motion, as is held in civil cases by authority which is controlling with us. *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 498; *Insurance Co. v. Crandal*, 120 U. S. 530, 7 Sup. Ct. Rep. 685. Our statute (section 7864) provides: "The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code." We think, under our statute, the authorities above control in this case; and the judgment of the lower court is affirmed.

BERRY, J., concurs.

SWEET, J. I dissent from the opinion of the court. When the prosecution rested, there was not, in my judgment, sufficient evidence to warrant or sustain a conviction. The prosecution having failed to prove the guilt of the accused, the latter had a perfect right to invoke the statute. After the court refused to advise an acquittal, the defendant excepted, and offered testimony in his own behalf. It is urged in support of the judgment (1) that defendant moved for an instruction to acquit,—an instruction which the court was not authorized to give; (2) that, by introducing testimony in his own behalf, he waived his exception; and (3) that the evidence is not all here. I shall consider these points as here presented.

1. The prosecution examined several witnesses, and rested. The defendant then moved the court to instruct the jury to bring in a verdict of acquittal. It is proper to state that the exact language of the motion, which was evidently made in open court, and not reduced to writing, does not appear in the

transcript. On page 10 we find the following statement: "The defendant, by his counsel, here moved the court to instruct the jury to return a verdict of not guilty, which motion was by the court overruled." On page 49 of the transcript the motion is presented in this form: "Defendant now moves the court to instruct the jury to render a verdict of acquittal." I quote the two statements as they appear in the transcript for the purpose of showing that the exact words embodied by the defendant in his motion do not appear in the record. This is not material, however, as the substance of both motions is the same. Section 7877 of the Penal Code is as follows: "If, at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it must advise the jury to acquit the defendant; but the jury are not bound by the advice." The court overruled the defendant's motion asking for an instruction to acquit. There is nothing to indicate that the action of the court was governed by any informality in the language of the motion. If, in the judgment of the court, the evidence was such as to warrant it in submitting the case to the jury, it was its duty to overrule the motion. If, on the other hand, the prosecution had failed to establish the charge made in the indictment, it was the duty of the court to advise the jury to acquit. I believe that the exercise of such a discretion is subject to review. The attorney general urges that "the court had no right to give the peremptory instruction in a criminal case as asked at page 10 of the transcript." It is true the court had no right to give the peremptory instruction to acquit, but no court would presume that the motion was overruled by the court below by reason of the fact that the word "instruct" was used by the attorney who made the motion in place of the word "advise." It is proper enough for lawyers to deal in technicalities. By the discussion of technical rules, and the attempt to maintain a strict, technical construction of the language of a statute, and the efforts, on the other hand, to obtain a broad and liberal construction of a law, a just and equitable medium of practice is established and maintained. It is, therefore, presumed that, in overruling the motion asking for an instruction to acquit, the court intended to overrule a motion asking it to "advise" the jury to acquit. I shall therefore consider whether or not the court erred in refusing to grant the motion.

When the prosecution rested, I do not think the state had introduced evidence upon which any person could be legally convicted of a crime. I think it follows that the defendant was entitled to the instruction, and that the court erred in not giving it; not because the defendant's attorney, careless of the language he used, asked the court to "instruct" instead of "advise," but because the prosecution had utterly failed to make out a case. It was not an instruction to be given or withheld at the discretion of the court. In the

absence of evidence to warrant a conviction, it must be given. To refuse the instruction was to give the sanction of the court to the conviction of the defendant without evidence to justify it; and the jury would have a right to suppose that, under the law, the evidence was sufficient to warrant a conviction. Certainly, such an act on the part of the court would interfere with the substantial rights of the defendant if, as a matter of fact, the evidence given would not warrant a conviction. Whenever a defendant asks an instruction of that character, he accepts the results that may follow a refusal on the part of the court to grant it. If, therefore, his request is refused, and the reasons therefor are sufficient, and he is prejudiced because of the order, the resulting misfortune is his own fault; but it does not justify the court in refusing the instruction asked for, if the *status* of the case demands it. The case cited by the attorney general (*People v. Horn*, 70 Cal. 17, 11 Pac. Rep. 470) simply declares that the court was not authorized to give the jury a peremptory instruction to acquit, but says the court was authorized to advise an acquittal. The theory of the law is that a man is innocent until he is proven guilty. This in very many cases is a fiction, and it not unfrequently happens that a person brought into court is required to prove his innocence. But the old theory is still the law, and while the personal liberty of the citizen is the paramount consideration of government it will continue to be the law. By refusing the instruction, when warranted, the court forces the prisoner either to go to the jury with a declaration by the court to the effect, in substance, that the evidence already given warrants a conviction, or, in most instances, to testify in his own behalf; in other words, forces him to prove his innocence.

The attorney general urges that the court was not authorized to advise the jury to acquit under subdivision 6, § 7855, which reads that the court must not charge the jury in respect to matters of fact. We do not apprehend that section 7877 is at all in conflict with the provisions of section 7855. Section 7877 distinctly states that the jury is not bound to act upon the advice given by the court; and, if the court were to advise the jury to acquit, it would be the duty of the court to state that the jury were at liberty either to accept or reject its advice. The fact remains, however, that when a person is charged with crime he must be convicted by legal evidence. The jury pass judgment as to the facts. This is an authority upon which the court dare not trespass. On the other hand, the evidence upon which a person is convicted must be legal evidence; and as to whether or not the evidence tendered is sufficient, under the law, to warrant a conviction, the court, on the last appeal, is the absolute judge. The statute provides that, if the court deems the evidence insufficient to warrant a conviction, it must so advise the jury. If there is, practically, no evidence of

guilt, it is not a matter of discretion with the court. Therefore, when the prosecution rested in this case, it was the duty of the court to advise the jury to acquit, regardless of any trifling mistake the attorney may have made in using one word for another. As well say that a court will refuse to dismiss an indictment, when sufficient reasons are given, because the prosecutor, following the old form, asks for a *nolle prosequi* instead of a dismissal.

2. It is urged that the defendant waived his exception to the order of the court under the rule laid down in *Insurance Co. v. Grandal*, 120 U. S. 530, 7 Sup. Ct. Rep. 685, and in *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493. The language of the court in the latter case (106 U. S. 701, 1 Sup. Ct. Rep. 494) is as follows: "It is undoubtedly true that a case may be presented in which the refusal to direct a verdict for the defendant at the close of the plaintiff's testimony will be good ground for the reversal of a judgment on a verdict in favor of the plaintiff, if the defendant rests his case on such testimony, and introduces none in his own behalf; but, if he goes on with his defense, and puts in testimony of his own, and the jury, under proper instructions, finds against him on the whole evidence, the judgment cannot be reversed, in the absence of the defendant's testimony, on account of the original refusal, even though it would not have been wrong to give the instruction at the time it was asked." If the rule laid down in this case applies to the section before referred to from our Penal Code, and to the rules of criminal practice in this territory, the discussion would be ended and the question settled, so far as this court is concerned. Subdivision 5, § 4354, Code Civil Proc., under which an action may be dismissed or a judgment for nonsuit entered, gives the conditions under which a nonsuit may be had as follows. "By the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury." The decision of the supreme court before referred to would, unquestionably, control the method of procedure under this section; but let us place the section from the Penal Code by the side of section 4354 of the Code of Civil Procedure, and note how marked the contrast: "If, at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it must advise the jury to acquit the defendant." This is simply declaratory of one of the principles of the common law, namely, that the guilt of the accused must be proven. In civil cases the court "may," "upon motion," grant the order; under the Criminal Code, the court "must" make the order, without motion, if the condition specified exists. In the case at bar, if the evidence was not sufficient to sustain a conviction, when the prosecution rested, the defendant, under this statute, was authorized to call upon the court for its enforcement; and if, in the judgment of the

appellate court, the evidence at that time warranted the request, the prosecution having failed to prove the guilt of the accused by legal evidence, the presumption of innocence and the peremptory statute entitled him to that instruction. Evidence that would justify the court below in sending a civil case to the jury in the exercise of its discretion would be one thing, and evidence that would warrant the conviction of a person accused of a crime would be an entirely different thing. The distinction between the two, however, is no more clearly marked than the difference in the two statutes. This construction of the statute, and the rights of the accused under it, are also in harmony with the principles of the common law, which it is intended to modify; and, under the rules of construction, we cannot pass one step beyond the point to which the statute authorizes us to go. Taking this view of the question, it matters little whether, in asking the enforcement of the statute, defendant's counsel used the word "advise" or "instruct;" for, in the absence of evidence to warrant a conviction, it was the duty of the court, under the positive mandate of the statute, to advise the acquittal, whether the defendant asked it or not. The section referred to leaves the common law in force to that extent. Under the common law, the defendant was not heard either in person or by counsel. The case was brought before the court, and the state offered its evidence. If, under that evidence, his guilt was not established, the prisoner was discharged. With the exception of the old presumption still existing in favor of the accused, nothing remains of the old principle, except this: "If the evidence does not warrant conviction, the court must advise acquittal." The mandate to obey what is left is as imperative as if the principle of the common law, and the practice under it, had never been modified at all. This is the only power left the court under which it may shield the prisoner in meritorious cases; but it is a positive right left the accused from the common-law practice, and must be exercised under the statute.

Let us consider the matter from the standpoint of another well-known principle. The ruling of the court was, in substance, a declaration to the effect that evidence had been given sufficient to warrant a conviction. If, under the legal effect of legal evidence, this was error, the rights of the accused were seriously and unlawfully injured. He was accused, arrested, and the state presented its evidence of guilt. He was in jeopardy. And, when the state rested, if the evidence was insufficient to warrant his being longer held, under the law and the statute that jeopardy was legally at an end, to the extent that the court "must," not "may," advise the jury to acquit; and it was defendant's right to invoke the statute. If the court deny the motion, the accused, if able, may rest and appeal to a higher court. If the accused is poor, he has but this alternative: to go to the

jury in the face of this declaration on the part of the court, or attempt to show his innocence both to the court and jury. To testify in his own behalf is his only hope; and thus, if the court err, it ultimately forces the defendant to the witness stand, and indirectly enforces and continues his jeopardy. In other words, the prosecution having failed to prove the guilt of the accused, the latter must still come forward, and prove his innocence.

3. It is also urged that the evidence is not all here. The presumption is that the transcript contains all of the evidence bearing upon the objection made by the defendant. It is too late for the respondent to object to the transcript. The Idaho statute, under which a bill of exceptions is prepared in criminal cases, was taken from the California Penal Code, and the principle in issue has been repeatedly passed upon by the supreme court of that state. In the case of *People v. English*, 52 Cal. 211, the same question was raised that is presented here. The court held that a bill of exceptions, in a criminal case, is presumed to contain all the evidence given at the trial bearing upon the point of the objection, and that, if the bill of exceptions prepared by the defendant in a criminal case does not contain all the evidence given, bearing on the point made, the district attorney should be permitted to suggest an addition to the bill of such evidence; but the appellate court cannot take his suggestion that such evidence was given. It is the duty of the district attorney to see that the evidence is here. This principle was confirmed in *People v. Dye*, 62 Cal. 524. It is urged that, under our statute, the rules of evidence in civil and criminal cases are the same, except as otherwise provided by the Code. That is true. This is not, however, a question of admission of evidence. It is a question of practice, and it is also a question of law; and I do not see that this rule of evidence has any bearing whatever on the issue at bar.

I must conclude that the court erred in declining to advise an acquittal, and that it was such an error as to interfere with the substantial rights of the defendant. It was such an error as might result in the conviction of an accused person through prejudice. In other words, under the evidence, it was an error that might prompt a jury to convict an innocent man, under the apparent sanction of the court, without evidence to warrant or sustain the conviction.

(2 Idaho [Hasb.] 750)

DRAKE *et al.* v. EARHART.

(Supreme Court of Idaho. March 5, 1890.)

RIPARIAN RIGHTS—PRIOR APPROPRIATION OF WATER—FINDINGS.

1. Act Cong. July 26, 1866, § 9, provided "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." Act Cong. July 9, 1870, § 17, provided that

"all patents granted * * * shall be subject to any vested and accrued water-rights." In Idaho, the superior rights of prior appropriators were acknowledged by statute and decisions of courts. *Held*, that a prior appropriator of the water of a stream, all of which he claimed, had used, and needed for irrigation, was entitled to the whole as against a patentee of land through which the stream flowed, though no custom to that effect was shown. BERRY, J. dissenting.

2. Where plaintiffs claim 600 inches of water in a stream by prior appropriation, and it appears that there were but 150 inches therein, failure to find under what pressure the water is measured is not prejudicial to defendant, who claims as riparian owner.

3. Sale by plaintiffs of a part of the water claimed by prior appropriation does not show that they attempted to appropriate more than they needed, where it appears that all the water of the streams was not sufficient to irrigate their land.

Appeal from district court, Alturas county; WEIR, Judge.

L. Vinyard, for appellant. F. E. Ensign and Lyttleton Price, for respondents.

BEATTY, C. J. In the year 1879, respondent Quigley took possession of a tract of unsurveyed land at the mouth of what has since been known as "Quigley Gulch," near the town of Hailey, in Alturas county, and at the same time appropriated for the irrigation of said land the water of the stream flowing down said gulch; and the other respondents, Drake and Covert, subsequently became owners in a part of said land and water. At later dates the several defendants in this action became possessed of certain lands lying upon said stream further up the gulch, and commenced the use of the said water. To perpetually restrain them from such use, this action was commenced; and, upon the trial before the court, the right to the water was adjudged to respondents, and defendants were restrained and enjoined from using any thereof. From this judgment the appellant Earhart alone has appealed to this court.

From the findings of the court it appears that in 1879 said Quigley located the land referred to, and afterwards he and said Drake, who had purchased a part, obtained patents therefor, and, so far as the findings show, still own it; that "in said year 1879, said Quigley took out of said Quigley creek, a stream flowing in said gulch, by a ditch built by him upon said land, all the waters flowing therein, and caused the same to flow upon a portion of said land;" that, "at the time of appropriation of said water as aforesaid, said Quigley posted a notice * * * claiming 600 inches of the water of said stream;" and the court also found "that said stream carries 150 inches of water;" that afterwards said Drake and Covert succeeded to all the water, and the three respondents "continued * * * to use said water of said stream for agricultural purposes upon the land before mentioned;" that they have at all times asserted title to all of said water; that none of the defendants had ever made any appropriation of any of said water in pursuance of the laws of this territory; that "irrigation is necessary to the proper cultivation of the

lands of all the parties, and all the waters of said stream are required for the irrigation of the lands of plaintiffs." It appears from Earhart's answer that he purchased his land in 1885, and that it had been occupied by his grantor since May, 1888. The appellant suggests the insufficiency of the findings. While they are not explicit, if they will support the judgment, they must not be disturbed. They show the respondents together own the land and water, the latter by prior appropriation; that they use it to irrigate this land, for which all the stream is used. They do not specify under what pressure the water is measured; but, as all in the stream is required by them, and as there are but 150 inches therein, being 450 less than was claimed by the act of appropriation, it cannot be discovered how, in this case, the failure to specify the pressure can result in injury to the appellant.

It is also found by the court "that some time in the year 188—, before the commencement of this action, plaintiffs Drake and Quigley sold a small quantity of said water to the Oregon Short Line Railway for a water supply at its station at Hailey." From the fact that respondent so sold a portion of said water, it is argued that they had attempted the appropriation of more than they needed for a "useful or beneficial purpose." It is, unquestionably, the law that more than is required for such purpose cannot be taken; that, when legally appropriated, it may be sold for some other useful purpose; and that its use for railroad necessities is such a purpose. Did respondents sell what they did not need? It appearing that in 1879 all the water of this stream was sufficient to irrigate but a part of the land now owned by respondents, it follows that the sale of the water was not from an unneeded surplus, but from that which they had actual use for. It is their privilege to dispose of what they need, if they desire. Its sale did not damage appellant, nor could its retention by them have benefited him. How the conveyances of this land and water were made, or by what arrangements the respondents together use them, does not appear, and, it not appearing to have been a matter of contest below, is immaterial here. The findings support the judgment.

The important question, for the settlement of which this appeal was chiefly brought, is what, if any, rights the appellant has to any of that water as a riparian proprietor. His claim is not based upon prior or any appropriation under our territorial laws, but upon the fact that the stream in question flows by its natural channel through his land; hence, that he is entitled to the use thereof allowed by the common law. This doctrine of riparian proprietorship in water as against prior appropriation has been very often discussed, and nearly always decided the same way by almost every appellate court between Mexico and the British possessions, and from the shores of the Pacific to the eastern slope of

the Rocky mountains, as well as by the supreme court of the United States. But for the fact that it has elsewhere repeatedly appeared in the same court, it would seem surprising that it should now be seeking another solution in this. While there are questions growing out of the water laws and rights not fully adjudicated, this phantom of riparian rights, based upon facts like those in this case, has been so often decided adversely to such claim, and in favor of the prior appropriation, that the maxim, "first in time, first in right," should be considered the settled law here. Whether or not it is a beneficent rule, it is the lineal descendant of the law of necessity. When, from among the most energetic and enterprising classes of the east, that enormous tide of emigration poured into the west, this was found an arid land, which could be utilized as an agricultural country, or made valuable for its gold, only by the use of its streams of water. The new inhabitants were without law, but they quickly recognized that each man should not be a law unto himself. Accustomed, as they had been, to obedience to the laws they had helped make, as the settlements increased to such numbers as justified organization, they established their local customs and rules for their government in the use of water and land. They found a new condition of things. The use of water to which they had been accustomed, and the laws concerning it, had no application here. The demand for water they found greater than the supply, as is the unfortunate fact still all over this arid region. Instead of attempting to divide it among all, thus making it unprofitable to any, or instead of applying the common-law riparian doctrine, to which they had been accustomed, they disregarded the traditions of the past, and established as the only rule suitable to their situation that of prior appropriation. This did not mean that the first appropriator could take all he pleased, but what he actually needed, and could properly use without waste. Thus was established the local custom, which pervaded the entire west, and became the basis of the laws we have to-day on that subject. Very soon these customs attracted the attention of the legislatures, where they were approved and adopted, and next we find them undergoing the crucial test of judicial investigation. As far back as 1855, the supreme court of California, in *Irwin v. Phillips*, 5 Cal. 145, and in *Tartar v. Mining Co.*, Id. 397, distinctly held that the prior appropriator of water should hold it against the riparian claim of the owner of land through which it flowed, and, also, that in all branches of industry the prior appropriator of land, water, and easements would be protected. Not only had such become the law by custom, by the legislative will, and the decisions of the courts, without dissent, but the general government, for many years, without protest, acquiesced in such occupation and use of its lands and waters by its citizens, while valuable properties and indus-

tries were building upon this principle. To put the question beyond uncertainty, to approve and adopt what already existed as the common law of the west, the congress, by its act of July 26, 1866, § 9, provided "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." It will be observed that the act is based upon the existence of local customs, laws, and decisions of courts. It is not necessary that all these conditions shall exist for the protection of the right; but, as held in *Basey v. Gallagher*, 20 Wall. 684, the existence of either condition is sufficient.

It has been said that in the case at bar no custom has been shown. It is not necessary it should be; for, prior to the beginning of appellant's claim, the superior rights of prior appropriation were acknowledged by our territorial law of 1881, and by the decisions of our courts. By a practically unbroken line of decisions the rule of the cases above referred to in 5 Cal. has been followed, and is now established by so many and such high authorities that it would seem this theme of discussion is exhausted. Brief reference, however, may be made to some of the leading cases. *Basey v. Gallagher*, 20 Wall. 681, 682, clearly indorses the superior right of prior appropriation between agricultural claimants in the following explicit language: "In the late case of *Atchison v. Peterson*, [Id. 507,] we had occasion to consider the respective rights of miners to running waters on the mineral lands of the public domain; and we there held that, by the custom which had obtained among miners in the Pacific states and territories, the party who first subjected the water to use, or took the necessary steps for that purpose, was regarded, except as against the government, as the source of title in all controversies respecting it; that the doctrines of the common law declaratory of the rights of riparian proprietors were inapplicable, or applicable only to a limited extent, to the necessities of miners, and were inadequate to their protection; that the equality of right recognized by that law among all the proprietors upon the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance, for mining purposes, to points from which it could not be restored to the stream; that the government, by its silent acquiescence, had assented to and encouraged the occupation of the public lands for mining; and that he who first connected his labor with property thus situated, and open to general exploration, did, in natural justice, acquire a better right to its use and enjoyment than others who had not given such labor; that the miners on the public lands throughout the Pacific states

and territories, by their customs, usages, and regulations, had recognized the inherent justice of this principle, and the principle itself was at an early period recognized by legislation, and enforced by the courts of those states and territories, and was finally approved by the legislation of congress in 1866. The views there expressed, and the rulings made, are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in those states and territories, by the custom of miners or settlers or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one." In this case it is said: "The right of the first appropriator, exercised within reasonable limits, is respected;" that it "is not unrestricted. It must be exercised with reference to the general condition of the country, and the necessities of the people." This language has been seized upon as justifying the equitable, if not equal, division of the water among all desiring or needing it, regardless of the claim of the prior appropriator. Such a construction is not justified, and would make the decision inconsistent with itself, as well as with the other decisions of the same court. *Jennison v. Kirk*, 98 U. S. 461; *Broder v. Water Co.*, 101 U. S. 276. It is evident that all the court means by this language is that the first appropriator shall not be allowed more than he needs for some useful purpose; that he shall not, by wasting or misusing it, deprive his neighbor of what he has not actual use for. In 98 U. S. 461, *supra*, the court says: "The owners of a mining claim and the owner of a water-right enjoy their respective properties from the dates of their appropriation,—the first in time being the first in right; but, where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed." It clearly follows, as the courts have certainly held, that when all cannot use the water without injury to the prior appropriator the other must yield to his superior right. The claim having been asserted that, when a party procured a patent for land, he would be entitled to the use of all waters flowing through the same, was put at rest by the act of congress of July 9, 1870, as follows: "Sec. 17. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights or rights to ditches," etc. Since this act the rulings have been uniform that the patentee of land has no claim upon the water flowing through the same as against a prior appropriator. *Barnes v. Sabron*, 10 Nev. 230; *Hill v. Lenormand*, (Ariz.) 16 Pac. Rep. 267, 268; *Geddis v. Parrish*, (Wash. T.) 21 Pac. Rep. 314; *Reduction Works v. Stevenson*, (Nev.) Id. 318; *Hammond v. Rose*, (Colo.) 19 Pac. Rep. 466; *De Necochea v. Curtis*, (Cal.) 20 Pac. Rep. 563; *Irrigation Co. v. Campbell*, (Idaho,) 18 Pac. Rep. 52; *Mining Co. v. Rosa*, 80 Cal. 334, 22 Pac. Rep. 222.

While there are numerous questions growing out of the water law, we have aimed to confine this discussion to that involved in this case, which is simply a contest between a prior appropriator of the water of a stream, all of which he claims, has used, and needs for a useful purpose, and a party who, since such appropriation, has entered and patented some of the land through which such water, by its natural channel, flows, and who claims its use as a riparian proprietor. In accord with the authorities, as well as with our local law on this subject, it must be held that the judgment of the lower court should be affirmed; and it is so ordered.

BERRY, J., (*dissenting*.) This action was brought in the court below to restrain the defendants from the use of any of the waters of a stream in Quigley gulch, on the east side of Wood river, and near the city of Hailey. The plaintiffs sue jointly, as prior appropriators of the water of that stream for agricultural purposes. The defendants are occupants of lands lying above the plaintiffs' on that stream, and through which lands of the defendants the stream runs. Judgment was given for the plaintiffs, declaring them jointly to be the absolute "owners of, and entitled to the use of, all the waters flowing in Quigley gulch," without reference to its amount, or to the purposes for which it was diverted, or owned by them, or is to be used; and the defendants are, and each of them is, enjoined from diverting or using any of the waters of said stream; and for costs against the defendants, in the sum of \$270. There was no motion for a new trial, and no statement of the case made, and the case comes up upon the judgment roll alone. It is claimed that the judgment roll discloses errors for which the judgment should be reversed, and that the judgment in itself is erroneous, in declaring the plaintiffs the exclusive owners of all the waters of the stream, and restraining the defendants from any use thereof, "notwithstanding it discloses that the water flows through the lands of the defendant Earhart."

I shall attend, firstly, to the first point made, namely, that the judgment roll discloses errors for which the judgment should be reversed. A liberal construction of the complaint may, perhaps, warrant the findings of fact made by the court, though it goes no further than that. It claims that the stream carries 114 inches of water. The findings of fact are as follows: "(1) In the autumn of the year 1879, William G. Quigley located a piece of government land near the mouth of Quigley gulch, in the Wood River valley, in the county of Alturas and territory of Idaho. The land being then unsurveyed public domain, he was at that time unable to purchase the same from the United States, but afterwards, upon the same being surveyed and coming in the market, he and the plaintiff Drake, to whom Quigley had sold a part of the lands originally claimed by

him, entered the same at the United States land-office at Hailey and afterwards took patents therefor. In said year 1879, said Quigley took out of Quigley creek, a stream flowing in said gulch, by a ditch built by him upon said land, all the waters flowing therein, and caused the same to flow upon a portion of said land, and in the same year built a house, and continued to reside on said land from that time until the commencement of this action. At the time of appropriation of said water as aforesaid, said Quigley posted a notice at the point of diversion of said water in which he claimed 600 inches of the water of said stream for agricultural purposes; that said stream carries 150 inches of water. (2) Afterwards, and before the commencement of this action, the plaintiff Drake succeeded to one-half of all the waters claimed and owned by said Quigley, and the plaintiff Covert succeeded to the other half thereof; and said plaintiffs Drake and Covert and said Quigley continued, except for the trespass and unlawful diversions of said water by the defendants hereinafter mentioned, to uninterruptedly use the waters of said stream for agricultural purposes upon the land before mentioned. (3) That some time in the year 188—, before the commencement of this action, plaintiffs Drake and Quigley sold a small quantity of said water to the Oregon Short Line Railway Company for a water supply at its station at Hailey. (4) At several times since the year 1881, parties not connected with this suit have, for the purpose of supplying certain brick-yards situate near said stream, taken small quantities of the water thereof to supply brick-yards for short periods of time, in some instances with the consent of Quigley, while he was an owner thereof, and at other times without the consent of any one of the plaintiffs. (5) The defendants each occupies a several and distinct piece of land above the point of diversion by plaintiffs, and the lands owned by them, through which lands of defendants said stream flows in its natural channel. (6) That defendants, and each of them, have taken out of said stream, at various times, quantities of water in ditches constructed by them and their predecessors, and used the same for irrigating their lands, to which use the plaintiffs have objected, and defendants have at all times been informed of and have known that plaintiffs asserted title to all the water flowing in said stream; and plaintiffs have many times torn out the dams constructed by defendants, and turned the water from their ditches back into the stream, and caused the water to flow down into the plaintiffs' ditches, and upon their lands. (7) None of the defendants have been in the actual adverse possession of the water of said stream, nor of any part thereof, for the period of five years next before the commencement of this suit. (8) None of the defendants at any time ever posted any notice claiming any of the waters of said stream, nor did they, or any of them,

comply, or attempt to comply, with any of the provisions of the act of the Idaho legislature of February 10, 1881, in relation to water-rights, with a view to acquire the right to the use of any of the waters of said stream. (9) Irrigation is necessary to the proper cultivation and the raising of crops upon the lands of all the parties to this action, and all the waters of said stream are required for the irrigation of the lands of the plaintiffs."

These are all of the findings of fact. No custom as to the use of water is alleged or found, and the appellant contends that these facts are insufficient to sustain a judgment for the plaintiffs. He says that custom, and custom alone, where right exists to use water for irrigating purposes on the public domain, must be shown as the basis of that right; that it must be alleged and shown, and, of course, must be found. That is the law. Custom is indispensable to the plaintiffs' right. Such right is founded on custom and user. 14 U. S. St. at Large, p. 253, § 9; *Basey v. Gallagher*, 20 Wall. 683. But nothing of the kind exists here. We might go no further, and, resting on this, the judgment is not sustained. But the counsel goes further. He insists that the respondents, and each of them, fails to show that he has, or ever had, lands to irrigate requiring 600 inches of water, or any other amount. The court seems to have properly assumed that the right to divert water for agricultural purposes depends upon having some parcel of land to irrigate. Such is, unquestionably, the law. The decisions of the court are uniform on that point; also the statutes of Idaho. Chapter 1, tit. 9. Covert does not seem to have had any land at any time. Quigley in 1879 is found to have occupied "a piece" somewhere at or near the mouth of the gulch, but there is no intimation as to how much,—whether one acre or one hundred acres; nor is there any definite location or description of it. Water was conducted onto "a part" of this "piece;" but whether upon that part which Quigley sold to Drake, and which Drake got a patent for, or upon that which Quigley retained, does not appear. At the same time, Drake and Quigley appear to have held their lands in severalty. Drake entered his land, whatever it was, at the land-office after 1879, presumably after the act of February 10, 1881; but, whenever it was, he is not shown to have been in the use of any waters at that time. After such purchase from the United States, the lands were not government domain, but any considerable appropriation of water by him must have been under the statute of Idaho. He did nothing, under that statute or otherwise, at any time, tending to constitute an appropriation by him. Neither did Covert.

In the second finding it is said that at some time not specified "Drake succeeded to 'one-half' of all the waters claimed and owned by Quigley, and the plaintiff Covert succeeded to the other half." By what means they

"succeeded," whether by abandonment by Quigley and reappropriation by Drake and Covert, or by sale by Quigley to them, of the lands on which the water was used, or by sale of the water alone, does not appear. Presumably, if such be the fact, it should have been by lawful claim by them for irrigating agricultural lands; and no such act of appropriation was done by either. But, whether Quigley divested himself of his assumed right by abandonment or otherwise, it is certain that Quigley had nothing remaining from the time Drake and Covert succeeded, one to "one-half" and the other "to the other half," of his rights. His interest was ended. He is out of the case, and yet the judgment is in his favor. As neither Drake nor Covert are in any way shown to have had at any time any interest whatever in, or right to use, this water, or any part of it, for agricultural or for any other purpose, all of the plaintiffs are out of court; and yet the judgment is in favor of all of them jointly. It is therefore impossible, in this case, to reach what might otherwise be the principal and more important question involved in the judgment, namely, whether such a claim as the plaintiffs made to absolute ownership for agricultural purposes of the waters of a natural stream of the country, to the entire exclusion of all other settlers on the same stream, whose lands require irrigation, and to whom water is one of the necessities of life, and through whose lands that stream may run, can, under our laws, be maintained. The facts found not being sufficient to sustain the conclusions of law or judgment, it follows that the judgment as to the appellant should be reversed.

There is no room for any presumption, that other prerequisites to a valid judgment existed. Indeed, it is shown affirmatively that the necessary grounds did not exist. Here, then, I think this case should end. What may be further said on the question of rights of parties diverting water upon lands for purposes of irrigation can have no binding force. There is no case before the court warranting a discussion of the subject. Such discussion may be taken as *obiter*, merely. But the majority opinion goes into it, and I may be excused for following its example, so far as the little time allowed me will permit.

1. The assumptions, in the majority opinion, of facts as drawn from the findings, or as properly deducible from those findings, I, for the most part, controvert. The findings of fact are hereinbefore stated in full, and they speak for themselves.

2. Nor do I admit that posting a notice on a stream, prior to 1881, claiming 600 inches of water, was "an act of appropriation." It had nothing to do with "an act of appropriation on the public domain." That could only be done on the public domain by having lands to irrigate; *second*, by actually diverting waters upon it, by means sufficient to conduct all the water actually appropriated. There is nothing of that kind in this case,

and the court is not warranted in assuming that there is.

3. The majority opinion pronounces the claim of a person whose lands lie upon a stream as resting on the "phantom of riparian rights." I deny that under the laws of this territory "riparian rights" are a "phantom," unless unlawfully and unjustly made so. The doctrine of riparian rights is a part of the common law; and the common law is the law of this territory, except as the statute steps in, and repeals or changes it. Section 18 of the Revised Statutes so declares. It provides that "the common law of England, so far as it is not repugnant to or inconsistent with the constitution or laws of the United States, in all cases not provided for in these Revised Statutes, is the rule of decision in all the courts in this territory." The United States statutes have in some respects modified the common-law rule of riparian rights on the public domain where customs are shown to exist, and not otherwise. No customs are pretended here. Indeed, all customs are studiously ignored. The statutes of the territory previous to 1881 had no provision whatever on the subject of water-rights. But in 1881 what are equivalent to common-law water-rights were in some respects expressly affirmed, only those rights were enlarged. Section 3180, Rev. St., provides that "all persons, companies, and corporations owning or claiming any lands situated on the banks or in the vicinity of any stream are entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed." In the preceding chapter of the statutes it is provided that by complying with certain conditions (not one of which is pretended to be complied with in this case) a party may entitle himself to superior rights in the use of water. No one denies this fact. But it nowhere provides that any one may entitle himself to ownership of a stream, or to entirely exclude others "on the banks or in the vicinity of a stream" from some use of the water, as provided in section 3180, above quoted. Our statute is a little more comprehensive—a little stronger, in some respects, in favor of those needing water—than the common law of riparian rights; but it leaves many of those rights intact. It is wrong, then, to designate these common-law rights as a "phantom." They are real, and the interests of our territory demand that they should be recognized.

4. By the common law, running water is not the subject of ownership. No statute of Idaho, nor of congress, either, makes it such. By custom, when that is shown, a person in its prior use may not be disturbed in its use, providing, as Mr. Justice FIELD says in *Basey v. Gallagher*, the custom and claim under it are reasonable. But that is as far as it goes,—as far as any statute of the United States or of this territory goes. Our

own statutes are in accord with that view. Rev. St. Idaho, § 3188. In *Basey v. Gallagher*, 20 Wall. 683, Mr. Justice FIELD says that "in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits; for this right to water, like the right by prior occupancy to mining ground, * * * is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and to vest an absolute monopoly in a single individual."

What does this judgment do, but to violate every provision of the foregoing, severally and as a whole? Is it reasonable to appropriate all the waters of a stream, even if it contains 1,000 inches, or whatever it may be, to irrigate "a piece" of land, with no intimation of its description or amount? Is it reasonable to allow absolute and "unrestricted" ownership in water diverted for purposes of irrigation, only, to be used, as in this case, for sale to railroads and brick-yards, or other purposes than irrigation, and still deny to others their natural, lawful, statutory rights in any of it? Where are the "reasonable limits" of such a claim? Is such a claim in accord with "the conditions of the country and necessities of the people," when those people are famishing for water, and precluded from using a drop, though an abundance runs past their doors? Does not this judgment establish "an absolute monopoly" of the waters of this stream? Every one of these questions carries with it its own answer. I do not propose to pursue this argument, and show that a great majority of the cases relied on to establish this doctrine of absolute ownership and exclusive monopoly in streams do not relate to the use of water for agricultural purposes at all, but that those cases relate to diversions or use for mining purposes only. That fact may be easily shown, or else that the cases where they relate to irrigation are based upon mining cases. There are few of them that are not so founded, even of those cited in the majority opinion. The doctrine of those cases would prevent the settlement upon lands depending on our natural streams, and, as in the case at bar, would drive away half or more of the settlers who have already settled there. This is not for the interest of the territory, and to allow the example of this case to obtain will prove detrimental in other ways than in decreasing our population. The suffering settlers will very soon resort to the demoralizing aid of the ever present "Winchester" or revolver. People will not tolerate such unlawful claims; and the sooner they are abandoned, or reduced within reasonable bounds, the better will it be for all. This judgment should be reversed.

(2 Idaho [Hasb.] 696)

GILPIN v. SIERRA NEVADA CONSOLIDATED MIN. CO.

(Supreme Court of Idaho. Feb. 28, 1890.)

MINES AND MINING—ADJOINING OWNERS—VEINS—INJUNCTION.

1. Rev. St. U. S. § 2332, provides that the owner of a mining claim "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular from their course downward as to extend outside the vertical side lines of such surface locations." *Held*, that an owner of a mining claim has no right to follow a vein into an adjoining claim unless such vein has its apex within his own side lines.

2. On bill to enjoin an adjoining owner from working a vein on plaintiff's claim, defendant alleged that such vein had its apex on his claim. Defendant's claim adjoined plaintiff's on the east of the latter; and it appeared that plaintiff sunk a shaft near his eastern line, in ledge matter, consisting of various substances, including some ore. Following the dip of the ledge matter, and defecting to the south about 150 feet, he struck defendant's under-ground workings, finding some ore before doing so. The ledge matter was continuous. Defendant's ore was of a kind sometimes found in "blanket veins," without apices or dips, and it was doubtful if the vein was a fissure vein. The dip was nearly at right angles with the north side line of plaintiff's claim, and defecting little, if at all, from the lead of defendant's ledge. The true average dip of a vein is always at right angles to the lead. All of defendant's tunnels were on the bed-rock or floor of the ore deposits, rose slightly as they receded from their mouths on defendant's claim, were at right angles with a line formed by their mouths, and pursued an almost due westerly course. The mouths were at an outcrop of a deposit, nearly horizontal in position, on a mountain-side. The dip of the floor of the ore deposits was from north to south. *Held*, that it was not shown that the apex of the vein was on defendant's claim, and hence defendant had no right to extend its works into, and extract ore from, plaintiff's claim.

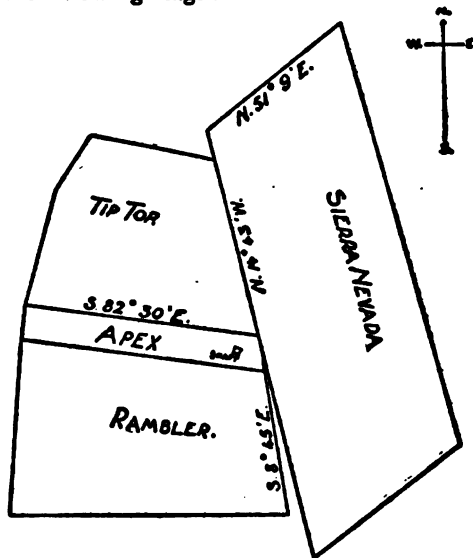
3. One who is in possession of mining ground, claiming title thereto, and who makes a *prima facie* case covering his surface locations, may sue to restrain an alleged unlawful interference with underground veins of ore within the lines of his claim.

4. Rev. St. Idaho, § 4288, provides that an injunction may be granted (1) when the complaint shows that plaintiff is entitled to the relief demanded, which consists in restraining the commission or continuance of the act complained of; (2) when the commission or continuance of some act during the litigation would produce waste or great or irreparable injury to the plaintiff; and (3) when the defendant is doing some act in violation of the plaintiff's rights, having a tendency to render the judgment ineffectual. *Held*, that injunction would lie to restrain continuance of the unlawful removal of ore from plaintiff's mine, whether or not the injury, if consummated, would be irreparable.

Appeal from district court, Shoshone county; SWEET, Judge.

The complaint shows the plaintiff to be the owner, and entitled to the possession, of one compact piece of mining lands in the Yreka mining-district, Shoshone county, Idaho territory, embraced within the outer boundary lines of three contiguous mining claims, called the "Apex," the "Rambler," and the "Tip Top," all constituting the plaintiff's said mining grounds; that while the plaintiff was so in possession, on the 29th of October, 1888,

the defendant, a corporation, entered upon such grounds of the plaintiff, and with force, etc., took possession, and unlawfully ejected the plaintiff, and still unlawfully withholds the same from the plaintiff, to his damage of \$100,000; that the plaintiff's said claim is upon a mineral zone or belt containing gold, silver, and other precious metals; that previous to such ouster the plaintiff had been working and mining the three locations named as above, as one mining claim, continuously since the 3d day of November, 1887; that the defendant owns a mining claim adjoining on the east of these several claims of the plaintiff, so constituting one claim, the defendant's claim being called the "Sierra Nevada;" that the western side line of the Sierra Nevada is coincident with eastern end boundary line of said Tip Top claim, and also with the eastern end line of the Apex claim, and nearly coincident with the eastern end line of the Rambler claim. The relation of the properties of the parties is shown by the following diagram:



The plaintiff further claims, in substance, that the plaintiff's middle claim, the Apex, is upon and along said mineral zone or belt; that the mineral-bearing rock in place is a part of such zone, and crops to the surface in and upon the Apex location, the true apex of the zone or belt being within the exterior boundaries of the Apex claim; also, that the zone or belt is of greater width than the Apex claim, and extends on either side of the Apex, and is covered by the Rambler and Tip Top locations. The plaintiff also claims, and the fact is admitted by the defendant both in its cross-complaint and in argument, that the defendant, prior to the commencement of this action, has been working the Sierra Nevada claim, and from the under-ground tunnels in the Sierra Nevada claim has extended its works and tunnels, beyond its western side line, into and upon the grounds claimed by the plaintiff, and maintains his possession

thereof against the plaintiff, and has been and is extracting and carrying away ore therefrom, and is, as the plaintiff avers, preventing the plaintiff from working his mines within his own mining grounds; that such acts are waste, and irreparable damage to the plaintiff's property; to recover which property, with other purposes, this action is instituted; that the defendant is a foreign corporation, and insolvent; and prays that pending the litigation a temporary injunction be granted, etc. The allegations of the complaint are made positively, as of the plaintiff's own knowledge, and the same are verified in the same manner.

The answer is upon information and belief, and is so verified. It admits that the defendant is a foreign corporation. Except this admission, it denies every other material allegation of the complaint, and prays that the complaint be dismissed. The defendant also files his cross-bill, and prays affirmative relief; and for such purposes makes this plaintiff, Larry O'Neill, A. D. Bevin, David Le Ban, A. M. Baldwin, Edward Leonard, W. T. Malony, William Rogers, C. J. McMillen, B. F. Bates, and W. B. Heyburn, parties defendant, and avers: (1) The corporate character of the cross-complainant. (2) That on the 6th of April, 1886, the lands of the Sierra Nevada claim were public domain, and unoccupied mineral lands, and on that day were duly claimed, by parties named, as a mining claim, under that name; that said locators, with others who had become interested in the Sierra Nevada claim, on June 3, 1886, "having discovered the true strike and course of said vein," filed an amended location of said claim, as it now appears on the diagram heretofore given; that the cross-complainant became the owner of such amended location and claim on the 15th of November, 1886, and is still such owner, and in possession of the same, and has expended \$100,000 in improvements thereon, in tunnels run in and upon said vein, cross-cuts, shafts, etc., and is still in possession of all such tunnels, etc. (3) "That, while said E. M. Gilpin claims to be the owner in his own right of said Apex mining claim, as a matter of fact, each and all of the parties hereto, to-wit, [the other defendants in this cross-complaint named,] are the owners of undivided interests therein as tenants in common with the said E. M. Gilpin," and the claim of said Gilpin to be the sole owner is untrue; wherefore said parties are joined as defendants herein in order that "their claims, together with the claim of the said E. M. Gilpin, may be fully and finally determined, adjudicated, and settled;" that said defendants "actually claim an interest unknown to the cross-complainant in and to the premises hereinbefore described, and in and to the vein thereon, which is the Sierra Nevada lode mining claim and vein;" and, that such claim may also be settled, it is necessary that all of said defendants be made parties. (4) That all of the defendants are insolvent, and are pretended owners of a

mining claim described in the complaint of the plaintiff, Gilpin, as the Apex, Rambler, and Tip Top mining claims, and, as such alleged owners, have by their under-ground workings entered upon the Sierra Nevada claim, and by shafts, etc., have gone down and broken into the works of the cross-complainant, "made by its following its said vein, upon the dip thereof, into the ground," and threaten to take and hold possession, etc., of said workings so broken into, and are engaged in under-ground works with that intent. (5) That the locations of the Apex, Rambler, and Tip Top are in fact void and of no effect, because they were made, or attempted to be made, within the line of the Sierra Nevada, etc., and that, if the defendants be allowed to carry out their designs, the cross-complainant will sustain irreparable damages. (6) And prays that the defendants named, except said Gilpin, be brought in as defendants; that all such defendants be decreed to have no right to any of the ground in controversy; that pending this suit the defendants be enjoined from entering upon, etc., any of the grounds in dispute, and upon the determination of the action the injunction be made perpetual.

A large amount of evidence was taken upon the issues so made up, and upon the 5th day of February, 1890, his honor, Judge SWEET, by order, denied the injunction. From that order an appeal is taken by the plaintiff to this court.

W. B. Heyburn and W. W. Woods, for appellant. Wm. H. Clagett and Albert Hagan, for respondent.

BERRY, J., (after stating the facts as above.)

There are three principal points in this case: (1) Is the plaintiff the owner of the mining grounds claimed by him, so as to be entitled to invoke the aid of this court to prevent the acts complained of? (2) Is the injury alleged of such a character as to warrant the exercise of the equity power of the court? And (3) is such injury, in fact, threatened or being done?

As to the question of non-joinder of parties plaintiff, that is not properly in issue on an application for an injunction against the acts of a stranger to the property threatened with injury. A party may intervene to protect by injunction his own interests, as well as the interests of his co-tenants. But, if this were otherwise, the deeds to plaintiff introduced in evidence on the hearing cover all the interests of each of those persons in each of the three claims alleged by the plaintiff to belong to him, except said W. B. Heyburn, who is not shown to have any interest in either of said claims; and from the evidence there appears to be no ground for such claim.

We may first inquire, then, as to whether the plaintiff has shown sufficient to give him a standing in court. This case seems to have been tried, in part at least, upon the theory and tacit understanding that *prima facie*

proof of the plaintiff's title was all, on the question of location, that need be shown in such a case as this. After some evidence had been put in by the plaintiff tending to show the validity of his location of the Apex claim the court asked: "Are you gentlemen going into matters showing everything which goes to show a valid location? Plaintiff's Counsel. We do not want to. Defendant's Counsel. We do not either. Plaintiff's Counsel. We just propose to make a *prima facie* case,"—and passed immediately from the subject of the Apex location (which to that point had been the subject of the evidence) to the location of the Rambler. This may not be considered as a stipulation releasing the plaintiff from the obligation to introduce further evidence on the location of the Apex, or that the evidence already in made a *prima facie* case of location; but it seems to express the mutual understanding between the court and the counsel on either side as to the theory and rule of law on which the case was to be heard and determined, and may well have had an effect in restricting the amount of evidence which either side might deem necessary after making a *prima facie* case. It is not to be presumed that the defendant, on a preliminary motion, and especially under such circumstances, would introduce all the evidence he would on the trial. From a review of the plaintiff's evidence up to the close of the examination of John Gill this theory was evidently relied on; but afterwards, however, the plaintiff returned to the subject of the location of the Apex, introduced Michael Gibbons, John M. Burk, W. Clayton Miller, J. M. Porter, C. D. Porter, and other witnesses as to the facts of locations, as to the character of the ledge claimed in the Apex, its outcrop within the Apex lines, the character of the material as to ore, its appearance or non-appearance in the shaft sunk from the surface of the Apex, the dip of the underground veins, and the relation of the ledge claimed for the Apex with the defendant's drifts beyond the west side line of the Sierra Nevada, and on other points. Much of this evidence was controverted by the witnesses of the defendant; and some of it was corroborated; but, on the whole, the weight of the testimony seems to be in favor of the validity of the plaintiff's locations. He certainly makes a strong *prima facie* case, covering his surface locations, and, of course, to the vein in the Apex, whatever it may be, and wherever it may run or dip. The defendant, in its brief, says: "The plaintiff should establish his title to the surface ground under which he claims, which, to say the least, is very doubtful upon the showing." This is the defendant's view after the evidence is all in. It must be noted that the plaintiff is in possession of his claim, and the presumption is that his possession is lawful, and the burden is on the defendant to repel such presumption, and also that one object of this action is to settle the question of that right. In the cross-bill the defendant demands that

it shall be settled. The action of the judge, or of either of the judges, before whom this motion has been considered, did not affect, or tend to affect, that settlement. The judges had no authority to do that. The fact of the plaintiff's compliance with the law, or his non-compliance, is a question of fact only, to be determined on the trial of the case. If, then, after all this preliminary proof on both sides is in; the question is pronounced by the defendant as "doubtful upon the showing," the status of the plaintiff as a proper party to demand the preservation of the property he is contending for is practically conceded. But without such concession the law insures such right to the plaintiff.

We may then inquire as to the character of the injury alleged. By section 4288, Rev. St. Idaho, subs. 1-3, it is provided that an injunction may be granted "(1) when it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;" and "(2) when it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, great or irreparable injury to the plaintiff; (3) when it appears during litigation that the defendant is doing * * * some act, in violation of the plaintiff's rights, respecting the subject of the action, and [having a] tendency to render the judgment ineffectual." The statute seems to be framed to meet the case of such an injury as is here complained of. The subject-matter of the litigation is a mine, which is valuable only for the mineral it contains. To remove that mineral is certainly waste, and waste is one ground for the issuance of this writ. It is also great injury; and that is another ground, whether it be reparable or not. Irreparable injury is still another ground, disjoined in the statute from the other grounds. To remove the ore from the mine, and leave but a worthless shell to be contended for, would certainly have a "tendency to render ineffectual" any judgment which the plaintiff might recover. Conceding the plaintiff's rights to his mining claim and to the ledge to be as stated in the complaint, it cannot be argued that continuing to remove the ore from the mine is not waste of the property, nor that such acts do not constitute great damage, nor that to do so does not tend to render a judgment in his favor ineffectual. The chief argument of the defendant is that the defendant is solvent, and abundantly able to pay any damage which may be found against it. But even on this point the case is against the defendant. The complaint states that the defendant is a foreign corporation. That is admitted. Also, positively, that it is insolvent. That is only denied on information and belief. There was no evidence given on the subject at the hearing. Hence that allegation of a fact in the case, except for the

purposes of pleading only, must be taken as unanswered. On the whole, upon this point, it may well be questioned whether the plaintiff has not fully shown that the injury, if consummated, will be irreparable. But, whether it be fully shown or not, the other statutory grounds, as we have seen, are sufficient to authorize him to claim an injunction.

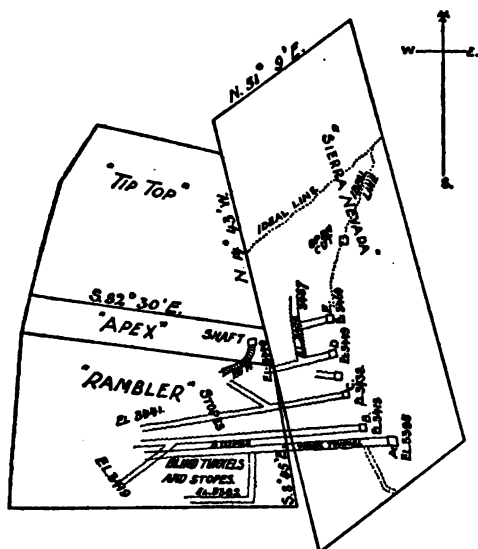
We may then turn to the main and last consideration in this case, and inquire whether the evidence taken shows that the injury complained of is in fact being done. We have before said that, *prima facie*, a miner is confined within the boundary lines of his claim. Section 2322, Rev. St. U. S., provides, among other things, that the owner of a mining claim "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." The claim of the defendant is that the veins of ore on which the defendant admits it is working are veins, the top or apex of which lies inside of the side lines of the Sierra Nevada claim. On the other hand, the plaintiff avers that the apex of such veins is not within the side lines of the Sierra Nevada claim, and hence that the defendant has no right to follow it within the plaintiff's lines. His theory is that the true apex of the lode is in his Apex claim, and that its strike is nearly at right angles with the western side line of the Sierra Nevada claim, and that the dip of the vein matter is more to the south than is claimed by the defendant. But the plaintiff also urges that, wherever the apex of this vein may be, or if it have no apex at all, but is simply a blanket vein, if its apex be not between the defendant's side lines, the defendant has no right to follow it into the plaintiff's grounds, or within the boundaries of the claims of which the plaintiff is in possession. That is a proper construction of the law. The defendant's right to that ore, if he have such right, must be based solely upon the fact that the vein has its apex within its own side lines. The difficulty in determining this matter is greatly increased by the fact that no up-raises upon the vein are shown to have been made by the defendant to determine its apex, or to show its dip or trend. No shafts have been sunk on any of the ground in question, except it be the shaft in the Apex claim, which penetrated the workings of the defendant. Considerable evidence has been produced, mostly (unless we except the evidence of the Apex shaft, and diagrams and plats of defendant's workings) of a speculative character. There is in that evidence much conflict on material points. But, considering all of the witnesses

of equal credibility, the circumstances under which their knowledge was obtained, and the probabilities of their correct understanding of the facts, throws light upon many of these apparent discrepancies; and the actual measurements and plats of skillful engineers show controlling facts, in view of which the oral evidence must be understood, and erroneous theories must be corrected. The courses of the surface lines of these several claims require careful attention. The fact that the Sierra Nevada claim has been relocated and swung around from its original location has little or no bearing upon what is here the main question. We are to consider the claim as it now is.

It is proved beyond a question that the plaintiff sunk a shaft from about midway between the side lines of the Apex claim, and near the eastern end line, in what is described as "ledge matter," consisting of quartzite, talc, and some ore, at a considerable deflection to the south from a vertical line, following the dip of this so-called "ledge matter" in its several variations, but always inclining to the south, a distance of about 150 feet, and was led thereby upon and into the under-ground workings of the defendant; that such shaft, in its descent, when the defendant's work was struck, had passed beyond the side line of the Apex claim, a considerable distance into the Rambler grounds; that in the descent the plaintiff found some ore before reaching the defendant's works, and had put some in sacks before reaching the lagging over the defendant's tunnel. This so-called "ledge matter" is testified to as continuous. It is worthy of note that the ore which the defendant was tunneling and stopping out was, in character, carbonate and galena. "Witness Gibbons. Question. State from your observation as to the quality of the ore. Answer. It was carbonate, I said." This does not seem to be controverted, and the fact may bear upon the question of apex or dip; for it is a matter of common knowledge that carbonate ores are sometimes found in blanket veins without apices or dips. The extraordinary width of this mineral belt or zone—extending, as all concede, often to many hundreds of feet—is unusual, and hardly conceivable in a fissure vein; also its position, almost horizontal, at least in the claims in question. All, taken together, may raise strong doubts, in the absence of actual demonstration, of its being in its main breadth a fissure vein at all. If that were so, it would be an end to the controversy between the parties, and the injunction should, of course, issue. But the case is presented as concerning a fissure vein only, with the usual apices and dips; and so we must consider it, by the light given us by the evidence. In examining the maps and diagrams in the case, our attention is at once called to the fact, from the map of the defendant, (Exhibit X,) that the mean dip of the vein in the grounds claimed by the plaintiff, corresponding, also, mainly to the evidence of the witness, is

south, 5 degrees west. The north side line of the Apex claim runs south, 82 degrees 30 minutes east. Hence such dip is only 2½ degrees east of a right angle with that side line of the Apex claim, or nearly at right angles with it. The lead of the vein as claimed by the defendant on that map seems by inspection to be about north, from 5 to 10 degrees east; so that the average dip, as the defendant claims it, would deflect from the lead of the Sierra Nevada ledge something less than 5 degrees,—possibly not at all. It was stated on the argument, and not controverted, and as we think the rule to be, that the true average dip of a vein is always at right angles to the lead; and, if the veins so being worked by the defendant are really dips from the Sierra Nevada claim or lead, it is difficult to harmonize these principles and facts. But they do all harmonize with the claim and theory of the plaintiff. To comply with the defendant's theory, the average true dip should be west, and perhaps some degrees north of west, or at least 90 degrees from what it is shown to be on the map, and also as stated by the witnesses.

The following diagram, drawn from the exhibits, mostly of the defendant, will tend still further to illustrate the facts in the case:



Tunnel A is a working tunnel, and some distance below the plane of the mineral and of the tunnels upon the ore. All the tunnels, B, C, D, E, are claimed by the defendant to enter on the outcrop of the ledge; but the elevations marked on Exhibit X show that such outcrop is not an apex or crest of a vein dipping laterally from it, but that it is an outcrop on the mountain side of a mineral deposit, nearly horizontal in position, but rising slightly as it recedes into the hill, and at right angles with a line formed by the mouths of these tunnels. All these tunnels run on the foot wall, or rather on the bed-rock or floor of the ore deposits. Here there can be no dispute as to the respective eleva-

tions of the mineral at the points named. The elevation of the bottom of the mouth of tunnel B is 3,415 feet. At its face, in the Rambler claim, it is 3,419 feet,—a rise of 4 feet. The elevation at the mouth of tunnel C, distant from B about 150 feet, is 3,438 feet. At a point a little over 200 feet west, where the measurement was taken, its elevation is 3,441 feet,—a rise of 3 feet. Tunnel D, at its mouth, is 3,449 feet. At about 150 feet west, its elevation is 3,454 feet,—a rise of 5 feet. At a point near the southeast corner of the Apex claim, it falls to 3,448 feet,—a depression of 1 foot below its mouth, about 250 feet distant. The elevation of tunnel E at its mouth is 3,469 feet. In about 100 feet it descends to 3,467 feet, and in about 60 feet further rises to 3,472, or to a plane 3 feet above its mouth. It is admitted on the argument that the water from these workings of the defendant flows out at the mouths of these tunnels. When we consider that these tunnels are practically almost parallel with each other, and running nearly west, it seems impossible to conclude that these deposits of ores in any way dip from anything yet shown in the Nevada claim. They all rise upward from the entire Sierra Nevada system, whatever its formation may be.

But, further considering the tunnel developments, there is not one of them that does not leave the line of the Sierra Nevada outcrop, practically, at right angles to it,—each, as testified by the defendant's witnesses, upon a vein of mineral, and pursuing an almost due westerly course; tunnel B, at least, running over 600 feet,—and all ending among the stopes, uniting these tunnels at their westerly ends. Not one tunnel indicates a lead in the direction of what the defendant claims as the apex of its mining claim; but all of them do indicate an extension of the mineral belt or zone westerly, at almost right angles from the defendant's outcrops, longitudinally with the side lines of plaintiff's claims, through and westerly of the point reached by the plaintiff's shaft, from what is called the "discovery point" of the Apex claim, the bed-rock or floor of the whole system rising slightly from the outcrop on the Sierra Nevada as the system, zone, or mineral belt and the defendant's tunnels reach to the westward. Another fact, heretofore mentioned, has proof positive in the several elevations of these tunnels, namely, that the dip of the floor of this mineral belt or zone is from north to south. The elevation at the mouth of tunnel B is 3,415 feet. One hundred and fifty feet northerly, at the mouth of C, the rise is 23 feet. At D, 125 feet further, the rise is 11 feet. From D to C, 100 feet further north, it is 20 feet. So that the rise from B to C—a distance, by inspection of the map, of about 375 feet—crossing this mineral belt, is 54 feet; and as far west as these tunnels go along this belt the same relations in the elevations of the southern portions seem to be maintained.

This also corroborates the evidence of some of the witnesses, and is consistent with plaintiff's claim.

From these and other like facts, it seems to us as plain that defendant shows no reason whatever to justify it in extending its works, and extracting the ore in this mineral ground west of its own side line of the Sierra Nevada claim, and within the boundary lines of the plaintiff's mining claim. The order denying the injunction should be overruled, and a temporary injunction should issue, as prayed in the complaint. It is so ordered.

BEATTY, C. J., (specially concurring.)
Upon the record we have in this matter, were it a hearing upon the merits, I would hesitate to agree to a reversal; for, from the examinations I have been able to make of the testimony, I think its weight seems to be with the defendant. This, however, is not to settle the title to the ground in controversy, but only to preserve its value until that title can be settled upon full hearing. Admitting the defendant is right, the inconvenience to it from an injunction will be less than would be the damage to plaintiff should he prove to be right. Always, in questions of injunction on the working of mines, the doubt should be resolved in favor of granting the writ. There is evidence for and against plaintiff's claim of a ledge in his Apex ground, and in the shaft therein; but the undisputed fact, which with me is almost controlling, is that the various workings of the Sierra Nevada show a nearly flat vein, with a much more decided dip to the south than to the west, which so far sustains plaintiff's theory that the vein runs easterly and westerly, instead of mere northerly and southerly, as defendant claims. At the same time it must be admitted that, from all the facts before us, the general course of the great principal vein through the country, for miles, is as defendant holds. Whether that dip to the south may be from some dislocation of the ledge, from neighboring dikes, or other causes,—may be a part of another cross-ledge,—I do not undertake to answer. The simple fact is, it is there; and, until clearly explained as only the result of some dislocation of the ledge, and not its true dip, I think plaintiff should be protected. I do not agree to any suggestion that these workings are a part of a wide vein, on the zone theory. While it may so prove, I do not think the facts before us so show; and I will not indulge in any theory. My concurrence in reversing the order refusing the plaintiff an injunction is based alone upon the reasons I have here stated.

(2 Idaho [Haab.] 670)

FIRST NAT. BANK OF LEWISTON v. WILLIAMS.

(Supreme Court of Idaho. Feb. 24, 1890.)

NEGOTIABLE INSTRUMENTS—ACTIONS ON—FINDINGS—RIGHTS OF SURETIES.

1. In an action on a promissory note, by an assignee after maturity, defendant alleged that he

signed the note as surety on the principal's agreement to give a mortgage to the payee to secure the note, which fact the payee knew, and that the payee accepted the mortgage with the note pursuant to such agreement. There was uncontroverted evidence of the truth of such allegations, and the mortgage, which showed the description of land covered and the purpose to secure the note, was in evidence. The judge, sitting without a jury, refused defendant's request to find on such allegations, except as to the giving of the mortgage; and also refused requests to find as to the condition and purpose of the mortgage, which plaintiff claimed was defective. *Held* reversible error.

2. Where the mortgage is not in fact invalid, allegations in the answer that the principal has given subsequent mortgages on the land, to its full value, and that, unless the note be paid from the land, defendant will be damaged, as the principal has no other property, are immaterial, and properly stricken out, as the first mortgage has precedence.

3. Rev. St. Idaho, § 4520, provides: "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage. * * * In such action the court may * * * direct a sale of the incumbered property, and the application of the proceeds" to the debt, etc., and, if a balance still remains, "judgment can then be docketed for such balance against the defendant or defendants personally liable." *Held*, that where a mortgage was given by the maker to secure a note, and for the surety's safety, and the security is valuable, an action could not be maintained on the note alone against the maker and surety, ignoring the mortgage.

Appeal from district court, Nez Perces county; JOHN L. LOGAN, Judge.

On the 30th day of October, 1884, Alonzo Leland and the appellant, M. M. Williams, duly made their joint and several promissory note, payable to the order of one A. J. Shaw, six months after date, and thereafter delivered the same to the payee. The note was given for the debt of Leland, and Williams joined in it at the request of Leland, as surety only; though the fact that he was surety did not appear on the face of the note. To induce Williams to join in the making of the note, it was agreed between Leland and Williams that Leland should give to Shaw, the payee, a first mortgage on real estate to secure the note, so that he, (Williams,) in case Leland did not pay the note, "would only have the balance to pay that the property did not bring;" which agreement was known to Shaw, and was assented to by him at the time. A mortgage was made, on the 1st day of November, 1884, by Leland to Shaw, acknowledged on the 6th day of the same month, and recorded by said Shaw, in said county, on the next day, the 7th of November, covering 160 acres of land therein described, the property of the mortgagor, setting out the note in full, and stating upon its face that it was "intended as a mortgage to secure payment of" this note so set out, and containing the usual power of sale. Whether the mortgage was delivered at the time of delivery of the note does not appear. On receipt of the mortgage, Shaw reported to Williams that it had been given to him by Leland. A little over three months after the note and mortgage fell due, in Shaw's hands, the latter assigned both note and mortgage

to one Volmer, the president of the plaintiff, who, on the same day, assigned them to his bank, this plaintiff. That, at the time he received the note and mortgage from Shaw, Volmer discovered that the mortgage was unsealed. The plaintiff brought his action against both the makers upon the note alone, by filing his complaint against both, but did not proceed further against Leland, and did proceed to a final judgment against Williams only. The answer, besides stating, in substance, the foregoing facts, (all of which appear either in the complaint, or were proven at the trial,) contains the following clause: "That after the mortgage to secure the note had been recorded, two mortgages, still valid and existing, have been executed and delivered by said Leland,—the first to said Volmer, and the second to the plaintiff itself,—both amounting to \$1,600, covering the same land described in the said mortgage, to secure the note, and were recorded before the commencement of this action; that said two subsequent mortgages are for the full value of said lands, and that said Leland has no personal property not exempt; and that, unless the note in suit be paid from such real estate, this defendant will sustain damage." This clause in the answer was by the court, on motion, stricken out before trial, the appellant excepting to such order. The answer further demands that, in case the defendant is held to pay the note in suit, said Williams be subrogated by judgment to the original rights in said mortgage of this plaintiff, and, of course, of said Shaw.

Hawley & Reeves, for appellant. *T. D. Cahalan* and *Brumback & Lamb*, for respondent.

BERRY, J., (after stating the facts as above.) The alleged grounds of error, mostly occurring on the trial, in the findings of the court, in refusing a new trial, and in the judgment, will more fully hereafter appear. The case was tried by the court without a jury. The evidence received upon the trial was introduced and given without objection. Being so given, the question of its admissibility, if objected to, does not arise. The complaint shows the note to have been past due when transferred by Shaw, the payee, to the president of the plaintiff; that on the same day he transferred it to his bank; and that both transfers were by "assignment." Whatever equities existed in favor of the appellant against the note, or the right to sue upon the note in the hands of the original payee, continued to exist against it in the hands of this plaintiff. It is proper, then, in the outset, to inquire as to the rights of the appellant, as against the original payee of the note. The obligations of Shaw will be considered as equally the obligations of the plaintiff. On the trial, when the plaintiff had rested his case, the appellant, the defendant below, called John P. Volmer, who testified that he had been president of the plaintiff corporation "ever since the bank was or-

ganized," identified the note; and, on being shown another paper, said: "That is a mortgage executed by defendant Leland to A. J. Shaw, the payee named in this note. I notice there is no seal of party executing it on this mortgage. It is in the same condition, as to execution and acknowledgment, as when I received it from Mr. Shaw. It may have been at the time I had transaction with Mr. Shaw that I noticed lack of seal. I never mentioned or said anything to Williams about there being any defect in the mortgage." Mortgage introduced in evidence by appellant. Alonzo Leland testified: "This is the note executed by me to A. J. Shaw. This is my signature. The other signature is that of Williams. I am principal debtor on the note. Williams signed it as surety only; and it was signed by him on condition that I should execute, to secure the payment of the note, a valid first mortgage upon real property. That was a condition of his signing the note. That condition was known also by Mr. Shaw, the payee of that note, and the agreement was assented to by him at the time. It was on those conditions, and under that agreement, that defendant Williams signed the note. That is my signature, and I executed that document, and supposed it to be a mortgage upon the land." M. M. Williams, the appellant, testified: "I am defendant sued in this action. I signed this note as surety only. I signed it on condition and under the agreement that Leland should secure the payment of it by a first mortgage on property, and he would get the money from Mr. Shaw, and I would have only any balance to pay that the property did not bring. Mr. Shaw, the payee, knew of the agreement and condition of my signing the note. I don't know whether the mortgage was executed or not. Mr. Shaw called right away, and told me he had the mortgage upon the land. Mr. Volmer, nor any officer of the bank, ever told me the mortgage was defective, or said anything about the mortgage."

There was no evidence in any way controverting either of these facts. Each was within the issues made by the pleadings. The judge in his findings, though specially requested by the defendant, refused to find upon either of these facts, except the fact that the mortgage to secure the note was, at Williams' request, given by Leland. To this refusal to find (1) as to the conditions on which the defendant Williams became a maker of the note, also as to the connection of Shaw with that agreement, and signing of the mortgage; (2) as to the condition of the mortgage as to seal, and what lands it was upon; (3) as to the knowledge of the plaintiff, in becoming the successor of Shaw in the ownership of the note,—the appellant excepted. This raises the question of the materiality of the issues involved in the points, or any of them, on which the judge refused to find. The description and amount of lands covered by the mortgage are shown in that exhibit, as well

as its object to secure this note. The evidence, as we have seen, will warrant findings only as claimed by the appellant. Contrary findings on either point, upon the evidence, could not be made. Those points are. (1) Was Williams only a surety upon that note? (2) Did Shaw, in taking that note, know what relations Williams held to it? (3) And for what purpose the mortgage was executed? And did he become a party thereto, by knowing the agreement between the principal and surety on the note, assenting to the agreement, and accepting the mortgage as security for the note? Of course, if he did, he was bound in good faith not to defeat the measures which the appellant had taken for his protection, and which Leland had placed in Shaw's hands as special security for the note. The mortgage security became and was a part of the contract between Shaw and the makers of this note. Besides the fact of its being the condition of appellant's signing, the payee of the note held it as a lien on property of the principal debtor, to which it was his duty to look before resorting to the surety on the note. If this were not an elementary principle of law, it became a controlling principle in this case, by virtue of the agreement between the makers, known and assented to by Shaw, and by his act in accepting the mortgage, pursuant to such agreement, together with the note. It is clear that those facts are material to this defendant. The counsel for respondent contends that, where there is no material issue tendered by the pleadings, findings on such matters will not be required. But the amendment to defendant's answer does tender these issues. The matter was material, and evidence was given upon it without objection, and was so submitted to the court as a part of the defendant's case. The authorities are numerous and conclusive that a failure to find upon a material issue, where the same is not in effect waived, but is requested, is error, and ground for reversal. *Hayne, New Trials & App.* §§ 239, 240, and cases cited; *Porter v. Muller*, 4 Pac. Rep. 531.

The appellant further contends that the court below erred in striking out a part of the answer, in effect as follows: "That since the execution and delivery of the mortgage by which the note herein sued upon is secured, and since the recording of said mortgage, that two mortgages, still valid and existing, have been executed and delivered by the defendant, Leland,—one of said mortgages to John P. Volmer, president of the First National Bank of Lewiston, plaintiff herein; and the other of said last-named mortgages to the plaintiff herein," aggregating \$1,600 in amount, and "covering the lands herein described," (the lands in the Leland mortgage,) "both of which were recorded prior to the commencement of this action;" and that said lands are not worth more than sufficient to pay said last two mortgages, etc.; and claiming such act was to the damage of the defendant. It appears by the evidence

that the plaintiff claimed the Leland mortgage to be defective, in not having been sealed; that such supposed defect was discovered by the president of the plaintiff when taking the note and mortgage from Shaw, and before taking the subsequent mortgages from Leland, upon the same property; but that the fact of such supposed defect was not communicated to Williams by any holder of these papers. It is only in view of the invalidity of this first mortgage that any injury to Williams could arise from those other mortgages. By the statute in force when the Leland mortgage was made, no seal was necessary. Section 1, "Act Concerning Conveyances," approved January 12, 1875. In effect, this statute was the same, as to the seal, as section 2920, Rev. St. Hence the mortgage was not invalid on that account, and it did in fact have precedence of the other two mortgages. This part of the answer was then immaterial to the issue, and was properly stricken out.

But the plaintiff was the holder of the note, and of a valid mortgage on real property to secure the same; yet instead of bringing an action to foreclose the mortgage, and for any balance that might remain after applying the proceeds of sale upon the sum due on the note, as he might have done, he filed his complaint against both of the defendants on the note alone, but had summoned only the surety on the note, and proceeded for a money judgment against him alone. This he had no right to do, not only because it was his duty to exhaust the securities of the principal debtor in his hands, placed there specially as a prior security, to protect the defendant, but also because the statute denies another action, by any party, for the foreclosure of the mortgage.

Section 4520, Rev. St. Idaho, provides: "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct a sale of the incumbered property, and the application of the proceeds of the sale to the payment of the costs of the court, and the expenses of the sale, and the amount due to the plaintiff; * * * and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt," etc.

There are no other provisions in that chapter affecting this case. As we have seen, the mortgage was valid, and it is not pretended that the security is valueless. The appellant claims that, upon a note so secured, an action ignoring the mortgage cannot be sustained; and cites *Bartlett v. Cottle*, 63 Cal. 366. In that case the court holds "that, in such case as the one at bar, an action cannot be maintained on the note alone, unless the security is valueless." In that case also

the value of the security appears to have been in issue, and it was not shown to be without value. This was decided under section 726 of the California Code of Civil Procedure, which substantially corresponds with the Idaho statute above quoted. *Vandewater v. McRae*, 27 Cal. 596, was an action by the holder of a note, secured by a mortgage on real estate, against indorsers of the note. Commenting upon the statute in question, the court in that case say: "The words [in the statute] 'secured by mortgage' are descriptive of the right or personal liability contemplated by the section, and any personal liability not so secured is manifestly without its purview. * * * A mortgage which, by its terms, is made applicable to the promise of the maker only, can in no just sense be regarded as collateral either to the personal liability or to the 'right' of which the contract of indorsement is the source." The judgment in that case, for the reason that the defendants' contract was not that of makers of the note so secured, but was that of indorsers only, and so was not secured, was against the indorsers. But the doctrine of *Bartlett v. Cottle*, supra, is fully recognized.

There can be no question in the case at bar, that the mortgage was given to secure the note, for the safety of the appellant. So, in *Ould v. Stoddard*, 54 Cal. 613, it was held that where a mortgagee had prosecuted an action in Ohio to final judgment, upon a note secured by a mortgage on lands in California, he could not maintain, in the latter state, an action for foreclosure, for the reason that under this statute there can be but one action for the recovery of any debt secured by mortgage. But the respondent's counsel contends that as the note was several as well as joint, under section 4106 of the Statutes, the plaintiff, at his option, might sue either or both of the defendants; and if he choose to sue only the surety on the note, as he was not the maker of the mortgage, foreclosure of the mortgage, in that suit, was impossible; also that it is optional with the plaintiff to abandon the mortgage security altogether; and cites *Ladd v. Ruggles*, 23 Cal. 233. On that question, if there be any doubt about it, we do not decide. But this joint and several note was the debt secured by this mortgage; and a judgment against either, upon the note, equally precluded a judgment of foreclosure of the mortgage, and in effect canceled it. Subrogation of the defendant, to the rights of the plaintiff in said mortgage, even had it been made, as there was a mere pretense of doing, (but which was not done,) would be of no use or value to him. He could no more foreclose it than could the plaintiff. The plaintiff had no right, by prosecuting this action, thus to deprive the defendant of the benefit of his original stipulation, for security to be given for the note, for his own protection, on his becoming a co-maker of it. He had a right to plead this statute, and the several decisions of the court on that question, and

the judgment rendered, were each and all erroneous. There are other points of error assigned, but, from the conclusions reached in the foregoing, they need not be considered.

The judgment in the court below, and the order overruling motion for a new trial, must be reversed. Judgment reversed, and new trial ordered. All concur.

(43 Kan. 285)

STEPHENS v. SCOTT et al.

(Supreme Court of Kansas. March 8, 1890.)

DEMURRER TO EVIDENCE—AGENCY—EVIDENCE.

1. A demurrer to evidence admits every fact and conclusion which the evidence most favorable to the other party tends to prove; but, where the court erroneously overrules such a demurrer, and afterwards the defect in the evidence is supplied by other evidence, introduced by either party, the error is cured.

2. Where a firm of real-estate agents, whose business it is to purchase and sell lands for others, write and send a letter to a land-owner, and in the letter inclose their business card, and give him to understand what the business of the firm is, and also in the letter make inquiry with reference to whether the land is in market, and its price, and the owner of the land immediately answers by letter, giving the price of the land, the terms and conditions upon which it may be sold, and the amount of commission or compensation which he is willing to allow to the real-estate agents for selling it, and the real-estate agents immediately commence to act as the agents of the land-owner in trying to procure a purchaser of the land, held, that they are his agents, and, when they find a person able, ready, and willing to purchase the land upon the terms and conditions prescribed by the land-owner, and they sell the land to such person, they have earned their commission.

(Syllabus by the Court.)

Error from district court, Harvey county; L. HOUK, Judge.

Keller & Dean, for plaintiff in error. *Peters, Lathy & Holliday*, for defendants in error.

VALENTINE, J. This was an action brought before a justice of the peace of Harvey county by Isaiah Scott and D. F. Hively, partners as Scott & Hively, against Henry Stephens, to recover of the defendant the sum of \$105.62 and interest for an alleged commission due the plaintiffs as agents of the defendant in procuring a purchaser of a tract of land belonging to the defendant. After judgment in the justice's court the case was appealed to the district court, where the case was again tried before the court and a jury, and the jury rendered a general verdict in favor of the plaintiffs and against the defendant for \$120.25, for which amount, together with costs, the court rendered judgment in favor of the plaintiffs and against the defendant; and the defendant, as plaintiff in error, brings the case to this court.

The plaintiff in error presents only two questions to this court for consideration: *First*. He claims that "the demurrer to the evidence should have been sustained, for the reason that Scott & Hively, plaintiffs below, wholly failed to establish their agency." The demurrer was overruled. *Second*. He claims

that the court below erred in giving the fifth instruction to the jury.

With reference to the first claim of error, we would state that it has already been held by this court that "a demurrer to evidence admits every fact and conclusion which the evidence most favorable to the other party tends to prove." *Christie v. Barnes*, 33 Kan. 317, 6 Pac. Rep. 599. See, also, the decision and cases cited in the case of *Railroad Co. v. Foster*, 39 Kan. 329, 331, 18 Pac. Rep. 285 et seq. This court has also held as follows: "Where a demurrer to plaintiff's evidence is overruled, when, on account of some omission in the testimony, it should have been sustained, and thereupon defendant proceeds to offer testimony, and in so doing supplies the omission, held, that the error in the ruling on the demurrer is corrected, and if, upon all the testimony in the case, the judgment was properly rendered, it will be upheld." *Railroad Co. v. Reeher*, 24 Kan. 228; *Goddard v. Donaha*, 42 Kan. 754, 22 Pac. Rep. 708. In our opinion, where a court erroneously overrules a demurrer to evidence, and afterwards the defect in the evidence is supplied by other evidence, introduced by either party, the error is cured. Upon the whole of the evidence introduced in this case, we cannot say that no cause of action was proved in favor of the plaintiffs below, and against the defendant below. But this question will be further discussed in discussing the next claim of error.

Upon the second alleged error it will be necessary to insert some of the instructions given by the court below to the jury. The instructions from the third to the seventh, inclusive, read as follows: "(3) The jury are instructed that an owner of land, wishing to sell it, and placing it in the hands of an agent for sale at a specified price, has the right, in his discretion, to revoke the agent's authority to sell altogether, or to change the price, or terms, or both, at any time before such agent has found and produces a buyer ready and able to make a purchase at the price and on the terms fixed by the owner. (4) The court further instructs the jury that, in general, an agency, when once established, is presumed to continue until it is shown to have been revoked, but when, after authority to sell a tract of land has been given to an agent, such a period of time elapses without any further communication between the principal and agent as that the value of the land has materially changed, or where other conditions have so changed in the mean time that it would be unreasonable to suppose that the principal and owner intended the agency to be a continuing one, in that case the jury would have the right to infer the revocation of the agent's authority; and in such a case an agent could neither bind his principal by a sale, nor recover compensation for finding a purchaser. (5) The jury are instructed that in this case, if plaintiffs read the letter of authority to Guilot, which was read in evidence to the jury, and if Guilot had

the means, and stood ready, to purchase the defendant's land at the price and on the terms named in the letter, whether anything was said about interest or deferred payments or not, and if the defendant received notice of these facts, plaintiffs would be entitled to recover, unless you further find from the evidence that defendant either directly revoked or modified the authority of plaintiffs before they had come to an agreement of sale with Guilot, or that by lapse of time and change of conditions the plaintiffs ought to have reasonably deemed the price fixed in 1884 was withdrawn. (6) In either of the last-named cases the plaintiffs could not recover. (7) The jury are further instructed that if you believe from the evidence that the letter of authority that has been read in evidence was written by the defendant in answer to a letter from plaintiffs, in which they stated to the defendant that they had a cash buyer for his land, and asking the price at which they would be allowed to sell the land to this buyer, in that case the answer of defendant would not confer a general and continuing authority upon plaintiffs to sell the land, but such authority would only continue for a reasonable length of time, and for the particular occasion to which plaintiffs had reference. Such an agency would not be presumed to continue into the following year."

The letter from the defendant to the plaintiffs, referred to in the foregoing instructions, reads as follows:

"Peabody, Kans., Nov. 5th, '84. Scott & Hively—Dear Sirs: Yours of the 4th inst. at hand, in regard the 251 94-100 acres of land in Sec. 31-24-2. There is a mortgage on the same of \$700 due four years from last August—the first—at seven per cent. interest, payable semi-annually to the Kansas Loan & Trust Co. They have offered to release for me on payment at any time.

At \$3.50 would be	\$2,121 50
If party will assume principal and interest from Aug. 1st to date.....	712 50

Leave	\$1,419 00
Will take on this basis.....	\$1,400 00
Or	1,400 00
.....	712 50

Or release mortgage.....	\$2,112 50
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"Will allow you 5 per cent. on amount, \$2,112.50. I believe that my terms was one-third cash, balance 4 years. Yours, truly, HENRY STEPHENS.

"Will make no greater deduction for cash than if party assumes the mortgage of \$700."

It appears from the evidence that on November 4, 1884, and prior thereto, the plaintiffs were real-estate agents doing business at Newton, in Harvey county, and in that vicinity. About that time some person made inquiry of them concerning the land about which the present controversy has arisen; and on that day they wrote a letter to the defendant below, who was the owner of the land, making inquiry with reference to

whether the land was in market, and its price, and giving him to understand that they were in the real-estate business, and in the letter sent to him their business card showing the nature and character of their business. On the next day, November 5, 1884, he answered their letter, sending to them the letter above quoted; and from that time on they considered themselves as employed by the defendant as his agents to sell his land for him, and they acted as such,—tried to procure a purchaser; and for that purpose, and from time to time, showed the land to several different persons. After this time, and in April, 1885, the defendant sent a postal-card to the plaintiffs, giving a list of his lands, and the prices; and in July, 1885, the parties met, and had a conversation about the matter. The defendant testified that in the postal-card he stated that he would raise the price of the land to \$10 per acre; but the plaintiffs testified that no such statement was ever made to them in any manner. In August, 1885, the plaintiffs sold the land to Henry Guiot. Before selling, however, they showed him the aforesaid letter, and read it to him, and sold the land to him according to the terms and conditions therein stated. They immediately wrote to the defendant, stating to him that they had sold his land; and he at once went to Newton with reference to the matter. When he arrived there, he did not, according to the testimony of the plaintiffs, question their authority to sell the land as they sold it; but all that he said was that he wanted a little more money. Indeed, he seemed to recognize their authority to sell the land as they did sell it. The defendant and one of the plaintiffs then went to see Mr. Guiot; and Mr. Guiot was able, ready, and willing to take the land upon the terms and conditions mentioned in the letter. But the defendant wanted more money, and they parted, and the defendant went home to Peabody; and on the next day, September 3, 1885, he wrote to the plaintiffs that he had sold the land to other parties at \$10 per acre. This ended the transaction, and soon thereafter the plaintiffs commenced this action. As the jury found in favor of the plaintiffs and against the defendant, we must now decide the case upon the theory that the evidence in their favor is true.

The defendant, as plaintiff in error, now objects to the fifth instruction given by the court to the jury, and in his brief states his objection as follows: "This was only an indirect way of telling the jury that the agency of plaintiffs below had been proven. The court tells the jury that they must find for the plaintiffs unless they find that their authority had been revoked or modified either directly by the defendant, or by lapse of time or change of conditions. In other words, the court tells the jury that plaintiffs were the agents of the defendant at one time, and that the agency was of a continuing character, and was still alive in September, 1885, when the letter was read to Guiot, unless it

had been revoked or modified." In the light of the evidence and the other instructions, we do not think that this instruction was erroneous. See, especially, the seventh instruction. When the defendant's letter of November 5, 1884, was received by the plaintiffs, and when they proceeded to act under it, they undoubtedly then became the agents of the defendant for the sale of his land. The first proposition with regard to the land came from the plaintiffs to the defendant. They, in effect, though not in express words, proposed to the defendant to become his agents to sell his land; and he, in effect, accepted their proposition, and appointed them his agents for that purpose, fixing the terms upon which the land might be sold, the price at which it might be sold, and the amount of their commission or compensation. The original proposition came from them to him, and not from him to them; and he accepted their proposition, appointed them his agents, and did not ask for any letter of acceptance in return, nor for any letter at all, nor for any acceptance at all. An acceptance from them to him would have been something like an acceptance of an acceptance. These transactions, taking only the undisputed facts, we think, constituted the plaintiffs the agents of the defendant, without anything further being done on their part than merely to proceed to act as his agents, and they were afterwards recognized as his agents by him; and this agency would, of course, continue unless revoked or modified by direct action on the part of one or the other of the parties, or by a change of circumstances effecting a revocation or modification of the agency. All the disputed questions of fact, we think, were fairly submitted by the court to the jury upon the evidence, and they found in favor of the plaintiffs and against the defendant; and their verdict, after being approved by the trial court, is final, and must end the controversy. The plaintiffs do not claim that the defendant's letter, without reference to any of the other facts, would constitute an agency; but they do claim that the letter, together with the other facts, does constitute an agency. The defendant, however, answers that, even if the letter, together with the other facts, should constitute an agency, still that such agency was a special and limited one, only for a particular purpose and occasion, giving to the plaintiffs authority to sell the property only to a particular individual, not Guiot, and that such agency was not exercised by the plaintiffs when they sold the property to Guiot. And, indeed, the defendant claims that such agency had expired, and had ceased to exist, long before the sale was made by the plaintiffs to Guiot. This theory of the case, however, was fairly submitted by the trial court to the jury by its seventh instruction, and the jury found against the defendant. We cannot say that any material error was committed in this case, and therefore the judgment of the court below will be affirmed. All the justices concur.

STETLER *et ux.* v. KING.

(Supreme Court of Kansas. March 8, 1890.)

APPEAL—MATTERS NOT APPARENT ON RECORD.

Where the instructions given to the jury are complained of, but none of the evidence is brought here, nor any statement as to its purport, but simply that the parties offered evidence and rested, it cannot be held that the court instructed the jury erroneously.

(Syllabus by Holt, C.)

Commissioners' decision. Error from district court, Ottawa county; M. B. NICHOLSON, Judge.

Thompson & Midgley, for plaintiffs in error. *G. W. Hurley and Chipman & Maltby*, for defendant in error.

HOLT, C. The defendant in error, Phillip King, as plaintiff, brought his action against defendants, alleging in his petition that he had made a verbal agreement with Milton Stetler to sell and convey to him certain real estate for the sum of \$1,600, to be paid in promissory notes, ponies, and \$550 in cash; that in accordance with such agreement a deed had been executed by said plaintiff conveying said real estate to Milton Stetler, but that the \$550 in cash had not been paid,—and asking judgment against him for that sum, and costs. A copy of the deed referred to was attached to, and made a part of, his petition. It contained a receipt in full for \$1,600 as its consideration. The defendant answered—*First*, by a general denial, and, *second*, "that before the commencement of this action these defendants paid to the plaintiff the full consideration for the said real estate as set forth in said deed." The plaintiff replied by a general denial. At the trial at the December term, 1887, of the Ottawa district court, the plaintiff recovered a judgment of \$536.24 and costs. The court instructed the jury that the burden of proof was upon the defendants. Of this the defendants complain.

The pleadings and instructions are set forth in full, but none of the evidence is preserved in the case made. The only statement in regard to the testimony is: "Said action came on for trial before the court and a jury; and the parties appearing offer their evidence, and rest." Under this statement in the case made, we cannot say there was any error on the part of the court in instructing the jury that the burden of proof rested upon the defendants. It is unnecessary, in a case made, to preserve all the testimony, or, in fact, any part of it; but, in its absence, there should be some statement showing in some way what its purport was. There was no statement in the case made that the evidence offered by either party tended to support the allegations of their respective pleadings, but simply that that they offered their evidence. It may have been of such a nature that the instructions of the court were correct. In the absence of any showing to the contrary, we are compelled to presume that the proceedings of the court were in every way regular and correct. Error must be shown, and is never pre-

sumed. Under this view of the case, we recommend that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 256)

MUMPER v. KELLEY.

(Supreme Court of Kansas. March 8, 1890.)

REAL PARTY IN INTEREST—REFORMATION OF CONTRACTS.

1. Whenever two persons make a contract for the benefit of a third, the third may maintain an action thereon for any breach thereof, to his injury.

2. Where a description in an instrument in writing is partially true and partially false, but where it can be clearly made to appear, either from the face of the instrument itself or from extrinsic facts, which portion of the description is true and which portion is false, the false portion of the description will not necessarily render the instrument void, nor will it necessarily require that the instrument should be reformed before it can be enforced. Generally, such an instrument will be held to be valid, and will be enforced without any reformation.

3. Where a petition sets forth and shows that the defendant and another person, and not a party to the action, executed a written contract for the benefit of the plaintiff, and it also appears from the petition that there was a partially true and partially false description in the contract, but the portion of the description that is true, if taken alone, is sufficient to uphold the contract, and the petition states, and it can also easily be shown by extrinsic facts, which is the true and which is the false portion of the description, held, that the petition does not, because of its allegations concerning the partially false description, disclose a contract that is void, or that needs reformation before it can be enforced, nor does it disclose a defect of parties defendant in the action.

(Syllabus by the Court.)

Error from district court, Edwards county; J. C. STRANG, Judge.

On January 18, 1887, George B. Mumper filed a petition in the district court of Edwards county against D. B. Kelley and H. V. Phelps. Kelley answered thereto. Whether service of summons was ever made upon Phelps or not, or whether he ever made any appearance in the case or not, is not shown; but all the subsequent proceedings seem to have been carried on wholly and entirely between Mumper and Kelley. On October 27, 1887, the plaintiff, with leave of the court, filed an amended petition, mentioning Kelley only as a defendant, which petition, omitting title and signatures, reads as follows: "Plaintiff states that on or about August, 1885, plaintiff was a partner in the firm composed of plaintiff H. V. Phelps, and O. P. Smith, which firm was engaged in the livery and stock business; that plaintiff at that time sold on verbal contract his interest in said business to H. V. Phelps for the sum of \$1,300, which the said Phelps verbally agreed to pay within two weeks; that the said Phelps did pay plaintiff the sum of \$200, leaving a balance due plaintiff of \$1,100; that on or about September, 1885, the said Phelps sold his interest in said livery business to the defendant Kelley for a valuable consideration, and as a part of said consideration the de-

defendant Kelley assumed and agreed to pay this said indebtedness of said Phelps to this plaintiff, amounting at that time to \$1,100; that, as evidence of said agreement and others, the said Phelps and Kelley made and signed a certain writing, a copy of which is hereto attached, marked 'A,' and made a part of this petition; that it was well known and understood by and between the said Phelps and the said Kelley what obligations the defendant assumed and agreed to pay, and each of them understood the writing referred to, to express this agreement, that the words in said contract, beginning on the nineteenth line of the same, 'It is also agreed that the said Kelley shall assume, and agrees to settle with G. B. Mumper for, whatever claim he may have against said Phelps on account of his previous interest in the firm of Smith and Mumper,' are referred to, and were understood by both as referring to the said obligation of said Kelley to said Mumper, as hereinabove set forth. The other words following were intended only as descriptive matter, and was a mistake, *i. e.*, 'which claim now appears on the books of O. P. Smith & Co.' The defendant, since the execution of said contract, has paid plaintiff \$700; and there is now due plaintiff from defendant the sum of \$400, with interest from October, 1885, at 7 per cent. Plaintiff asks that the contract, Exhibit A, be reformed by striking out the words 'which claim now appears on the books of O. P. Smith & Co.,' and that he have judgment against defendant for \$400 and interest, as above stated." The agreement mentioned in the petition as "marked A" and "Exhibit A" reads as follows: "This agreement, made this 12th day of September, 1885, between H. V. Phelps, of Kinsley, Kansas, and D. B. Kelley, of the second part, witnesseth that the party of the second part has this day bought of H. V. Phelps and P. C. Aston their interest in the property of O. P. Smith & Co., this day conveyed to said Kelley by bill of sale of even date herewith. It is a condition of this transfer, which it is the purpose of this contract to indicate, that the purchaser assumes the obligation of said Phelps heretofore given to T. S. Johns, and agrees to pay the same. It is also agreed that said Kelley shall assume, and agrees to settle with G. B. Mumper for, whatever claim he may have against said Phelps by reason of his previous interest in the firm of Smith & Mumper, which claim now appears on the books of O. P. Smith & Co. Witness our hands this 12th day of September, 1885. D. B. KELLEY. H. V. PHELPS." The defendant demurred to the foregoing petition upon the following grounds, to-wit: "(1) That there is a defect of parties defendant in this, that it appears from said petition that said H. V. Phelps, mentioned therein, is a proper and necessary party to this action, and a complete determination of the questions involved cannot be made without the presence of said Phelps; (2) that said petition does not state facts sufficient to constitute a cause of action."

This demurrer was sustained by the court below, and the plaintiff's action dismissed, and judgment rendered in favor of the defendant and against the plaintiff for costs; and the plaintiff, as plaintiff in error, brings the case to this court for review.

Robb & Smith, for plaintiff in error. *W. H. French*, for defendant in error.

VALENTINE, J., (*after stating the facts as above.*) That the plaintiff's petition states a cause of action in favor of the plaintiff and against the defendant, we think, can scarcely be questioned; for in this state it is well settled and established that whenever two persons make a contract for the benefit of a third the third may maintain an action thereon for any breach thereof, to his injury. *Manufacturing Co. v. Burrows*, 40 Kan. 361, 363, 19 Pac. Rep. 809, and cases there cited. Such a contract and such a breach are alleged in the plaintiff's present petition.

But the more difficult question presented is whether there is a defect of parties defendant or not. Now, if it were necessary that the contract upon which the plaintiff has founded his action should be reformed in order to give him a cause of action thereon, then it would seem necessary that each of the parties making the contract should be made a party to the action. But is it necessary that the contract should be reformed? Is there not enough in the contract, aside from the untrue portion of the description of the claim of Mumper against Phelps, upon which Mumper may maintain his present action against Phelps without any reformation of the instrument? May not that portion of the instrument which is untrue be treated merely as surplusage? Instruments in writing are often treated in that manner both in actions at law and in suits in equity. Where a description in an instrument in writing is partially true and partially false, but where it can be clearly made to appear, either from the face of the instrument itself, or from extrinsic facts, which portion of the description is true, and which portion is false, the false portion of the description will not necessarily render the instrument void, nor will it necessarily require that the instrument should be reformed before it can be enforced. Generally, such an instrument will be held to be valid, and will be enforced without any reformation. *Insurance Co. v. McLanathan*, 11 Kan. 533, 547; *King v. Aultman*, 24 Kan. 246. In the first case it was held, among other things, as follows: "Where, in the description of real estate, there are found repugnant calls, the instrument is not void for uncertainty, nor is there any need of reforming it, provided it clearly appears, either from the face of the instrument, or extrinsic facts, which is the true, and which the false, description." In the second case it was held that, where the description of a mare in a chattel mortgage was partly true and partly false, the untrue portion of the description would not render the mortgage invalid; and the mortgage was

held valid and enforceable without any reformation. The contract in the present case contains the following provision: "It is also agreed that said Kelley shall assume, and agrees to settle with G. B. Mumper for, whatever claim he may have against said Phelps by reason of his previous interest in the firm of Smith & Mumper, which claim now appears on the books of O. P. Smith & Co." Now, it appears from the allegations of the petition that Mumper did have a claim, and only one claim, against Phelps, by reason of his (Mumper's) previous interest in the firm of Smith & Mumper, and this claim was originally for precisely \$1,300. But Phelps paid \$200 thereof before the present contract was executed, thereby reducing the amount of the claim down to \$1,100; and Kelley, after the contract was executed, recognized his obligation under the contract to pay this claim, and paid \$700 thereof, leaving only \$400 of the claim still due and unpaid. The only difficulty in the way is that the claim never appeared upon the books of O. P. Smith & Co. Does this render the claim uncollectible, or prevent its collection until there shall be a reformation of the contract? Under the pleadings, there is no dispute concerning the correctness of the claim from the time of its inception to the present time. At the time the contract was made, it was just \$1,100. It is now precisely \$400, and Kelley, in his contract with Phelps, agreed to pay it all; and the only defense which he now sets up is that there was a partially false description of the claim in the contract, and that he is not bound to pay it unless Phelps is made a party defendant in the action, and the description reformed. We do not think that it is necessary to reform the description. Suppose a purchaser of real estate should agree with his vendor to assume the payment of a mortgage debt already existing against the property; and suppose that, although the mortgage was sufficiently described, still that it was also stated that the mortgage was recorded in Book B, in the register's office, while in fact it was not recorded in that book, but was recorded in Book C. Could the purchaser refuse to pay the mortgage debt, or refuse to pay it until after the contract should be reformed? If Mumper, instead of having only one claim against Phelps, had several claims against him, then it might be a material question as to whether the particular claim sued on was the one intended to be paid by Kelley, and it might then be possible that Phelps would be a necessary party in the case. But such is not the present case. Under the facts of the present case as they are alleged in the petition, it is wholly immaterial whether the claim sued on had ever been entered on the books of O. P. Smith & Co. or not; and we must take the facts as they are alleged in the petition to be true. If, however, they are not true, then it devolves upon the defendant to answer, denying them. And the defendant might also in his answer set up a state of facts very differ-

ent from those stated in the plaintiff's petition, and facts that would require that Phelps should be made a party defendant; but the petition itself does not disclose any such state of facts. We think the demurrer to the plaintiff's petition should have been overruled. The judgment of the court below will therefore be reversed, and cause remanded for further proceedings. All the justices concurring.

(43 Kan. 307)

STEINBUCHEL v. WRIGHT.*(Supreme Court of Kansas. March 8, 1890.)***NEW TRIAL—EXCESSIVE DAMAGES.**

In an action for slander the jury returned a verdict for the plaintiff for \$4,000. The trial court decided that all the damages above \$500 were excessive; but, as the plaintiff remitted \$3,500, the court entered judgment for the balance. *Held*, that the damages were so excessive as to show the verdict was given under the influence of passion or prejudice, and therefore that the amount thereof should be submitted to the judgment of another jury.

(Syllabus by the Court.)

Error from district court, Sedgwick county; T. B. WALL, Judge.

On the 1st day of September, 1886, Ida A. Wright brought her action against Herman Steinbuchel, to recover \$10,000 for slander. On the 18th day of November, 1886, with permission of the court, she filed the following amended petition, omitting caption: "Said Ida A. Wright now comes by leave of court, and for amended petition herein says that she is, and at the time of the grievances hereinafter mentioned was, a married woman, and the wife of said plaintiff John H. Wright; that said Herman Steinbuchel, well knowing the premises, on or about the 1st day of June, A. D. 1886, in a certain discourse in the presence and hearing of divers persons, maliciously spoke and published of and concerning said Ida A. Wright the false and malicious words following, to-wit: 'She [meaning said Ida A. Wright] is a common strumpet. He [meaning said Ida A. Wright's said husband] has picked her [meaning said Ida A. Wright] up to ride around with him [meaning said John H. Wright] for his [meaning said John H. Wright's] own use. They [meaning said Ida A. Wright and her said husband] are not married,'—by means whereof Ida A. Wright has been damaged in her reputation in the sum of \$10,000. Wherefore, said Ida A. Wright prays for judgment against said defendant for said sum of \$10,000." Subsequently the defendant filed the following answer: "And now comes defendant, Herman Steinbuchel, and denies each and every allegation contained in plaintiff's amended petition, and, for a further defense, the said defendant, Herman Steinbuchel, says that he did say, at the time set forth in plaintiff's petition, that he [the said defendant] believed that John H. Wright, husband of Ida A. Wright, plaintiff herein, was not a married man, and the woman who accompanied him,

the said John H. Wright, at the said time, was not the plaintiff Ida A. Wright, but another woman; that on or about the 1st day of July, A. D. 1886, the said defendant, Herman Steinbuechel, became acquainted, through the said John H. Wright, husband of the plaintiff Ida A. Wright, that he, the said John H. Wright, was a married man, and that the woman who accompanied him, the said John H. Wright, was the plaintiff Ida A. Wright, and wife of the said John H. Wright, whereupon the said defendant, Herman Steinbuechel, apologized to the said John H. Wright, husband of the plaintiff Ida A. Wright, for anything and everything said by the said defendant, Herman Steinbuechel, at the time aforesaid, against the said John H. Wright and his wife, Ida A. Wright, the plaintiff herein." Trial had on the 4th of March, 1887. The jury returned a verdict for the plaintiff, and assessed her damages at \$4,000. The defendant filed his motion for a new trial, alleging, among other things, excessive damages, appearing to have been given under the influence of passion or prejudice. During the progress of the argument, upon the motion for a new trial, the court announced that it regarded the verdict as excessive; that it ought not to stand; that it would not allow a verdict for more than \$500, but if plaintiff's counsel were disposed to enter a *remittitur* of the excess over \$500, it would permit the verdict to stand for that amount. The counsel for plaintiff announced to the court that they would enter on behalf of plaintiff a *remittitur* from the verdict of all of the excess over \$500. Thereupon the court announced it would overrule the motion for a new trial. Judgment was entered for \$500, and costs. The defendant excepted, and brings the case here.

Sluss & Stanley and *J. D. Davis*, for plaintiff in error. *Dale & Reed* and *Martin & Eckstein*, for defendant in error.

HORTON, C. J., (*after stating the facts as above.*) This was an action in the court below for slander. The jury returned a verdict for the plaintiff for \$4,000. It was alleged in the motion for a new trial, among other things, that the damages allowed were given under the influence of passion or prejudice. In overruling the motion for a new trial, the court found that the assessment of the jury beyond the sum of \$500 was excessive. Seven-eighths of the verdict was voluntarily remitted by the plaintiff rather than to have a new trial. In view of the action of the trial court and the testimony in the case, we are compelled to say that the damages were so excessive as to show the verdict was given under the influence of passion or prejudice. If seven-eighths of the verdict was rendered under the influence of passion or prejudice, the other one-eighth must also have been rendered under like influence. In such a case, the amount of damages should be submitted to the judgment of another jury. *Railway Co. v. Hand*, 7 Kan. 380; *Railroad*

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Co. v. Cone, 37 Kan. 567, 15 Pac. Rep. 499; *Cassin v. Delany*, 38 N. Y. 178. We do not desire to intimate that a verdict of \$500, or even a larger sum, would be excessive in a case of this kind, if a jury free from passion or prejudice should render such a verdict; but a verdict that is seven-eighths excessive ought not to be the basis of a judgment. In such a case a new trial should be allowed. The judgment of the trial court will be reversed, and cause remanded; all the justices concurring.

(43 Kan. 605)

CITY OF ATCHISON v. ROSE.

(*Supreme Court of Kansas. April 4, 1890.*)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—EVIDENCE.

1. In an action against a city for damages, for falling into an opening in the sidewalk, it is competent to show by parol evidence the length of time the street upon which this sidewalk in question was situated had been open.

2. When a proper question is propounded to a witness, but the answer thereto is objectionable, the remedy is by a motion to strike it out. *Hynes v. Jungren*, 8 Kan. 391; *Stone v. Bird*, 16 Kan. 488; *City of Wyandotte v. Gibson*, 25 Kan. 236.

3. The cross-examination of a witness should generally be confined to matters brought out in the examination in chief.

4. *Held*, that the record shows that the claim of plaintiff had been presented to the city council, and disallowed, before this action was commenced.

5. It is competent for the plaintiff, in a suit for damages, to show, by physicians living in the vicinity of his residence, what the services of an attending physician were worth, during his sickness, which was the result of the injury, as a part of the element of his damages.

6. The instructions of the court, and the special instructions asked by the defendant below, considered, and *held*, that no error was committed by the trial court, and that the verdict was sustained by sufficient evidence.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Atchison county; *DAVID MARTIN*, Judge.

William R. Smith and *H. C. Solomon*, for plaintiff in error. *J. W. Coburn* and *B. P. Waggener*, for defendant in error.

GREEN, C. This action was instituted by Robert R. Rose against the city of Atchison, on the 17th day of May, 1884, to recover damages against the city in the sum of \$10,000, for injuries received while traveling along the sidewalk on the south side of Commercial street, in said city, between Fourth and Fifth streets. It is claimed, on the part of the defendant in error, that on the 13th day of February, 1884, while exercising reasonable and ordinary care and diligence, and without notice that said sidewalk was in a dangerous condition, he fell in a hole and opening in the sidewalk, by reason of the boards being broken; that he was violently thrown down, injured, and bruised in the back, spine, and legs, and for some weeks suffered pain; and that he was permanently injured. It was further claimed, upon the part of the defendant in error, that the city of Atchison had neglected to keep the side-

walk where he was injured in proper repair; that, for more than a year prior to the injury, the city had permitted said walk to become broken, and to remain so; that the sidewalk, which was composed of boards, had become worn and rotten, and, through the carelessness of the city, had been permitted to remain so for a long period of time; and, further, that the city had actual notice of the dangerous condition of the walk. The answer of the defendant was a general denial; and, further, if the plaintiff was injured, as claimed, it was by his own negligence, and not through any negligence of the city. A trial was had at the November term, 1885, of the district court of Atchison county, before the court and jury, and a verdict rendered in favor of the plaintiff below for the sum of \$5,000. A motion for a new trial was filed, which was heard at the February term, 1886, and was sustained by the court, unless the plaintiff would consent to remit \$2,500 of the amount of the verdict, and accept judgment for the sum of \$2,500, which the plaintiff below accepted, and the motion for a new trial was overruled. The defendant below excepted, and brings the case here for review. Sixteen separate questions of fact were submitted at the request of the plaintiff below, and 32 questions of fact submitted at the request of the city, which are as follows:

"Question 1. On the evening of February 13, 1884, was the plaintiff injured by stepping into a hole or opening in the sidewalk on the south side of Commercial street, between Fourth and Fifth streets, in the city of Atchison? Answer. Yes. Q. 2. On February 13, 1884, was Commercial street in said city a public street, regularly laid out and dedicated, and used as such? A. Yes. Q. 3. Had it been so laid out and used as a public street in said city since about 1858? A. Yes. Q. 4. If question 1 is answered 'Yes,' state for what length of time prior to February 13, 1884, had such hole or opening remained in said sidewalk. A. From twelve to eighteen months. Q. 5. Did said defendant negligently permit said hole or opening to remain in said sidewalk for a long time prior and up to the time of the injury to the plaintiff? A. Yes. Q. 6. Ought the defendant, in the exercise of ordinary and reasonable care, to have discovered the hole or opening in said sidewalk prior to the injury of the plaintiff, and caused the same to be repaired? A. Yes. Q. 7. On February 13, 1884, when said plaintiff was injured, was said sidewalk, at the place where said plaintiff was injured, in a safe and proper condition? A. No. Q. 8. Was plaintiff injured by reason of the defendant negligently permitting said sidewalk to be and remain out of repair? A. Yes. Q. 9. Were the injuries which the plaintiff sustained on February 13, 1884, the result solely of the carelessness and negligence of the defendant? A. Yes. Q. 10. At the time plaintiff was injured, how much was he earning per day? A. According to testimony, about five dollars. Q. 11. As a result of

such injuries, how long was the plaintiff confined to his bed and room? A. Seven or eight weeks. Q. 12. Was he thereafter compelled to use crutches? A. Yes. Q. 13. If question 12 is answered 'Yes,' then state for what length of time plaintiff was compelled to use crutches as a result of such injuries. A. About eight months. Q. 14. During all of said time did he suffer much pain as a result of such injury? A. Yes. Q. 15. Is the plaintiff permanently injured? A. We think so. Q. 16. Will he ever probably recover from such injuries by him received on February 13, 1884? A. We think not.

"A. J. GWYNN, Foreman."

"Q. 1. Was Commercial street at the time of the alleged injury a public thoroughfare and street of Atchison? A. Yes. Q. 2. What was the width of said Commercial street? A. 80 feet. Q. 3. How much of said street had the city of Atchison designated to be used on each side for sidewalks? A. 12 feet. Q. 4. What was the width of the sidewalk on the south side of Commercial street at the place where the alleged injury occurred? A. Eleven and one-half feet to curb. Q. 5. Was there an opening between the sidewalk on the south side of Commercial street, between Fourth and Fifth streets, at the place where the alleged injury occurred, at the time of the said alleged injury? A. Yes. Q. 6. How wide was said opening? A. Do not know. Q. 7. Who constructed the area, if there was one, at the place above mentioned? A. Do not know. Q. 8. Did the city of Atchison or its officers have actual notice or express knowledge, previous to the alleged accident, that the sidewalk was in a dangerous and unsafe condition at the place where the alleged injury referred to occurred? A. Yes; by its city clerk and street commissioner. Q. 9. On what part of the sidewalk was the alleged defect? A. North side. Q. 10. If the plaintiff had walked in the center of the sidewalk, or that part nearest the store building, would he have received the injuries complained of? A. Probably not. Q. 11. How wide was the hole in the sidewalk where plaintiff was injured? A. Eight inches. Q. 12. How long was it? A. From twelve to eighteen inches. Q. 13. How deep was it? A. From three to seven feet. Q. 14. How far was the nearest part of said hole from the front? A. About nine feet. Q. 15. How far was it from the curbing of the street? A. Extended from the curbing 18 to 24 inches. Q. 16. What was the distance from the south end of this hole to the front of the building abutting on the sidewalk? A. About nine feet. Q. 17. How thick was the lamp-post at the top of the sidewalk? A. Six inches. Q. 18. Who was the owner of the premises in front of which the alleged accident is said to have occurred? A. L. F. Bird and others. Q. 19. Could the plaintiff have avoided the accident by the exercise of ordinary care? A. No, sir. Q. 20. Could the plaintiff have avoided the accident had he not been carrying a cradle upon his shoulders? A. No. Q. 21. Did

the plaintiff have his attention called to the hole in the sidewalk before he stepped into it? A. No; but his attention was called to it just as he was falling. Q. 22. Was the plaintiff looking where he was walking or in front of him at the time of the accident? A. Attention was directed ahead of him. Q. 23. Could the plaintiff, by looking in front of him when walking down the street, have avoided the accident? A. Had he been examining for holes, he might have. Q. 24. Was the hole through which plaintiff stepped covered by having a board nailed over it several days before the accident? A. No. Q. 25. If you find that the city had notice of the hole in the sidewalk, state how long it had said notice before the injury, and how was said notice given. A. Had notice for 12 to 18 months of said opening, and notice given to city clerk and street commissioner. Q. 26. Was the plaintiff's leg or thigh dislocated or fractured by the accident? A. We do not know. Q. 27. Was the plaintiff a confirmed cripple before the accident, and was his disability permanent? A. There was a deficiency in the lower limb, from the knee down, which caused a slight limp. Q. 28. If your answer to No. 27 is 'Yes,' state how long he has been such cripple. A. Since he was four years old. Q. 29. Before the accident occurred, how much shorter was plaintiff's left leg than his right, and how much smaller was his left leg below the knee than his right leg below the knee? A. His limb below the knee was half to an inch shorter; the leg below the knee was perceptibly shorter. Q. 30. At this time is the plaintiff suffering any pain from his thigh by reason of the accident? A. At times he is. Q. 31. If the answer to No. 30 is 'Yes,' state whether said suffering is continuous. A. No. Q. 32. If you find a verdict for the plaintiff, will you state how much you allow for pain and suffering, and how much for medical attendance, and how much for loss of time? A. For pain and suffering, \$3,700.00; for medical attendance, \$100.00; for loss of time, \$1,200.00.

[Signed] "A. J. GWYNN, Foreman."

A number of errors are assigned by counsel for the plaintiff in error, and we will consider them in their order:

1. The first claim is that it was error to show by the plaintiff below the length of time Commercial street had been used as a thoroughfare prior to the 13th day of August, 1884. We fail to see the force and effect of this objection. If the witness knew the fact, it was certainly competent to show it by oral evidence, and the evidence was competent.

2. The second error complained of is in admitting evidence, against the objection of the defendant below, as to the value of the plaintiff's services in his business. The question objected to was: "What were your services in the business you were engaged in worth per day?" The objection was that it was incompetent, irrelevant, and immaterial. We think it was perfectly competent to ask

the witness the question. He had a perfect right to show what his services were worth at the time he was injured. The answer the witness gave might have been objectionable, but no motion was made to strike it out. The rule is well settled that, if the answer was not responsive, the remedy was by motion to strike out. *Hynes v. Jungren*, 8 Kan. 391; *Brumbaugh v. Schmidt*, 9 Kan. 117; *Stone v. Bird*, 16 Kan. 488; *City of Wyandotte v. Gibson*, 25 Kan. 286.

3. The next assignment of error is that the court sustained an objection to a question propounded by counsel for the city to witness Frank McCain, on the ground that the same was not proper cross-examination. The question was as follows: "Was it not lighter than almost any other part of Commercial street?" There was nothing in the direct examination with reference to the light; in fact, the evidence showed that the witness was not present when the accident occurred, and could not well give a comparison of the degrees of light at different points on the sidewalk. We think it was not germane to the examination in chief, and there was no error in sustaining the objection. *Sumner v. Blair*, 9 Kan. 521; *Pratt v. Brockett*, 20 Kan. 201; *Maier v. Randolph*, 33 Kan. 340, 6 Pac. Rep. 625.

4. The next assignment of error is in permitting the plaintiff below to introduce a section of an ordinance of the city of Atchison. A reference to the record shows that the objection of the defendant below was sustained, and we do not see why counsel should complain. A word in passing will dispose of the further objection made, as to the bill presented to the city council. This was wholly immaterial, as the record shows that the claim for damages was presented to the city council, and disallowed.

5. A final objection is made to the introduction of the evidence of Dr. H. P. Grover. The question asked was: "What, in your opinion, was it reasonably worth, the service of the attending physician upon Mr. Rose, yourself, and Dr. Gough, during the sickness as the result of this injury?" The objection was that it was incompetent, irrelevant, and immaterial. The witness answered: "I don't think the charge of one hundred dollars out of the way." The evidences showed that Dr. Grover was a physician, living where the defendant in error resided; that he was familiar with the prices and fees of a physician; and we think the question and answer were proper and competent.

6. We pass to the next assignment of error made by the city in refusing certain instructions asked. The record discloses the fact that 20 special instructions were asked upon the part of the plaintiff below, and 27 upon the part of the city. The court refused all of the instructions asked upon the part of the plaintiff and defendant, and instructed the jury upon all matters arising upon the pleadings and evidence, and, we think, correctly. This court has commended the rule adopted

by the trial judge in this case, in the case of *Deitz v. Regnier*, 27 Kan. 109. Chief Justice HORTON, speaking for the court, says: "But if the law is fully declared to the jury by the court in a general charge, and such charge embraces all points arising in the case, the court is not bound to repeat its charge in the form of special instructions, or give the special instructions in the language asked for."

7. The last contention of the counsel for the city which we shall notice is that the evidence was insufficient to establish the permanent injury of the plaintiff below. There was considerable medical testimony to show the nature of the injury, some to the effect that the injury received, by the defendant's falling through the sidewalk, was permanent. Others testified that the defendant would improve, with proper treatment. There was evidence to support all the findings of the jury, and the general verdict is sustained by sufficient evidence, and we fail to find in the record any good reason why it should be disturbed. We therefore recommend that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered.

(43 Kan. 324)

WASHINGTON *et ux.* v. HOSP.

(Supreme Court of Kansas. March 8, 1890.)

TAX-SALES—REDEMPTION—NOTICE—TAX-DEEDS.

1. The notices of the time limited to redeem land sold for taxes by a publication and posting must be completed four months before the expiration of the time within which such land may be redeemed; and, if the notices are posted in the required places at least four months before such time, it will be deemed a completed notice by posting, and, if proper publication has been made, a sufficient compliance with section 187 of the tax-law.

2. A tax-deed regular on its face is *prima facie* evidence that the proceedings were regular, and that the redemption lists and notices were properly posted; and to overcome this *prima facie* showing, affirmative proof is necessary.

3. The presumption of law, in the absence of testimony, is that a public officer does his duty; and, where the affidavit of the county treasurer, attached to the redemption notices in his office, recites that the notices were posted at four different places in his county, one of which was in his office, it must be assumed, in the absence of other testimony, that the notices were posted in public places, and that one of them was posted in a conspicuous place in his office.

(Syllabus by the Court.)

Error from district court, Wyandotte county; O. L. MILLER, Judge.

N. Cree, for plaintiff in error. *Alden & McGrew*, for defendant in error.

JOHNSTON, J. This is a proceeding to reverse a judgment of the district court of Wyandotte county awarded in an action of ejectment wherein Leander Hosp sought a recovery of real estate from George and Alice Washington, and prevailed. Hosp held under a tax-deed regular upon its face; and the only attack made upon his title, or the tax proceedings on which it was founded, was that the redemption notice given was insuffi-

cient. According to the notice the time limited for redeeming the land in controversy was September 5, 1885; and, under the statute requiring notice to be given and completed four months before the expiration of the time of redemption, publication and posting of the notices must have been completed on May 5, 1885. The statutory provision which governs the giving of such notices, or so much of it as is necessary to quote, reads: "The county treasurer, at least four months before the expiration of the time limited for redeeming lands as aforesaid, shall cause to be published in some paper published in, or of general circulation in, his county, once a week, for four consecutive weeks, (the publication herein provided to be completed at least four months before the day of sale,) a list of all unredeemed land. * * * He shall also cause to be posted for the same length of time such list and notice in at least four public places in the county, one of which shall be in some conspicuous place in his office." Comp. Laws 1885, c. 107, § 137. The publication in the newspaper is conceded to be sufficient, and the notices were all posted prior to May 5, 1885, but three of them were not posted until May 2, 1885; and it is now claimed that all should have been posted four weeks preceding May 5, 1885. The contention is that the posting must correspond with the publication, and that the four-months notice of redemption cannot be given by posting unless the notices are posted four months and four weeks before the expiration of the time to redeem. This construction does not accord with our view. The provision requiring a posting "for the same length of time" refers to the period of four months which must intervene between the completion of notice and the time of redemption. The theory of the statute is that notice by both methods shall be given and completed at least four months before the time limited to redeem. The notice by publication is complete when it has been published in a newspaper of general circulation once a week for four consecutive weeks. The notice by posting is complete when lists and notices have been posted in four public places in the county, one of which shall be in some conspicuous place in the office of the county treasurer. It may be granted that the posting is as essential as the publication, and that the notice in each case must be "for the same length of time;" that is, both of the notices in the present case must have been completed on May 5, 1885. This was done, and we think the requirements of the statute were complied with.

Another objection to the notices is that the proof offered did not show that they were posted in public places, nor that one of them was posted in a conspicuous place in the county treasurer's office. The tax-deed under which Hosp claimed, and which he offered in evidence, being regular upon its face, was *prima facie* evidence of the regularity of the proceedings, and that the redemption lists

and notices were properly posted up. Having established his case, it devolved upon the Washingtons to prove that the notices were not posted as the law required. The only proof offered by them to sustain their claim was the affidavit of the county treasurer found in the record of the county, in which, among other things, he recited the time and places in his county where the notices were posted, and also stated that one of them was posted in his office. No testimony was offered to show that the places where the notices were posted were not public places, nor that the one posted in the office was not in a conspicuous place. More than that, the presumption of law, in the absence of testimony, is that the officer does his duty; and in this case we must assume, from the state of the record, that the county treasurer did that which was required of him. There was no proof offered to overthrow the *prima facie* case established by the defendant in error. *Stout v. Coates*, 35 Kan. 382, 11 Pac. Rep. 151. The judgment of the district court must be affirmed; all the justices concurring.

(43 Kan. 327)

BALL v. BIGGAM et al.

(Supreme Court of Kansas. March 8, 1890.)

JUSTICE OF THE PEACE—JURISDICTION—APPEAL.

1. The amount claimed in a plaintiff's bill of particulars fixes the jurisdiction of the justice of the peace, and if it be in excess of \$300, the justice has no jurisdiction of the action.

2. On appeal from a judgment of a justice of the peace, the jurisdiction of the district court is wholly and exclusively appellate.

3. Where the defendant takes an appeal from a judgment of a justice of the peace, and files no answer, set-off, or counter-claim, it is sufficient to raise the question whether the court has jurisdiction if he objects at the trial to the introduction of any evidence on behalf of plaintiffs for the reason the court has no jurisdiction of the subject-matter of the action.

(Syllabus by Holt, C.)

Commissioners' decision. Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

W. P. Douthitt and Bennett R. Wheeler, for plaintiff in error. *J. B. Johnson*, for defendants in error.

HOLT, C. This action was brought before a justice of the peace of Shawnee county by defendants in error, as plaintiffs, against the defendant. In their bill of particulars, which was filed on the 25th of September, 1884, they asked judgment for \$300, and interest from September 14, 1884. A judgment was rendered in favor of plaintiffs in the justice's court, but the amount thereof is not stated in the record. The defendant, Ball, appealed to the Shawnee district court, where the action was tried at the January term, 1887, by the court and a jury, and a verdict rendered in favor of plaintiffs for \$350.75. Afterwards the plaintiffs filed a *remittitur* of \$50.75 of the verdict, which was allowed by the court; and a motion for a

new trial, which had been filed, was overruled, and judgment entered against defendant for \$300, and costs, over his objections and exceptions. In his brief he presents a single question for our consideration, namely, whether the district court had jurisdiction over the subject-matter of the action. The defendant filed neither answer, set-off, nor counter-claim to the plaintiff's bill of particulars; but in the district court, after the jury had been impaneled, and a witness called for plaintiffs, he objected to the introduction of any evidence because the bill of particulars did not state facts sufficient to constitute a cause of action, and also for the reason that the court had no jurisdiction of the subject-matter of the action. The plaintiffs say that this objection came too late, and that all questions of jurisdiction had been waived by the defendant taking his appeal, and appearing for trial in the district court.

The first question that confronts us is whether the justice of the peace had jurisdiction of the subject-matter in controversy. Section 2, c. 81, Comp. Laws 1885, ("Procedure Civil, before Justices,") provides: "Under the limitations and restrictions herein provided, justices of the peace shall have original jurisdiction of civil actions—*First*, for the recovery of money only, and to try and determine the same, where the amount claimed does not exceed three hundred dollars." This section fixes the jurisdiction of the justice upon the amount claimed. In this action the amount claimed over \$300 was but a fraction of a dollar, but if we could extend it 60 cents we might extend it \$60. The language of the statute is imperative. It lays down an arbitrary rule. The line is drawn exactly at \$300, and the courts have no authority to change or enlarge it. *Wagstaff v. Challiss*, 31 Kan. 212, 1 Pac. Rep. 631; *Wilson v. Sparkman*, 17 Fla. 871; *Caloway v. Byram*, 95 Ind. 423; *Elderkin v. Spurbeck*, 2 Pin. 129. The plaintiffs concede that ordinarily the jurisdiction that the district court obtains by virtue of an appeal is simply that of the justice court; but they claim that, because the defendant appealed, and sought the district court as the forum in which to try the action, he has waived this rule. The jurisdiction of the district court is exclusively and wholly appellate. Its original jurisdiction is not invoked at all. If the justice court was without jurisdiction, it follows that the district court was also without jurisdiction. If the court had no jurisdiction over the subject-matter of the controversy, objection could be made at any time during the trial in the district court. The judgment before the justice, being *coram non judice*, was void, and could have been enjoined in an attempt to collect the same by execution. Perhaps this method was as speedy and inexpensive as any for contesting in the courts the question whether the judgment of the justice of the peace was void. Certainly, it was one of the methods open to the defendant.

This decision makes no novel application of the law. In *Cooban v. Bryant*, 36 Wis. 605, the plaintiff obtained a judgment against the defendant, who appealed; and the supreme court, reversing the judgment of the trial court, held, if the justice court had no jurisdiction, the trial court acquired none by the appeal, and remanded the case with directions to dismiss the action. This was substantially the rule in *Dillard v. Railroad Co.*, 58 Mo. 69, and in *Taylor v. Smith*, 64 Ill. 445. *Shuster v. Finan*, 19 Kan. 115, and *Miller v. Bogart*, Id. 117, are not in conflict with this case. In *Shuster v. Finan*, there was an agreement of the parties, entered into in writing, to transfer the case to the district court, and no appeal was taken. In *Miller v. Bogart*, the justice of the peace had jurisdiction originally of the case, and the question of jurisdiction was raised in that case upon an entirely different case than the one raised in this. It was also held in the latter case that no objection was made during the term the action was tried, and when the objection was made it came too late.

The taking of an appeal would waive any question of jurisdiction of the person, and all irregularities in the appeal; but there was no waiver of the jurisdiction of the court of the subject-matter by defendant appealing. His objection to the jurisdiction made in the district court was in time, and in the proper manner, and should have been sustained, and the action dismissed. We recommend that the case be reversed and remanded, with directions to dismiss the action.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 314)

BRADLEY et al. v. HARWI et al.

(Supreme Court of Kansas. March 8, 1890.)

PAYMENT—PROMISSORY NOTE—BURDEN OF PROOF.

The giving of a promissory note for an antecedent debt is *prima facie* not a payment or extinguishment of the debt, and will not be so regarded unless that is the express agreement of the parties; and, where a party alleges as a defense that the note was accepted as payment, the burden of proof rests upon him to show that such was the purpose and agreement of the parties.

(Syllabus by the Court.)

Error from district court, Graham county; LOUIS K. PRATT, Judge.

C. W. Smith and W. B. Ham, for plaintiff in error. H. J. Harwi, for defendants in error.

JOHNSTON, J. This was an action brought in the district court of Graham county by Bradley, Wheeler & Co. against Harwi & Lank and H. J. Harwi, to recover the purchase price of a stock of goods sold by them to one W. H. Reasoner on December 16, 1886. The plaintiff alleged, among other things, that the company sold the stock of goods on credit to Reasoner at the time mentioned, and that in March, 1887, he sold the greater part of the goods to Harwi & Lank under a contract

with them by which they were to pay the purchase price of the goods to Bradley, Wheeler & Co., as agreed upon between the plaintiff and Reasoner. The answer of the defendants admitted purchasing the goods from Reasoner, but they alleged that they had paid the full value of the same to Reasoner. They denied that they ever assumed the indebtedness of Reasoner to plaintiff on the goods, and for a further defense alleged "that, subsequent to the said sale and delivery of the goods aforesaid by the said Reasoner to these defendants, the said Reasoner has paid off and discharged the account sued on in this action by note accepted and taken as payment and extinguishment of said debt accrued." In the plaintiff's reply the allegations of defendants' answer were denied. A trial of the cause was had, with a jury, upon the issues thus presented, and in charging the jury the following instruction was given: "The defendants deny any liability to plaintiffs upon the causes of action set up in the petition, and claim that they bought a part of the implements referred to in the petition from said Reasoner, and paid him for them. They also claim that plaintiffs settled the claim sued on with said Reasoner, by taking his notes therefor in full settlement of said claim, after the purchase and delivery of a part of said implements by them from Reasoner. If the evidence offered by defendants is equally or more convincing to you than the testimony to the contrary is, that either or both of said claims as made by defendants are true, then your verdict should be for defendants." An exception was taken to this instruction, and the giving of the same is the only ground of error assigned for reversal.

It devolved upon the plaintiff to establish the allegation that there had been an assumption of the indebtedness by the defendants, but in the latter part of the instruction the burden of proof is placed upon the plaintiff in regard to whether the note was taken from Reasoner as a payment and an extinguishment of the original indebtedness. In this respect the charge was erroneous. It is now well settled that the giving of a promissory note to meet an antecedent debt is not a payment or an extinguishment of the debt for which it is given, unless that is the express agreement of the parties. Without such an agreement, the original debt would *prima facie* continue to exist, and the promissory note given would be regarded merely as an evidence of indebtedness. The one who alleges that there was such an agreement, or that the note was accepted in satisfaction of the pre-existing debt, takes upon himself the burden of proving it. The defendants, having set up this defense, and alleged that the debt had been extinguished by the execution of the promissory note, must prove the allegation by a preponderance of the testimony. The theory upon which the case was submitted to the jury required the plaintiff to prove the non-existence of an agreement that the

note was taken in discharge of the debt, while under the authorities such note is *prima facie* not a payment or discharge of such indebtedness. *Kermeyer v. Newby*, 14 Kan. 164; *McCoy v. Hazlett*, Id. 430; *Shepard v. Allen*, 16 Kan. 182; *Medberry v. Soper*, 17 Kan. 369; *Mullins v. Brown*, 32 Kan. 312, 4 Pac. Rep. 305; *Bank v. Newton*, 14 Pac. Rep. 492; 1 Amer. & Eng. Cyclop. Law, 102, and cases cited. For the error above mentioned the judgment must be reversed, and a new trial granted; all the justices concurring.

(43 Kan. 318)

LIMERICK et al. v. MURLATT.

(Supreme Court of Kansas. March 8, 1890.)

JUSTICE OF THE PEACE—DISQUALIFICATION—INTEREST.

1. At common law, it is a misdemeanor for a justice of the peace to act as agent for one of the parties litigating before him.

2. A justice of the peace was given a large block of notes by a plaintiff, under an agreement with him that actions were to be brought upon the notes before the justice, if they could not be collected by the justice without suit. The agreement further provided that if, in the actions commenced before him upon the notes, "the justice was able to make his costs out of the defendants, he was to do so; but, if he could not make his costs out of the defendants, he was not to get his own costs." Held, that the agreement between the justice and the plaintiff made the justice an interested party in the result of the actions, and therefore disqualified him to act as justice of the peace in the case.

3. Held, further, that a justice of the peace to whom an action upon one of the notes was transferred on change of venue from the justice originally issuing the summons, and also that the district court to which the plaintiff appealed, properly sustained motions to dismiss all prior proceedings because the action was commenced before a justice who was interested in the case, and therefore disqualified.

(Syllabus by the Court.)

Error from district court, McPherson county; FRANK DOSTER, Judge.

Frank G. White, for plaintiffs in error.
Simpson, Bowker & Travis, for defendant in error.

HORTON, C. J. The facts in this case are as follows: On May 22, 1883, Henry Murlatt executed his promissory note, payable on October 1, 1883, to the order of the Burlington Insurance Company, for \$28.65. The note was subsequently assigned in writing to John F. Limerick & Co. On the 19th of August, 1887, the note being in the possession of C. M. Bruce, a justice of the peace of the city of McPherson, a summons was issued thereon by him, and delivered to A. J. Brown, a constable, for service. The summons was served. At the commencement of the action a bond for costs was filed and approved by the justice. On the 29th of August, 1887, at the time for the return of the summons, Murlatt filed an affidavit for a change of venue from C. M. Bruce, the justice of the peace, on account of prejudice. The application was granted, and the justice transmitted all of the papers to B. F. Short, another justice of the peace of the city of McPherson. On the

5th of September, 1887, the case came on to be heard; and Murlatt presented a motion to dismiss the case upon the ground that C. M. Bruce, before whom the action was commenced, was at the time the agent of John F. Limerick & Co. for the collection of the note, and also for the reason that no valid bond for costs had ever been executed or filed,—Limerick & Co. being non-residents. The motion to dismiss was sustained by the justice of the peace to whom the case had been transferred, and Limerick & Co. appealed to the district court. A motion was made to dismiss the case in the district court for the same reasons that were presented to the justice of the peace. The district court sustained the motion, and entered a dismissal, with costs against Limerick & Co. It appears from the record that C. M. Bruce, prior to the commencement of this action before him, was given a large block of notes by Limerick & Co., under an agreement that actions were to be brought thereon before him if the notes could not be collected by the justice without suit. The note in dispute is one of the notes received by C. M. Bruce under this arrangement. It is also shown, we think, that the bond for cost was signed in blank by the parties whose names are attached thereto. The justice filled up the bond in the absence of the parties and the sureties, and then filed and approved the same.

We think, upon the facts disclosed by the record, that the judgment of the district court must be affirmed. A. R. Brown, the constable, testified, among other things, as follows: "Question. Now, to refresh your memory, Mr. Brown, I ask you if this clause wasn't inserted in this contract, that Mr. Bruce should take these notes, and sue upon them, and, in case he was able to make his costs out of the defendants, he was to do so; and, if he couldn't make costs out of the defendants, he was not to get his own costs? Answer. That was my understanding. I don't know whether it was in there. Q. How did you get that understanding? A. It was talked there. Q. I will ask you if you were a party yourself to that contract, as constable? A. I was to a part of the contract; I was the party to serve the papers that were issued to me, and I was to serve them on the same terms that the justice of the peace was to issue them. Q. What were the terms you were to serve them on? A. I was to serve them on the terms, if we got the costs out of the defendants, I was to get my costs, and, if I didn't, I wasn't." C. M. Bruce denied that the agreement was as Brown stated. He, however, admitted that a written agreement was entered into between him and Limerick & Co., but said the paper was lost, and could not be produced. The presumptions are all in favor of the rulings of the trial court; and, where the testimony in a case is in any way conflicting, it must be construed, if possible, to sustain the court. We must, therefore, under the gen-

eral finding of the trial court, accept the testimony of A. R. Brown as true.

Under the agreement entered into between C. M. Bruce, the justice of the peace, and Limerick & Co., Bruce was interested in the action commenced before him. If he could not recover his costs from Murlatt, the payee, he was not to receive any costs. This, of course, was an inducement for him to render judgment against Murlatt in order to obtain his costs, whether Murlatt was liable or not upon the note. In one sense, the agreement was in the nature of bribery. It was very much as if Bruce was to receive money from Limerick & Co. if he would render judgment against Murlatt, the maker of the note. "It occasionally happens that, while a court has jurisdiction over the subject-matter in controversy, and the parties to the action, the judge of the court is disqualified from acting by reason of his having an interest in the suit, or his being related to some of the parties, or his being within some of the disqualifications recognized by the common or by the statute law. It is a maxim of every country that no man should be judge in his own case. The learned wisdom of enlightened nations, and the unlettered ideas of ruder societies, are in full accordance upon this point; and, wherever tribunals of justice have existed, all men have agreed that a judge shall never have the power to decide where he is himself a party. In England it has always been held that, however comprehensive may be the terms by which jurisdiction is conferred upon a judge, the power to decide his own cause is always a tacit exception to the authority of his office." *Freem. Judgm.* § 144. In the case of *Hesketh v. Braddock*, 3 Burrows, 1847, a judgment of the portmote court of the city of Chester was reversed by the great sessions for the county of Chester, and the reversal affirmed by the court of king's bench, because the person who tried the cause, and the officer who returned them, were interested in the cause. In *Dyer v. Smith*, 12 Conn. 384, it is said: "The court instructed the jury that if the defendant, when he issued the writ and rendered judgment, was the owner of the note on which the suit was brought, and, knowing himself to be such owner, instituted the suit, and rendered the judgment, for the purpose of collecting his own debt, he was liable in this action for having caused the plaintiff to be arrested and committed to jail. The law thus laid down by the court is founded upon the clearest principles of the common law, and of natural justice. It would be a reproach to the law to allow a man to be a judge in his own case. It is said to be 'one of the great ends of the institution of civil society to prevent men from being judges in cases wherein they are concerned, and to remit the decision of adverse interests to those who can have no interest whatever in the determination of any such cases.' *The Two Friends*, 1 C. Rob. (Amer. Ed.) 282; *Mayor of Hertford's Case*,

1 Salk. 396." At common law it is a high misdemeanor for a justice of the peace to act as agent for one of the parties litigating before him. *Boyer v. Potts*, 14 Serg. & R. 157. So, where a justice of the peace, who was a surveyor of the highways, joined in making an order at the session in a matter which concerned his office, and his name was put in the caption, the order was for this reason quashed. *Case of Foxham Tithing*, 2 Salk. 607. It is said in *Boyer v. Potts*, supra: "Justices of the peace, no doubt, frequently act as agents for those who employ them; but they ought to know that they do so at the peril of being convicted of a highly aggravated misdemeanor, which is indictable at the common law. Ignorance cannot palliate a crime of this sort, for the turpitude of acting both as a judge and party in the same cause cannot but be obvious to the dullest comprehension." It is the right of every citizen of the state to have a fair and impartial trial. This right applies to civil as well as criminal causes, and not only to judges of courts of record, but also to justices of the peace, and all other persons authorized to decide between parties in respect to their legal rights.

In this case, C. M. Bruce not only issued the summons in a case in which he was interested, but he also filed and approved a bond for costs. Therefore, in a case in which he was interested, he passed upon the form of the bond, and the sufficiency of the sureties thereto. As Bruce was interested, and as he was not and could not be impartial, he was disqualified to act in the case. The appearance of Murlatt to take a change of venue on account of prejudice did not waive the disqualification of C. M. Bruce, or confer upon him jurisdiction. As soon as the cause was in the possession of a justice competent to hear and dispose of motions, Murlatt filed a motion to dismiss. This motion was sustained, and in the district court a similar motion was sustained. Therefore the case does not come here as if judgment had been rendered, and then collaterally attacked. The motions to dismiss were in the nature of direct attacks upon the prior proceedings. Exceptions were taken to Bruce acting as a justice of the peace as soon as Murlatt had the case before a justice who was disinterested. Murlatt consented to nothing which aided or helped Limerick & Co. Limerick & Co. are not innocent parties; they are wrong-doers. By their agreement with Bruce, the justice of the peace, they placed before him a temptation—an inducement—to render a judgment corruptly. Such an agreement between the parties was not only improper, but illegal. The conduct of Limerick & Co. deserves severe censure, not support or toleration. *State v. Cross*, 38 Kan. 696, 17 Pac. Rep. 190; *Sigourney v. Sibley*, 21 Pick. 101; *Hall v. Thayer*, 105 Mass. 219. The judgment of the district court will be affirmed; all the justices concurring.

(43 Kan. 292)

SHERMAN CENTER TOWN Co. v. SWIGART.

(Supreme Court of Kansas. March 8, 1890.)

CORPORATIONS—CONTRACTS—AUTHORITY OF OFFICERS.

1. Where the president and secretary of a corporation execute a contract in behalf of the company, which is regular on its face, and not shown to be outside of the regular business of the corporation, it is *prima facie* evidence that it was executed with authority; and those who deny the authority take upon themselves the burden of establishing their claim.

2. Where the president and secretary of a corporation act openly and publicly as its agents in making contracts, and generally in managing its business, with the understanding and acquiescence of the directors that they shall so act, the corporation will not be relieved from liability upon contracts so made, upon the mere ground that the directors failed to formally confer authority on these officers by vote or resolution entered on the records of the corporation.

(Syllabus by the Court.)

Error from district court, Sherman county;
LOUIS K. PRATT, Judge.

J. H. Sterling, for plaintiff in error. Bagley & Andrews, for defendant in error.

JOHNSTON, J. William B. Swigart brought this action against the Sherman Center Town Company, to recover damages for the breach of a contract by which the company bound itself to remove a building, with a stock of goods which was therein, from Itasca to Sherman Center, and there place the building, upon lots which the company agreed to convey to Swigart, in good condition, over a cellar and foundation similar to that upon which it stood in Itasca. The cause was tried without a jury, and a general finding made by the court that Swigart was entitled to recover from the town company \$250, and upon this judgment was entered. Some argument is made that the making of the contract was not within the chartered powers of the company, but this question is not raised by the pleadings, and there is nothing in the record which discloses what the authorized purposes of the company are.

The principal contention is that the contract was entered into without authority from the directors of the company. There is sufficient evidence, we think, to sustain the general finding, holding the company liable on the contract. It was executed in due form by the president and secretary of the company, and, being regular upon its face, and executed by the duly-constituted officers of the corporation, it is *prima facie* evidence that it was executed with authority; and those who deny the authority take upon themselves the burden of establishing their claim. The company has received the benefits of the contract, and no question regarding the authority of the officers was raised until about the time this action was brought. The board of directors consisted of seven members, a majority of whom resided in Sherman Center, and were fully cognizant that the president and secretary were acting for the company, and had made this and

many other similar contracts in behalf of the company. Some claim is made that no authority had been formally conferred upon them to represent the company, and that the rules governing the corporation did not warrant them in the exercise of the powers which they assumed to exercise; but there is no competent proof what the charter and by-laws of the corporation provided, nor was the record of the official proceedings of the board of directors offered in evidence. Express authority by resolution, directing the president and secretary to represent the company, and execute the contracts, is not indispensable to the exercise of that power by these officers, as their authority may be implied from their conduct and acquiescence of the directors. The general understanding among the directors was that the president and secretary should act for the company in making contracts, and in managing the business affairs of the corporation. They acted openly and publicly as the agents of the company, with the full knowledge and acquiescence of the directors. The president of the corporation testified that there was no vote or resolution formally entered authorizing them to make contracts and manage the affairs of the corporation, and that the reason that a meeting was not called for that purpose was that they had been advised by their attorney that that procedure was unnecessary to the exercise of such authority. While he says that no official record was made of their authority, it was understood among them that the president and secretary should do the business of the company. We think the legitimate inference to be drawn from the testimony is that they were legally authorized to act for the company, and that it should not escape liability upon its contracts on the mere ground that the authority was not expressly conferred by resolution entered upon the records of the corporation. *University v. Martin*, 39 Kan. 750, 18 Pac. Rep. 941; *Giles v. Ortman*, 11 Kan. 59; *Durham v. Coal Co.*, 22 Kan. 282.

The refusal to continue the cause is assigned as error, but a sufficient showing of diligence to obtain the testimony of the absent witness was not made, and the court certainly did not abuse its discretion in denying the application.

The other objections are not of sufficient importance to require notice. Judgment affirmed; all the justices concurring.

(43 Kan. 282)

SHERMAN CENTER TOWN Co. v. MORRIS.

(Supreme Court of Kansas. March 8, 1890.)

CORPORATIONS—CONTRACTS—ULTRA VIRES—ESTOPPEL.

1. A corporation which has enjoyed the benefits of a contract cannot plead that it was *ultra vires*, where no fraud is intended or has been committed.

2. A provision in a charter of a private business corporation, that "the indebtedness of the company shall not exceed \$500 at any one time," must be regarded as merely a by-law, and there-

fore directory only. Such a provision will not annul a contract of which the corporation has enjoyed the benefit.

(Syllabus by the Court.)

Error from district court, Sherman county; LOUIS K. PRATT, Judge.

J. H. Sterling, for plaintiff in error. J. W. Lewis, for defendant in error.

HORTON, C. J. J. R. Morris recovered a judgment against the Sherman Center Town Company for \$1,304.85, with interest and costs. This judgment is complained of by the town company. The principal grounds of defense are that the written contract was not authorized by the board of directors of the town company, and also that it is *ultra vires*. The company is a corporation, organized under the laws of the state for "the purchase of lands, the surveying and platting of town-sites, selling lots and other lands." The charter also provides that "the indebtedness of the company shall not exceed \$500 at any time." The number of directors of the company were seven, and at the time of the execution of the contract D. G. Clark was the president, and Samuel J. Gandy the secretary. The contract related to the purchase of a stock of general merchandise, valued at \$1,904.22. It was executed in the name of the company, signed by its president and secretary, with the seal of the company attached. Before this action was brought, the contract had been fully complied with on the part of the seller, and all the purchase price paid but \$1,304.22, the balance sued for. The case was tried before the court without a jury, and a general finding made in favor of Morris against the town company.

The rule is that a corporation has no powers except such as are granted or necessarily implied by its charter. If we could ascertain from the testimony that the town company had not received the benefit or proceeds of the merchandise purchased by its president and secretary, we would have no hesitation in saying that the plaintiff below was not entitled to recover. It does not appear from the charter that the corporation had any authority or power to engage in buying and selling general merchandise. It appears, however, from the testimony, that at the time the contract was executed the stock of merchandise was at Voltaire, in Sherman county. After the contract was executed, and a part of the purchase money paid, the merchandise was removed from Voltaire to Sherman Center, where the business of the town company was carried on, and where a majority of the directors of the company reside. There is testimony tending to show that the company sold the merchandise, and appropriated its proceeds to its own use and benefit. The town company did not show, or offer to show, that the president and secretary of the company purchased or received the merchandise for their own use and benefit or that they applied the proceeds to their own use and benefit. The general rule is that where a

contract executed by a corporation is *ultra vires*, and the corporation receives the money or property paid upon such contract, the money or the value of the property may be recovered, to prevent injury resulting from the application of *ultra vires* upon a corporate contract, if no fraud is intended or has been committed. "After a corporation has enjoyed the benefit of a contract or other arrangement made in good faith with any of its regular agents, it is but fair that every reasonable presumption should be made in order to hold the transaction binding upon the company. Under these circumstances, the acquiescence of the shareholders may often be presumed." 2 Mor. Priv. Corp. § 632. While an executory contract made by a corporation without authority cannot be enforced, yet, where the contract has been executed, and the corporation has received the benefit of it, the law interposes an estoppel, and will not permit the validity of the contract to be questioned. *Durham v. Mining Co.*, 22 Kan. 232; *Kennedy v. Bank*, 7 Neb. 59; *Rich v. Bank*, Id. 201; *University v. Martin*, 39 Kan. 750, 18 Pac. Rep. 941; *White v. Bank*, 22 Pick. 181; *Allegheny City v. McClurken*, 14 Pa. St. 81. Where a contract results to the benefit of a corporation, very slight evidence of acquiescence or application will be sufficient to give it validity. *Getty v. Milling Co.*, 40 Kan. 281, 237, 19 Pac. Rep. 617.

We think that the limitation of \$500 in the charter of the corporation cannot be regarded of any more force than a by-law. The statute of the state provides that the charter of an ordinary private corporation shall set forth the amount of its capital stock, but does not require its indebtedness shall have other limit. The limitation, therefore, of \$500 is for the direction of the officers and agents of the corporation, and may be considered directory only. It does not annul the contract. "Where the corporation has had the benefit of an act performed by an agent in disregard of a mere formality, slight evidence will usually be sufficient to establish ratification by the shareholders, or an estoppel by reason of laches." 2 Mor. Priv. Corp. § 634; *Ang. & A. Corp.* § 264; *Bates v. Bank*, 2 Ala. 462; *Bond v. Bank*, 2 Ga. 92.

The other alleged errors are not sufficiently material or important to comment upon. The judgment of the district court will be affirmed; all the justices concurring.

(43 Kan. 250)

STATE v. BLAKESLEY.

(Supreme Court of Kansas. March 8, 1890.)

LARCENY—RECEIVING STOLEN GOODS—WITNESS.

1. Counts for grand larceny and for unlawfully and feloniously receiving the stolen property, described in the count for larceny, may be properly joined in the same information or indictment.

2. Where a witness for the prosecution in a criminal cause, upon re-examination, in explaining collateral matters drawn out upon his cross-examination, implicates the defendant in another offense than the one charged against him, and no objection is taken at the time to his statements,

such answers, affecting collateral matters only, cannot afterwards be contradicted by the witnesses for the defendant.

3. An examination of the record in this case shows that the evidence is greatly conflicting, but it cannot be said that the verdict is not supported by sufficient evidence.

(*Syllabus by the Court.*)

Appeal from district court, Saline county;
R. F. THOMPSON, Judge.

Lowitt & Norris, for appellant. *L. B. Kellogg*, Atty. Gen., and *E. W. Blair*, for the State.

HORTON, C. J. On the 12th day of February, 1889, P. L. Gebhart made complaint before R. H. Bishop, a justice of the peace of the city of Salina, charging James Blakesly with stealing, taking, and carrying away a gate, a water-tank, and 20 pieces of lumber, all of the value of \$32. A warrant was issued by the justice, and the defendant was arrested, and had his preliminary examination for the offence of larceny. He was bound over to appear at the next term of the district court to answer the charge. On March 4, 1889, the county attorney of Saline county, filed an information in the district court of that county, charging Blakesly with stealing, taking, and carrying away one gate, of the value of \$7; one water tank, of the value of \$8.60; and 20 pieces of pine timber, of the value of \$12, the goods and chattels of Davis, Briggs, and Gebhart. On the 18th day of March, 1889, the information was amended by adding an additional count thereto, charging the defendant with unlawfully and feloniously buying, receiving, and taking into his possession the gate, water-tank, and lumber described in the first count. Blakesly was tried March 28, 1889. He was acquitted of the charge of larceny, but convicted of buying, receiving and taking into his possession the property described in the information. He was adjudged to pay a fine of \$100, and also all the costs of the prosecution, and was ordered to be committed to the county jail until the fine and costs were paid. He appeals to this court.

1. It is claimed that the trial court committed material error in requiring the defendant to go to trial on the charge of buying, receiving, and taking into his possession stolen property, without his first having had a preliminary examination therefor. This question was raised on motion only, and not by a plea in abatement. It is not properly before us for determination. "It is not necessary that the information itself should show that a preliminary examination had been first had before the filing of the information, nor that the information itself should show a legal cause for filing the same without such preliminary examination; and an information otherwise good, filed without such showing, will be held good on a motion to quash or on a motion in arrest of judgment." *State v. Finley*, 6 Kan. 366. Even, however, if the motion to quash the information were treated as a plea in abatement, as

the defendant was convicted of a misdemeanor only, and not a felony, he cannot urge as a ground for a new trial, or in arrest of judgment, that he did not have a proper preliminary examination. In *State v. Watson*, 30 Kan. 281, 1 Pac. Rep. 470, the syllabus reads: "Where a defendant is prosecuted for a felony which includes a misdemeanor of the kind above mentioned, and no proper preliminary examination has been had for either the felony or the misdemeanor, and the defendant files a plea in abatement because of such want of preliminary examination, and the court overrules the same, and the defendant is afterwards tried and found guilty of the misdemeanor only, and is sentenced therefor, held, that no material error was committed."

2. It is next claimed that the court committed error in not requiring the state to elect on which count of the information it would go to trial, for the reason that the two counts stated separate and distinct offenses. The point is not tenable. Counts for grand larceny, and for receiving stolen property, may be properly joined. *State v. Daubert*, 42 Mo. 242; *Gandolpho v. State*, 33 Ind. 439.

3. It is further claimed that the court committed error in allowing a witness to testify that railroad ties and timber which the witness thought belonged to the Union Pacific Railway Company were found upon the premises of the defendant, thereby attempting to show that the defendant had bought or received other stolen property. This evidence was wholly incompetent, and ought not to have been received by the court, but, as the court withdrew the evidence from the consideration of the jury, the defendant has no material ground for complaint. *State v. Fooks*, 29 Kan. 425; *State v. Furbeck*, Id. 535; *Whittaker v. Voorhees*, 38 Kan. 71, 15 Pac. Rep. 874. Charles Williams gave similar evidence, but the record shows that one exception only was taken to what he testified to about railroad ties and timber. The exception occurred in the following extract from his evidence: "Question. While you were at Blakesly's, did you see any railroad ties about his place? Answer. I did, sir. Q. Where did you see them? (Objected to as incompetent, irrelevant, and immaterial. Objection overruled, and defendant excepted.) A. I saw them on the north side of his field, in a straw-stack." Blakesly then proceeded to tell in detail all about the railroad ties and timber, without other objection or exception, and no motion was made to strike out his answers, or to instruct the jury to disregard the same. Under these circumstances, the defendant is in no condition to complain of the testimony of Williams.

4. It is also claimed that the court should have ruled out the answers of Charles Williams, wherein he attempted to implicate Blakesly in a matter for which he had been arrested. In order to fully understand the point presented, it is necessary to quote from the testimony. Williams was a witness in

troduced upon the part of the prosecution. To affect his credibility, the counsel for the defendant asked him, on cross-examination: Question. What are you charged with now you are in jail? Answer. I am charged now with taking a plow, a spool of wire, and a scythe from Skelton's place; that is what I am charged with now." Upon re-examination of this witness, the counsel for the prosecution asked him: "Question. How about this plow and wire business? Was you arrested the same day you was charged with it? Answer. No, sir; it was like this: I was working for the defendant, breaking colts, herding, stretching wire, setting posts, and digging holes; that was my business,—everything. Q. Go on. A. I was working for Mr. Blakesly. He had been away that day, and there was no one there except myself. I was herding, watering, and tending to his hogs, and doing other work there. He came home about three-quarters of an hour by sun, and said: 'Have you driven the colts to-day;' and I said 'No,' that I had not time; that there was no one to attend to the things but me. He says: 'Those colts must be driven out every day, after the chores are done; drive them every day.' He says: 'You can drive them as far as Brookville, but drive them moderately, and in coming back, come back by Skelton's place. I have bought a spool of wire there and a scythe, and bring them and a plow along back with you;' and I did so. About forty rods from the house, Mr. King and his boy, a disinterested party to me, came out, and says: 'Stop that.' Q. Is that the plow and spool of wire that you got that evening,—is that what you are charged with stealing? A. Yes, sir."

No objection was made to the last questions or answers. No motion was made to strike out the answers, or to withdraw them from the consideration of the jury; therefore the court committed no error in receiving them, as no exception was taken at the time. Subsequently the counsel for the defendant attempted to introduce evidence to contradict these answers. Where a witness makes statements as to collateral matters upon cross-examination, or upon re-examination without objection, his answers cannot be contradicted by other witnesses. Therefore the court properly rejected the impeaching testimony as to collateral issues. To prevent the evidence of Williams upon collateral matters from affecting prejudicially the defendant, the court gave the following instruction: "The jury are instructed that the explanation given by the witness Charles Williams, as to how he came to be in possession of the property he is charged with having stolen, is to be considered by you solely as affecting his credibility as a witness, and must not be considered in reference to or in any way affecting the defendant in this case."

5. It is finally claimed that the verdict in the case is not supported by sufficient evidence. The testimony of the prosecution established that the property described in the

information had been recently stolen from the parties therein named, and that soon thereafter it was found upon the premises, and in the possession of the defendant. The testimony of the defendant tended to show that Charles Williams, a witness for the prosecution, stole the property which was found at defendant's place; that Williams claimed to own the property; that he got it from a man by the name of Thompson, for whom he had worked; that defendant never at any time laid any claim to it, or any part of it; and that the property was left in a public place, and exposed in the most public manner. It is well established that the verdict of a jury will not be disturbed if there is sufficient testimony to sustain it. We cannot see, from the record before us, that there is any failure of evidence. It is evident that the jury did not believe all the witnesses offered by the defendant. The trial judge, who had the opportunity of seeing all the witnesses and hearing them testify, declared, by his judgment and sentence, that he thought the jury ought to have believed the testimony of the prosecution. It is the province of the jury to settle all questions of fact, and when their verdict is sustained by the testimony, and upheld by the judgment of the trial court, we ought not to interfere. The judgment of the district court will be affirmed. All the justices concurring.

(43 Kan. 299)

STATE v. OVERSTREET.

(Supreme Court of Kansas. March 8, 1890.)

ABDUCTION — CONCUBINAGE — INDICTMENT — EVIDENCE.

1. An information, otherwise good, charging E. O. with the abduction of a female under the age of 18 years, from her parents, for the purpose of concubinage, is not vitiated by the addition of the words "for the purpose of having sexual intercourse with him, the said E. O."

2. Where the evidence establishes that the defendant, a married man, and a girl of the age of 16, occupied a club-room together, being the only persons in the building, going there about midnight, and remaining until nearly daylight the next morning, and that before and since that time he had been paying assiduous attentions to the girl, giving her presents, taking walks with her, and meeting her alone, and at his own house, when his wife was away, and that he wrote letters to her, all without the consent of her parents, it is sufficient to sustain a verdict under a charge of abducting a female under the age of 18 years for the purpose of concubinage.

3. Letters without date or signature, but shown to have been in the handwriting of the defendant, and bearing evidence within themselves, and by comparison with other letters actually received by the girl seduced, that they were intended for the said girl, and were written when he was criminally intimate with her, are admissible in evidence against the defendant, although there was no positive proof that they had been actually received by the girl.

(Syllabus by Holt, C.)

Commissioners' decision. Appeal from district court, Ellis county; S. J. OSBORN, Judge.

The defendant was charged in an information which, omitting the formal parts, was

as follows: "One Edgar Overstreet did then and there, feloniously, one Artie Toms, a female under the age of eighteen years, to-wit, of the age of sixteen years, take away from A. R. Toms, her father, and M. E. Toms, her mother, they, the said A. R. Toms and M. E. Toms, then and there having the legal charge of the said Artie Toms, without the consent, and against the will, of the said A. R. Toms and M. E. Toms, for the purpose of concubinage, by having sexual intercourse with him, the said Edgar Overstreet." At the September, 1889, term of the Ellis district court, he was tried, found guilty, and sentenced to imprisonment in the penitentiary for the term of three years. From that judgment he appeals. The testimony introduced at the trial showed that Artie Toms, a girl 16 years old, September, 1888, was living with her parents in Ellis county, and that the defendant was a near neighbor, a married man, and father of two children: that there had been an intimacy between Artie and defendant since midsummer, 1888. The most direct and positive testimony of any flagrant act was in reference to the night of the 17th and 18th of January, 1889, when Artie spent part of the night with the defendant, alone, in a gambling or club room above a billiard hall near her father's dwelling. The first part of that night she stayed with a Mrs. Doige, who, with her husband, occupied one part of her father's residence. About midnight, Mr. Doige came home from this club-room. When he entered the house, the girl arose, went out of doors, and into this club-room, with the defendant. Her father and mother were aroused. Her father, following, and ascertaining where the girl was, tried to obtain the key of the man who had rented the room; but, being unable to get it, he watched the place until nearly 6 o'clock the next morning, when the defendant unlocked the door at the foot of the stairway leading to this room, and let the girl out, who went home, and he, relocking the door, went up stairs again. Shortly afterwards, Mr. Toms went away for a few minutes, leaving some one else to watch the door. While Mr. Toms was away the defendant came down, opened the door, and passed out by a back alley. Overstreet had been very attentive to Artie for several months prior to January 18th. He had given her a number of presents,—a guitar, breastpin, rings, ear-rings, books, and music,—and had also taught her to play on the guitar. He had been in the habit of walking by the house, or standing opposite to Artie's window, communicating with her by means of signs upon his fingers, supposed to be the deaf and dumb alphabet. When he commenced going with her the girl was an obedient and dutiful daughter, and was attending the public schools, but she became disobedient,—left school; and, when she was sent away to another town, Overstreet wrote for her, and she came back. He had been remonstrated with by Artie's mother and her two sisters, and at

one time agreed to cease going with the girl, but did not keep his promise. There is quite a volume of testimony showing the opposition of Artie's father and mother to this intimacy between her and the defendant; also, the remonstrances of her mother and two sisters. The mother's testimony, which was substantially corroborated by her two daughters, was that Artie and the defendant were together a great many times both before and after the 18th of January. Her mother testified that her attention was first called to his improper actions by others. She then watched him, and found that he would come by the house, and make signs, and shortly afterwards the girl would leave the house, and meet him. At one time the mother followed her daughter up to Mr. Overstreet's house, and saw Artie and defendant sitting together on the sofa,—he with his head close to her shoulder. Mrs. Overstreet was away at the time. She said that he monopolized her company, and kept her away from other young people. When he went out to walk he would meet her. That whenever Mrs. Overstreet was away from home the girl would slip out of the house, and go up there. When he came about, she would steal out of the house, "and we would miss her, and couldn't find her. She did this hundreds of times, and I'd follow them, and sometimes I'd find them; and that was the way it was all the time." There were a number of letters introduced in evidence by the state. The first, Exhibit A, was a letter found beside Artie's trunk. The first part of the letter was as follows: "Dearest Loved One: Good morning, my little black rascal. I have just gotten up, and it is twenty minutes past three. I say, you had better take a few more lessons from Kinney, and take them regular. I want you to learn me before long, or as soon as we go to Texas. Mrs. Doige didn't say anything to Jen about us last night." His wife's name was Jennie. Further along in the letter, writing of Mrs. Doige, he says: "I told her to shut up, and then I cussed Mrs. Doige until I went to sleep. We will fool her, if she does think she will find anything out." In another part of the letter he says: "Brownwood is where my father lives. It is a good place to go. You can go there, and wait for me. Tell your ma I am not a Texan, but I would not be ashamed of it if I was, for the people in the town I lived in are ten times smarter than the people of Ellis. Well, now, don't talk about short letters, for yours is still shorter than mine. You are very sweet, and I love you very much. I will stop now, for I want to see you. May be I will write more when I go up-town. Yours forever." The next letter was found behind the looking-glass in Mr. Toms' house. It was addressed, "Dearest Loved One," and contains a great many terms of endearment, closing with: "I love you, and none but you. I love you, if you hate me. You want to fuss, don't you, my sweet little black rascal. Please don't get mad at me, little sweet love.

Yours." These letters are without signature, but were identified as being in the handwriting of the defendant. Then follows in evidence quite a number of letters, in the same handwriting, which were found by Mrs. Toms at the defendant's house. She said she knew they had been locked up in Artie's trunk, but had been taken out, and were up there. They are full of endearing appellations, and are very fervid in their protestations of affection, and show considerable ingenuity and versatility in the use of pet names. In various parts they refer to "Jen" in disparaging terms, spoke of her mother slightly, and of her two sisters somewhat bitterly. The letters were addressed to "Loved One," "Dearest Loved One," "Sweet, Darling Angel," "Dearest Sweet Little Loved One," "My Darling Sweetheart," "Darling Artie," and "Sweetest Darling." They contained such phrases as: "Darling, will you please forgive me? Yes, forgive me; yes, love. I would kiss your little foot, if you would say please to me." "Sweetest, Darling Artie: Please destroy this letter as soon as you read it. I love you, little sweet darling, and it is awful hard for me to stay away over here, and you over there to talk. You must not get mad at me so much. There, I see the finger. I'm coming." "You are a daisy, and I love you one hundred million steam-boats full, and I know that I would like to be over there with you now. I would squeeze you so hard you would say: 'Stop, you old fool, you.'" "I love you, and have not the least love for any one else. You are my queen, my all." "Oh, darling! how could I get along, and not talk with you every day? You don't know how bad it makes me feel. I could kill that old sow for coming. I hate her, the old devil! We must find some way to talk a little, any way, or we will go to Texas at once. I love you, my own sweet little queen, and I want you all to myself, and I am going to have you, or die trying." And so on *ad nauseam*.

A. D. Gilkeson, for appellant. L. B. Kellogg, Atty. Gen., and W. R. Nicholson, for the State.

HOLT, C. The provision of the statute under which this prosecution was commenced is section 35 of the Crimes Act, to-wit: "Every person who shall take away any female under the age of eighteen years from her father, mother, guardian, or other person having legal charge of her person, without their consent, either for the purpose of prostitution or concubinage, shall upon conviction thereof be punished," etc. The defendant insists that the information was insufficient. He says that if it had followed the wording of the statute, simply, it would have been a good information under section 35, but the addition of the words "by having sexual intercourse with him, the said Edgar Overstreet," limited the scope of the section, and precluded the idea of concubinage. He further objects that the evidence did not sustain

the verdict, and that the instructions defining "concubinage" were misleading and erroneous. Was the offense described in section 35 charged in the information, or was it vitiated by the addition of the words "by having sexual intercourse with him, the said Edgar Overstreet?" And was the evidence sufficient to sustain the verdict? The information, evidence, and instructions are consistent with each other; and the objections made by the defendant are fairly in the record. They are practically the same, and what we may say in examining the evidence will decide also the other objections named.

There is not a particle of testimony to show that the defendant kept or boarded Artie Toms at any place, or that he kept house with her; but it is established that he occupied a room alone with her nearly all night of the 17th and 18th of January, 1889. It is contended by the defendant, however, that, even if there was criminal intercourse on that night, yet that act alone would not constitute the offense of concubinage. He insists that there must have been a cohabitation—a living together as husband and wife—before the crime charged could have been consummated. The defendant cites a number of authorities to sustain his contention,—among others, the case of Cannon v. U. S., 116 U. S. 55, 6 Sup. Ct. Rep. 278, but that authority is not exactly applicable to this case. That decision, construing the provisions of the Edmunds law, aimed against polygamous marriages, held that it was not necessary to the commission of the offense that the party charged should occupy the same room, or sleep in the same bed, or have sexual intercourse, with the females charged to have been his polygamous wives, but it was enough simply that he occupied the same house, and ate for any considerable time at the same table. We presume that the *gravamen* of the offense of concubinage is not simply living in the same house together, but having intercourse with each other, as man and wife, when there has been no legal marriage. Bouvier defines concubinage to be "the act or practice of cohabiting in sexual commerce without the authority of law, or a legal marriage." In Missouri they have exactly the same statute as section 35, which was construed recently in the case of State v. Feasel, 74 Mo. 524. The court says: "To constitute concubinage, within the meaning of section 1257, Rev. St. 1879, [similar to section 35] which makes it an offense to carry off any female under the age of eighteen years for the purpose of concubinage, it is not necessary that the illicit intercourse should continue for an indefinite or considerable length of time. A single act is sufficient." This question was raised by the giving of an instruction by the trial judge, Hon. H. S. KELLEY, whose work on Criminal Pleading and Practice the defendant cites as authority in this action. The instruction was to the effect "that, if the jury believed from the evidence that defendant did take away from her father Bella Murray, a fe-

male under the age of eighteen years, for the purpose of concubinage,—that is, for the purpose of cohabiting with her, as man and wife, in sexual intercourse,—for any length of time, even for a single night, without the authority of a legal marriage, they would find him guilty.” The point was raised by the defendant in that case that the word “concubinage” meant something more than a single act of sexual intercourse; but the court held, squarely, that a single act was sufficient to constitute the crime. We are aware that there are other definitions of the word “concubinage,” but we are not inclined to explain and refine away the meaning of a wholesome and remedial statute, when it fully covers the mischief intended to be reached. The main crime contemplated by this statute is the taking away of a girl from her parents for the purpose of defiling her. After one act of sexual commerce, the happiness and honor of the girl are destroyed; her character is gone; her reputation may be ruined. It is not all important, as we view this case, to make a finely-drawn distinction, though radically different in its application and effects, between the occupation of that room alone one night, with all the circumstances leading up to and following it, and a living together in a tenement as husband and wife, unlawfully, for any considerable time. Under the evidence in this case, it is not necessary to go as far as the Missouri court did. The letters introduced and found at her parents’ house, in which it is proposed to the girl to go to Brownwood, and wait for him; the giving of the presents; talking with her by means of the deaf and dumb alphabet; stealing out a hundred times during the year to meet him; his persistent attentions,—all point to the fact that she was, and had been for months, his mistress; not kept by him in a room or house for that purpose, but seduced and cajoled from her father’s house for the act of sexual intercourse, and then allowed to return.

The other objection of the defendant is to the introduction of the letters, especially those not found in her father’s house. None of them have any date or signature, but the want of signature is not especially material in this matter, because they are identified as being in the handwriting of defendant. There is no positive proof that they were in the hands of Artie, however. Her mother testified, in an indefinite manner, that she knew they were in her trunk. How or why she knew that fact is not stated. They were found at defendant’s house. Conceding that there was no proof that they were ever in Artie’s hands, yet they were admissible for the purpose of showing the defendant’s motives in paying so much attention to this young girl. They are his admissions as much as though they had been found in his diary, or had been told to a third person, and for that reason were admissible as evidence against him. Their lacking date is the most serious objection to them. Yet, the fact that this intimacy commenced in the mid-

summer of 1888, and continued for nearly a year, is testimony sufficient to show that they must have been written either in 1888 or 1889, and were written during the iniquitous attentions, artifices, blandishments, and protestations he was showering upon this young girl. They themselves were very strong evidence; for certainly no married man, the father of children, could have written to a young girl in the style they were worded for any other object or purpose than a criminal one. In the first letter introduced, which was found by Artie’s trunk, there was a statement that they would go to Texas, where his father lived; written to seduce and lead her away from home. The whole record teems with proofs of his paying her improper attentions, giving her presents, making signs, and writing her letters, both before and after the occupation of the club-room together. We think not only the single act of sexual intercourse of the night of the 17th and 18th of January is fairly established, but that there had been criminal relations existing between them for a long period. Under the evidence in this case, and the authority of *State v. Feasel*, supra, we recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 262)

STATE v. BARKER.

(*Supreme Court of Kansas. March 8, 1890.*)

CONTINUANCE—ABSENCE OF WITNESS—LARCENY.

1. A sufficient showing of diligence to compel the continuance of a cause in order to obtain additional testimony is not made out where the defendant applying for the continuance has failed to subpoena the absent witness for the alleged reason that he was informed the witness would be present at the trial.

2. Error cannot be predicated upon a ruling excluding testimony, where the testimony desired is not shown in the record, nor any statement made as to what the proposed testimony would be.

3. Before closing his evidence the defendant asked for a postponement of the trial to the following day, in order to obtain the testimony of a person for whose attendance a subpoena had only been issued a few hours before, and was not yet served. No adequate reason was given for the delay in causing the subpoena to issue, nor any satisfactory showing made that it would be served, or the presence of the witness obtained. *Held*, that the denial of the application is not a ground for reversal.

4. While the jury were in the jury-room deliberating on their verdict, they desired the testimony of a witness that was given orally in court; and the sheriff, who was on the outside of the room, the door being locked, responded: “Gentlemen, you cannot have any testimony admitted after you have gone into your jury-room.” *Held*, that the defendant suffered no prejudice by reason of this communication, and that it afforded no ground for a new trial.

5. The evidence examined, and *held* sufficient to sustain the verdict finding the defendant guilty of larceny.

(*Syllabus by the Court.*)

Appeal from district court, Ness county; V. H. GRINSTEAD, Judge.

Stidger & Redd, for appellant. *L. B. Kellogg*, Atty. Gen., and *Geo. C. Brownell*, for the State.

JOHNSTON, J. In this case, Doc. Barker was convicted of stealing a cow, and the punishment imposed was imprisonment at hard labor for a period of two years. He complains here that the court erred in refusing a continuance of the trial to the next term of the court on account of the absence of a witness. It appears that no subpoena had been issued for the witness, nor was there any effort made to obtain his testimony until the day preceding the trial, when it was learned that he had gone to Michigan. The only excuse offered for this want of diligence was that the defendant had been incarcerated in the county jail for 10 or 12 days prior to the trial. There was no showing as to when the witness left the county, nor any reason given for failing to have him subpoenaed in sufficient time. The defendant was arrested on July 6, 1889. The preliminary examination was on July 11th, and on August 9th the information was filed against him in the district court, and the case was not called for trial until September 25th. There was ample time for the issue of subpoenas and the preparation for trial. In his application for continuance, he states that he was informed that the witness would be present to testify. He should not have rested upon this information, as the law affords a defendant compulsory process to insure the attendance of his witnesses, and ordinary diligence requires that he should avail himself of it. "Process runs to all parts of the state. If either the state or the defendant waits until the last moment before preparing for trial, the omission is not the fault of the law or the court; and any ill result is fairly chargeable to the party guilty of the omission." *State v. Rhea*, 25 Kan. 578. The matter of continuance was largely within the discretion of the trial court; and such diligence was not shown by the defendant, in an effort to obtain the testimony, as would compel a continuance, or justify a holding that there had been an abuse of discretion in its refusal.

The next error assigned is that defendant was not permitted to tell the jury what Stephens, the party from whom he claimed to have obtained the cow, said to him at the time that he took possession of her. In testifying in his own behalf, he said that while he was driving three heifers along the road from Ness county to Dighton, in Lane county, he met Stephens on the road with a cow, which he turned over to him; and Stephens said he wanted the defendant to take the cow to Dighton, and sell her, as he owed some parties there, and did not want to take her himself. He was proceeding to give further statements of Stephens, when an objection to the testimony proposed to be given was sustained by the court. What the further statements of Stephens proposed to be given in evidence were, the record fails to state, and hence we cannot say that the court erred in excluding the same. The presumptions are in favor of the correctness of the rulings of the court; and it is probable that the testi-

mony excluded was hearsay, and not admissible. He was allowed to testify that he obtained the cow from Stephens, and to give Stephens' explanation of why he put her in defendant's possession, and to deny all guilty knowledge that the cow had been stolen. It may be remarked that Stephens was afterwards called as a witness, and denied that he delivered the cow to defendant, or that he even saw the defendant on the day or night in question. We cannot say that there was any error committed in excluding the testimony.

Another objection is that the defendant was compelled to close his evidence without the testimony of Samuel Briggs, which, it is claimed, was material. A subpoena was not issued for his attendance until about 10 o'clock of the day of trial; and it appears that he resided 15 miles from Ness City, the place of trial. The subpoena was served about 6 o'clock in the evening of that day, and it appears that Briggs arrived at Ness City at 9 o'clock on the next day. In the afternoon of the day of the trial, and before his evidence was concluded, the defendant asked for a postponement till the next day, to await the coming of Briggs, and this was refused. No adequate excuse was offered for the delay in causing the subpoena to issue. The court did not in fact know, when the application was made, whether the subpoena would or could be served, as the affidavit only stated, in that respect, the bare conclusion that the witness would be present on the morrow, without giving any facts to justify such a conclusion. If due diligence had been exercised and shown in subpoenaing the witness, and a satisfactory showing had been made that his attendance could have been obtained by the next morning, the court might, if it deemed the testimony material, have properly exercised its discretion in granting an adjournment. But these things are lacking, and, besides, the testimony is not very important. It is evident that the animal was taken from the pasture of its owner on the evening or night of the 30th of June, 1889, and was taken to Dighton, and sold by the defendant, about 10 o'clock on the next day. It was proposed to show by Briggs that he delivered to Barker on the evening of the 30th of June, about sundown, the three heifers, and that defendant started in the direction of Dighton with them, which was about 22 miles distant from Briggs' place, and that the pasture from which the stolen cow was taken was 13 miles away, in another direction; and Briggs stated in an affidavit that he did not think the defendant had time to go from his place that evening to the pasture in which the cow was kept, which was about 2 miles west of Ness City, and drive her to Dighton, by 10 o'clock the next day. It is not clear, however, that there was not sufficient time to accomplish this task. But, even if the testimony is to be regarded as important in the case, there was not sufficient diligence shown by the defendant in securing the attendance

of Briggs at the trial. We think there was no reversible error in denying the application for a postponement.

It is next contended that the evidence is insufficient to support the conviction, for the reason that it was not clearly shown that the cow was in fact stolen in Ness county. Defendant testified that he obtained possession of the cow in Lane county; and he insists that, as there is no direct testimony as to the taking of the cow in Ness county, the verdict cannot be sustained. We think the evidence is sufficient to support the conviction. The jury evidently did not believe the testimony of the defendant that he got the cow from Stephens in Lane county, or that he met or saw the defendant at that time. It appears that the cow was seen by its owner in the pasture about noon on June 30th, and on the following day he discovered that she was missing. On July 1st the cow was found in the possession of the defendant, near Dighton. He admits that he was in Ness county on the 30th of June, although some distance away from the pasture from which the cow was taken; that he drove the other three animals from Ness county to Dighton in the night-time; and that, instead of driving them into the town, he left them about a mile distant, when he went into town, and negotiated the sale. He also admits that, when the cow in question was sold, he signed a fictitious name, "J. W. Good," to the bill of sale. There is no satisfactory explanation given why he assumed and signed the name of "J. W. Good;" and from these facts, and some other circumstances, and the inconsistency of some of his statements, the jury were warranted in discarding his testimony, and in finding that the animal was stolen by him in Ness county.

The remaining objection is the conduct of the sheriff while the jury were in his charge, deliberating on their verdict. It appears that he was standing on the outside of the room occupied by the jury, the door being closed, and the jury desired the testimony of a witness, given orally on the trial, and the sheriff, in response, said: "Gentlemen, you cannot have any testimony admitted after you have gone into your jury-room." While it was the duty of the officer to have conveyed the request of the jury to the judge, and obtain a direction from him, yet the officer was undoubtedly correct in the answer which he gave. This was the only communication between the officer and the jury, and when it occurred the jury-room was locked. It is manifest that the defendant suffered no prejudice by reason of this communication; and upon appeal we must disregard technical errors or defects and exceptions which do not affect the substantial rights of the parties. Crim. Code, § 293. No prejudicial error having been found in the record, the judgment of the district court will be affirmed; all the justices concurring.

v.23p.no.10—37

STATE v. REICK.

(Supreme Court of Kansas. March 8, 1890.)

INTOXICATING LIQUORS—ILLEGAL SALES.

Where there is no evidence introduced at the trial of a criminal offense that establishes with any degree of certainty that the offense charged was committed before the date of the filing of the information, a verdict of guilty is not sustained by sufficient evidence, and should be set aside.

(Syllabus by Holt, C.)

Commissioners' decision. Appeal from district court, Geary county; M. B. NICHOLSON, Judge.

Humphrey & Humphrey, for appellant. *L. B. Kellogg*, Atty. Gen., and *W. J. Franklin*, for the State.

HOLT, C. The defendant, Herman Reick, at the October term, 1889, of the Geary district court, was convicted of selling intoxicating liquors. The defendant appeals. The information was filed on the 19th day of July, 1889. The defendant claims that the testimony introduced was insufficient to establish that the liquors sold were intoxicating, and more especially that the evidence failed to prove any sale before the date of the filing of the information, namely, the 19th of July. At the trial the state elected to stand upon two counts,—one a sale made to George McCullough, and the other to James Middleton. The defendant insists that the evidence must show, beyond a reasonable doubt, that the offenses were committed on a day prior to the filing of the information, and cites Whart. Crim. Ev. § 103, and Whart. Crim. Pl. § 120. George McCullough at the trial testified that he knew the defendant and his place of business. The following is all the testimony concerning the date of any alleged sale of intoxicating liquor to the said McCullough: "Question. I will ask you if you were in his place of business, or when were you in his place of business? Answer. I can't say as to the exact time. Q. To refresh your memory, were you in his place of business about the 13th day of July, 1889? A. I can't say as to that. I might have been there, and then again I might not have been there. Q. Have you been in his place of business within the last six months? A. Yes, sir; I have been within that time. * * * Q. I will ask you, Mr. McCullough, whether or not you obtained any beer at Herman Reick's place of business within the last six months? (The defense objected to the question as leading.) A. I obtained what he called 'malt.'" James Middleton, after testifying that he was acquainted with the defendant and knew his place of business on the 10th day of July, 1889, testified as follows: "Question. I will get you to state whether or not you were in his place of business on or about the 10th day of July, 1889? Answer. I can't say. Q. Was you there on or about that time? A. Yes. Q. You say you was? A. I was, I believe. Q. That is, were you there along towards the last of July, 1889? A. Yes, sir; along to-

wards the last. Q. I will get you to state whether you obtained intoxicating liquors of any sort in that place of business? (Objected to as leading. Objection sustained, with the following question.) Q. Did you obtain liquors in his establishment? A. I got half a pint. Q. Didn't you send your wife, and ask him for some? A. Yes, sir. Q. Didn't your wife bring you some that he gave her for you? A. I think not. Q. Your wife brought some the next day? A. Yes, sir; I believe she did." The defendant himself testified that he had been in business at the place described by the witnesses since the 15th day of last June. The main contention at the trial was that the liquors sold were not intoxicating. Upon that point there was a great volume of evidence, and probably the jury found correctly on that phase of the case. The date of sale during the trial was evidently subordinated to that question, and for that reason, probably, did not receive the attention it otherwise would have done; but the only question before us that we care to consider relates to the time of sale. We think the evidence did not sustain the verdict. There is nothing in the testimony of McCullough that even inferentially would prove that he bought the "malt" before the 19th day of July, and, from all the testimony of Middleton, there is nothing that would fix with any degree of certainty the date of his purchase before that day. We are compelled, therefore, to recommend that the case be reversed.

PER CURIAM. It is so ordered.

JOHNSTON, J. (*dissenting*.) I am of opinion that the conviction on the second count, which was for a sale to James Middleton, should stand. Although the testimony in regard to the time of sale is not as full and clear as it should be, I think it sufficiently shows that sale to have been made anterior to the filing of the information. The fact that there was little controversy upon this point probably accounts for the meagerness of proof, and doubtless it might have been made fuller, as the affidavit of Middleton attached to the information states that he bought a half pint of whisky from the defendant at his place of business about the 10th of July, 1889, for which the defendant charged him 25 cents.

(43 Kan. 404)

TOPEKA WATER SUPPLY CO. v. CITY OF
POTWIN PLACE *et al.*

(*Supreme Court of Kansas. Nov. 9, 1889.*)

CONSTITUTIONAL LAW—WATER SUPPLY AND SEWERAGE—INJUNCTION.

1. The following proviso contained in section 8, c. 232, of the Session Laws of 1889, is not unconstitutional or void. The proviso reads as follows: "Provided, that no sewer shall be permitted to empty into any stream from which a water supply is obtained, within three miles above the point where said water supply is obtained."

2. Under this proviso the city of Potwin Place has no authority or power to construct a sewer which it shall permit to empty into the Kansas river within three miles above the wells established and

operated to obtain a water supply for the city of Topeka by the Topeka Water Supply Company.

ON REHEARING.

A private corporation cannot maintain an action for an injunction to perpetually enjoin another from committing acts which would be wrong and in violation of law, and which it is claimed would also affect injuriously the plaintiff's business, where the plaintiff itself is a wrong-doer, and could not possibly do right in carrying on its business, and be injured by the acts sought to be prevented, and could not rightfully continue to carry on the business which might be affected by the defendant's wrongful acts, even if the defendant and all others should refrain from such wrongful acts, and should do right and obey the law.

(*Syllabus by the Court.*)

Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

J. D. McFarland and Case & Moss, for plaintiff in error. Vance & Campbell, J. B. Larimer, and Hazen & Isenhardt, for defendants in error.

HORTON, C. J. The Topeka Water Supply Company commenced its action in the court below against the city of Potwin Place, its officers and employes, to perpetually enjoin the construction of a system of sewers for carrying off filth, excrement, and refuse matters of the city into the Kansas river above the wells of the company, and also to prevent the officers, agents, and employes of that city from using the same for any like purpose. The trial court made special findings of fact, and stated its conclusions of law thereon. This proceeding is prosecuted to review and reverse that judgment.

The Topeka Water Supply Company is a corporation existing under, and by virtue of, the laws of the state. It was organized on August 12, 1881, and has ever since existed as such corporation. The purpose for which the company was organized and incorporated was to construct a system of water-works in the city of Topeka, and to supply the city, and the inhabitants thereof, with water for domestic, culinary, and manufacturing purposes, and for all other purposes for which water is commonly used in large cities.

The company commenced the construction of its works in the city of Topeka about October 20, 1881. It purchased, and became the owner in fee-simple of, a tract of land, within the corporate limits of the city, lying along the south bank of the Kansas river, and adjacent thereto, which tract of land is about 600 feet in length along the river, extending back from the river about 65 feet. About the same time, it became the owner in fee-simple of an island in the Kansas river about 100 feet north of the land mentioned, which island contained about 6 acres, and being about 2,000 feet in length east and west along the river. The engine-house and buildings of the company are located between Harrison street and Topeka avenue, in the city of Topeka; and its wells are north of the engine-house and buildings, on the land belonging to the company. The frontage of the lands on the Kansas river, as they now

are, is the same as the north frontage of the island on the river when the island was purchased by the company. This frontage is more than 1,800 feet. Immediately after the purchase of its lands the company sunk a large well upon the island, and erected an engine-house and buildings on the land on the south bank of the river, and placed in said buildings all the necessary engines, machinery, and other appliances for the purpose of pumping water from the wells, and distributing it throughout the city. The company connected the well with its engine-house and machinery by a large pipe, and also laid throughout the city several miles of water-pipes for the purpose of distributing water, the water-pipes being connected with the houses, residences, and other buildings of the city, and also placed in the city, at various places, fire-hydrants, to supply water in case of fire; the water so distributed being pumped, by means of the engines and machinery, out of the well on the island, and forced through the water-pipes. In the month of July, 1882, the company, by means of its works and appliances, began to supply the city, and inhabitants thereof, with water for domestic, culinary, fire, and manufacturing purposes, and for all other purposes for which water is commonly used, and continuously ever since has been, and is now, so supplying the city, and inhabitants thereof, with water; and the water so supplied, is now, and has been since said time, generally used in the city of Topeka, by the inhabitants thereof. Since the company commenced supplying water, it has been continuously, year by year, until the present time, enlarging its works and appliances, and has put down additional pipes throughout the city; and it has now about 31 miles of pipe laid, and is now supplying water to about 1,500 residences of the city, as well as to the hotels, public schools, manufacturing establishments, and various other places in the city, besides supplying the city with water for fire protection. The company has since 1882 sunk on the island in the river three additional wells for the purpose of supplying water. All of these wells are connected by pipes, and the water in all the wells can be drawn from both north and south wells. The wells of the island are supplied with water from the Kansas river, and the ground water finds its way to the river through the soil, and finally through the sand surrounding the island. The bed of the river where the water flows, as well as so much of the bed of the river between the south bank of the river and the bank of the island where the water at one time flowed, consists of gravel and sand of varying depths; and the water flows or percolates through the sand and gravel. The water, ordinarily fed into the wells, is filtered through the sand and gravel before it enters the wells; but there is an iron pipe, 18 inches in diameter, extending from one of the wells out into the flowing stream of the river, above the sand, which pipe has a valve, and from that pipe

water can be let into the wells directly from the flowing stream of the river above the bed of the sand. The iron pipe is so placed for the purpose of letting water into the wells in case the supply thereof, as ordinarily fed into the wells, should become exhausted, as it would be, in an unusual demand for fire purposes. The water from the flowing stream of the river above the bed of the sand has upon several occasions been let into the wells; the supply, as ordinarily fed into the wells upon these occasions, not having been deemed sufficient to supply the demand. The wells are walled up on the sides, and the walled cemented, and built several feet higher than the top of the island, and covered over. The supply of water, as ordinarily fed into the wells, flows in at the bottom of the wells. The wells are only fed by the river coming in at the bottom thereof, and what is let in by means of the iron pipe extending out into the flowing stream of the river. The water fed into the wells from the bottom thereof is of the same kind and character as that in the flowing stream of the river above the bed of sand, except the changes that are caused by means of the filtration through the sand. The water of the wells is being constantly pumped therefrom, and stands from 5 feet to 16 feet in depth in the wells; the depth varying with the amount of water in the Kansas river.

Many questions are presented and elaborately discussed in the voluminous briefs of counsel. After a careful and critical examination of all of these, and the authorities cited, we think that chapter 232, Sess. Laws 1889, controls, and therefore that very much referred to in the briefs need not be commented upon. Section 3 of said chapter 232 contains this provision: "That no sewer shall be permitted to empty into any stream from which a water supply is obtained, within three miles above the point where said water supply is obtained." The sewer of the city of Potwin Place, if permitted to be constructed and used, will empty and discharge its contents into the Kansas river one and three-fourths miles above the established water supply of the company complaining. This established water supply endangered by the acts of the city of Potwin, according to the findings of the trial court, is very extensive, as water is furnished therefrom to the inhabitants of the city of Topeka, a city of over 40,000 people, as well as to its hotels, public schools, manufacturing establishments, etc. The language of the proviso in the statute does not limit the sewers designated therein to such only as are constructed by cities of the first class. Courts ought not to make any construction against the expressed letter of the statute, for nothing can so express the meaning of the makers of an act as their own direct words. Applying this well-recognized rule, we find that the proviso demands "that no sewer shall be permitted to empty into any stream within three miles above the point where the water

supply is obtained." If there is any ambiguity in regard to the general scope and purport of a statute, the cardinal rule of construction is that the intent of the law-makers, when ascertained, governs. Mere awkwardness of expression does not overthrow the statute, as the substance controls. If we recur to the views of the members of the legislature in debate, at and before the act passed, to ascertain its meaning, we find the discussion upon the subject in that body clearly establishes that it was the intent of the law-makers that no sewer should be constructed, by any city, corporation, or person in the state, within three miles above an established water supply, and that the purpose of the proviso was to prevent the pollution of streams, rivers, and other like sources of water supply. There were introduced into the legislature in 1889 two bills to prevent the pollution of the sources of water supply. These bills did not come to a vote, but the substance of one of the bills is the proviso referred to. It was originally reported as an independent bill, and it was added as an amendment to said chapter 232. We, however, need not discuss this point further, because it is conceded in the supplemental brief filed by the counsel for the city of Potwin Place that this proviso was presented and adopted for the express purpose of attempting to prohibit that city from constructing and operating its sewer above the wells of the water supply company. Considering the language used, the history of chapter 232, the acrimonious debate on the proviso therein, it could not have been the intent of the law-makers in sanctioning the amendment, and in subsequently passing the act as amended, to limit the proviso to sewers constructed by cities of the first class only.

Laws similar to the one under discussion have been adopted in many states. In Massachusetts the statute provides that "no sewage, drainage, or refuse or polluting matter, of such kind and amount as, either by itself or in connection with other matter, will corrupt or impair the quality of the water of any pond or stream hereinafter referred to, for domestic use, or render it injurious to health, and no human excrement shall be discharged into any pond used as a source of water supply by a city or town, or upon whose banks any filter basin so used is situated, or in any stream so used, or upon whose banks such filter basin is situated, within twenty miles above the point where such supply is taken, or into any feeders of such pond or stream within such twenty miles." Pub. St. Mass. 1882, § 96, p. 448. Said chapter 232 is challenged, however, upon the ground that its title is not broad enough. It is also alleged that that act applies to two distinct and separate subjects. Further, it is claimed, as the sewer of the city of Potwin Place was in process of construction at the time the act became a law, that it cannot apply in this case, because the act cannot have any retroactive effect, and also because no compensa-

tion is provided therein to pay the city of Potwin Place for the cost and expense of the sewer as far as it was constructed at the time the act went into force. None of these objections are well taken. The title of the act is as follows: "An act providing for the condemnation of right of way for the construction of flushing ditches or conduits and discharging sewers or outlets for sewers in cities of the first class, and prohibiting the discharge of sewerage from any source within certain distance of water supply." The title is certainly broad enough, because, in expressed terms, it refers to "prohibiting the discharge of sewerage from any source within certain distance of water supply." In *State v. Commissioners*, 40 Kan. 65, 19 Pac. Rep. 362, it was urged that the title of chapter 128, Sess. Laws 1887, was not broad enough to include the proviso prohibiting the vote and issue of bonds, excepting for school purposes, within one year after the organization of new counties. The title to that chapter reads as follows: "An act relating to the organization of new counties, and amendatory of section one, chapter ninety, of the Session Laws of 1886, and section two of chapter sixty-three of the Session Laws of 1876, and sections three and five of that part of chapter twenty-four of the General Statutes of Kansas entitled 'An act relating to the organization of new counties.'" The proviso in that chapter is "that no bonds, except for the erection and furnishing of school-houses, shall be voted for and issued by any county or township within one year after the organization of such new county under the provisions of this act." The claim against the proviso of said chapter 128 was not sustained. This proviso was held valid and constitutional. As the proviso in section 3 of said chapter 232 relates to sewers, it cannot be said that the act applies to two distinct and separate subjects. *Philpin v. McCarty*, 24 Kan. 393; *State v. Barret*, 27 Kan. 213; *Commissioners v. State*, 36 Kan. 337, 13 Pac. Rep. 558. *State v. Barrett*, supra, clearly declares the law to be that the action of the law-making power must in all cases be upheld, unless its action is manifestly in contravention of the constitution. Neither the title nor the subject of said chapter 232 are in any way in conflict with the provisions of the constitution of the state. The city of Potwin Place has no vested right to construct or empty its sewer to the Kansas river. Such a matter is under the regulation and control of the state. Laws of this character are not void though they disturb the enjoyment of individual rights without making compensation. *Salus populi suprema est lex*. 1 Dill. Mun. Corp. (3d Ed.) § 141; *State v. Mugler*, 29 Kan. 252. Of course, if the statute is constitutional, and applies to sewers generally, as, in our opinion, it does, the right of the parties in this case are determined by it. *Cooley, Const. Lim.* (5th Ed.) 470.

In conclusion, we may state that the pollution of streams and rivers by municipali-

ties and public bodies in charge of sewage and drainage occasion the frequent exercise of the preventive powers of equity. Upon principle, a municipality or any other public body has no more right to defy or disobey the law than a private person. Gould, Waters, § 545. Neither the city of Potwin Place, nor any other city, corporation, or person, can exercise any power which is expressly forbidden by the statute. The judgment of the district court will be reversed, and the case remanded, with direction to grant a perpetual injunction as prayed for in the petition of the plaintiff. All the justices concurring.

ON REHEARING.

(April 4, 1890.)

VALENTINE, J. This case was decided by this court on November 9, 1889; and the judgment of the court below was reversed, and the court below was directed to grant a perpetual injunction against the defendants as prayed for in the plaintiff's petition. In due time a motion for a rehearing was filed in this court by the defendants, and that motion is now before us for consideration. The writer of this opinion must admit that he did not understand this case as well as he ought to have understood it when the judgment of this court was rendered; and it is now the opinion of the court that such judgment is to some extent erroneous, and that it must be modified and corrected. It, in effect, perpetually enjoins and restrains the city of Potwin Place, and all its officers and agents, and the contractor, from constructing or using their contemplated sewers anywhere or in any manner, and also from discharging any sewage of any kind whatever into the Kansas river, although such sewage might, by comparison with the waters of the Kansas river, be pure enough to tend to make such waters at that place very much purer than they now are. The plaintiff in this case, the Topeka Water Supply Company, is a private corporation, and its sole business is to procure water from the Kansas river and furnish the same to the city of Topeka, and to the inhabitants thereof, for compensation. The principal defendant in the case, the city of Potwin Place, is a municipal corporation, a city of the third class, and the other defendants, except Rosen, are its officers; and Rosen is the sewer contractor. The object of the action, according to the prayer of the plaintiff's petition below, is to perpetually enjoin the defendants, and their agents, employees, and successors, from constructing and using a system of sewers, and from discharging sewage into the Kansas river above the plaintiff's wells. The case was tried before the court below without a jury; and that court made voluminous findings of fact, and, upon such findings, rendered judgment in favor of the defendants and against the plaintiff, denying to the plaintiff any injunction. It is now suggested that some of such findings are conflicting and contradictory. If they are, then that is a good ground for a reversal of the judgment of the

court below, and for granting a new trial; but it is no ground for rendering a final judgment upon such findings for either party, as this court has ordered to be done. It is also suggested that some of the findings are not supported by sufficient evidence. If this were true, it would be a good ground for a reversal of the judgment of the court below, and for granting a new trial; but it would not be any proper ground for rendering a final judgment in the case in favor of the party against whom the findings of fact were made. We have no authority to reverse the findings of fact made by the district court, nor to make findings of fact for ourselves upon the evidence brought to us from the district court, nor to set aside the findings of fact made by the district court, nor to ignore such findings, where they are within the issues made by the pleadings in the case, nor to render, or order to be rendered, a final judgment for either party against or without findings of fact. All that we can do, if we do not think that the findings of fact are supported by sufficient evidence, is to reverse the judgment of the trial court rendered upon them, and order that a new trial be granted. But, in fact, while the evidence in the case is to some extent conflicting, yet every finding of fact made by the trial court, we think, is supported by sufficient evidence; and therefore, under the well-established rule of this court, and of all other courts that hear cases on petition in error, we must take the findings of fact made by the trial court as absolutely true and correct, or at least true and correct so far as they are material to the case, and not in conflict with each other. Now, taking the findings of fact made by the trial court as absolutely true and correct, will they support and sustain the judgment rendered by this court, or must such judgment be vacated, or to some extent modified? We shall now proceed to consider such findings of fact, and their effect upon this case.

It appears from the findings of fact made by the court below that the sole business of the plaintiff is to furnish water to the city of Topeka, a city of the first class, and to the inhabitants thereof, for compensation, and that it has the right to so furnish the same only under the provisions of an ordinance of the city of Topeka which was adopted on September 5, 1881, and took effect on September 7, 1881, which ordinance, with all its terms and conditions, the plaintiffs shortly afterwards accepted; and it has acted under it ever since. Under the ordinance, the plaintiff, the Topeka Water Supply Company, has the right and the privilege "of supplying the city of Topeka, in Shawnee county, in the state of Kansas, and the citizens of said city of Topeka, with good, clear, healthful, and wholesome water, well suited for domestic and manufacturing purposes." Section 1 of the ordinance. The ordinance also provides, among other things, as follows: "Sec. 10. Said company binds itself, during the continuance of the contract which may be made

under this ordinance, to furnish at all times, for public and private use of said city, and the inhabitants thereof, a full and sufficient supply of good, clear, healthful, and wholesome water, well suited for domestic and manufacturing purposes." "Sec. 16. Any failure on the part of said company to comply with any of the provisions of this ordinance, either as to the amount of water or the quality of the same, or any failure to furnish a sufficient supply of water at all times, excepting in cases of unavoidable accidents, said company shall forfeit its franchise, and this charter shall be null and void."

The Topeka Water Supply Company has no right or privilege, and none has ever been granted to it, to furnish any other kind or character of water to the city of Topeka, or to its inhabitants, than the water described in the foregoing provisions of the ordinance. According to the findings of the district court, the water supply company obtains its water from the Kansas river, both directly and indirectly. It obtains it by means of an iron pipe extending from one of the supply wells out into the river and into the flowing stream, and all the wells are connected by means of iron pipes; and it also obtains water by means of the same percolating from the Kansas river, through the sand and gravel in that vicinity, into its supply wells. But with reference to this last-mentioned kind of water the court finds, in its sixth finding of fact, among other things, as follows: "The water fed into said wells from the bottom thereof is of the same kind and character as that in the flowing stream of said river above said bed of sand, except the changes that are caused therein by means of the filtration through the sand." The court below also made the following special findings of fact: "(13) That, notwithstanding the drainage from said the city of Potwin Place, or from other sources, is discharged into said the Kansas river in the manner above stated, the said wells belonging to and used by the plaintiffs for supplying the inhabitants of the city of Topeka with water for domestic use and purposes, the said wells above described cannot be supplied with good, wholesome water, well suited for domestic purposes, from the Kansas river, at said wells, or at any point within two or three miles above said wells; that the topography of a large portion of the territory included within the corporate limits of the said the city of Topeka lying west of Kansas avenue, in said city, and south of said Kansas river, is, and always has been, and always will be, such that the drainage outlet of an area of about 600 acres, on which reside not less than 15,000 inhabitants, and which number is rapidly increasing, and said drainage is caused, by surface and under-ground drainage, to flow into said river in close proximity to, and principally above, said wells, and all within the drainage area of said wells; that, immediately adjacent to, and west and south-west of, the corporate boundaries of the city of

Topeka, and lying south and west of the city of Potwin Place, within three years, numerous and large plats and additions and suburbs to said the city of Topeka have been laid out, and are being rapidly built up, for residence and families and other purposes, and many hundreds of houses, including a large hospital, several churches, stores, and school-houses, have been erected, and many more are in contemplation and progress of construction, and will in the near future be erected and occupied; that said platted territory last above described outside of the city of Potwin Place, and outside of the corporate limits of the city of Topeka, includes more than a thousand acres of land, all platted into town lots, and designed to have houses erected on and occupied as residences, and for various other purposes; that about 400 houses have been erected on said tract during the last three years, and are now being occupied; that the natural drainage from all the said territory finds its way into the Kansas river above and near the wells of the Topeka Water Supply Company, by surface drainage and under-ground drainage, known as 'ground water,' and, by following through the sand and gravel, finds its way in the wells of the Topeka Water Supply Company, by the laws of natural drainage, and tend to pollute the water in the upper and lower currents in the Kansas river at and above said wells. (14) That less than two and one-half miles above said wells of the Topeka Water Supply Company, and on the south bank of said Kansas river, are located the buildings of the Kansas Insane Asylum, which buildings are constantly occupied by more than seven hundred (700) inmates, etc.; that all the sewage of said buildings, and the premises connected therewith, flows constantly through a large sewer or pipe into the Kansas river, which tends to and does pollute the water in said river; that said asylum buildings were erected and occupied, and said sewer therefrom was used, as aforesaid, in 1879, and before said Topeka Water Supply Company was organized, and have been in constant and uninterrupted use ever since. (15) That on the north bank of the Kansas river, and above said wells, is a large slaughter-house, and several manufacturing establishments, and several thousand people have erected and occupy many houses on and near the north bank of said river; and said portion of the city of Topeka has no system of sewerage whatever, and the said portion of the city is growing rapidly in a western direction. (16) That all these facts were known to said the city of Topeka and said the Topeka Water Supply Company previous to the purchase of the real estate herein described, and the construction and erection of its buildings, wells, etc., aforesaid, by said the Topeka Water Supply Company."

The principal ground, at the present time, upon which the plaintiff founds its right of action, is the proviso attached to section 3, c. 232, of the Session Laws of 1889. It is

said that this proviso was procured to be enacted by the legislature especially for the purpose of affecting this very case, which case was then pending in the district court of Shawnee county. Now, assuming, for the purposes of this case, that this proviso is valid, and applicable to this case, (but the question is a doubtful one,) still, has the plaintiff, with or without this proviso, any cause of action upon the facts of the case as found by the trial court? The proviso reads as follows: "Provided, that no sewer shall be permitted to empty into any stream from which a water supply is obtained, within three miles above the point where said water supply is obtained." Now, this proviso does not purport to give to any person or corporation, public or private, any cause of action; and therefore, notwithstanding this proviso, we shall have to resort to the general principles of law and equity in order to determine whether the plaintiff has any cause of action or not, under the facts of this case. It must be remembered that the plaintiff in this case is a private corporation, and not the state of Kansas, or any public officer who has any authority to represent the state. It also obtains its water from a navigable stream, whose waters it does not own, and cannot own, until it separates them from the stream. *Wood v. Fowler*, 26 Kan. 682. And, while it owns the land adjoining the river, and up to the margin of the stream, yet it does not obtain or use the water which it obtains from the river as a riparian proprietor. It is simply a corporation, that cannot drink, nor use water for any domestic or household purpose, nor use it to supply any natural want, and it does not use it as an incident to some primary use of its real estate, and, indeed, it does not use it under any riparian right; but it uses it merely for the purpose of carrying it away from the stream, across its land, and into the city of Topeka, and there selling it to others for compensation. This is not a use of the water under riparian rights. *City of Emporia v. Soden*, 25 Kan. 588, 606, 607.

But, above all, and worse than all, according to the findings of the court below, it is itself a wrong-doer, violating its contract with the city, violating the city ordinance, and violating duty and obligation, by furnishing water to the city of Topeka, and to its inhabitants, which is unfit for use. Now, the question arising upon these facts is not whether a party in the rightful and legal exercise of a legitimate business has the right to an injunction to restrain some wrong-doer from committing acts which will seriously and injuriously interfere with and affect such party's lawful and rightful business; but it is whether one wrong-doer may obtain an injunction to restrain another wrong-doer from committing an act which could not possibly, under any circumstances, do the plaintiff any harm, if the plaintiff should himself or itself do right, and obey the law, and where the absolute refraining by the defendant and all others from the com-

mission of the act or acts complained of, and from all other wrongful acts, would not, and could not possibly, under any circumstances, enable the plaintiff to do right, and to obey the law, if the plaintiff should still continue to carry on the business sought to be protected by the injunction. Of course, the state of Kansas, through its attorney general or any other proper officer, and by any proper action or proceeding, has the right to compel all the corporations of the state, public and private, and all the officers of the state, and others, to obey the laws of the state, and this without reference to whether any particular injury may result to any individual or corporation from a violation of the laws or not; but no private individual or private corporation has any such extended right. A private person or corporation has no right to an injunction merely to restrain another from committing some apprehended violation of law. Nor has such private person or corporation any right to an injunction to restrain another from doing any particular act, unless the performance of the act would result to the injury of the party seeking the relief; and, even then, in order to entitle the party seeking the relief to the relief sought, the contemplated injury must be substantial, and not merely nominal, and must be special and particular as to the party seeking the relief, and different in kind from that which will affect the public in general. An action for damages, where the wrong has already been committed, may sometimes be maintained where the damage is merely nominal; but no action for an injunction to restrain the commission of an anticipated wrong can be maintained unless the anticipated wrong will clearly work some substantial injury to the party seeking the relief. Nor has a private person or corporation any right to an injunction to restrain another from the commission of any act merely for the purpose that such private person may reap some anticipated advantage from the future commission of some wrong or some unwarranted act on his or its part. The party seeking the relief cannot say to the person whom he or it wishes to have enjoined: "It is true I will not be injured by your wrongful act or acts, provided I do right myself, but I do not intend to do right. I expect to violate duty, obligation, contracts, the city ordinances, and to infringe upon the dearest and most valued rights of others, and by so doing, I expect, if you do not interfere, to reap great, though reprehensible, advantage, but, if you do interfere, it will prevent me from reaping this much coveted and contemplated advantage; and, therefore, as you are an expected and intended wrong-doer as well as myself, you should be restrained from the commission of your contemplated wrongs in order that I may commit mine." Under the findings of the trial court, the Topeka Water Supply Company may, if it chooses, obtain reasonably good water by going further up the river to a place above

Potwin Place, above the insane asylum, and getting its supply of water there; but, according to such findings, it cannot obtain good water from the place from which it now obtains its supply. If it should go above Potwin Place, and there obtain its water, then no act or acts on the part Potwin Place could possibly do it any harm; and, according to the findings of the court below, it cannot obtain good water below Potwin Place, and at or above the place from which it now obtains its water. It can there obtain only such water as is unfit for use; and by obtaining the same there, and furnishing it to the city of Topeka, and to the inhabitants thereof, it not only does wrong, but it also violates its contract, and violates the city ordinance. Will a court of equity encourage any such thing? Such would be a violation of some of the best-established maxims of equity. This is an equitable action, and it is a general rule of equity that he who seeks equity must do equity; and it is also a general rule of equity that he who goes into a court of equity must do so with clean hands. In other words, a party can obtain no order, judgment, or decree from a court of equity for the purpose that he may with greater profit or advantage violate the rules of equity. The granting of an injunction in this case could be of no possible benefit or value to the plaintiff, provided it should do right itself. If the findings of the court below are correct, then not all the injunctions which all the courts in Kansas or elsewhere could grant would be sufficient to enable the plaintiff to furnish, from the place where it now obtains its supply, "good, clear, healthful, and wholesome water, well suited for domestic and manufacturing purposes;" and courts of equity are not swift to grant futile, worthless, or fruitless orders.

Although both parties in this case are wrong-doers, yet this is not merely a question of balancing wrongs as between such wrong-doers. The party seeking the relief must himself or itself do right, or it is not entitled to the relief sought. There are differences, however, between the wrongs of these two wrong-doers, some of which we might mention. The plaintiff's wrongs are not only contemplated, but they are also present, as well as past and consummated; while the defendants' wrongs are only in prospect,—merely contemplated or expected. It is true the defendants have already constructed some of their sewers, and this court, by its judgment, has ordered that they be enjoined from using them; but it does not appear from the record that any of these sewers have been constructed anywhere near the Kansas river, or that the defendants have ever yet discharged any sewage into or near such river. They have not yet done, or caused to be done, the slightest injury or damage to the plaintiff; and as yet the plaintiff has no cause to complain of anything that has really or actually taken place. It would result in some loss to either party to refrain from the com-

mission of its contemplated and intended wrongful acts. The plaintiff, at some loss, would have to go further up the river to procure good water, while the defendant the city of Potwin Place, at a loss of about \$75,000, according to the findings of the court below, would have to go further down the river to discharge its sewage. But, if it should go further down the river to discharge its sewage, would not some still lower riparian proprietor—the owner of a town lot, for instance, worth a few dollars—commence an action to restrain such city from discharging its sewage there? And such lower riparian proprietor, if he were an individual person, would probably have real and substantial riparian rights. Whether he could maintain any such action or not, it is not necessary to express any opinion in this case. If the plaintiff could obtain good water from the place where it is now obtaining it, except for the contemplated wrongful acts of the defendant, then we would think that the plaintiff would have a right to an injunction. Even if the plaintiff, except for the joint or separate wrongs, actual and contemplated, of the defendant, and as many others as might possibly be engaged in doing wrong, could obtain good water from the place where it is now obtaining it, it would also have its right to an injunction. But such is not this case, under the findings of the court below. Under such findings, even if the defendant and all others should do right, and obey the law, still the plaintiff would not be able, from the place where it now procures its water, to obtain that kind of water which it has agreed to furnish to the city of Topeka, and to the inhabitants thereof, and which kind only it has any right to so furnish. The plaintiff in error has cited several cases where the actions were brought either by the attorney general, or for the recovery of damages, or where, except for the wrongs of the defendant or of the defendant and others, the plaintiff might do right, and still be injured, or for the invasion of strict riparian rights; but none of these cases is the present case. The present case is an action, in equity, for an injunction, by a private corporation which is itself a wrong-doer, and which cannot do right, and obey the law, and suffer any injury. The question stated in considerable detail is substantially as follows: Where the sole business of a private corporation is to furnish a city, and the inhabitants thereof, "with good, clear, healthful, and wholesome water, well suited for domestic and manufacturing purposes," and such private corporation has no right or privilege to furnish any other kind of water, and such private corporation obtains its water from a certain navigable river, it owning the land up to the margin of the stream where it obtains its water, and another city is about to discharge sewage into such river above the place where such private corporation obtains its water, but the water in such river is already so polluted that, if such city and all others should refrain

from doing any wrongful act that might tend to further pollute the same, such private corporation would still be unable to procure good water, fit for domestic use, from such river at the place where it obtains its supply, or from any place between that place and the place where such city contemplates discharging its sewage, can such private corporation maintain an action for an injunction to perpetually enjoin such city and its officers from constructing or using sewers in the city, or from discharging sewage into the river at the place where such city contemplates the discharge of its sewage? A controlling fact in this case, aside from the other facts, is that the plaintiff is a wrong-doer, and that it cannot be anything else than a wrong-doer, and be injured by the contemplated acts of the defendants.

The defendants have also cited a considerable number of cases, among which is the case of *Wood v. Sutcliffe*, 8 Eng. Law & Eq. 217, 2 Sim. (N. S.) 163, which seems to have the fullest application of any case cited on either side. We do not know of any case having entire application to this case; hence, in the consideration of this case upon this motion for a rehearing, we have considered the same almost entirely upon the general rules, principles, and maxims of law and equity, and especially upon the following general maxims in equity, to-wit: "He who comes into equity must come with clean hands;" "he that hath committed iniquity shall not have equity;" and "he who seeks equity must do equity." It certainly cannot be maintained that an action for relief in equity may be founded upon iniquity, and in favor of a water supply company which possibly, on account of its own wrong-doing, has forfeited its right to exist as such. See Sections 1, 10, 16, of the Topeka city ordinance, above mentioned, and the findings of fact of the court below.

Upon the general principles of law and equity, we think that the judgment of this court heretofore rendered is erroneous. It will therefore be modified to the extent that, instead of directing the court below to issue a perpetual injunction in favor of the plaintiff, it will direct the court below to grant a new trial. All the justices concurring.

(43 Kan. 543)

ROCK CREEK TP. *vs rel.* TYLER v. ST. JOSEPH & G. I. R. CO.

(*Supreme Court of Kansas. April 4, 1890.*)

HIGHWAYS — OBSTRUCTION — RAILROAD CROSSINGS.

When a public highway is located over an existing railroad track, some years subsequent to the construction of the railroad, there is no liability upon the part of the railroad company, under section 43, c. 84, Comp. Laws 1885, to the township in which the crossing is located, for damages for the obstruction of the highway.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Nemaha county; R. C. BASSETT, Judge.

J. W. Cunnick and *A. J. Felt*, for plaintiff in error. *J. E. Taylor* and *John M. Ragan*, for defendant in error.

GREEN, C. The plaintiff commenced this action under section 43, c. 84, Comp. Laws 1885, to recover damages from the defendant for obstructing a highway, by reason of the construction of its railroad. The case was tried to the court upon the following agreed statement of facts: "(1) The St. Joseph & Grand Island Railroad Company was built in 1869 and 1870 over the land where this road is located, and the right of way obtained August 4, 1866, recorded in Book H, page 133. (2) The county road was established in January, 1884, by order of the county court, on a petition presented October 13, 1883, and recorded, (Book 3, Road Record, pp. 131, 132,) which are part of this agreed case, and road one-half in Brown and Nemaha counties, each." Judgment was entered for the defendant below. It is claimed by the plaintiff in error that the defendant was liable, under the law, no matter whether the railroad was built before or after the location of the highway. We hardly think this is the correct rule. While it is clearly the duty of a railroad company to restore the highway crossings whenever its road crosses over highways to a safe condition, and to keep them so, and to make the approaches thereto, yet such is not its duty in reference to the crossings of public highways over railroads where the public highways were laid out and opened subsequent to the construction of the railroad. 1 Ror. R. R. 554. In this case, the evidence shows that the railroad was built some 15 years before the highway was established, and about six years before the passage of the law under which this suit was brought. We do not see how it can be successfully maintained that this law could have any operation upon a railroad located long before the passage of the act, and years before the establishment of the road; and we are of the opinion that there is no liability under this law, when a highway is located over an existing railroad, for the obstruction of the highway by the railroad, if the company complied with all the laws in force when the road was constructed. Again, this case was tried upon the agreed statement of facts set out above, there being no other evidence upon which the court could base a judgment. Certain exhibits were attached to the petition, showing the action of the board of commissioners, notice to the railroad, assessment of damages, and other steps to fix the liability of the company; but these were denied, and it would be necessary to furnish some proof before the plaintiff would be entitled to recover. We see no error in the record as presented to us, and therefore recommend that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(43 Kan. 526)

UNITED STATES ELECTRIC LIGHTING CO. v. MARTIN.

(Supreme Court of Kansas. April 4, 1890.)

SERVICE OF SUMMONS—PUBLICATION—AFFIDAVIT.

1. An affidavit for publication, showing that the defendant is a foreign corporation; that the plaintiff is unable to make service of summons upon the defendant within the state; that the defendant has personal property within the state, which is fully described; that this property has been taken possession of by a receiver of the court; that the plaintiff seeks to appropriate this property for the payment of his claim; and that his action is brought upon a contract made between him and defendant,—is sufficient to authorize service.

2. The fact that the property taken possession of by the receiver has been obtained by the defendant in an action of replevin, still pending in the court, will not oust the court or the receiver of the control thereof.

(Syllabus by the Court.)

Error from district court, Greenwood county; A. L. REDDEN, Judge.

T. L. Davis, for plaintiff in error. Clogston & Fuller, for defendant in error.

HORTON, C. J. S. A. Martin brought an action in the court below against the United States Electric Lighting Company to recover the sum of \$300, claiming the sum as damages for breach of a parol contract. The electric company is a foreign corporation. At the time that Martin filed his petition a receiver was appointed by the probate judge. Under the order of the probate judge, the receiver took possession of one western dynamo, one automatic regulator, five duplex inclosed arc lamps, nine single inclosed arc lamps, one base frame, and circuit of wire. Afterwards, Martin made and filed an affidavit for service by publication. The electric company appeared specially, and moved the court to quash the service, which was overruled. The company, with the leave of the court, then filed an answer. The case came on for trial before the court without a jury, and judgment was rendered in favor of Martin, and against the company, for \$300. The company excepted, and brings the case here.

1. It is claimed that the affidavit did not state facts sufficient to authorize service by publication. We think otherwise. The affidavit showed that the defendant is a foreign corporation; that the plaintiff was unable to make service of the summons upon the defendant within the state; that the defendant had personal property within the state, which is fully described; that the property had been taken possession of by a receiver of the court; that the plaintiff sought to subject and appropriate this property for the payment of his claim; and that his action is brought upon a contract between him and defendant. Sections 72, 73, Civil Code.

2. It is further claimed, as the personal property referred to in the affidavit was in litigation, that the court could not obtain jurisdiction or control thereof, and therefore that the service by publication was insufficient. It appears that the property was

claimed by the electric lighting company under a chattel mortgage executed on the 18th day of January, 1886, by C. E. Decker; that that the company had made a demand of Decker for the possession of the property under the mortgage, and he had refused to surrender it. The company then brought suit of replevin to recover it. Decker contested the company's right to it. The sheriff had been in the possession of the property, under an order of replevin, for more than 24 hours, and no redelivery bond had been given. He had tendered the property to the attorney of the electric company, and, as the company did not take possession of it, he turned it over to the receiver. The appointment of a receiver is a provisional remedy. The receiver was appointed by the probate judge. In exercising this power, the probate judge acted as an officer of the district court. The appointment of a receiver by the district court secured to that court the power to control, at its discretion, all controversies which affected the property placed in the custody of the receiver. The district court had the authority to change the property from one of its officers to another officer. All the proceedings complained of, both in this action and in the replevin action, were pending in the district court,—the same court. Therefore there is nothing against the service by publication on account of the property being in litigation or *in custodia legis*. Gross v. Bogard, 18 Kan. 288; Bates v. Wiggins, 37 Kan. 44, 14 Pac. Rep. 442.

3. The subsequent discharge of the receiver did not, and could not, affect the jurisdiction of the court, because the defendant was then in court by its appearance and answer.

4. Upon an examination of the testimony, we can sustain the damages given Martin against the electric company for a breach of his contract, to the amount of \$150; but for the claim of L. S. Clark against the company, assigned to Martin, the testimony is insufficient to sustain all the damages allowed. Under the contract between Clark and the electric company, electric light was to be furnished him, for \$150, from December 23, 1886, to December 23, 1887. Clark had the light for six months. It is not shown that the light furnished him was bad during that time; therefore Clark's damages could not have exceeded \$75. Judgment ought not to have been rendered for Martin for a larger sum than \$225. If the plaintiff below shall remit, within 30 days, \$75 from the judgment, the balance will be affirmed, the costs in this court to be divided. If, however, there shall be no remitter, the judgment must be reversed. All the justices concurring.

(43 Kan. 458)

WISNER et ux. v. BIAS.

(Supreme Court of Kansas. April 4, 1890.)

DEMURRER TO EVIDENCE.

Where the evidence of the plaintiff does not support the allegations in her petition, and a demurrer is presented to such evidence by the de

pendant, such demurrer should be sustained; and if overruled, is error.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Sedgwick county; T. B. WALL, Judge.

Chester I. Long, for plaintiff in error. *Denton & Jones*, for defendant in error.

STRANG, C. This action was brought by Rachel Bias, plaintiff below, before a justice of the peace of Barber county, to recover damages for the conversion, by the defendants below, of certain personal property alleged to belong to the plaintiff below. No answer required, and none filed. Trial before the justice resulted in a judgment in favor of the plaintiff for \$25. Defendants appealed to the district court, and afterwards the case was sent on a change of venue to Sedgwick county for trial, and tried before the court and jury, resulting in a judgment for the plaintiff for \$50 and costs. The defendants demurred to the evidence of the plaintiff on the trial of the case in the district court, which demurrer was overruled, and the ruling excepted to. Motion for a new trial was made and overruled, and the ruling excepted to, and the plaintiffs in error bring the case here, and allege that the court erred—*First*, in not sustaining the demurrer to the evidence of the plaintiff below; *second*, the court erred in overruling their motion for a new trial; *third*, the court erred in rendering judgment for the plaintiff, and against the defendants, on the verdict of the jury; and, *fourth*, the court erred in rendering judgment against the defendants for costs. August 20, 1884, Henry Wisner, plaintiff in error, sold to Hattie J. Bias the improvements, without specifying them, on a certain quarter section of land in Barber county, Kan. She pre-empted said land, and, after making final proof thereon in May, 1885, sold the land, with all the improvements, without specifying them, to her mother, Rachel Bias, defendant herein. At the time Hattie J. Bias purchased the improvements on said land, and pre-empted the same, it was not known just where the line between that quarter and the quarter adjoining it on the east, then owned and occupied by the plaintiffs in error, was. There were some improvements, consisting of a claim-house, some breaking, and a wire fence on the west side of said piece of land. Prior to this time the defendants below had made certain improvements on the west side of their quarter section, adjoining the land of plaintiff below on the east, and near the line, consisting of a barn, sheep-house, stock corral, board fence, and wire fence, which were used by them to shelter and secure their stock. In the spring of 1885, the husband of Rachel Bias procured one Skinner to locate the line between the land of his wife and the land of the plaintiffs in error. Skinner's survey located the land much further east than either of the parties had supposed it was, and east

of the sheep-house, stock corral, board fence, and wire fence, built and occupied by the plaintiffs. Soon after Wisners moved those improvements further over on their land. Mrs. Bias then brought this suit to recover damages for the taking and conversion of the sheep-house, stock corral, board fence, and wire fence, basing her ownership of that property on the fact that she had purchased the improvements upon her quarter, and the further fact that Skinner's survey located those improvements upon her land. To recover, the plaintiff below was required to establish affirmatively her title to the property alleged to have been converted. This we think she failed to do. It is evident, from the evidence introduced by the plaintiff, that, at the time Hattie J. Bias purchased the improvements on the land she afterwards sold to her mother, Wisner had no intention of selling her the improvements in question, and equally evident that she had no idea that she was buying them, and that she never did suppose they belonged to her or her mother until after the Skinner survey. The proof by the plaintiff below of her ownership in the property alleged to have been converted consists entirely in the fact that she purchased of Wisner the improvements on the land, and that the Skinner survey showed these improvements to be on her land. Skinner was not the county surveyor, nor one of his deputies, nor did he make his survey under any agreement between Wisners and Mrs. Bias for the location of the line between their lands; and, besides, there was no proper evidence of any survey by Skinner. The Skinner survey settled nothing as to the location of the line between the lands of the parties, and therefore settled nothing as to the ownership of the property in dispute. That being true, there was no evidence to support the claim of ownership by the plaintiff below to the property said to have been converted, and the demurrer of the defendants below to the evidence should have been sustained. The overruling of said demurrer, therefore, was error. We think it unnecessary to notice the other errors.

It is recommended that the judgment of the district court be reversed, and the case remanded for further trial.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 461)

WOOD v. NICOLSON.

(*Supreme Court of Kansas. April 4, 1890.*)

QUIETING TITLE—PLEADING—AMENDMENT—TAX-DEED—VALIDITY.

1. Where the district court renders judgment upon a petition that is fatally defective, and the defendant files no answer, nor makes any appearance, the judgment may be corrected by proceedings in error in the supreme court.

2. Where service is made by publication upon a defendant in a civil action, and the defendant is in default, the plaintiff cannot, in his absence and without notice, amend the petition, which is fatally defective, so as to cure the defect by stating a

cause of action, and then, without new service or other notice, and in the absence of the defendant, obtain a judgment against the defendant upon the new or amended petition.

3. Before an action to quiet title to real estate can be maintained, the plaintiff must have either the actual possession thereof or the legal title.

4. Where the granting clause of a tax-deed does not describe or convey any property, the deed is not in substantial compliance with the statute, and is therefore void upon its face.

(*Syllabus by the Court.*)

Error from district court, Wabaunsee county; R. B. SPILLMAN, Judge.

T. N. Sedgwick, for plaintiff in error.
Malcolm Nicolson, for defendant in error.

HORTON, C. J. On the 19th day of August, 1887, Malcolm Nicolson procured from the county clerk of Wabaunsee county the assignment of three tax certificates held by the county. One of the certificates covered the N. E. $\frac{1}{4}$ of section 31, township 13, range 10; one the N. W. $\frac{1}{4}$ of section 32, township 12, range 10; and one the S. E. $\frac{1}{4}$ of section 32, township 12, range 10. These certificates were for the sale of 1873, for the tax of 1872. Nicolson took out a tax-deed to the land described, based upon the tax certificates, the consideration for the deed being \$145.65. He commenced this action to quiet title against Harriet H. Wood on September 7, 1887. The service obtained was by publication, and by the terms of the publication notice the defendant was required to answer the petition on or before October 28, 1887. On the 27th day of October, 1887, Nicolson obtained leave to file a supplemental or amended petition to his original petition. On the 29th day of October, 1887, he took judgment quieting his title. Harriet H. Wood brings the case here, and alleges that the petition did not state facts sufficient to constitute a cause of action against her, therefore that the judgment rendered is erroneous. Any material error apparent in the final judgment of a district court may be corrected by proceedings in error in this court, although no exception was taken by the party complaining, and no appearance by him at the trial and judgment, and no motion made to set aside the judgment. *Koehler v. Ball*, 2 Kan. 160; *Lender v. Caldwell*, 4 Kan. 339. It seems to be conceded that the original petition was fatally defective. The amendment was intended to cure the defect, but as the defendant was served by publication only, and had never appeared or answered in the case, and was not present at the time the amendment was asked for, allowed, or filed, the action of the trial court in permitting an amendment so material to the petition to be filed, and in rendering judgment thereon, in the absence of the defendant, was error. *Haight v. Schuck*, 6 Kan. 192; *Alvey v. Wilson*, 9 Kan. 401; *Railroad Co. v. Van Riper*, 19 Kan. 317. The petition alleges that the lands described are "wild, open, uncultivated, and unoccupied," and sets forth that the plaintiff's title is based upon a tax-deed, referred to and made a part of the petition as "Exhibit A." The

granting clause of the deed is as follows: "Now therefore, I, G. W. French, county clerk of the county aforesaid, for and in consideration of the sum of one hundred and forty-five dollars and sixty-five cents, (\$145.65,) taxes, costs, and interest due on said land for the the year A. D. 1872, to the treasurer paid as aforesaid, and by virtue of the statute in such case made and provided, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said Malcolm Nicolson, his heirs and assigns forever, subject, however, to all the rights of redemption provided by law." The statutory form of a tax-deed has not been followed, nor is the deed in substantial compliance with the statute. Section 138, c. 107, Gen. St. 1889. In the granting clause of the deed there is nothing sold or conveyed, no property described. The deed is therefore void upon its face. Before an action to quiet title can be maintained, the plaintiff must have either the actual possession or the legal title. *Eaton v. Giles*, 5 Kan. 24; *O'Brien v. Creitz*, 10 Kan. 202; *Douglas v. Nuzum*, 16 Kan. 515. The petition shows that Nicolson did not have actual possession of the land, and, as the tax-deed upon which his title is based is void, he has no legal title. The purpose of the amendment, which was allowed without notice and in the absence of the defendant, was to attach to the petition a tax-deed which had been issued after the commencement of the action, and in this way to cure the defective tax-deed originally attached to the petition. There is, however, but one tax-deed in the record, and this tax-deed is the one referred to as fatally defective. This tax-deed was not issued until the 26th day of October, 1887, nearly two months after the action was commenced. It is possible that there was some mistake in the preparation of the record, and that a valid tax-deed was filed with the supplemental or amended petition, but the transcript purports to be a full and complete one, and only one tax-deed is embraced therein; that is a void one. On account of the errors referred to, we cannot sustain the judgment of the trial court. The judgment must be reversed. All the justices concurring.

(43 Kan. 441)

MILLER v. BLUE.

(*Supreme Court of Kansas. April 4, 1890.*)

NUISANCE—DAMAGES—PLEADING AND PROOF.

In an action for damages by the owner of a building against the owner of an adjacent building, for the maintenance of a nuisance therein, where the answer is a general denial, it is error to admit evidence, over objection, tending to prove that plaintiff had, at a time prior to the origin of his alleged cause of action, kept a saloon, in violation of law, in his building.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Geary county; M. B. NICHOLSON, Judge.

J. R. McClure, for plaintiff in error. *J. R. Burton*, for defendant in error.

STRANG, C. This was an action for damages, commenced in the district court of Geary county. The plaintiff alleged in his petition that he was the owner, and in possession, of a certain stone business house in the city of Junction City; that the defendant, since the erection of his said business house by the plaintiff, had constructed, on the lots abutting his in the rear, a frame building, in which for two years then last past she had kept and maintained a nuisance, to-wit, a bawdy-house, or house of ill fame; that, by reason of the maintenance of such nuisance in her said building by the defendant, the plaintiff had been prevented, during said period of two years, from renting his said store-house, whereby he had been damaged in the sum of \$1,200. The defendant answered by a general denial simply. On the trial of the case in the court below, the plaintiff was introduced as a witness in his own behalf, to prove the ownership of his building, its rental value, his unavailing efforts to lease it during the period named in his petition, and that the defendant, during said period, kept and maintained in her said building the nuisance complained of. On the cross-examination he was asked if, during the time he occupied his building, he did not use it as a saloon; if he did not sell beer and whisky therein by the glass,—by the drink; if he did not have a large quantity of whisky stored in the cellar of said building at the time of the trial; what it was worth, and what he paid for it,—all of which evidence was admitted over the objection of the plaintiff, and the ruling of the court in that regard was by him properly excepted to. The admission of such evidence over the objection of the plaintiff is assigned as error here.

Under the pleadings in the case the questions to be determined were: *First*. Was the plaintiff the owner, and in the possession, of the building described in his petition as his during the time therein stated? *Second*. Did the defendant, during the period named by plaintiff in his petition, keep and maintain the nuisance complained of, to the injury of the plaintiff? *Third*. If so, how much damage did the plaintiff suffer thereby? A rule governing the introduction of testimony is that the evidence offered must correspond with the allegations in the pleadings, and be confined to the point in issue, (*Brookover v. Easterly*, 12 Kan. 152;) and it is the duty of the court to insist upon a compliance with such rule, (*Graham v. Trimmer*, 6 Kan. 230.) Did the evidence, the admission of which is complained of, relate to the issue, or any part thereof? We think not. Just what light such evidence would throw upon any of the questions raised by the pleadings it is difficult to understand. If the plaintiff had at any time kept a saloon in his building in violation of law, and had complained of the defendant for keeping a bawdy-house adjacent thereto, covering the same period of time during which he was running his saloon, such evidence would be admissible in mitigation of dam-

ages, in an action by the plaintiff against the defendant for damages accruing to him growing out of the keeping by the defendant of such bawdy-house. But in this case the record shows that the plaintiff had not occupied his building for nearly two years, and that he made no claim for damages for any portion of the time during which he had occupied it; hence the evidence was not material for that purpose. A careful examination of the record discloses no ground upon which the evidence complained of was admissible in this case. If not admissible, was its admission prejudicial to the rights of the plaintiff? We think it was. By the admission of such testimony, and the instruction of the court in relation thereto, which was also complained of, and assigned as error, the jury may have been misled. They probably were led by such evidence to believe that the plaintiff, as well as the defendant, had been engaged in business in violation of law; and, if so, that he had no right to complain of the consequences of the defendant's violation of law. We think such evidence would tend to produce in the minds of the jury such a conclusion, and was therefore prejudicial to the plaintiff's rights, and hence error. It is therefore recommended that the judgment of the district court be reversed, and the cause remanded for another trial.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 553)

HEITMAN v. GRIFFITH *et al.*

(*Supreme Court of Kansas*, April 4, 1890.)

PARTNERSHIP—HUSBAND AND WIFE.

1. The general manager of the business of a partnership, having power to borrow money, and to give the necessary securities therefor, may borrow money from his wife, and give the necessary securities therefor, and the same will be upheld in equity, where the entire transaction is honest and in good faith, and where in equity the same should be upheld.

2. And where at the time when the money is borrowed a promissory note for the amount loaned is given in the firm name to the wife, and also at the same time it is understood that, if the money should not soon be returned to her, she should also have a chattel mortgage on the property of the firm to secure the debt, and in about 23 days thereafter the chattel mortgage is executed, held that, as against the firm or a member thereof, the chattel mortgage is valid.

(*Syllabus by the Court.*) -

Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

Overmeyer & Safford, for plaintiff in error.
G. N. Elliott and Robert A. Frederick, for defendants in error.

VALENTINE, J. This was an action brought in the district court of Shawnee county on October 12, 1886, by Charles Heitman against William H. Griffith and Sarah M. Griffith, who were husband and wife, for the purpose of dissolving a partnership known as "W. H. Griffith & Co.," annulling a chattel mortgage purporting to have been executed

by the firm of W. H. Griffith & Co. to Mrs. Griffith, for an accounting between the partners, and for the appointment of a receiver to take charge of the partnership affairs. The business of the firm consisted in operating a planing-mill, dressing lumber, etc. A provisional receiver was appointed at the commencement of the action. The defendants answered separately. Mrs. Griffith in her answer set forth, among other things, that she had no interest in the partnership, except that the firm owed her the sum of \$878.86, and interest due on a promissory note secured by a chattel mortgage on the property of the firm. The plaintiff replied to both answers by filing a general denial. The case was tried on June 27, 1887, before the court without a jury, virtually with regard to the truth of Mrs. Griffith's answer, and the court found generally in favor of the defendants, and that the firm of W. H. Griffith & Co. owed Mrs. Griffith the sum of \$957, principal and interest, due on the aforesaid note and chattel mortgage, and that the same was a first lien upon the mortgaged property, and rendered judgment in accordance with these findings, and ordered that the receiver pay and satisfy the judgment out of the funds of the copartnership; and the plaintiff, as plaintiff in error, brings the case to this court for review.

The questions in dispute in this case are and have been principally questions of fact, and not questions of law, and with reference to these questions of fact the court below found in favor of the defendants, and against the plaintiff, upon sufficient evidence, and hence there is but little for this court to decide. It appears that, about 19 years before the trial in the court below, Mr. and Mrs. Griffith were married. Neither at the time had any property, but since that time, and up to the trial of this case, both used their best endeavors to accumulate property, and they together accumulated a considerable amount. Mrs. Griffith never carried on any separate business, and never obtained any property except what she obtained through the joint exertions of herself and husband, and which was set apart to her by the consent of both. During the aforesaid 19 years they had owned several pieces of real estate, and the titles to some of them were placed in her name, and to others in his name, and all this was done in good faith, and not for the purpose of defrauding any person. It does not appear that either of them was ever insolvent or embarrassed financially; and, from anything appearing in the case, either of them could now easily pay any debt or debts which he or she may owe. About nine or ten years before the trial, a piece of real estate was sold which belonged to Mrs. Griffith, and with the proceeds thereof certain other real estate at or near the corner of Second and Jackson streets in the city of Topeka was then purchased, and the title to this last-mentioned real estate was placed in the name of Mrs. Griffith, and it belonged to her. About May, 1886,

this property was sold, and in August afterwards a portion of the proceeds was loaned by Mrs. Griffith to the firm of W. H. Griffith & Co. to pay a debt which the firm owed to Hall & Brown, of St. Louis, Mo., for machinery, etc., purchased by the Topeka firm from the St. Louis firm, and which St. Louis debt was past due and secured by a chattel mortgage on the property of the Topeka firm. Prior to this time, and about June or July, 1885, a copartnership was organized, consisting of Griffith and L. T. Rensch. Afterwards, and about December 1, 1885, Heitman became a member of the copartnership, paying into the copartnership \$1,000 for the privilege of becoming a member, and written articles of copartnership were drawn up, and signed by all the parties. Griffith acted as the general manager of the business affairs of the firm. About June 8, 1886, Rensch sold out his interest in the copartnership to Griffith, and after that time the firm consisted of Griffith and Heitman. About August 15, 1886, Griffith borrowed the amount of the aforesaid promissory note from Mrs. Griffith, and, with the money got from her, paid the aforesaid debt owing by the firm to the St. Louis parties, and gave to Mrs. Griffith the aforesaid note, dated August 15, 1886, executed by Griffith in the name of the firm. It was understood at the time that this money was to be repaid to Mrs. Griffith in a few days, or that she should have a chattel mortgage on the property of the firm to secure the note. The note not being paid, the chattel mortgage aforesaid was executed by Griffith in the name of the firm on September 6, 1886, to secure the payment of the note, and this chattel mortgage was deposited in the office of the register of deeds on October 12, 1886. Under the findings of the court below, all these transactions were in good faith, and no fraud was committed or intended to be committed, as against Heitman or any other person, by either Griffith or his wife. Griffith, in his capacity as general manager of the business affairs of the firm, had, at several times, with the knowledge of the plaintiff, transacted other business matters of like character with this,—that is, he had borrowed money at different times, and given notes or other securities, and with such money had paid the debts of the firm, or had used it in carrying on the business of the firm, and had afterwards repaid the borrowed money. But it is claimed that this transaction between Griffith, representing the copartnership, on the one side, and his wife, on the other side, is void, for the following reasons:

1. It is claimed that the utmost good faith is due from every member of a partnership towards every other member thereof, and that good faith requires that no partner shall obtain any private advantage at the expense of the firm. This, of course, is correct. The plaintiff also says that "every husband is interested in his wife's property in innumerable ways; it adds to his credit, importance, comfort, and power;" and that if she should die

first he would inherit one-half of her estate in any event, and might inherit the whole of it. This is also correct; but from these things the plaintiff goes further, and claims that Griffith, as the manager of the business of the firm, could not have any dealings with his wife without gaining some private advantage at the expense of the firm, and that this private advantage would have the effect to destroy the validity of all such dealings. This we do not think is correct. The remote interest which a husband has in his wife's property cannot prevent him from having business dealings with her, although he may be acting for a partnership of which he is a member, provided, of course, that such dealings are honest and in good faith; and such dealings will be upheld and sustained in equity whenever it is equitable that they should be upheld and sustained. This action is itself an equitable action, and, as the plaintiff seeks equity, he should be willing that equity should be extended to others. Now, it is certainly equitable, where the money of Mrs. Griffith has gone into the partnership funds for the purpose that it should be used, and where it has been in fact used, to pay off and discharge a partnership past-due debt, and has also relieved the partnership property from a chattel mortgage already past due, that she should have her money returned to her; and as it was understood at the time when she loaned the money that if it was not repaid to her in a short time she should have a chattel mortgage on the property of the firm to secure the debt, and as she afterwards obtained the chattel mortgage, it is certainly equitable that she should have a lien upon the mortgaged property. Her mortgage was simply placed upon the same property which had been relieved from the previous chattel mortgage by the payment of her money.

2. It is also claimed that the mortgage is void for the reason that it was given for a pre-existing debt. In other words, the money was loaned, the debt created, and the note given on August 15, 1886, and the mortgage to secure the debt was not executed until September 6, 1886. This mortgage, however, was given in pursuance of an agreement made at the time when the money was loaned that such should be done in case the money was not soon refunded; but, even if no such agreement had ever been made, the ground for claiming the mortgage to be void would hardly be sufficient. *Draper v. Cowles*, 27 Kan. 484. Before the plaintiff or any one else should be allowed to say that the mortgage should be held void he should refund to Mrs. Griffith her money. The judgment of the court below will be affirmed. All the justices concurring.

(43 Kan. 528)

STRATTON *et al.* v. HAWKS.

(Supreme Court of Kansas. April 4, 1890.)

LOST DEED—FINDINGS BY COURT—REVIEW.

1. Only that degree of proof that is necessary to satisfy the trial court of the existence of the

fact that the original is not in his possession, or under his control, is required to entitle a party to use the record of a deed in evidence.

2. A finding of fact necessarily embraced in the general judgment rendered by the trial court will not be disturbed in this court if there is some evidence to sustain it.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Wabaunsee county; R. B. SPILLMAN, Judge.

George G. Cornell, for plaintiff in error.
Hazen & Isenhardt, for defendant in error.

SIMPSON, C. The defendant in error, Isadora Hawks, filed her petition in the district court of Wabaunsee county, in April, 1885, in which she demanded partition of certain real estate, alleging that she was the owner of an undivided half thereof, and that Levi Stratton was the owner of the other half. Stratton answered, denying her ownership of an undivided half of the land, and claiming that one Jacob Beard was the owner of that part of the land claimed by her. Jacob Beard and Permella, his wife, by permission of the court, were made parties; and they filed answers, claiming that Jacob Beard was the owner of that part of the land claimed by Isadora Hawks. The real controversy was between Isadora Hawks and Jacob Beard as to the ownership of the one undivided half of the real property. The case was tried by the court, who rendered a judgment partitioning the land between Isadora Hawks and Levi Stratton. Beard brings the case here. The objections, made by the attorneys of the defendant in error, that the petition in error was not filed within a year, and that the case made does not show affirmatively that the motion for a new trial was filed in time, are not well taken, and are both overruled.

The history of the transaction out of which arises the contention about ownership is as follows: On the trial of the case, title was admitted from the government down to Levi Stratton and Jacob Beard. The principal question was whether Beard and wife had executed a deed for their interest in the land to one R. M. Thompson, through whom Isadora Hawks claims. The defendant in error, to maintain the issues on her part, introduced as a witness the register of deeds of Wabaunsee county, who brought with him the record of a deed from Beard and wife to Thompson. That was offered in evidence. The deed was claimed as a forgery by Beard and wife, and they objected to the introduction of the record. George W. Hawks, the husband of Isadora Hawks, was then examined for the purpose of laying a foundation for the introduction of the record. He testified in chief and cross-examination that he had done the correspondence, and directed the business, in purchasing the land for Isadora Hawks; that she never did have the original deed in her possession or under her control, either directly or by his agency; that he had the custody of all the deeds, papers, and business of the family; and that he knows that she has not the

possession of the deed, as the original deed was never sent them from Ohio. He said that it might be that his wife had the deed, without his knowledge, "but it is not at all probable." This record shows that the deed was executed on the 28th day of May, 1878, in Clinton county, Ohio. It was filed for record in Wabannsee county on the 29th day of November, 1879.

It is very strongly urged that no proper foundation was shown for the introduction of the record of the deed in evidence, and that the trial court erred in permitting it to be read. The attorney of the plaintiffs in error draws the line very strictly; and, while he does not cite the case of Brock v. Cottingham, 23 Kan. 383, he had it in mind when he wrote his brief. It has no application to the case we are considering. In that case an execution was alleged to have been lost, and the party was seeking to prove its loss, and then its contents by parol; and this court held to the strict rule; that its loss must clearly be proven, and that its last known custodian must be introduced to show the loss. The question here is, what amount of proof is necessary to satisfy the court that an original deed, that has been duly recorded, is not in the possession or under the control of a party who is seeking to introduce the record of the deed, to admit such record? Section 387a of the Civil Code, and section 27, c. 22, Comp. Laws 1885, are probably the only statutory provisions regulating the introduction of the record, and determining its effect as evidence when introduced. These two sections seem to require only such proof as will satisfy the court that the original deed is not in the possession or under the control of the party desiring to use the record, in order to entitle the record to be admitted. In truth, the section of the Code that is more particularly applicable does not prescribe how it shall be determined that the original is not in the possession or under the control of a party desiring to introduce the record. The other section, that allows certified copies of the record to be introduced, says that, upon proof that the original is not in the possession or under the control of the party desiring to use it, certified copies of the record may be introduced. Probably both sections mean that the record, or certified copies of the record, may be introduced whenever it is shown to the satisfaction of the court that the original is not in the possession or under the control of the party offering the record, or a certified copy thereof. Only that degree of evidence is required that creates a reasonable certainty of the existence of that fact.

Complaint is made in this case because Isadora Hawks was not put upon the witness stand to testify as to her possession and control of the deed to Thompson. Suppose she had been. She would have, undoubtedly, stated that her husband transacted her business, and was the custodian of all the papers connected with it. The showing would not have been made stronger by the addition of

her evidence. It is a mere matter of evidence, (Williams v. Hill, 16 Kan. 23;) and all that is necessary to do is to produce enough to satisfy the trial court of the fact that the original is not in the possession or under the control of the party offering the record. The degree of evidence required must, of necessity, be governed by the particular circumstances surrounding each offer. In this case the proof offered was satisfactory to the trial court, and must be regarded as sufficient on review, under well-known and oft-repeated rules.

Another objection to the introduction of the deed, or rather the record of it, was made on account of a defective acknowledgment; but, as the objection is a general one, and no particular defect is pointed out or insisted on in the brief of counsel for plaintiffs in error in this or the subsequent deeds to which an objection is made, we will not notice the objections.

It is also insisted with vigor and ingenuity that there was no delivery of the deed from Beard and wife shown by the record. This was one of the most closely contested questions involved in the case. The direct evidence bearing upon it was conflicting. Many circumstances were shown from which strong inferences arose tending to support both theories. The judgment rendered by the trial court necessarily includes a finding that there was a delivery of the deed to Thompson, because, if the trial court had been of the opinion that there had been no delivery of the deed, the inevitable result would have been that the judgment would have been rendered in favor of the party now here complaining. It is true, beyond all qualification, that there is some evidence to support the finding contained in the judgment, that there was a delivery of the deed to Thompson. Hence we cannot disturb the judgment for the reason urged, without entirely disregarding well-established rules. We have discussed the material questions sufficiently; the others are unimportant. There are no reversible errors in the record. It is recommended that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 558)

LAMONT v. WILLIAMS.

(Supreme Court of Kansas. April 4, 1890.)

REPLEVIN—AFFIDAVIT—CONTINUANCE.

1. An action for the recovery of personal property may be maintained although no affidavit in replevin is filed. The action can proceed as one for damages.

2. When the property sought to be recovered is not taken by the writ, or not delivered to the plaintiff by virtue thereof, it is immaterial, after judgment, whether there was an affidavit in replevin or not.

3. When the court, of its own motion, makes an order continuing all cases undisposed of until the next regular term, and in a few minutes thereafter announces that the order will be set aside, and that such cases will be for trial during the

following week, the jurisdiction and control of the court over such cases for that term is not lost by the first order.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Pratt county; S. W. LESLIE, Judge.

R. F. McGrew, for plaintiff in error. *Noff-singer & Carakadon*, for defendant in error.

SIMPSON, C. This action was commenced by George A. Williams, in the district court of Pratt county, on the 19th day of November, 1887, against the sheriff of Pratt county, to recover possession of a general stock of merchandise in the town of Preston, in said county, that was in the custody of the sheriff by reason of attachment proceedings against one Matthew Williams at the suit of several wholesale merchants. George A. Williams is the son of Matthew Williams, and claims to be a purchaser for value of the stock of merchandise attached. There was a trial by a jury, and a verdict and judgment in favor of George A. Williams for the return of the property, or its value, assessed at \$1,000, and for \$180 damages for its detention. A motion for a new trial was overruled. The sheriff brings the case here for review, and alleges several errors, the principal one being the overruling of his motion to quash the writ of replevin, because "there was no affidavit in said action upon which to base said writ."

The "case made," filed in this court, does not contain any affidavit, as required by section 177 of the Civil Code. The trial court certifies that the case made contains a correct transcript of all the pleadings, records, proceedings, etc. A motion was made in this court to send the case back to the trial judge for correction. It was asserted that the affidavit in replevin that was in the case made at the time it was served for amendment, also the second clause of a motion to set aside the writ of replevin because there was no affidavit, are not now in the case made, and consequently are not a part of the record. The trial judge has no power over the case made after it is certified, (*Lewis v. Linscott*, 37 Kan. 379, 15 Pac. Rep. 158, and authorities cited therein,) and we cannot grant this motion. These controversies about the contents of cases made are not creditable to the attorneys, and would rarely occur if that degree of care and examination would be bestowed upon them at the time of their settlement that ordinary prudence demands. It is primarily the duty of the attorney of the plaintiff in error, in the preparation of a complete case made, to insert therein all the file papers, the journal entries, and all the evidence; or, if this is not necessary to the determination of the questions to be reviewed in this court, so much thereof as is essential for that purpose. After its service on the attorney of the defendant in error, it becomes his duty to carefully examine it, and if, in his opinion, it does not contain all that is re-

quired, to suggest amendments thereto, and return the case made, with his suggestions. It is equally the duty of both attorneys to be present at the time and place of settlement, if due notice has been given thereof, to see that the case made contains all the essential requisites before it is settled and signed by the trial judge. If these various duties are faithfully performed, there can be no reasonable cause for contention about the correctness of a case made, except in cases wherein it is alleged that changes have been made after the settlement. This court has no power to change a case made in any respect. We may disregard manifest clerical errors, (*Edmondson v. Beals*, 27 Kan. 657,) or may disregard the certificate of a trial judge, when it is shown to be intentionally false, (*Railway Co. v. City of Fort Scott*, 15 Kan. 435.) It may be possible that a case might arise in which there was such a conclusive showing that the case made had been so changed after its settlement that such gross injustice would result from a record so constituted that this court would decline to consider it. In this particular case the contention is about an entirely immaterial matter, and we shall pay no attention to it.

One of the principal errors complained of was the overruling of a motion to set aside the writ of replevin because there was no affidavit in replevin. As this was provisional, and the plaintiff in the action did not get the property by virtue of the writ of replevin, it becomes entirely immaterial after judgment. Even if the writ of replevin never issued, the action could proceed as one for damages. An action in replevin may be maintained under our Code without a seizure of property at some time before the final determination of the suit, and therefore without an affidavit. (*Hoisington v. Armstrong*, 22 Kan. 110; *Wilson v. Fuller*, 9 Kan. 177; *Ward v. Master-son*, 10 Kan. 77. In the case of *Batchelor v. Walburn*, 23 Kan. 733, BREWER, J., speaking for the court, and construing section 176 of the Code, says: "The plaintiff may, not must; and he may at the commencement of the suit, or at any time before answer. The action exists, or may exist, before the order. The section recognizes the action, and says certain things may be done in it. It nowhere provides that a failure to take the order abates the action, or that defendant may prevent a recovery by showing that plaintiff has not availed himself of all the privileges which the statute has given. The order for the delivery is ancillary. It is like an order of injunction, which may be the final judgment or a provisional remedy. Code, § 237. In replevin, the judgment may be for the possession, or the value thereof, in case a delivery cannot be had. Id. § 185. And delivery may be enforced after judgment by attachment, as for a contempt. Id. § 188. It would be a strange omission if such action could not be maintained; in many cases, a gross denial of justice." It is evident from all these cases that, even if there was no affidavit in

replevin in this particular case, the error overruling the motion to set aside the order of replevin for that reason, is now, after judgment, and probably before, an immaterial one. In any event, it probably could only effect a question of costs. It could not abate the action. This is not only expressly decided, but clearly demonstrated.

The next error seriously urged for reversal is the overruling a motion for continuance. On Saturday, the 14th day of January, 1888, during the regular term of the Pratt county district court, an order was made continuing this case, with all others, until the April term. This order was made by the judge on his own motion. In a few minutes thereafter the court announced that the orders for continuance made previously in all such cases would be set aside, and the cases tried during the following week; and on the 17th day of January following the court caused an order to be entered on the journal setting aside the orders for continuance heretofore made. To this latter order the plaintiff in error excepted. This order also assigned this case for trial on the 18th day of January. The case was not reached for trial in regular order until the 20th day of January. On the 19th day of January the plaintiff in error filed his motion for a continuance. On this statement the plaintiff in error claims that by the order of continuance made by the court on Saturday, the 14th, the case was off the docket for that term, and passed out of the control of the court, and could not be reinstated. In the case of *Gray v. Ulrich*, 8 Kan. 112, a continuance was granted by consent of the parties; but afterwards, during the term, on application of one of the parties in the absence of the other, the continuance was set aside, and the case heard. The court, commenting on some other errors, says: "Ordinarily, too, it is improper, after a case has been continued, to set aside the continuance and dispose of the case, in the absence of one party, and on the application and in favor of the other. A record thus scarred is not comely to look upon. However, if these were the only errors, we should probably be constrained to let the judgment stand until, at least, application had been made to the court in which it was rendered to vacate it." This is a much stronger case than the one we are considering. Here the order of continuance was only in existence a few minutes, was made by the court on its own motion, and changed by the court. The case was not tried or disposed of in the absence of either of the parties to the action. In the case of *State v. Plowman*, 28 Kan. 569, a criminal case, in which the defendant was charged with robbery, a continuance was ordered by the court on the motion of the defendant. Shortly after this, the order of continuance was set aside, and the case tried. Substantially the same claim was urged for reversal in that case as in this. It was said that when the court made the order for continuance the case wholly passed beyond the jurisdiction of the court for that

term. This was denied by this court, and the conviction and judgment affirmed. The trial judge makes a statement respecting this continuance, and incorporates it in the case made; but it is not material, except in his statement that he ordered the order of continuance set aside within a very few minutes after it was made. We have grave doubts whether, under any fair construction of the motion for a new trial filed in this case, this alleged error was called to the attention and passed upon by the trial court; but we have considered it, and do not think it a sufficient cause for reversal. This brings us to the consideration of the sufficiency of the affidavit for a continuance, and it so manifestly falls within many of the reasons given in the cases of *Kilmer v. Railroad Co.*, 37 Kan. 84, 14 Pac. Rep. 465, and *Board v. Linscott*, 80 Kan. 240, 1 Pac. Rep. 81, and is especially so largely in the discretion of the trial court, that its ruling will not be held to be erroneous.

Finally, it is insisted as causes for reversal that the amount of damages is excessive, and that there is error in the assessment of the value of the property taken. These are questions peculiarly within the province of a jury to determine, and as to the first there is some evidence to sustain it; and as to the second the jury decided between the value as stated by the defendant in error and the amount as stated by him that was realized by the sheriff's sale. The plaintiff below had the right to recover the market value of the goods at the time they were taken from his possession by the sheriff on the attachment levies. His statement was that the goods were of the value of \$1,400. On his cross-examination he stated that the goods seized were afterwards sold by the sheriff for the sum of \$642.12. On these statements the jury returned in their verdict the value at \$1,000; this sum being a fair average between the two methods of valuation, and probably nearer correct than either of the others. The amount cannot be considered excessive, under the evidence, and the verdict was approved by the trial court. We recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 481)

SHANE v. PALMER.

(Supreme Court of Kansas. April 4, 1890.)

PAYMENT—AGENT—AUTHORITY.

An agent who loans money and collects and remits interest to a non-resident holder of note and mortgage, and is expressly authorized to remit principal and interest after loan is due, is authorized to receive payment on said note and mortgage, although they are not at the time in his possession. (*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Dickinson county; M. B. NICHOLSON, Judge.

John H. Mahan, for plaintiff in error.
Stumbaugh, Hurd & Dewey, for defendant in error.

STRANG, C. Action for foreclosure of mortgage. Defendant pleaded payment to T. C. Henry & Co., and alleged that they were the agents of the plaintiff below, with authority to receive such payment. The undisputed evidence in the case shows that on the 20th day of January, 1880, A. H. Vansant and wife executed to Asa C. Palmer, plaintiff in the case, the note and mortgage sued on, for \$250, due in five years, with interest at the rate of 10 per cent., payable semi-annually; that afterwards, and before said note became due, the plaintiff in error became the owner of the legal title to the premises upon which the mortgage in suit was made a lien; that, as each semi-annual coupon for interest became due, the plaintiff in error paid the amount thereof to T. C. Henry & Co., who claimed to be the agents of the defendant in error, and who receipted to him for the same, forwarded it to the defendant in error, whereupon he returned to them the coupon therefor, and they delivered it to the plaintiff in error; that a few days before the note sued on became due the plaintiff in error paid the same, with the amount of the last interest coupon thereon, to T. C. Henry & Co.; that T. C. Henry & Co. failed to pay over to the defendant in error the money so paid them.

The only disputed question in the court below was whether or not T. C. Henry & Co. were the agents of A. C. Palmer, with authority to receive the money on said note. That question the court below resolved in favor of the plaintiff, and entered judgment for him for the amount of the note and for costs. The defendant filed a motion for a new trial, which was heard and overruled, to which order, overruling the motion for a new trial, the defendant objected and excepted, and assigns as error herein the refusal of said court to grant a new trial. The question to be determined here is, did the court below commit error in refusing to grant a new trial? And this question turns upon the further question, were T. C. Henry & Co. the agents of A. C. Palmer, plaintiff below, to collect the money due on the note sued on? If T. C. Henry & Co. had no authority to receive such payment, then the record discloses no error; but, if they had such authority to receive such payment, then the judgment of the court below is erroneous, and should be reversed.

It is a very serious question whether the defendant below was not justified in making the payment of said note and interest to T. C. Henry & Co. by reason of the course of business between them. For nearly five years T. C. Henry & Co. had in fact acted as the agents of the plaintiff below in connection with his loans in Dickinson county. They had loaned his money; collected both the interest and principal of said loans. The several state-

ments of account by the plaintiff below with T. C. Henry & Co., produced in evidence, all show that he expected them to make collections for him as well as to loan his money. Besides, he frequently reminded them that the interest on certain loans and the principal of others were due him, and asked them to remit the same. How could he expect them to remit money due on his notes and mortgages without they were authorized to collect the same? Commencing in July, 1880, about the time the first interest coupon was due on the note sued on, the plaintiff below refers 15 times, in so many different letters addressed to T. C. Henry & Co., to the particular claim in suit in this case. In a number of such letters he reminds them that the interest on the note is due, and asks them to remit it to him. In others he refers to coupons inclosed, on which they have collected the interest, and remitted it to him. These letters and accounts stated by Palmer with Henry & Co. come very near disclosing express authority to collect all the claims therein referred to. But the right of Henry & Co. to collect the note sued on need not be based upon authority conferred in these letters and accounts stated between Palmer and Henry & Co. by Palmer himself. Turning to page 26 of the case made, we find another letter addressed to Henry & Co. by Palmer, in which he says: "There is now due me the A. H. Vansant principal and interest, January 20th, \$262.50. Please remit." The sum named as principal and interest was the full amount of the claim sued on. We have no hesitation in saying that this letter confers explicit authority on Henry & Co. to receive the money on the Vansant note. Palmer says to Henry & Co., "There is \$262.50 due me on the principal and interest of the claim in dispute," and adds, "Please remit." If he had said, "Please collect and remit," the authority of Henry & Co. to receive payment of said claim would not have been questioned. Why are not the words, "Please remit," under the circumstances, equivalent to, "Please collect and remit?" Henry & Co. could not remit without first collecting or receiving the money on the note. Authority to remit must necessarily, under such circumstances, include authority to receive. It is said Henry & Co. did not have in their possession the note when they received and receipted to plaintiff in error for the money paid them thereon. Neither did Henry & Co., at any of the many times when interest was paid on said note, have in their hands the coupon for the interest paid; but they received the money and receipted for it to plaintiff in error, and remitted it to Palmer, and in due time received from him the coupon, and delivered it to the plaintiff in error.

We believe Henry & Co. had explicit authority from Palmer to receive the money on the note sued on. It therefore follows that the judgment of the court below is erroneous, and we recommend that it be reversed, and

the case remanded, with instructions to grant a new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 509)

WALLACE et al. v. EVANS.

(Supreme Court of Kansas. April 4, 1890.)

MAINTENANCE OF HIGHWAY—DEFECTS.

A party who built a dam, causing the backwater to fill a ravine across which ran a public highway, made a causeway composed of logs, brush, stone, and earth at the place where the public highway ran across the ravine, and made a better way than existed before the construction of the dam. The public used it, and it was for a time maintained and repaired by the overseer of highways of the road-district. Held, that the owner of the dam was not chargeable with its maintenance and repair, and was not liable for the value of mules whose death was occasioned by the causeway being out of repair.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Norton county; **LOUIS K. PRATT**, Judge.

L. H. Thompson and **C. D. Jones**, for plaintiffs in error. **J. R. Hamilton**, for defendant in error.

SIMPSON, C. The plaintiff below brought his action to recover the sum of \$400, the alleged value of a pair of mules, and \$200 as exemplary damages. He alleged that in August, 1882, Wallace constructed a dam across a creek that caused the water to fill up a ravine across which ran a public highway that had been located, opened, and traveled long before the construction of the dam; that the water had flowed into the ravine until, at the time complained of, it was 10 feet deep, and was a hazardous and dangerous obstruction to travel on said highway; that Wallace had sold said dam to Railsback, who, at the time the injury occurred, owned and maintained said dam; that on the 9th day of September, 1885, the plaintiff, with his team of mules, was traveling on said highway, with no knowledge of the dangerous condition thereof at the place it crossed the ravine, and that in attempting to cross said ravine his two mules were drowned in the water flowing into said ravine by reason of the construction of said dam. The defendants demurred to the petition, and their demurrer was overruled. They then answered, alleging, among other things, that at the time the dam was built they caused a safe and suitable embankment to be made of brush, earth, and other material across said ravine, on the line of said highway, thereby making a safe and suitable crossing; that this crossing was turned over to the road-district, and accepted by it, and these defendants were released from any further liability, or any obligation to keep up and maintain said crossing. They also plead contributory negligence. Cause tried at April term, 1887, to the court, who rendered a judgment for \$400, a motion for

a new trial being overruled. Wallace and Railsback bring the case here. They claim that the trial court erred in overruling their demurrer to the petition and evidence; that the right of action is barred by the statute of limitations, as the dam was constructed under section 14, c. 66, Comp. Laws 1885; that there was a misjoinder of parties defendant; that there was an obligation resting on the road-district to maintain the crossing and keep it in repair; that the evidence shows contributory negligence.

1. The petition in this case alleges that the place at which the loss occurred to the plaintiff below was a public highway, and alleges an obstruction thereof that was the cause of the loss of the mules. The erection of a dam caused the water to fill up a ravine across which the public highway ran. The man who built the dam constructed across the ravine an embankment of stone, logs, brush, and earth, that made a good, safe, and reliable crossing as long as it was maintained in the condition in which it was constructed. It was shown at the trial that the road overseer had caused work to be done thereon, and that for some years it was constantly used and reasonably safe. Wallace, one of the plaintiffs in error, built the dam and the embankment, and after owning the mill property, including the dam, for about one year, sold and conveyed it to one Page, who subsequently sold it to Railsback, the other plaintiff in error, who owned the dam at the time of the loss of the mules. On this state of facts it must be apparent that no liability can possibly attach to Wallace for the loss. Putting this question in the strongest possible attitude for the defendant in error, and assuming for that purpose that the erection of the dam and the backwater in the ravine was a continuing nuisance, yet still Railsback, and not Wallace, is responsible for the damages occasioned by it. When Wallace sold the dam, and some one else purchased it and assumed all liability, there seems to be no point of view in which Wallace could be held longer responsible. The judgment against him is wrong.

2. To constitute an obstruction to a public highway, it must appear that the public travel by reason thereof is actually hindered and endangered. No private action can be maintained if the obstruction continues and becomes a common nuisance on account of the nuisance *per se*, but if any individual suffers a more special injury than any other from the continuance of such a nuisance, he has his action therefor. All this is alphabetical law, and affords a sure basis upon which the argument in the case must rest. The controlling question in this case is, who is responsible for the care and repair of the highway at the point where it crosses the ravine? It is as much a part of the highway as any other portion of its length or breadth. The people at large have the right to the free and uninterrupted use of it, not upon the suffer

ance of the men who built the embankment, but as a matter of right. It has been held that, if a man builds a bridge that is useful to the public in general, it is the duty of the public authorities to repair it, notwithstanding it may be of benefit to the builder. *Rex v. West Riding of Yorkshire*, 5 Burrows, 2594; *Heacock v. Sherman*, 14 Wend. 58; *Requa v. City of Rochester*, 45 N. Y. 129; *Thomp. Highw.* (3d Ed.) 12. If a bridge is erected over a natural stream by a man for his own benefit, and it is of public utility, and is used by the public, the public is bound to keep it in repair; for in such case, although the bridge is of advantage to the man who built it, he did not create the necessity for it. *Dygert v. Schenck*, 23 Wend. 446. Where a person erected a mill and dam for his own profit, and by so doing deepened the water of a ford, through which there was a public highway, but the passage through which, before the deepening, was very inconvenient, and the miller built a bridge over it, and the public used it, and the miller had repaired it, the court held that the county, and not the miller, was chargeable with the repair. *Rex v. County of Kent*, 2 Maule & S. 513. All public bridges are *prima facie* repairable by the public. Most, if not all, of the earlier cases that have any bearing on this question make this distinction: If the bridge is built by a private person, and it is manifestly to the interest of the public to use it, and they do use it, and the way is better than it was before the bridge was built, the public are chargeable with its repair; but, if the improved way is not better than it was before, the public receives no benefit. This is certainly a very liberal interpretation of the law, so far as the public are concerned. If the principle of these cases is applied to the facts developed on the trial of this case, there can be no recovery against Railsback, as the duty to keep the crossing in repair is devolved upon the road-district. Our statutory enactments, requiring railroad corporations to restore to its former condition any public highway it may cross in the course of its construction, seems to have this principle in view. This court, construing this provision, held that when a railroad company restores the crossing of a public highway to the condition that existed at the time of the construction of its line across the highway, the railroad company is under no obligation thereafter, under this provision, to maintain it in a safe and sufficient state of repair. *Railroad Co. v. Long*, 27 Kan. 684. It can be said that it is the statute that relieves the railroad company from the liability to maintain the highway after it has been restored to its former condition, and that there is no statute that operates in favor of the defendants in error. While it is true that the courts in this country have almost universally refused to hold the public to a common-law liability to repair public highways, the statutes of every state establish their liability, and this is so universal that *prima facie* they must be chargeable

therewith; but the question in this case is, has not the public, by its acceptance and use of this road-way, and by its control and repair, assumed the liability? It cannot be successfully contended that this particular fill or causeway across the ravine is not a part of the public highway. The public has the absolute control of it. The man who built it has no right to obstruct it. If he lives in that road-district, he can be compelled to contribute money or labor to its maintenance and repair. The moment he finished its construction it became a part of the public highway, and his control ceased for every purpose. It then necessarily became the statutory duty of the road-district to keep it in repair. The record discloses that at the place where these plaintiffs in error filled the ravine they made a better and safer road-way than existed before. It is shown that it was used for some years by the public. There is some evidence tending to show that the road overseer of the district caused work to be done on it, and at times repaired it. It is not shown that it was located on the land, or that it was erected for the personal benefit of either of the plaintiffs in error. This case was tried and decided upon the theory that both Wallace and Railsback were chargeable with the maintenance and repair of a public highway, and this was error. We recommend that the judgment be reversed, and a new trial granted.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 455)

UNITED STATES WIND ENGINE & PUMP
CO. v. LINVILLE, Clerk.

(Supreme Court of Kansas. April 4, 1890.)

CLERK OF COURT—FALSE CERTIFICATE OF LIENS.

Where, in an action against a clerk of the district court to recover damages for making a false certificate as to the non-existence of liens against certain town lots, by a purchaser of said lots, it appears, by the allegations of the petition and its exhibits, that, when the certificate was made, an abstract was presented to the clerk showing a conveyance to the purchaser, long before a lien was filed against the lots in the office of the clerk for materials furnished, and that his certificate did not result in any damage to the plaintiff in error, a demurrer to the petition was properly sustained.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Osborne county; CLARK A. SMITH, Judge.

Robinson & Lawrence, for plaintiff in error.
Hays & Pitts, for defendant in error.

SIMPSON, C. The plaintiff in error alleges in his amended petition filed in the district court of Osborne county, on the 5th day of January, 1888, that the defendant in error is the clerk of the district court of that county; that as such clerk he was the custodian of the records showing mechanics' liens filed on real property in said county; that he was accus-

tomed for hire to make certificates showing the existence or non-existence of liens on real property that persons were desirous of purchasing; that on the 11th day of May, 1887, for a valuable consideration, the defendant in error made and delivered to the plaintiff in error a certificate that there were no mechanics' liens on lots 3 and 4 of block 1, in the second addition of Truman and Davis to the city of Osborne, when in truth and in fact there was a mechanics' and furnishers' lien upon the record in said defendant in error's office against said lots for the sum \$214 and interest, which said lien had been on file in that office since November 29, 1886, against the immediate grantors of the plaintiff in error; that, by reason of said false certificate, the plaintiff in error did pay and assume to pay the said sum of \$214, with interest. Judgment is asked for that amount. Attached to the amended petition, as an exhibit and a part thereof, is a copy of the original abstract, from which it appears that the usual recitations as to title were made and certified by one O. A. Truman, an abstractor, with the usual certificates of the county treasurer about taxliens, and the certificate of the defendant in error showing that there were no judgment, mechanics', or other liens against the lots recorded or filed in his office. In that part of the abstract prepared by Truman it is stated that Chase and wife, the immediate grantees of the plaintiff in error, executed a mortgage to the plaintiff in error for the sum of \$1,400, on the 10th day of May, 1886, and that the mortgage was recorded on the 11th day of May, 1886. The certificate of the defendant in error is dated May 11, 1887. The date of the filing of the mechanic's or material lien was November 29, 1886, for material furnished after July 1, 1886. The defendant below demurred to the amended petition because it does not state a cause of action, and the demurrer was sustained. The plaintiff stands on his amended petition, and brings the case here to review the ruling sustaining the demurrer. The copy of the abstract attached to the petition in the record shows that the town lots were conveyed by Chase and wife to the plaintiff in error, by warranty deed, on the 10th day of May, 1886. The allegation in the petition is that there was a material lien filed against the property on the 29th day of November, 1886, for materials furnished after the 1st day of July, 1886. So, taking the two together, the conclusion is irresistible that the plaintiff in error is not injured by the certificate made by Linville. Something is said, or rather intimated, in the briefs about the statement in the abstract as to the date of the deed from Chase and wife to the plaintiff in error being a mistake, but it must be evident that we can neither surmise or determine that this recitation in the abstract was the result of a mistake made by the abstractor. We recommend that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

LARABEE v. PARKS *et al.*

(43 Kan. 436)

(Supreme Court of Kansas. April 4, 1890.)

ATTACHMENTS—LIENS—PRIORITIES.

When several orders of attachment are issued against the same defendant, and all are executed, their priority of lien is determined by the time of their reception by the sheriff, and not by the order in which he executed them.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Stafford county; ANSEL R. CLARK, Judge.

Whiteside & Gleason and Hardy Sayre, for plaintiff in error. *Halverson & Hillis, J. W. Rose, and J. D. McFarland*, for defendants in error.

SIMPSON, C. On the 4th day of November, 1887, a creditor of W. W. Parks caused an attachment to be levied on his stock of merchandise, situate in the town of Stafford. The attachment was levied by a deputy-sheriff, at 11:30 A. M., who at once took possession and begun an invoice and appraisalment. On that same day the plaintiff in error and the defendants in error, Burnham, Hanna, Munger & Co., both commenced actions against Parks, and had orders of attachment issued against him. The order of attachment of the plaintiff in error was issued by the clerk and delivered to the attorney about 2 o'clock P. M. The order of attachment of Burnham & Co. was issued by the clerk and delivered to the attorney a few minutes later. The town of Stafford, where Parks, the debtor, lived, and where his stock of merchandise was located, is distant 11 or 12 miles from St. John, the county-seat. The attorney of the plaintiff in error, immediately on the receipt of the order of attachment, started for Stafford, and delivered the order to the deputy-sheriff, who was there making service of the first order, at 3:45 o'clock P. M. of the same day. The attorney of Burnham & Co. took the order delivered to him to the sheriff's office, at the county-seat, and delivered the order to the sheriff of the county at 2:30 P. M. of said day, who at once telegraphed to his deputy at Stafford that he had received the order. The order of attachment in favor of the plaintiff in error was served on the evening of November 4th, and that of Burnham & Co. on the morning of the 5th. Subsequently a receiver was appointed, who, under the orders of the district court of Pratt county, took charge of the attached property, and sold the same, and made due report of his proceedings. The question between the plaintiff in error and Burnham, Hanna, Munger & Co. arises on an application for the distribution of the proceeds of sale by the receiver. It is conceded that the first attaching creditor should be first paid, but the contention between these parties is as to the balance of the proceeds. The question is this: Is the priority of lien determined by the time of the delivery of the order of attachment, or by the time of the levy, in cases in which the property is already in the cus-

tody of the sheriff by virtue of prior levies in attachment? Section 196 of the Code of Civil Procedure says: "Where there are several orders of attachment against the same defendant, they shall be executed in the order in which they are received by the sheriff." The mandatory expression of this section is so plain and vigorous that there can be no reasonable doubt as to the duty of the sheriff. The law fixes the order in which several writs of attachment against the same defendant must be executed. A construction that will allow the sheriff to change the order, by the physical or passive act of levy, cannot be tolerated. There is no question here as to the validity of either lien; the inquiry is one of priority. It must be conceded that, if the sheriff had observed the plain requirement of section 196 of the Code, the order in favor of Burnham & Co. would have been first executed, but, as he disobeyed the law, it is now gravely insisted that the order of attachment last received becomes the first lien by reason of that act of disobedience. It is also suggested that, even if the sheriff disobeyed the law, the injured party has his remedy under section 718 of the Code. The injured party has more direct and speedy relief by the court declaring that, in cases of this character, the sheriff must execute orders of attachment that come into his hands in the order in which they are received by him; and if he does not, and attempts, by the levy of a later order, to give its lien priority over a former one, both he and the parties in whose interest he makes the levy, whether with or without an intention to create a preference, must be compelled to observe the mandates of the legislature in this respect. It is the duty of the court to see that its ministerial officers scrupulously observe the commands of a statute about whose meaning there can be no doubt. Whatever may be the view of text-writers, or the decision of other courts, construing statutes that do not contain this provision, the rule in this state, as declared by the legislature, is that, where there are several orders of attachment against the same defendant, their priority must be determined by the order in which they were delivered to the sheriff. This rule the district court of Stafford county enforced. We recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 545)

STREETER *et al.* v. DOWELL.

(Supreme Court of Kansas. April 4, 1890.)

APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.

It is the policy of this court, evidenced by a long line of decisions, to sustain the findings of a jury, especially when passed upon and approved by the trial court, if there is any proper evidence that fairly tends to sustain such findings; but, where the evidence to sustain such findings grows out of a conversation that is so disconnected, uncertain, incomplete, and shadowy that it is ques-

tionable whether it rises to the dignity of evidence at all, we think the exception, and not the rule, should govern.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Pratt county; S. W. LESLIE, Judge.

E. A. Austin, King & Thompson, and Chas. H. Toll, for plaintiffs in error. Noffsinger & Carskadon, for defendant in error.

STRANG, C. Streeter & Bradbury were the original contractors on a portion of the Chicago, Kansas & Nebraska Railroad, in Pratt and Kiowa counties, Kan. Cheney & Keys were subcontractors under Streeter & Bradbury on a part of the same road. Willis E. Dowell was a merchant doing business at Pratt, Kan. Cheney & Keys issued certain time-checks to laborers on said road under themselves, which checks were transferred to Willis E. Dowell. Cheney & Keys also gave orders to the men in their employ on said road, on Willis E. Dowell, for supplies, which orders were filled by Dowell. This action was brought by Dowell to recover on said time-checks, and also on said orders for supplies. His petition states a common-law action on common counts,—one for work and labor, one for goods sold and delivered. In the first count he alleges that the labor represented by the time-checks transferred to Dowell was performed at the special instance and request of Streeter & Bradbury, the original contractors, and that they undertook and agreed to pay for the same. In the second count he alleges that he furnished the supplies to the employes of the defendants upon orders given by the defendants, and upon the representation and agreement of the defendants that they would pay for them. It will be noticed that in this second count the plaintiff does not say which of the defendant firms, Streeter & Bradbury or Cheney & Keys, gave the orders on him for the supplies furnished by him, nor which of said defendant firms promised to pay for such supplies; but the evidence clearly shows that the orders were given by Cheney & Keys. The case was tried by the court and a jury. Verdict for the plaintiff against Streeter & Bradbury alone. Motion for a new trial. Motion overruled, which ruling was duly excepted to, whereupon Streeter & Bradbury bring the case here for review.

This not being a statutory action on the bond of Streeter & Bradbury, given under our statutes, (sections 1257, 1258, Gen. St. 1889,) and the men who performed the labor having been employed by Cheney & Keys, the liability of the defendants Streeter & Bradbury, so far as the first count in the plaintiff's petition is concerned, must rest solely upon the undertaking and promise to pay the men who performed the labor represented by the time-checks in suit. A careful examination of the record fails to disclose any evidence of such an agreement by

the defendants Streeter & Bradbury, except the undertaking in their bond. It must be held, therefore, that Streeter & Bradbury are not liable for anything under this count of plaintiff's petition.

So far as the second count is concerned, this court has held in *Parkinson v. Alexander*, 37 Kan. 110, 14 Pac. Rep. 466; *Wells v. Mehl*, 25 Kan. 205; and *Railway Co. v. Ritz*, 30 Kan. 80, 1 Pac. Rep. 27,—that the original contractors constructing a railroad are not liable, even on their bond, for provisions or goods furnished persons in the employ of subcontractors on orders of the subcontractors. The liability, therefore, of Streeter & Bradbury, under the second count, must also rest upon their alleged undertaking and promise to pay for the goods furnished by Dowell to the laborers of Cheney & Keys on their orders. From an examination of the record, it is not quite clear that there was not some conversation between Dowell and Stone, superintendent of Streeter & Bradbury in charge of the work on said railroad, in relation to the payment of Dowell's claim for goods sold by him to Cheney & Keys. It is clear, however, that the arrangement of Dowell for the sale of goods was made with Cheney & Keys, and that Streeter & Bradbury had nothing to do with the making of that arrangement, and, at the time it was made, knew nothing about it. It is also clear that the whole or a large part of said goods were sold and delivered by Dowell before he had any talk with Stone about them. The undertaking, if any, on the part of Stone, was not in writing. It was by parol, and would not furnish evidence to bind Stone or his principals, if ever so definite and complete, so far as the goods were concerned that were delivered before the conversation between Dowell and Stone in relation thereto took place. Mr. Bradbury testifies that Stone had no authority to make any promise that would bind Streeter & Bradbury to pay for goods sold to Cheney & Keys, and no one testifies that he had. But, as we think there is not sufficient evidence in the record to support the finding of the jury and judgment of the court thereon, we will not stop to investigate the question of Stone's authority to make such a promise as plaintiff seeks to prove. It is the policy of this court, as evidenced by a long line of decisions, to sustain the findings of the jury, especially when passed upon and approved by the trial court, if there is any proper evidence that fairly tends to sustain such findings; but, where the evidence to sustain such findings grows out of a conversation that is so disconnected, uncertain, incomplete, and shadowy that it is questionable whether it rises to the dignity of evidence at all, we think the exception, and not the rule, should govern. The evidence relied on in this case to support the verdict of the jury, and the judgment of the court thereon, is, we think, of that character; and therefore we recommend

that the judgment of the district court be reversed, and the case remanded for a new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 514)

ELDER v. ELDER.

(*Supreme Court of Kansas. April 4, 1890.*)

OPEN ACCOUNT—DORMANT JUDGMENT—TENDER—COSTS.

1. Mutual open accounts existed between the parties to this action, but prior thereto a judgment had been rendered against one as maker, and the other as indorser, of a promissory note. The indorser contributed to the payment of the judgment, and, after it became dormant, sought to recover the amount so contributed, as an item of the mutual open account. *Held*, the amount so paid by him is not an item of the open account, and that it is barred by the statute of limitations.

2. When a party pleads a tender of a certain sum, and brings the money into court, it is not error for the court to render judgment against the plaintiff for costs accrued subsequent to the tender, when the recovery is the same as the amount tendered.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Franklin county; A. W. BENSON, Judge.

H. P. Welsh, for plaintiff in error. C. B. Mason and Mechem & Smart, for defendant in error.

GREEN, C. This is an action upon an open account, tried by the court below without the intervention of a jury, and the following findings of fact and conclusions of law were made: "(1) Some time prior to February, A. D. 1882, a judgment was rendered in this court in favor of Matilda Dyer against Alva Elder as principal, and P. P. Elder as surety, amounting, at the date named, February, 1882, to \$727.34. (2) The defendant was unable to pay said judgment in full, but had the sum of \$200 to apply thereon. Thereupon the plaintiff proposed to pay said judgment if the defendant would give him said \$200 to apply thereon, which was accordingly done. With said \$200 and \$572.34 out of his own funds P. P. Elder paid off said judgment; and some time shortly afterwards entered said amounts so paid, as also the amount so received, in a pocket memorandum book, and afterwards transcribed the same to the account sued upon. (3) The plaintiff and defendant are brothers, and for several years open and mutual accounts have existed between them, a part of which, attached to the petition, follow the items therein, referring to said judgment. This account consists of mutual debits and credits, relating mainly to their farming transactions, for work done, produce furnished, cattle pastured, and the like, extending from October, 1882, to the spring of 1887. Statements of these accounts have been made out, and presented from time to time by one to the other, corrections made, and additions agreed upon, but no final set-

tlement has been made between them. In none of said statements have the items relating to said judgment been presented, claimed, or in any manner referred to. It appears that P. P. Elder originally kept account of the items charged by him in a pocket memorandum book, and transcribed the same into the account referred to, (a copy of which is attached to the petition.) The plaintiff knew that the defendant was unable to pay said judgment, but intended, when he paid the same, to hold it against said defendant, and have the benefit of such judgment in recovering the money so advanced and paid by him, whenever the defendant was able to pay it. The defendant was not informed, and did not know, that the plaintiff had charged him with the same in account, but seems to have supposed, and treated it as a present made by his brother to him in view of former transactions between them. P. P. Elder, from time to time, indorsed notes and became surety for Alva Elder, until about December, 1886, when they had a settlement concerning said matters, and Alva Elder executed a mortgage on his real estate to said P. P. Elder, to secure the amounts so indorsed and paid for him by said P. P. Elder, amounting to \$2,300. Not all of said indorsements, however, were included in said mortgage; for it appears that a note made by Alva Elder, of about \$700, indorsed by P. P. Elder, was not included. Said indorsement, however, had been secured by a chattel mortgage, when this real-estate mortgage was given. The said Dyer judgment, or the money paid thereon by P. P. Elder, was not included, nor was it in any manner referred to by either party. Some time in the spring of 1887, the defendant having received a considerable sum of money from the Louisiana Lottery, the plaintiff called on him, and demanded the \$527.34, so paid by him on the Dyer judgment, which was refused. This was the first demand or claim for repayment ever made by the plaintiff. Thereupon the plaintiff examined the record, intending to have execution issued on said judgment, but, finding it dormant, he, to use his own expression, thought he would try it on the account; and so this action was brought on the 28th day of April, 1887. There is due to the plaintiff from the defendant on said mutual account (excluding the items relating to said judgment) the sum of \$54.25." As conclusions of law, the court found: "(1) That said items dated February, 1882, relating to the Matilda Dyer note and judgment, do not constitute a part of the open, mutual account. (2) The cause of action accruing to P. P. Elder, by reason of the moneys so advanced and paid by him on said judgment, was barred by the statute of limitations before the commencement of this action. (3) The plaintiff is entitled to judgment against the defendant for \$54.25, the balance so found due on said account, and is not entitled to recover judgment for the amount so claimed for payment on said judgment." Judgment was

entered for the plaintiff for \$54.25. The plaintiff makes no complaint on the findings of fact by the court, but the claim is made that the court erred in its conclusions of law, upon the facts so found.

There seems to be but one item in controversy in this case, and that is the first item in the defendant's account, under date of February, 1882, "To cash paid on note of A. Elder to Matilda Dyer, and judgment on the same, v. P. P. Elder, as indorser, seven hundred and twenty seven 34-100 dollars." The question is as to whether this is properly an item of account, and, if so, whether the same is barred by the statute of limitations. After this item in the defendant's account there is a hiatus of six months, and but two more items appear in the account for the year 1882. The next item in the account is October 30, 1883. Then follow a number of items to October 30, 1885. The question we are obliged to answer in this case is this: Did this item of \$727.34 constitute a part of the open account between the plaintiff and the defendant? It appears from the findings of fact that the judgment which was obtained, and for which this item is charged, became dormant, and, without resorting to the remedy of a revivor of the judgment, the plaintiff attempted to make it a part of the mutual account between him and the defendant. There seems to be no dispute as to the balance of the account. We are of the opinion that this item is not properly a part of the mutual open account between the parties to this action. The original item having been contracted in the first instance by the execution of a note, that note having been merged in a judgment, and that judgment having become dormant, it is not legitimately an item of mutual account; and hence could not be set out as a claim against the defendant in the manner in which it was attempted in this suit; and that the item was barred by the statute, and the findings of the court below were in accordance with the law of the case.

One further complaint is made by the plaintiff in error, with reference to the judgment for costs in the case. The record shows that a tender was made, and the amount which the defendant admitted to be due, \$54.25, was brought into court. There was therefore no error in taxing to the plaintiff all costs which accrued subsequent to the tender. There being no error apparent of record, we recommend that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 492)

RAYNOR et al. v. BRYANT.

(Supreme Court of Kansas. April 4, 1890.)

SALE — WARRANTY — CONSTRUCTION — GENERAL AGENT.

1. The verdict is sustained by sufficient evidence.
2. A warranty given by a sewing-machine company, with each sewing-machine, to a person

to whom 40 different sewing-machines are sold by the company, reads as follows: "Official Warranty, No. —, 16,822. With the exceptions of shuttles and needles, we warrant the Leader sewing-machine, as numbered above, for the term of five years from this date, for family purposes. If any part of the machine is defective in workmanship or material, upon return of such part to us, we will replace free of cost. This warranty does not cover machines with altered or defaced numbers. The Leader sewing-machine herein mentioned was ordered by J. B. Bryant, and the number of this warrant must correspond with the number on the groove in needle bar; otherwise, it is evidence of fraud. No warranty is genuine unless it bears the official seal of this company." *Held*, that this warranty should be construed as follows: The warranty is a warranty of the machine as a whole, and as to each separate part, with the exception of the shuttles and needles, and this for the period of five years, in case the machine should be reasonably and properly used only for family purposes, with the privilege to the purchaser of returning to the company any particular part of the machine which might be found to be defective in either workmanship or material, and of having the same replaced by another, free of cost.

8. Where a person purchases a large number of sewing-machines from a sewing-machine company, and has other dealings with the company, and all the business on the part of the company is transacted through a certain agent, *held* that, for the purposes of such dealings, such agent may be considered as a general agent of the company, and that his agreements with reference to the business will bind the company.

4. Where a sewing-machine company sells a large number of sewing-machines to a person, and with each sewing-machine gives a warranty, and all the warranties are alike except as to numbers, and the sewing-machines do not fulfill the warranties, *held* that, on a trial of a case between the purchaser and representatives of the company, the court below did not err in permitting the purchaser to prove various defects in the several sewing-machines without first proving the particular number of each machine.

(Syllabus by the Court.)

Error from district court, Wyandotte county; J. P. HINDMAN, Judge.

This was an action on a promissory note, commenced on December 12, 1885, before a justice of the peace of Wyandotte county, by William H. Raynor and John L. Severance, assignees of the Leader Sewing-Machine Company, against J. B. Bryant. The note was for \$142.08, with a payment thereon of \$6.50. It was executed by Bryant to the Leader Sewing-Machine Company, was dated February 18, 1885, and was due in six months after date. The defendant filed an answer, which, omitting title and signature, reads as follows: "Now comes the defendant, J. B. Bryant, and, for answer to the plaintiff's petition herein, says that he admits the execution of the promissory note sued on herein, but says that the consideration for said note is a number of Leader sewing-machines which said defendant purchased of and from the Leader Sewing-Machine Company, and that said defendant received of and from said company written warranties, of which Exhibit A, hereto attached, is a copy, and made a part hereof, and that said defendant still has in his possession, and unsold, fifteen of said sewing-machines, which he is unable to sell or dispose of, for the reason that said Leader Sewing-Machine Company has failed, and

said warranties are worthless, and of no value whatever. Wherefore, said defendant is damaged in the sum of \$150 by reason of the premises aforesaid. (2) And for a further answer and defense said defendant says that the Leader Sewing-Machine Company warranted said machines to be in good condition, but that said machines were useless and worthless as sewing-machines, and were not in good order. Said company warranted said machines to be in order, and to continue in order, and to keep the same in repair, for a period of five years from and after said purchase. Said defendant says that said sewing-machines so purchased by him and warranted by the said company were not in good order, and the plaintiffs the Leader Sewing-Machine Company entirely failed, neglected, and refused to put said machines in order, although often requested so to do, to the great damage of this defendant, in the sum of \$80; and defendant has been compelled at divers times to pay out money from time to time since he purchased said machines, to have the needle wheels nickel-plated, and the treadles repaired, and the shuttle plates replated; and that said machines so delivered to said defendant were not in good order, but were useless, and of no value whatever. (3) And said defendant, for a third and further defense, says that he denies each and every allegation and averment in said plaintiff's bill of particulars contained and set out, and that said note is wholly without consideration." Exhibit A, attached to the foregoing answer, omitting formal parts, reads as follows: "Official Warranty, No. —, 16,822. With the exception of shuttles and needles, we warrant the Leader sewing-machine, as numbered above, for the term of five years from this date, for family purposes. If any part of the machine is defective in workmanship or material, upon return of such part to us, we will replace free of cost. This warranty does not cover machines with altered or defaced numbers. The Leader sewing-machine herein mentioned was ordered by J. B. Bryant, and the number of this warrant must correspond with the number on the groove in needle bar; otherwise, it is evidence of fraud. No warranty is genuine unless it bears the official seal of this company." The case was tried before the justice of the peace and a jury, and a verdict and judgment were rendered in favor of the plaintiffs for \$45, and the plaintiffs appealed to the district court, where the case was again tried before the court and a jury, and the jury rendered a general verdict in favor of the defendant, and judgment was rendered accordingly; and the plaintiffs, as plaintiffs in error, bring the case to this court for review.

D. B. Hadley, for plaintiffs in error. *Alden & McGrew*, for defendant in error.

VALENTINE, J., (after stating the facts as above.) We think the evidence introduced on the trial of this case was sufficient to au-

thorize the verdict rendered by the jury; and, if so, then the only question remaining is whether there was any such error committed by the trial court during the trial as will require a reversal of the judgment of such court. It would seem to us that the principal dispute between the parties arises from a difference between them as to what is the true and proper construction of the warranty given by the Leader Sewing-Machine Company, with each sewing-machine, to the defendant. The plaintiffs seem to construe such warranty, not as a warranty of the sewing-machine as a whole, but only as a warranty of its separate parts, and not that each separate part should remain reasonably good, with proper use, for a period of five years, or for any other period of time, but, simply, that, if it should be defective in workmanship or material at the time when the machine was sold, then that the purchaser should have the privilege of returning it to the company, to have the same replaced by another, and should not have any other remedy. On the other side, the defendant claims that the warranty is a warranty of the machine as a whole, and as to each separate part, with the exception of the shuttles and needles, and this for the period of five years, in case the machine should be reasonably and properly used only for family purposes, with the privilege to the purchaser of returning to the company any particular part of the machine which might be found to be defective in either workmanship or material, and of having the same replaced by another, free of cost. The case was tried in the court below, both by the defendant and by the court, upon the defendant's theory as to the true and proper construction of the warranty; and hence the plaintiffs claim that it was erroneously tried. Evidence was introduced on the trial tending to prove that the defendant purchased 40 sewing-machines from the Leader Sewing-Machine Company, and gave six promissory notes therefor, all of which have been paid except the one sued on; that the transactions had between the sewing-machine company and the defendant were all carried on and conducted, on the part of the company, through the agency of Phil. Jacobs; that the machines were not good machines; that many parts of them were defective both in workmanship and material; that the defendant returned some of the parts to the sewing-machine company for the purpose of having them made better, or others returned in their places; that the company repaired or replaced these parts, but charged the cost thereof to the defendant, which he paid; that Jacobs gave the defendant the privilege of making good, and repairing, all defective parts which might be found in the sewing-machines, and stated that the company would pay him therefor, and that it would save the company the expense of transportation to and from the company; that the defendant did repair, and cause to be repaired, many of such defective parts, at considerable cost to him; that he

still has 15 of such sewing-machines on hand, which are almost worthless, and which he cannot sell; that the sewing-machine company is insolvent, has made an assignment, is not carrying on any further business; and that no such machines as those purchased by the defendant, nor any of the parts thereof, are now being made or supplied by the company.

We think the warranty given with each sewing-machine was correctly construed by the court below; and, if so, then there is but little room for the plaintiffs to claim that any material error was committed by such court. And, construing the warranty as the court below construed it, it makes but very little difference whether Phil. Jacobs was a general or only a special agent for the Leader Sewing-Machine Company, though, from the facts proved, it is fair to hold, as between the sewing-machine company and the defendant, that he might be considered as a general agent for the company, and therefore that his agreement concerning the repairs of the various parts of the sewing-machines would bind the company. *Babcock v. Deford*, 14 Kan. 408; *Sewing-Machine Co. v. Rheinschild*, 25 Kan. 534; *Banks v. Everest*, 35 Kan. 687, 12 Pac. Rep. 141; *Insurance Co. v. Barnes*, 41 Kan. 161, 21 Pac. Rep. 165. The rights of the parties, however, without such agreement, would be about the same as with, and therefore such agreement is of but little importance. As a general warranty was given with every sewing-machine, and as all the warranties were and are alike, except as to numbers, it makes no difference, and constitutes no error, that the trial court permitted the defendant to prove the various defects in the several machines without first proving the particular number of each machine.

There are other claims of error, but we do not think that they require any comment. The judgment of the court below will be affirmed. All the justices concurring.

(43 Kan. 597)

TWEDELL *et al.* v. WARNER.

(Supreme Court of Kansas: April 4, 1890.)

EJECTMENT—PLEADING—JUDGMENT—TAX-DEEDS—LIMITATION.

1. An answer in an action of ejectment that alleges with particularity the execution of the tax-deeds and all anterior proceedings, and that they are all in due and legal form, to which is attached copies of several tax-deeds as exhibits and as a part thereof, from which it appears that the tax-deeds are void on their face, the allegation as to legality, being inconsistent with the exhibits, does not authorize the trial court to render a judgment for such defendant on the pleadings, when the plaintiff files an unverified reply containing a general denial.

2. Where a tax-deed is taken out on the 7th day of April, 1876, on a sale made in May, 1871, and is deemed by the party holding the same to be void, and he procures the execution of another tax-deed for the same sale, on the 23d day of February, 1887, held, that under section 143, c. 107, Comp. Laws 1885, the first deed was merged in the second, and as he pleaded the last deed in an action pending at the time the last deed was executed, in

which he was a defendant, as a defense, no question of the statute of limitations could arise.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Johnson county; J. P. HINDMAN, Judge.

A. Smith Devenney, for plaintiffs in error.
I. O. Pickering, for defendant in error.

SIMPSON, C. Action in ejectment by William Warner against J. W. Tweedell et al., to recover possession of 40 acres of land, and for rents and profits. The petition is in the usual form. The defendants filed an amended answer, by consent, in which they allege that the land in controversy was subject to taxation for the year 1870; that the same was lawfully assessed for that year, and taxes lawfully levied; that the land was lawfully and regularly advertised and sold for the unpaid taxes for the year 1870; that John W. Sponable became the purchaser; that there was executed and delivered to Sponable a lawful and regular certificate of sale, and that, after due and legal notice of redemption had been given, a tax-deed was issued to Sponable, in due form of law, and that said tax-deed was lawful in all respects, and the same was recorded; that Sponable afterwards conveyed the land to Tweedell, who conveyed small parcels of the same to the other defendants; and that they had all been in the actual possession of the land for more than five years under said tax-deed to Sponable. The tax-deed to Sponable is made an exhibit to and a part of the answer of the defendants. To this answer there was filed an unverified answer, containing a general denial of the allegations contained in the amended answer. The case was tried to the court, a jury being waived, and the following special findings of fact were made and filed:

"(1) That the land in controversy, to-wit, the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of sec. 1, town 12, range 23, in Johnson county, Kan., was Shawnee Indian land, and was duly selected and patented by the government of the United States to David Deshane, a Shawnee Indian, on the 28th day of December, 1859. (2) That said David Deshane afterwards duly conveyed said land, by deed of general warranty, (against all persons except the U. S.,) to Joab Toney. Said deed was dated December 17, 1869, and was duly approved by the secretary of the interior for the United States, May 2, 1871. (3) That said Joab Toney and wife, Charlotte M. Toney, conveyed said land, by deed of general warranty, to Edward De Yeager, dated March 14, 1870; that said deed was duly recorded on the 11th day of July, 1870; that said deed was defective as to the names of some of the parties, and described the land as in township 11, when the land intended by both grantors and grantee to be conveyed was that first above described, being in township 12. (4) That said Joab Toney and wife, Charlotte M. Toney, conveyed said

land, by deed of general warranty, to said Edward De Yeager, dated April 9, 1871, recorded January 7, 1874, which said deed was made to correct the deed described in the third finding of fact from same grantors to said De Yeager for the same land. (5) That said Edward De Yeager and wife conveyed said land, by deed of general warranty, to the plaintiff, William Warner, and William Burnett, on the 28th day of June, 1875, which said deed was duly recorded on the 30th day of June, 1875. (6) That said William Burnett and wife conveyed by quit-claim deed all their interest in said land to the plaintiff, William Warner, on the 12th day of May, 1877, which deed was duly recorded on the 8th day of December, 1885. (7) That said land was attempted to be assessed for taxation in the year 1870, but that no county or state was given in said assessment, and the land was otherwise defectively and insufficiently described. (8) Taxes were afterwards levied against said land for the year 1870, and became delinquent; that the delinquent tax-list, as published, did not describe the land in controversy; did not state where the land would be sold; and there was no sufficient proof in the records showing that any publication had been made of delinquent taxes on the land in controversy for the taxes of said year. (9) That said land was sold by the treasurer of Johnson county on May 14, 1871, to J. W. Sponable, for the sum of \$4.70, which was said to be the whole amount of taxes, interest, and costs then due and unpaid on said land. (10) That the whole amount of taxes, interest, and costs then due and chargeable against said land, as shown by the tax-roll of said county, for the taxes of said year, exclusive of printer's fee for printing the delinquent tax-list, was \$4.35. (11) That on the 5th day of January, 1871, the commissioners of Johnson county, Kan., made a written contract with J. A. and H. F. Canutt, publishers of the Olathe News Letter, a weekly newspaper printed and published in said county, and of general circulation therein, by which the latter agreed to publish the delinquent tax-list for the taxes of the year 1870, for the sum of three cents per description for all insertions; that whatever publication was made of said delinquent taxes was under said contract; that no more than three (3) cents was paid by said county to said publishers for publishing the delinquent notice of said land for the taxes of the year 1870, for all insertions; but that the sum of twenty-five (25) cents was charged against said land for such publication, and included in the amount for which the same was sold, as aforesaid. (12) That the printer did not file his affidavit of publication of said delinquent tax-list for more than fourteen days after the last publication, being April 13, 1871, and said affidavit was not made and filed until October 16, 1875. (13) That a tax-deed based upon said sale for delinquent taxes of 1870 was issued by the county clerk

of Johnson county, Kan., to J. W. Sponable, dated April 7, 1876, recorded June 19, 1876, which said deed recites on its face the sale of the following lands, to-wit: The N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, and the west $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 1, in town 12, range 23, and the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 6, and the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 20, in township 12, range 24, and the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 6, in town 13, range 24, containing 220 acres, more or less, in gross, and that said sale was held on the first Tuesday of May, 1872; that the taxes of the year 1873 had been paid by the said John W. Sponable, and the consideration named in said deed was the sum of \$157.59. (14) That the redemption notice as published does not describe the land in controversy as being in Johnson county, or in the state of Kansas, and the printer's affidavit does not show that such notice was published four consecutive weeks, and the affidavit of the county treasurer does not show that he posted, or caused to be posted, a copy of said redemption notice in four public places in said county. (15) That after the commencement of this action, and on the 23d day of February, 1887, the county clerk of said county issued to John W. Sponable a tax-deed (based upon said sale for said taxes of the year 1870) purporting to convey to said Sponable the land in controversy, and including the taxes of 1873, and for a consideration named therein of \$23.87-100, which deed was recorded May 2, 1887, and stated on its face as follows: 'This deed is made to correct a deed dated April 7, 1876, and recorded in book 31, page 511.' (16) That on the 1st day of March, 1887, after the commencement of this action, John W. Sponable and wife, for the nominal consideration of one dollar, conveyed said land by quitclaim deed to the defendant James W. Tweedell, which said deed was recorded May 2, 1887. (17) That this action was commenced January 24, 1887; that the annual rental value of said land is and was the sum of sixty (\$60) dollars for the three (3) years next before the commencement of this action, and sixty dollars (\$60) for the time subsequent thereto to this date. (18) That said land was vacant and unoccupied until the year 1881, and has been in the possession and occupancy of defendants ever since said date; that said defendants have received all of the rents, issues, and profits thereof during said time. (19) That the whole amount of taxes paid by said defendants and their grantors on said land, including the costs of said tax-deed and recording same, with twenty (20) per cent. interest thereon from the date of such payments, respectively, is the sum of two hundred and nineteen dollars and ninety-eight cents, (\$219.98.)

"CONCLUSIONS OF LAW.

"(1) That at the commencement of this action said plaintiff was and that he now is the absolute owner in fee-simple of the said N. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, sec. 1, T. 12, R. 23, in

Johnson county, Kan., and was and is entitled to the immediate possession thereof. (2) That said defendants wrongfully kept plaintiff out of possession of said lands, as alleged in this petition, and that plaintiff is entitled to recover of and from said defendants, as rents and profits, the sum of two hundred and forty dollars, (\$240.) (3) That the tax-deed from Johnson county to J. W. Sponable, dated April 7, 1876, and recorded June 19, 1876, was void on its face, and did not start the statute of limitations to running in its favor after the record thereof. (4) That the tax-deed dated February 23, 1887, to John W. Sponable, was invalid, and conveyed no title to the grantee. (5) That said defendant Tweedell took no title to the land in controversy under and by virtue of the quitclaim deed from J. W. Sponable and wife, dated March 1, 1887. (6) That said defendants are entitled to recover of plaintiff before he is let into possession of said land, the taxes paid by them and their grantors, including costs of tax-deed and recording the same, with twenty (20) per cent interest thereon, amounting to the sum of two hundred and nineteen dollars and ninety-eight cents, (\$219.98,) and that the same is a lien on said land until paid. (7) That the said plaintiff is entitled to have set off the amount due him for rent and profits against the amount found due said defendants for taxes, as aforesaid, and that plaintiff is entitled to judgment against defendants for any excess over the amount necessary for the payment of said taxes. (8) The court finds for the plaintiff and against the defendants, and each of them, which finding is based solely and wholly upon the above facts, which are all the facts in this case. It is therefore now here considered, ordered, and adjudged by the court that said plaintiff, William Warner, have, recover, and receive of and from said defendants the immediate possession of all of said lands and tenements; that said plaintiff is the owner thereof; that plaintiff recover of and from said defendants the sum of twenty dollar and two cents, (\$20.02) due him for rents and profits, over and above the sum due the defendants for taxes and interest paid as aforesaid; that plaintiff recover all his costs in this behalf expended, taxed at \$——; and that execution issue therefor."

Judgment for the recovery of the possession was rendered for Warner. A motion for a new trial overruled.

The only serious contention on the behalf of Tweedell, Cole, and Howland for a reversal of the judgment is that the state of the pleadings was such that they were entitled to judgment on the pleadings, and that Warner was not authorized to go behind Tweedell's last tax-deed, and by the anterior proceedings show it was void, as he was permitted to do by the trial court. The plaintiff below, Warner, had filed his petition in the usual form of an action in ejectment. The defendants below, who relied upon a tax-deed with five years' possession under it,

pleaded it with all the particularity required by the case of *Walker v. Fleming*, 37 Kan. 171, 14 Pac. Rep. 470. To this the plaintiff below replied by a general denial, unverified. On this state of the pleadings it is claimed that under the case of *Walker v. Fleming*, the execution and authority being admitted, the legal effect of the tax-deeds and former proceedings naturally followed, and it was error for the trial court to allow Warner to invalidate the tax-deeds by evidence of the existence of substantial defects in the anterior proceedings. This may be sound if the plaintiffs in error had not attached as exhibits their various tax-deeds, and made them a part of their answer. In thus doing it appears from their own answer that the tax-deeds are void on their face, and hence we have an answer that alleges the execution of the tax-deeds, with the validity of all the preliminary proceedings, and exhibits void tax-deeds in conflict with their allegations of due execution and legal authority. Where any two allegations of the same party are inconsistent with each other, the allegation most unfavorable to such party is deemed to override the other allegation. *Butler v. Kaulback*, 8 Kan. 668; *Board v. Shaw*, 15 Kan. 33. The tax-deeds being a part of the answer, they must speak for themselves. The court will give them their legal import. *Board v. Shaw*, supra. The tax-deed executed on the 7th day of April, 1876, is void on its face, because for one reason it shows a sale of several tracts, not contiguous, in gross. This renders the sale void. It also recites an impossible day of sale, in this: It purports to have been sold on the 4th day of May, 1872, at an adjourned sale of the sale begun and publicly held on the first Tuesday in May, 1872, when the first Tuesday in May in that year occurred on the 7th day of the month. The tax-deed of date February 23, 1887, recites a sale of this tract alone on the 4th day of May, 1872, at a sale begun and publicly held on the first Tuesday of May, 1871. This deed recites that it is made to correct the deed made on the 7th day of April, 1876. This probably brings it under the operation of section 143, c. 107, Comp. Laws 1885. Waiving all consideration of the question of Sponable's right to the second deed, as the record shows that in 1881 he had quitclaimed it to Tweedell, and hence Tweedell, and not Sponable, should take out the deed, we are inclined to hold that the county clerk had no authority to execute the second deed. Sections 172-174, c. 107, Comp. Laws 1885. The execution of the second deed was nearly 16 years after the sale, and nearly 11 years after the execution of the first deed. As the sale was made before section 174 of chapter 107 went into effect, the extreme limit of time within which the second deed could have been taken out was the 11th day of May, 1882. In other words, if Sponable, or those who claim under him, desired to take out successive tax-deeds on the same sale, they must have taken out their last deed before

the 11th day of May, 1882, as section 174 applies to sales made before the approval of the act containing section 174, and gives the holders of tax certificates of sales made before that time one year after its passage within which to take out their deeds. The act containing the section went into effect on the 10th day of May, 1881. The case of *Austin v. Jones*, 37 Kan. 327, 15 Pac. Rep. 166, holds that section 143, c. 107, does not repeal or limit section 141, but gives the land-owner two years in which to set aside "any and all tax-deeds," where different or successive tax-deeds upon the same sale have been put upon record by the same party; not merely two years in which to set aside the last tax-deed put upon record by the same party, but two years in which to set aside any and all such different and successive tax-deeds put upon record, without regard to the length of time the prior tax-deeds merged in the last tax-deed have been of record. So that there can be no question of the statute of limitations in this case that could by any possible construction bar the right of Warner to recover the land. When the tax-deed of February, 1887, was taken out on the same sale as that of May, 1876, and was put on record, and was by consent pleaded in this action, that was then pending, it divested the case of all questions arising under the various statutes of limitations. We recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 457)

AMERICAN CENT. INS. CO. v. NEFF.

(Supreme Court of Kansas. April 4, 1890.)

NEW TRIAL—SUCCEEDING JUDGE.

When a motion is made for a new trial, and continued until the judge who tried the case has gone out of office, and his successor hears such motion, it is his duty to grant a new trial. *Bass v. Swingley*, 42 Kan. —, 23 Pac. Rep. 714, followed. (Syllabus by Green, C.)

Commissioners' decision. Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

Rossington, Smith & Dallas, for plaintiff in error. *J. D. McFarland*, for defendant in error.

GREEN, C. This action was commenced in the district court of Shawnee county in October, 1882, by the defendant in error, to recover upon an insurance policy issued by the defendant below to J. B. Misserly, upon a store building in Wellington. The claim was made by the plaintiff below that Misserly and wife sold the property to him, and that he was the owner of the building when the loss occurred. A trial was had upon the issues joined between the parties on the 26th of June, 1884, before the Honorable JOHN MARTIN, then district judge of Shawnee county. After all the testimony had been offered by the parties, the court instructed

the jury that, under the law and the evidence, the defendant was entitled to a verdict, which was accordingly rendered. Subsequently, and within the statutory time, the plaintiff filed his motion for a new trial, and about four years thereafter, and after the judge's term had expired, the motion for a new trial was heard by the present judge of the district court of Shawnee county, and by him sustained; to which ruling of the court plaintiff in error excepted, and brings the record here for review.

There is but one question we can pass upon in this case, and that is the ruling of the court below in sustaining the motion for a new trial. While there is a case made filed in this court, and signed by the present judge of the district court of Shawnee county, showing what took place before the motion for a new trial was passed upon, we can only consider the ruling of the court upon this one question, namely, the motion for a new trial; and in the light of the decision made by this court in the case of *Bass v. Swingley*, 42 Kan. —, 22 Pac. Rep. 714, the ruling of the court was correct, and we therefore recommend that the action of the court in granting a new trial be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 548)

GUILD v. McDANIELS.

(Supreme Court of Kansas. April 4, 1890.)

JOINT PROMISSORY NOTE—SURETY—LIMITATION.

1. An action upon a contract not in writing, expressed or implied, must be brought within three years.

2. Where a joint maker of a promissory note, or his representative, pays the note, and then brings an action against the other maker, upon the ground that he is in fact only a surety, his action, although brought upon the note, must be mainly proved by parole evidence; because he must show by such evidence the amount he paid upon the note, the date of payment, that his joint maker is the principal, and that he is a surety only. Therefore, the action is founded on an unwritten and implied agreement of his principal, and must be brought within three years.

(Syllabus by the Court.)

Error from district court, Washington county; E. HUTCHINSON, Judge.

J. W. Rector and Omar Powell, for plaintiff in error. Lowe & Smith, for defendant in error.

HORTON, C. J. On the 1st day of April, 1880, John Guild executed a promissory note to the order of J. S. Springer for \$325, payable 12 months after date, with interest at the rate of 12 per cent. per annum. J. R. McDaniels, at the request of Guild, signed the note as a joint maker, but he was in fact only a surety. It was then delivered to J. S. Springer, the payee. Subsequently, J. R. McDaniels died, and Cynthia E. McDaniels was appointed and qualified as administratrix of his estate. Afterwards, J. S. Springer informed Mrs. McDaniels that he should look

to the estate of J. R. McDaniels, deceased, for the payment of the note. Springer also informed the administratrix that Guild was insolvent, and it would be impossible to make the amount of the note from him. The administratrix, without having the claim allowed before the probate court, paid and took up the note on the 24th day of November, 1880,—several months before it was due. This action was brought by Cynthia E. McDaniels, as administratrix, against John Guild, to recover the amount paid upon the note. The petition was subsequently amended, and stated, among other things, that "the payment was made and the note taken up on the 24th day of November, 1880; that the same is now, and has ever since been, in the possession of plaintiff, as such administratrix, and as a part of the assets of the estate." The prayer demanded judgment upon the note, with interest as therein provided. Guild filed a demurrer to the amended petition, upon the ground that it did not state facts sufficient to constitute any cause of action in favor of the plaintiff and against him. This demurrer was overruled. The answer denied every allegation of the petition, and specially denied that the defendant was the principal upon the note. Upon the trial Guild objected to the introduction of any evidence. His objection was overruled. The jury returned a verdict for Mrs. McDaniels, as administratrix, and assessed the amount of her recovery at \$559. Judgment was entered upon the verdict. Guild excepted, and brings the case here.

The principal question for our determination is whether the action, at the commencement thereof, was barred by the statute of limitations. This action was commenced October 8, 1884, more than three years after the payment by Mrs. McDaniels. By the Code, (Comp. Laws, § 3811,) actions upon contracts not in writing, express or implied, are limited to three years, and actions upon contracts or promises in writing to five years. If the case falls under the former limitation, it is barred; otherwise it is not. Plaintiff below claims that, under the doctrine of subrogation, or substitution, as it is also termed, Mrs. McDaniels is entitled to recover upon the note; therefore, that her action is upon a contract in writing, and barred only by the five-years statute of limitations. We are willing to extend the remedy of subrogation to the fullest extent. We think the great weight of American authorities is to the effect that the surety paying the debt of his principal becomes the equitable assignee, not only of the collateral securities, but of the principal undertaking. 3 Pom. Eq. Jur. § 1419, note 1; Cottrell's Appeal, 23 Pa. St. 294; Lidderdale v. Robinson, 2 Brock. 159; Ellsworth v. Lockwood, 42 N. Y. 93; Waldrup v. Black, 74 Cal. 409, 16 Pac. Rep. 226; Crippen v. Chappel, 35 Kan. 495, 11 Pac. Rep. 453; Yapple v. Stephens, 36 Kan. 686, 14 Pac. Rep. 222. The application of this doctrine, however, to this case will not extend

the statute of limitation to five years. The relation of principal and surety does not appear from the note itself. To recover in this action it was necessary for Mrs. McDaniels to establish, by parol evidence, the payment of money, and the dates and amounts of payment. It was also necessary for her to establish, by parol evidence, that the relation of principal and surety existed between John Guild and her husband, J. R. McDaniels, who appear upon the face of the note as joint makers. She did not take any written assignment of the note at the time of payment, but instead thereof the words, "Paid November 24th, 1880," were written across the face of the note by the probate judge or the attorney for the estate at one of the annual settlements made by Mrs. McDaniels with the probate court, after she had taken up the note. The action of Mrs. McDaniels, therefore, rested largely upon oral proof. She did nothing, so far as the record shows, to manifest any intention to put herself in the place of the original creditor (the payee) until her claim for indemnity or reimbursement was barred by the three-years statute of limitations. Upon payment by the surety of the debt for which he is bound, the same being then due, a right of action for reimbursement immediately arises in his favor, and against the principal. The law implies a promise of indemnity on the part of the principal. After the surety, without the request of the principal, pays the debt before it is due, a cause of action accrues to the surety at the time the debt becomes due. Section 176, Brandt, Sur. Mrs. McDaniels paid the note before it became due, because she believed Guild was insolvent; and, as the note was drawing 12 per cent. interest, it was to the benefit of the estate to pay it as early as possible. In Pennsylvania, whose courts are very favorable to the doctrine of a fictitious revivor of the satisfied security, it has been uniformly held that it is not to be resorted to where it will have the effect to defeat the defendant's right to plead the statute of limitations. Section 267, Brandt, Sur., and the authorities there cited. In Neilson v. Fry, 16 Ohio St. 552, it is said: "Statutes of limitation are statutes of repose, and the periods of limitation are graduated, mainly, with reference to the nature of the evidence on which the actions rest, or by which they can be defeated. The evidence in an action for subrogation is certain and enduring, mainly consisting of records or written contracts. The action for money paid, or, if you please, the right to the aid of a fiction in the prosecution of the action, rests in parol proof of a frail and perishable nature. It rests in proof of verbal contracts and relations of parties; in proof of the payment of money, and the dates and amounts of payment. If my co-debtor takes an assignment of the creditor's security, I know where I stand, and act accordingly; prosecuting the necessary action, and husbanding and preserving my means of defense. But, if he puts the transaction in the

form of a cancellation of the debt, I rest in the belief that we will be placed by the law upon equal footing in regard to evidence and limitation; and therefore I pretermitt my actions, and rely upon parol proof of parol liability, of counter-claim, and of set-off." In Harrah v. Jacobs, 75 Iowa, 72, 39 N. W. Rep. 187, BROTHEROCK, J., speaking for the court, says: "It will be observed that the relation of principal and surety does not appear from the instrument itself. If the relation exists, it must be established by parol evidence. The right of action would therefore be founded upon an unwritten contract, and under our statute would be barred in five years." In this state an action upon a contract, not in writing, expressed or implied, must be brought within three years; and, as this statute controls in this case, the action of Mrs. McDaniels was barred in three years. If the note in this case showed upon its face that the relation of principal and surety existed between Guild and McDaniels, or if Mrs. McDaniels had obtained a written assignment or transfer to her of the note, or had a written agreement with Guild that she paid the same at his request, the case would be wholly different.

Counsel for plaintiff below cites the cases of Kupfer v. Sponhorst, 1 Kan. 75; Water-Power Co. v. Brown, 23 Kan. 688,—to show that the true relation of the parties to a note may be established by parol. This is true where an action is brought by the payee or holder of a note against the parties liable thereon; but in such a case the evidence does not go to the merits, but is simply to be considered in determining, among the parties liable, who is in fact principal and who surety. In this case the merits involved the direct issue between the plaintiff and defendant as to who was in fact the principal and who the surety; therefore, to establish the claim of the plaintiff below, parol evidence was indispensable. The action, therefore, was upon a contract not in writing. Until a contract not in writing was established by Mrs. McDaniels against Guild, the alleged principal upon the note, no cause of action was proved in her favor. The judgment of the district court will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

All the justices concurring.

(43 Kan. 567)

**GERMANIA FIRE INS. CO. OF NEW YORK
CITY v. THOMPSON.**

(Supreme Court of Kansas. April 4, 1890.)

INSURANCE—FOR BENEFIT OF CONTRACTOR—EVIDENCE.

Where a builder contracts with the owner of lots to furnish the material, and erect thereon a house, and said builder, desiring a contractor's insurance on the building, goes with the owner to an insurance agency, and makes application for such insurance, and the agents issue a policy in the name of the owner, and insert therein a clause, "contractor's insurance for thirty days," and the intention is to indemnify the contractor against loss by fire for 30 days, and at the expiration of

that time indemnify the owner against loss by fire on said building for 3 years, *held*, that such a policy may be enforced for the benefit of the builder. *Held, also*, that, to explain and give effect to such a policy, oral evidence may be resorted to.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Wyandotte county; O. L. MILLER, Judge.

Scroggs & Gibson and Barnum, Reubens & Ames, for plaintiff in error. *J. O. Fife*, for defendant in error.

STRANG, C. This action was brought in the district court of Wyandotte county, by George W. Thompson, upon a policy of insurance, to recover a loss by fire. George W. Thompson contracted with one F. A. Crouch to furnish the material and erect for said Crouch a six-room house, and turn it over in a completed state, for \$1,250. When the house was nearing completion, Thompson thought it best to procure a contractor's insurance thereon. He spoke to Mr. Crouch about it, and together they went to the office of Messrs. Boddington & Foster, insurance agents. Mr. Thompson, the plaintiff below, made his desire known to the agents, telling them all about the *status* of the building, his interest therein, and the time he thought necessary in which to complete and turn over the house to Crouch, and asked for insurance in the sum of \$750 for 30 days. He questioned them to ascertain the cost of that amount of insurance for the time stated. They told him, if Crouch would insure his interest in the building with them, they could put both in one policy, and thus his insurance would come cheaper. Mr. Crouch was consulted, and said that arrangement would suit him; whereupon the agents said they would draw a policy to Mr. Crouch for the term of 3 years, with a contractor's insurance for 30 days. Mr. Thompson said he did not know about such matters, but, if that was the way to do, it was all right, and offered to pay his premium; but the agent said he had not figured out the amount of his premium; that he (Thompson) might settle with Crouch for his part of the premium, and they would settle the whole matter with Mr. Crouch. Thompson then asked when his insurance would commence, and they replied, "At once,—this minute." The agents then explained that his contractor's risk commenced then, and run for 30 days, when it would expire, and Mr. Crouch's risk would then commence, and run from the end of the 30 days for the lifetime of the policy. The policy was written up by Mr. Boddington, one of the insurance firm, on the 2d or 3d day of December, 1884, but was not dated, on account of his being called away, until the 16th of the month. A day or two after Thompson and Crouch were at the insurance office, and made their application for insurance, Mr. Crouch, who had before this deeded his lots on which the house so insured was erected to one Grier as security for money loaned of Grier, saw Mr. Foster, one of the said firm of insurance agents,

and informed him of the fact that the lots were deeded to Grier as security, and told him he might make the interest he had in the policy payable to Mr. Grier. The policy, however, was never changed. At the time Thompson and Crouch made their application for insurance, Crouch informed the agents that he did not have the money with him to pay his premium. Boddington said: "That is all right. We have money matters between us, and we can fix that all right." Afterwards, and after the loss occurred, Crouch paid the premium to Mr. Boddington. The fire which resulted in the loss occurred the night of December 31st, and within the 30 days during which the contractor's risk in favor of Thompson ran. Thompson furnished the defendant below with proof of his loss within the time allowed by the policy. The case was tried by the court and a jury, and a verdict rendered for the plaintiff for \$897.27. Defendant interposed a motion to set aside the verdict, and for a new trial. Motion overruled. And the defendant comes here with its case made, assigning quite a number of errors, but seems to rely on only two of them, since but two questions are discussed in the brief; and in fact several of the errors assigned raise the same question, based upon separate exceptions taken at different stages of progress in the trial below.

The first question we will consider is the one raised by the exception to the ruling of the court on the defendant's objection to any evidence being received under the petition in the case. This question is also raised by a demurrer to the petition, and the ruling of the trial court thereon, which was excepted to; but, as the objection to the reception of evidence raises the whole question, and that is the one discussed in the brief of plaintiff in error, we will take the matter in the same order. The question raised under this assignment of error is, does the petition state a cause of action in favor of the plaintiff below, George W. Thompson, and against the defendant below? The plaintiff in error asserts that it does not, and bases his assertion upon the fact that the policy, which is attached to the petition of the plaintiff below, and made a part thereof, and upon which the suit is founded, shows that it was issued to F. A. Crouch, and promised to indemnify him against loss or damage by fire; and nowhere in said policy does the name of Thompson, the plaintiff in the action, appear, nor does such policy anywhere, by its terms, promise to indemnify him (Thompson) against loss or damage by fire. An examination of the third amended petition satisfies us that the plaintiff in error is mistaken; that the petition does state a cause of action in favor of the plaintiff below, and against the defendant below, and that the court, therefore, committed no error in its ruling complained of. It is true that the policy, upon its face, discloses a contract of insurance between the company and F. A. Crouch; but it also discloses something more. It contains the words,

"with a contractor's insurance for thirty days." These words are wholly unnecessary and superfluous, so far as any insurance to Mr. Crouch in said policy is concerned. They can have no relation to his contract with the company. We must presume these words were included in said insurance policy for some purpose. The plaintiff in error insists that they were incorporated in said policy for the purpose of indicating that other and separate insurance was consented to by the company. That view eliminates Mr. Thompson, plaintiff below, from the case entirely; and that is the construction contended for by the counsel for the plaintiff in error, who in their brief intimate that, growing out of Thompson's conversation with the agents of the company, he may have an oral contract or policy with said company upon which he might make a claim for his loss, and, if not paid, sue and recover. But the words, "with contractor's insurance for thirty days," are not of themselves sufficient for the purpose of allowing other insurance. If inserted in the policy for that purpose, they need to be supplemented in order to give them that effect. If for that purpose, how much other insurance is allowed? There is nothing in the words to indicate the amount of other insurance allowed. The amount of other insurance allowed is as material as that other insurance is allowed at all. It would seem, even from an inspection of the policy, that it is no more rational to say that the words under consideration mean simply that other insurance is allowed, than that they have the effect claimed for them by the plaintiff in error. But the petition alleges that the policy sued on was issued for the express purpose of insuring Thompson on a contractor's risk for 30 days, and that the words, "with a contractor's insurance for thirty days," were inserted in said policy with the intention of reaching that result. This allegation, coupled with the fact that the meaning of the policy sued on is not clear,—in fact, it is so ambiguous that, to give it effect for any purpose contended for by either party in the case, it must be explained,—leads us to conclude that the objection to the reception of evidence under the petition was properly overruled.

The next question is, is it proper, in order to explain and give effect to the words, "with a contractor's insurance for thirty days," to allow the introduction of parol evidence? We think it is. Not for the purpose of changing or altering, by diminishing or enlarging the contract of the parties, which may not be done, but for the purpose of learning what the real contract of the parties is, for the purpose of making clear the contract, which upon its face is uncertain and ambiguous. *Clin-ton v. Insurance Co.*, 45 N. Y. 454; *Simpson v. Kimberlin*, 12 Kan. 579. Where a contract is susceptible of two constructions, evidence of the surrounding circumstances, and the conversation of the parties relating thereto, is admissible to enable the court and jury to arrive at its true meaning. *Babcock v. Deford*,

14 Kan. 408; *Mason v. Ryus*, 26 Kan. 464. We do not think the oral evidence contradicts the written contract. It simply explains and gives effect to the contract, that without it is unintelligible.

Plaintiff complains that the court permitted the plaintiff below to open his case after the overruling of a demurrer to the evidence, and introduce additional testimony. The opening of the case, for additional testimony, after a demurrer to the evidence is overruled, is not error. The statute (paragraph 4370, Gen. St. 1889) makes this a matter of discretion with the trial court. *Cook v. University*, 14 Kan. 548; *Railroad Co. v. Dryden*, 17 Kan. 279; *Railroad Co. v. Reecher*, 24 Kan. 228; *Mason v. Ryus*, 26 Kan. 467; *Oberlander v. Confrey*, 38 Kan. 462, 17 Pac. Rep. 88.

The plaintiff charges that the jury were permitted by the court to separate during the trial, without the usual admonition. When the plaintiff below rested his case the defendant below demurred to the evidence. The demurrer was heard and overruled, and counsel passed up to the court the instructions they wished. At this point the court permitted the jury to separate, without having first admonished them as required by statute. The record shows that the separation was but for a few moments, while the judge examined the instructions. There is nothing to show that the jury left the court-room, even; nor anything to show that anything transpired during such separation to in any manner affect the relation of any of the jurors to the case. The separation of the jury without the statutory injunction was an irregularity, but we do not think it in any way prejudiced the plaintiff's case; and as, under our Code, it is only material error that we can notice, we cannot disturb the action of the trial court upon this ground.

We have now examined all matters alleged as error in the record before us, and conclude that the judgment of the district court ought to be affirmed; and such is our recommendation.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 529)

MISSOURI PAC. RY. CO. v. ATCHISON.

(*Supreme Court of Kansas*. April 4, 1890.)

JUSTICE OF THE PEACE—TRESPASS ON REAL ESTATE—DAMAGES.

1. Although a justice of the peace has jurisdiction in actions for trespass upon real estate only where the damages demanded do not exceed \$100, yet a party may waive the trespass, and sue for the value of the occupation and use of his real estate by the defendant as upon an implied contract, demanding more than \$100 damages and less than \$300.

2. Where a case is certified by a justice of the peace to the district court on the ground that the boundaries of land are in dispute, the case will be proceeded with in the district court as if originally commenced therein.

3. Where a plaintiff sues for the value of the use and occupation of a small piece of land out of a very much larger tract, and on the trial he

proves that the defendant occupied and used the small piece of land, and also proves the value of the use and occupation of the entire tract, but does not prove the value of the use and occupation of the small piece of land used and occupied by the defendant, nor of any other portion of the large tract, and the jury render a verdict in favor of the plaintiff and against the defendant, assessing the plaintiff's damages at the value of the use and occupation of the entire tract, and judgment is rendered accordingly, *held* error.

(*Syllabus by the Court.*)

Error from district court, Leavenworth county. ROBERT CROZIER, Judge.

Waggener, Martin & Orr, for plaintiff in error. *J. H. Gillpatrick*, for defendant in error.

VALENTINE, J. This was an action, brought before a justice of the peace of Leavenworth county by David Atchison against the Missouri Pacific Railway Company, to recover \$200, for the occupation and use by the defendant of a certain piece of land belonging to the plaintiff. The defendant answered in the justice's court denying the allegations of the plaintiff's bill of particulars, and alleging that the defendant itself owned the land, and had the rightful possession thereof. The defendant also moved the court to certify the case to the district court upon the grounds that the title to the land, and also the boundaries thereof, were in dispute; and the justice sustained the second ground, and certified the case to the district court. After the case had been transmitted to the district court the defendant moved the district court to dismiss the same upon the grounds (1) that the justice of the peace had no jurisdiction of the action, for the reason that the action was merely trespass upon real estate, and where the damages demanded exceeded \$100; (2) that the district court had no jurisdiction of the case, for the reason that the case had come to the district court only by being certified thereto by a justice of the peace, who had no jurisdiction. This motion was overruled by the district court, and the case was then tried before the court and a jury; and the jury rendered a general verdict in favor of the plaintiff and against the defendant, and assessed the plaintiff's damages at \$200, and judgment was rendered accordingly; and to reverse this judgment, the defendant, as plaintiff in error, brings the case to this court.

We think the justice of the peace had jurisdiction of the case. It is, perhaps, true that the defendant's possession and use of the plaintiff's property was a tort and a trespass, as, according to the plaintiff's bill of particulars, the defendant occupied the property without the consent of the plaintiff, and if the plaintiff's action had been brought only for the trespass the justice would not have had any jurisdiction to try the case; for a justice of the peace, in Kansas, has jurisdiction in actions for trespass upon real estate only where the damages demanded do not exceed \$100. Justice's Act, § 6. But the plaintiff's action was not merely one for the

trespass. He, in effect, waived the trespass, and in fact sued for the value of the use and occupation of his property as upon an implied contract. In the case of *Fanson v. Linsley*, 20 Kan. 235, the following decision was made by this court: "(2) Whenever one person commits a wrong or tort against the estate of another with the intention of benefiting his own estate, the law will, at the election of the party injured, imply or presume a contract on the part of the wrong-doer to pay to the party injured the full value of all benefits resulting to such wrong-doer; and when the injured party elects to waive the tort his cause of action may be used as a set-off. (3) Where one person commits a wrong or tort against another without any intention of benefiting his own estate, and his own estate is not thereby benefited, the law will not imply or presume a contract on the part of such wrong-doer to pay for the resulting damages; and such cause of action cannot be used as a set-off." See, also, *Hagaman v. Neitzel*, 15 Kan. 384; *McGonigle v. Atchison*, 33 Kan. 726, 7 Pac. Rep. 550. See, also, section 20 of the act relating to landlords and tenants, which reads as follows: "Sec. 20. The occupant, without special contract, of any lands shall be liable for the rent to any person entitled thereto." Besides, when this case was taken from the justice of the peace to the district court, the district court took the case in the same manner as though it had been originally commenced in that court; and, even if we should call the occupation of the premises by the defendant an absolute trespass upon the property, still the district court would have taken complete and ample jurisdiction of the case, and might have permitted the plaintiff to demand and recover damages for any amount which he might have been able to prove. Section 7 of the justice's act, which provides for certifying cases from a justice of the peace to the district court when "title or boundaries of land is in dispute," provides that when the case shall be taken to the district court "said case shall be docketed, and thereafter proceeded with, in the district court, as if originally commenced therein." It will be seen from this that the district court, when a case is certified to it as this case was, in effect takes original jurisdiction of the case, and not appellate jurisdiction; and hence the case of *Wagstaff v. Challiss*, 31 Kan. 212, 1 Pac. Rep. 631, has no application to this case. See, also, in this connection, *Shuster v. Finan*, 19 Kan. 114; *Miller v. Bogart*, Id. 117; and *Douglass v. Easter*, 32 Kan. 496, 4 Pac. Rep. 1034. We think the jurisdiction of the district court, after the case was taken there, was as broad and ample as though the case had been originally commenced in that court.

The second claim of error is that the amount of the recovery is excessive. It appears that the plaintiff below owned a tract of land east of the defendant's railway, and between it and the Missouri river, 150 feet

long, north and south, and 70 feet wide, east and west. In his amended bill of particulars he alleged that the railway company had occupied and used a portion thereof 100 feet in length and 20 feet in width. On the trial he proved that the railway company had occupied and used a portion thereof 57 feet in length and 20 feet in width, or, in other words, nearly one-ninth of the entire tract. This small piece of ground the railway company had occupied and used for two years next preceding the commencement of this action, and the plaintiff claimed \$200 damages therefor. On the trial he proved that the value of the use of the entire tract was \$100 a year, or \$200 for the use of the entire tract for the entire time for which the plaintiff sued; and he did not prove what the value of the use of the ground occupied by the railway company was, or what the value of the use of any other portion of ground out of the entire tract was. The verdict of the jury was in favor of the plaintiff, and they assessed his damages at \$200; for which amount, with costs of suit, the court rendered judgment. Now, it is clear beyond all question that the plaintiff should not recover damages or compensation for the use of his entire tract of land when he did not in his pleadings claim for all, and when the railway company in fact occupied and used only a small portion thereof,—less than one-ninth thereof. Hence the verdict of the jury, and the judgment of the court below, were in this respect erroneous. Under the evidence, we have no means of equitably adjusting or apportioning the values of the use of the different portions of the entire tract, or of equitably determining what should be the amount of the recovery. Hence for this error the judgment of the court below must be reversed. *Powers v. Clarkson*, 11 Kan. 101. The judgment will be reversed, and cause remanded for a new trial. All the justices concurring.

(43 Kan. 446)

MILLER v. MORRISON et al.

(Supreme Court of Kansas. April 4, 1890.)

ALIMONY—JUDGMENT—SATISFACTION.

A decree of divorce was rendered, and the custody of a minor son was given to the mother, and the father was required to pay to the mother \$300. Two hundred dollars of that amount was afterwards paid, and afterwards the father and mother entered into an agreement that if the father would take the care and custody of the minor son, that the mother would relieve him from the payment of the other \$100 still remaining due and unpaid, and the father, in pursuance of such agreement, did take such son under his charge, and continued to support and maintain him. *Held*, that the agreement was valid, and that these transactions had the effect to pay, satisfy, and discharge the judgment for the remaining \$100.

(Syllabus by the Court.)

Error from district court, Atchison county; SENECA HEATH, Judge *pro tem*.

This was an action brought in the district court of Atchison county by George H. Miller against Keturah V. Morrison and Frank

E. Shaw, sheriff of Atchison county, to restrain the defendants from enforcing and collecting a certain judgment, and an execution issued thereon. Mrs. Morrison, who was formerly the wife of Miller, was the judgment creditor; Miller was the judgment debtor; and Shaw, who was the sheriff of Atchison county, had the execution in his hands, had already levied the same upon the property of Miller, and was advertising the property for sale. The case was tried before the court without a jury, and the court made special findings of fact and conclusions of law, which read as follows:

"FINDINGS OF FACT.

"(1) At the June term for 1885 of said court, in a case then pending in said court, wherein the above-named defendant Keturah Morrison, then Keturah Miller, wife of said George H. Miller, was plaintiff, and said George H. Miller was defendant, a decree of divorce divorcing said parties was rendered on the 30th day of June, 1885, on the cross-petition of the said George H. Miller, and by reason of the default [this should be another word] of the wife, said Keturah Miller, the decree granted to said Keturah Miller the custody of their son Harry Miller, then aged two (2) years, and to said George H. Miller the custody of their son Harvey Miller, then aged five (5) years, such custody in each case to continue until the further order of the court. No special provision was made for the support of either of the children, but the wife was awarded absolutely three hundred dollars (\$300) as alimony, to be paid as follows: One hundred dollars (\$100) in sixty (60) days, one hundred dollars (\$100) in one (1) year, and one hundred dollars (\$100) in two (2) years, and such alimony declared and adjudged to be a lien upon the property of the said George H. Miller, described in the petition in this action.

"(2) The first of said installments was paid when due. In February, 1886, said Keturah Miller told the plaintiff, Geo. H. Miller, (who had on several occasions since the divorce tried to induce her to give him the said child Harry Miller,) that if he would take the said child, and keep him with the other child, she would release him from the payment of the last installment, and, upon his agreement to do so, took, with the consent of said George H. Miller, both of said children to her home, about five miles distant from the home of said George H. Miller, and about five (5) days thereafter returned both of them to said Geo. H. Miller, who has since that time had the custody and full charge and control of said children, and has cared for and kept them at his own expense. There was no definite time agreed upon as to which said Geo. H. Miller was to keep said Harry Miller, but by the acts of the parties, and the circumstances succeeding and connected with the agreement, it is shown that both parties intended that the mother of said children should not thereafter have anything to do with the custody, care, nurt-

ure, education, and support of said children.

"(3) The second installment of said alimony was paid when due, and the last installment has not been paid by reason of the agreement between said plaintiff, George H. Miller, and said defendant Keturah Morrison."

"CONCLUSIONS OF LAW.

"(1) Said plaintiff, George H. Miller, is still liable for the payment of the last installment of said alimony.

"(2) The plaintiff is not entitled to the permanent injunction prayed for in this action."

Upon these findings and conclusions the court below rendered judgment in favor of the defendants, and against the plaintiff, and the plaintiff, as plaintiff in error, brings the case to this court for review.

Jackson & Royse, for plaintiff in error.
J. T. Allensworth, for defendant in error.

VALENTINE, J., (*after stating the facts as above.*) In this state, under all ordinary circumstances, the father and mother of minor children born in lawful wedlock have an equal and a joint right to the possession, custody, and control of their minor children, and neither has a superior right to the other. Const. Kan. art. 15, § 6; Act Relating to Guardians and Wards, § 1; *State v. Jones*, 16 Kan. 611. And, as a consequence of such equal and joint right, they are also under an equal and joint obligation to care for and to support and educate their minor children. *Harris v. Harris*, 5 Kan. 46, 50. In the case just cited, the following language is used: "But this obligation rests equally upon the mother, and this whether it be regarded as a legal or natural duty. Originally it was a purely natural obligation, resting upon both parents alike. At an early period a sanction was added to this natural duty by St. 43 Eliz. c. 2, which directs that 'the father and mother, grandfather and grandmother, of poor impotent persons, shall maintain them, if of sufficient ability, as the quarter sessions shall direct.' 1 Bl. Com. 448. 'This statute being in aid of the common law, and to enforce a natural duty, is adopted in this state by statute. Comp. Laws 1862, p. 678. This statute makes it alike the duty of the mother, as of the father, to support their children, and applies only to those unable to support themselves, whether they be minors or not, and makes this duty dependent upon the ability of the ancestor to discharge it. Without this ability, there is no legal liability.' It will be seen by an inspection of our constitution and statutes that the rules of the common law, with respect to the rights and duties of fathers and mothers with regard to their minor children, have been considerably changed and modified in Kansas. The tendency in Kansas has always been towards an exact equality among the sexes under the law. The tendency has been to place all adult persons, male and female, upon the same legal plane, so far as such a thing can be accomplished.

But while the rights of parents under the laws of Kansas to the custody and control of their minor children are exactly equal, yet neither has such an absolute right in this regard that it may not, under particular circumstances, or by contract, or by a decree of a court, be greatly modified or absolutely abrogated. Act Relating to Minors, § 5 *et seq.*; Civil Code, § 645; *In re Bort*, 25 Kan. 308; *Chapsky v. Wood*, 26 Kan. 650; *Walrath v. Walrath*, 27 Kan. 395; *Strong v. Marcy*, 33 Kan. 109, 5 Pac. Rep. 366; *Chandler v. Dye*, 37 Kan. 765, 15 Pac. Rep. 925. We suppose that it will be admitted that the obligation or duty of the plaintiff, Miller, to see that his son Harry should be properly supported and cared for, was not completely annulled by the decree rendered in the divorce case; but certainly by such decree his obligation to that effect was made only secondary, and that of his divorced wife, Keturah, was made primary. Indeed, as between the two, it was her duty alone to support, care for, and educate their son Harry. She obtained the right by such decree to Harry's custody and services, and that right carried with it the duty and obligation to support and maintain him. Mr. Bishop, in his work on Marriage and Divorce, has cited the following among other cases: *Husband v. Husband*, 67 Ind. 583; *Pawling v. Willson*, 13 Johns. 192; *Finch v. Finch*, 22 Conn. 411; *Fitler v. Fitler*, 33 Pa. St. 50; and then he uses the following language: "The true legal principle applicable to cases of this kind seems to be that the right to the services of the children and the obligation to maintain them go together; and, if the assignment of the custody to the wife extends to depriving the father of his claim to their services, then he cannot be compelled to maintain them otherwise than in pursuance of some statutory regulation. So where the court, granting the divorce and assigning the custody to the wife, makes, under authority of the statute, provision for their support out of the husband's estate, he would seem, within principles already mentioned, to be relieved from all further obligation." 2 Bish. Mar. & Div. § 557. We think the decree rendered in the divorce case, giving the custody of the son to the mother, virtually, as between the father and the mother, but without reference to the father's obligations to the son and to the public generally, relieved the father from all obligation to support and maintain his son, and cast the burden of such support upon the mother. In other words, as between the father and the mother, it became the mother's duty entirely by such decree to support and maintain their son, and therefore there was ample and sufficient consideration for the agreement entered into between the father and the mother that, if the father would take the care and custody of the son, she would relieve him from the payment of the \$100, still remaining due and unpaid on the judgment rendered in the divorce case; and as the father did take the son under his charge, and under

such agreement, and has continued to support and maintain him, we think the judgment for such \$100 has been completely paid, satisfied, and discharged, and therefore that the father should not be further harassed and molested by any attempt to enforce the same. As tending strongly to support this view, see the case of Walrath v. Walrath, 27 Kan. 395. See, also, Chandler v. Dye, 37 Kan. 765, 15 Pac. Rep. 925. The judgment of the court below will be reversed, and cause remanded, with the order that judgment be rendered upon the findings of the court below, as prayed for in the plaintiff's petition. All the justices concurring.

(43 Kan. 590)

WILKINSON v. ELLIOTT et al.

(Supreme Court of Kansas. April 4, 1890.)

DIVORCE—ALIMONY—*LIS PENDENS*—HUSBAND AND WIFE—CONVEYANCES.

1. Where the wife files a petition asking for a divorce and for alimony, in which she definitely described certain real estate of the husband, and prays that it may be set apart and decreed to her as permanent alimony, the doctrine of *lis pendens* will apply; and any one who purchases such property during the pendency of the action will be bound by the judgment subsequently rendered therein.

2. Where a party temporarily hands a petition to the clerk of the district court, in order that he may place his file-marks thereon, and not for the purpose of allowing it to remain in official custody as a permanent record, and he does not ask for, or obtain, the issuance of a summons, but holds the petition in his own possession, away from the record, the action is not pending, within the meaning of the statute on *lis pendens*.

3. The case of Munger v. Baldrige, 41 Kan. 236, 21 Pac. Rep. 159, holding that a married woman may appoint her husband, by power of attorney, as her agent to convey the inchoate interest which she holds in his real estate, followed.

(Syllabus by the Court.)

Error from district court, Sedgwick county; T. B. WALL, Judge.

George, King & Schwinn, for plaintiff in error. Murray & Elliott, for defendant in error.

JOHNSTON, J. This was an action brought by Augusta L. Wilkinson against John B. Elliott and Alexander C. Wilkinson, for the purpose of canceling a certain deed conveying a quarter section of land, which purported to have been executed by Wilkinson and the plaintiff to John B. Elliott on May 25, 1883, and to quiet the title to the land in her. Some of the leading facts in the case are that on February 19, 1883, the plaintiff and Alexander C. Wilkinson were then, and for a long time prior thereto had been, living together as husband and wife, and their family at that time consisted of six children. Some difficulty having arisen between them, they agreed to separate; and, in the settlement made between them, it was arranged that she should take a herd of cattle, and in turn should execute to him a power of attorney authorizing him to sell the real estate in controversy, the title to which stood in his name, and it had previously been occupied by them

as their homestead. The power of attorney was executed on February 19, 1883, and was recorded on February 22, 1883. After the settlement was made, Mrs. Wilkinson moved from the land to a house in the same neighborhood, where she resided for a short time; and she subsequently went from there to the home of her father. On May 25th of the same year, Alexander C. Wilkinson negotiated and sold the land to John B. Elliott, and under and by virtue of the power of attorney mentioned he conveyed her interest to the purchaser. The purchase price of the land was about \$2,200, which was made up in part of a mortgage upon the land of \$700, and also of a judgment and some tax-liens, which Elliott assumed. On May 21, 1883, Augusta L. Wilkinson, by her counsel, prepared a petition praying for a divorce from her husband on the ground of gross neglect of duty, and praying, also, that the real estate in controversy should be granted to her by the court as permanent alimony. The petition was presented to the clerk of the district court, who placed his file-marks thereon, when it was immediately thereafter taken by counsel for plaintiff in error from the court and the possession of the officer. There was no *præcipe* for a summons filed, nor any summons issued, until May 25, 1883, and not then until after the conveyance to Elliott had been made. On the 24th day of May, and upon the application of Augusta L. Wilkinson, an order was granted by the district judge, at his chambers, restraining her husband from selling or disposing of this real estate during the pendency of the divorce proceedings. But this order was not filed in the district court until the 25th day of May, nor served until the following day; and the testimony of the defendant in error tends to show that neither the order nor the original petition which had been filed were returned to the district court until after the transfer of the real estate in controversy was made to Elliott. On May 20, 1885, a divorce was granted by the district court; and in the judgment it was decreed that the land in controversy should be given to Augusta L. Wilkinson as permanent alimony. Soon afterwards, she brought the present action; and the district court, after a full hearing upon the evidence offered, made a general finding in favor of the defendants, and denied the plaintiff the relief asked for.

Two points are made against the judgment: *First*, that the power of attorney executed by Mrs. Wilkinson, authorizing the conveyance of the land, was void for the reason that she was a married woman, and was therefore incapable of thus conferring authority on her husband to convey the land in controversy; and, *second*, that the conveyance of the land to Elliott was made during the pendency of the action for divorce and alimony, and that, under the doctrine of *lis pendens*, Elliott took the conveyance subject to any judgment that might be rendered in that action.

In regard to the first question, it has already been determined by this court that "a married woman may appoint her husband, by power of attorney, as her agent to convey the inchoate interest which she holds in his real estate; and an instrument duly executed by himself, and by him for her under such authority, is effectual to transfer such interest." *Munger v. Baldrige*, 41 Kan. 236, 21 Pac. Rep. 159. It is claimed that a different rule applies where the land attempted to be conveyed is a homestead, but this question we need not determine. After the settlement between Wilkinson and his wife, and before the conveyance to Elliott, they ceased to occupy the land as a homestead. There is some controversy in regard to whether the land retained the homestead character after the possession of the same had been surrendered, but, in view of the general findings of the court in favor of the defendants, we must assume that the homestead was voluntarily abandoned by them; and hence the case of *Munger v. Baldrige* is an applicable and controlling authority. The power of attorney was sufficient in form, and after execution was immediately placed on record. It still remains a matter of record, and there has been no attempt to revoke the same in the manner required by statute. Gen. St. 1889, par. 1133. There being no revocation, the power of attorney must, under the authority cited, be held valid and effectual.

The next inquiry is whether the doctrine of *lis pendens* applies in actions for divorce and alimony, and whether Elliott was a *pendente lite* purchaser. In her petition for divorce and alimony, Mrs. Wilkinson stated at length the grounds of divorce, the necessity of alimony for the support of herself and family, and that this land, particularly describing it, constituted the principal property of the defendant; and she prayed that the rents of the land should be paid to her, and that the land itself should be decreed to her as permanent alimony. The law provides that, when a divorce is granted to the wife on account of the fault of the husband, she shall be restored to all her lands which have not been disposed of, and shall be allowed such alimony out of her husband's real and personal property as the court shall think reasonable. Civil Code, § 646. The general rule is that one who purchases from a party to an action the subject-matter of the litigation is bound by the judgment subsequently rendered. It is essential to the doctrine of *lis pendens* that the litigation should be about some specific thing to be affected by the result of the action, and that the particular property should be so described and pointed out by the proceedings as to give notice to the whole world that they intermeddle at their peril. *Freem. Judgm.* §§ 196, 197. It is contended that the doctrine has no application in actions for divorce and alimony, because the matter upon which the jurisdiction acts is the *status* of the parties, and not the disposition of the property. In our state,

however, both questions may be the subject of litigation in the same action. If a divorce is asked on account of the fault of the husband, the wife may ask not only that all her own land may be restored to her that has not been disposed of, but may describe particular property belonging to the husband, and ask that the same may be set apart for her as permanent alimony. When this is done, the property is made the subject-matter of litigation, and is brought within the jurisdiction of the court, and any one who purchases the same should be bound by the judgment or decree thereafter rendered. If, in such an action, there was no specific property pointed out, but only a general prayer for alimony, the doctrine would not apply, for the reason that the alimony might be awarded out of either real or personal property; and, as no particular property was described and made the subject-matter of the litigation, no one could have notice that any particular property was involved. Although the courts are not in accord upon the question, the prevailing and better opinion is as stated by Bennett on *Lis Pendens*, § 99: "The primary object for which the suit is brought is not material, provided the court has jurisdiction of the property for secondary purposes; and so it would seem that where a bill for divorce and alimony is filed by the wife against the husband, and there is no special allegation in it pointing out any particular property which is sought to be charged with the payment of the alimony, there will be no *lis pendens* as to either real or personal property of the defendant. Such a case cannot be distinguished from those where the action is professedly *in personam*, and where the contention in the case is entirely independent of any particular property. The same results of the advantage to the public, the same argument founded upon public policy, would exist in the one class of cases as in the other. If, however, the bill should contain special allegations, should point out particular real or personal property, and, within the limits of the manifest jurisdiction and powers of the court to grant the relief, should seek to have alimony assigned out of such specific property, there would be constructive notice of the *lis pendens*." *Powell v. Campbell*, 20 Pac. Rep. 156; *Brightman v. Brightman*, 1 R. I. 112; *Daniel v. Hodges*, 87 N. C. 98; *Ulrich v. Ulrich*, 8 Mackey, 290; *Tolerton v. Williard*, 30 Ohio St. 579; *Vanzant v. Vanzant*, 23 Ill. 536; *Draper v. Draper*, 68 Ill. 22; *Sapp v. Wightman*, 103 Ill. 150.

The question remains, however, whether the action of divorce was so pending at the time the land was transferred as to make Elliott a purchaser *pendente lite*. The plaintiff had executed a power of attorney conferring authority on Wilkinson to convey the land. It was conveyed before Elliott had actual notice that a proceeding for divorce was begun or, in contemplation, as we are bound to assume from the finding of the court. The petition for divorce was prepared and indorsed

as filed, it is true, before the sale was made; but, as we have seen, it was immediately taken from the office. No *præcipe* for summons was then filed, nor was the summons issued in the case until after the conveyance was made. The Code prescribed that "when the petition had been filed the action is pending, so as to charge third persons with notice of its pendency, and, while pending, no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title; but such notice shall be of no avail unless the summons be served, or the first publication made, within sixty days after the filing of the petition." Civil Code, § 81.

Was the handing of the petition to the clerk, and his mere indorsement thereon, a sufficient filing, within the meaning of this statute? It seems to us that it cannot be so held. The filing contemplated by the statute is to place the petition in the custody of the clerk, there to remain subject to inspection by all interested parties. "File" meant, at common law, "a thread, string, or wire upon which writs and other exhibits in courts and offices are fastened or filed for the safe-keeping and ready turning to the same." Whart. Law Dict.; Bouv. Law Dict. The modern method of filing papers is to place them in the official custody of the proper officer to be kept as a permanent record, and the making of an indorsement thereon by the officer of the time they were received. According to Bouvier, "a paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file." The mere handing of a petition to an officer for indorsement, and for a temporary purpose, cannot be regarded as a "filing," within the meaning of the statute of *lis pendens*. It must be placed in the custody of the clerk as a permanent official record, and for the purpose of giving notice to all of what is the nature and scope of the litigation. The statute requires that all such papers shall be safely kept in the custody of the clerk, but in this case it would seem that the petition was not handed to the clerk to be received and kept by him as a permanent record. It seems probable that, for some reason, the plaintiff did not desire the purpose and scope of the action to be known until an order of injunction could be obtained. Her conduct, however, was such that a stranger to the action had no opportunity of informing himself what property, if any, was involved in her proposed action. Shall she have the benefit of a notice based on an alleged record, when by her own act she has rendered an examination or search of the record abortive? Before the sale of the land the defendant did in fact, through an attorney, make inquiry and search as to whether there was anything of record affecting the title to this real estate, and was told by the clerk that there was nothing; and no petition was found in the custody of the clerk, where such papers are kept when they are filed. To adopt the rule invoked by the plaintiff would tend to the en-

couragement, rather than to the prevention, of fraud. Before the doctrine of *lis pendens* will apply, the petition should be actually filed, and made a permanent record, with the *bona fide* intention of proceeding with the prosecution of the action; and it should be kept on record, open to inspection by the whole world. It is said that it is the intention and act combined which makes the filing of a petition or commencement of an action effective. Under a statute which provides that the filing of a petition constitutes the commencement of an action, it was held that a petition delivered to the clerk of the court with instructions not to issue process until further instructions were given, is not the commencement of an action, so as to prevent the running of the statute of limitations, and that it should be treated as having been left with the clerk in his individual capacity, as bailee. *Maddox v. Humphries*, 30 Tex. 494. *Benn. Lis Pendens*, § 42. When the plaintiff handed her petition, temporarily, to the clerk, she did not ask for, nor obtain, the issuance of a summons,—an essential step to the institution of an action. It was, apparently, the intention that the acts and purposes of the plaintiff should be concealed from all until the petition was finally returned and deposited with the clerk to be kept by him as a permanent record. It is our opinion that until the petition was permanently placed on record, with the *bona fide* purpose of diligently proceeding with the litigation, the action cannot be regarded as pending, within the meaning of section 81 of the Code. Under the findings of the court, it must be held that Elliott had no actual notice of the allegations of the petition, or of the purposes of the plaintiff; and, having neither actual nor constructive notice, he cannot be regarded as a *pendente lite* purchaser. The judgment of the district court will be affirmed. All the justices concurring.

(43 Kan. 572)

SHAW *et al.* v. STEWART *et al.*

(Supreme Court of Kansas. April 4, 1890.)

MECHANICS' LIENS—TIME OF FILING—COMPLETION OF BUILDING.

1. Where the abandonment of work upon a building is caused either by the consent or fault of the owner, the building is to be deemed completed for the purpose of filing a mechanic's lien.

2. If a contractor permanently abandons his work upon a building, before completing the same under his contract, the subcontractor may, if not inequitable, consider the building as completed, for the purpose of filing a lien thereon.

3. A person making a subcontract is presumed to make it knowing the agreement of the principal contractor, but a subsequent agreement between the owner and the contractor cannot be set up to the subcontractor's disadvantage.

(Syllabus by the Court.)

Error from district court, Harper county; J. T. HERRICK, Judge.

This action was brought to enforce mechanics' liens upon certain property in the city of Anthony, Harper county. The facts are as follows: J. T. Harris entered into a contract with E. J. Stewart on the 9th day of

November, 1885, to erect for Stewart a two-story frame building upon lots 1 and 2, in block 46, of the city of Anthony, for the sum of \$1,500. Harris, under the contract, was to furnish all the materials and do all the work necessary to its construction. To secure the faithful performance of the contract, Harris entered into an undertaking, with sureties, to said Stewart in the sum of \$2,000. Immediately after the execution of the contract and bond, Harris commenced to erect the building contracted, but, not having the materials to build the same, entered into a sub-contract with plaintiff in error, G. B. Shaw & Co., on the 16th day of November, 1885, by which G. B. Shaw & Co. contracted to furnish, to said Harris, lumber and other building materials to the amount of \$693.31, to be used in the construction of the building. Pursuant to the contract, G. B. Shaw & Co. furnished to Harris lumber, etc., in said amount, to be used, and which was used, in the erection of the building; of which sum only \$82.31 has ever been paid by Harris to G. B. Shaw & Co., leaving a balance due from Harris, contractor, to G. B. Shaw & Co., the sum of \$611. The said materials were furnished by plaintiff in error, G. B. Shaw & Co., to Harris, between the 16th day of November, 1885, and December 16, 1885. Harris continued the work of erecting the building until about the first week of December, 1885, when he stopped work temporarily. He did some more work upon the building during the month of December, 1885; but finally, on or about the last week of December, 1885, wholly quit work, and abandoned the building in an unfinished condition. The contractor, J. T. Harris, refusing to further proceed with the erection of said building, and having abandoned the erection of the same, G. B. Shaw & Co., on the 3d day of February, 1886, served upon E. J. Stewart a statement of a lien upon the lots and building as subcontractor, and filed the same on said day in the office of the clerk of the district court of Harper county. On the 26th day of March, 1886, to further protect its lien, G. B. Shaw & Co. filed in the office of the clerk a verified statement of a lien, as subcontractor. On the 8th day of May, 1886, G. B. Shaw & Co. filed in the office of the clerk of the district court of Harper county a petition to foreclose the lien aforesaid, making E. J. Stewart, the owner; J. T. Harris, the contractor; Costa & Ghio, A. D. Moore, R. W. Catlin, J. M. Slaybaugh, Martin Fox, W. C. Comer, A. J. Hansbery, J. B. Rinehart, J. M. Hansbery, J. F. Tuttle, and James Archibald, subcontractors, and H. W. Lewis, mortgage lienholder,—parties defendant. On the 19th day of July, 1886, E. J. Stewart filed his answer, setting up, among other things, that Harris did not complete the building, abandoned it, and that the lien was filed prematurely. Afterwards, on October 30, 1886, E. J. Stewart filed his amended answer, which set up in a more definite manner the same defenses contained in his original answer. Shaw & Co., on the 12th day of No-

vember, 1886, filed a reply. On the 8th day of May, 1886, Costa & Ghio, originally defendants in this action, brought an original action upon their mechanic's lien against the property, making all the defendants in error herein defendants, and in addition thereto made this plaintiff in error, G. B. Shaw & Co., a defendant. On the 12th day of January, 1887, upon motion of defendants, the two actions of G. B. Shaw & Co. v. E. J. Stewart et al. and Costa & Ghio v. J. Stewart et al. were by order of the court consolidated as one, with the title of the same as G. B. Shaw & Co., and Costa & Ghio, plaintiffs v. E. J. Stewart et al., defendants. All further proceedings were had under the last-mentioned title. All of the other subcontractors answered in the consolidated action, setting up their respective liens by way of cross-petitions, but they have filed no petition in error in this court. Defendant H. W. Lewis defaulted in the action, after being personally served. Personal judgment was rendered against J. T. Harris, defendant, April 20, 1887, upon both the amounts claimed by G. B. Shaw & Co. and Costa & Ghio, in their favor, respectively. On the 19th day of January, 1887, E. J. Stewart filed an amended answer in the consolidated action, which set up the same defenses as his former answers. On the 19th day of January, 1887, plaintiffs, in the consolidated action, filed their replies to answers of Stewart and other defendants. On the 12th day of January, 1888, the action came on for trial before the court, a jury being waived; plaintiffs introduced their evidence in support of the allegations in their petitions filed; and rested their causes. Thereupon, on January 13, 1888, defendant E. J. Stewart demurred to the evidence of plaintiffs G. B. Shaw & Co. and Costa & Ghio. The trial judge, on January 16, 1888, sustained the demurrer to the evidence of plaintiffs, and rendered a judgment in favor of defendant E. J. Stewart, and against them; to which ruling plaintiffs objected, and excepted at the time. At the same time the court overruled defendant E. J. Stewart's motion for judgment on the pleadings. On the 16th day of January, 1888, plaintiffs filed motions for a new trial in said action, which motions were overruled. The plaintiffs excepted, and bring the case here.

Shepard, Grove & Shepard, for plaintiff in error. *George H. McMahon, W. S. Cade*, and *Hamilton & Cubbinson*, for defendant in error.

HORTON, C. J., (after stating the facts as above.) E. J. Stewart is the owner of lots 1 and 2, in block 46, in the city of Anthony. On the 9th day of November, 1885, he entered into a written contract with J. T. Harris, by which it was agreed that Harris should erect a two-story frame building on the lots for \$1,500. Harris was to furnish all the materials and labor for the building. To secure the faithful performance of the written contract, Harris executed to Stewart a written

undertaking, with two sureties, in the sum of \$2,000. G. B. Shaw & Co. furnished lumber, under a contract with J. T. Harris, which was actually used in the building, of the value of \$693.30, of which \$82.30 only has been paid. Costa & Ghio furnished hardware, under a contract with J. J. Harris, which was used in the building, of the value of \$108.33, none of which has been paid. Harris commenced the construction of the building soon after the date of his contract, but quit work, and abandoned the building in an unfinished condition, late in December of 1885. Shaw & Co. filed their lien for lumber on the 26th day of March, 1886. Costa & Ghio filed their lien for hardware on the same day. The trial court sustained a demurrer to the evidence of the plaintiffs, interposed by Stewart, upon the ground that the liens of the plaintiffs were prematurely filed. The question presented by the record is, where a contractor refuses to proceed with his contract, and abandons a building before its completion, that he has contracted with the owner to build and complete, can a subcontractor, who has furnished materials under a subcontract with the contractor, which are used in the building, treat the building as completed at the time the contractor abandoned it, and file his lien for materials without further delay? It is contended in support of the ruling of the trial court that the right of the plaintiffs is purely a statutory right; that the remedy depends upon the existence of the right; and that the right of the plaintiffs to file their liens depended upon the existence of certain conditions precedent. Among others, the completion of the building and the filing of the statutory statement within 60 days after its completion. Sections 631, 632, Comp. Laws 1885. If there had been no permanent abandonment of the construction of the building by the contractor, we would be compelled to affirm the ruling of the trial court. *Davis v. Bullard*, 32 Kan. 234, 4 Pac. Rep. 75; *Seaton v. Chamberlain*, 32 Kan. 239, 4 Pac. Rep. 89. In the *Davis* Case it was said: "It is our view, however, that, as between the owner of the property and the contractor and subcontractor, the contractor and the subcontractor should be considered as substantially one and the same person with reference to the completion of the building, and therefore that the building should be considered as completed when, and only when, the contractor has completed his part thereof. No privity of contract exists between the owner of the building and the subcontractor, but the subcontractor's rights are based simply and solely upon his contract made with the contractor. The contractor, and not the owner of the building, is the subcontractor's debtor, and the subcontractor has no right to claim that the building has been completed until the contractor under whom he claims has such right." But upon the facts of this case, the ruling of the trial court, that the liens of the plaintiffs were prematurely filed, because the building was not fully completed,

cannot be sustained. Such a construction of the statute is too technical and too harsh against persons furnishing materials as subcontractors, to be used in buildings. It is said in *Kneeland on Mechanics' Liens*, § 65, that "there are circumstances under which performance by the contractor is excused, and he may maintain a lien under a *quantum meruit* for the work done, or under the contract for the proportional amount of performance rendered. The claimant will be entitled to the benefit of a lien, if the failure was caused either by the consent or fault of the owner." All the authorities sustain the proposition that, if the abandonment of the work upon the building had been caused by Stewart, the owner of the property, plaintiffs would be entitled to their liens; as the abandonment of the work would be deemed a completion of the building for the purpose of filing such liens. *Catlin v. Douglass*, (U. S. Cir. Ct. Kan.) 33 Fed. Rep. 569; *Trammell v. Mount*, (Tex.) 4 S. W. Rep. 377.

Now, it is well settled by the authorities that the equities of the persons performing labor and furnishing materials for buildings are superior to those of either the contractor or the owner. The abandonment by the contractor of the work upon the building ended his contract with the owner. The subcontractors were without fault. The effect of the failure to go on with the work was to prevent the plaintiffs from furnishing any more lumber or hardware, and their contracts with the contractor were also at an end. The owner had in his building their materials. If the non-completion of the building had been by the consent or fault of the owner, the liens for materials used in the building would not be prematurely filed, although there had been no completion of the building. In such a case, the letter of the statute could not be invoked to defeat its beneficial and equitable purpose. So, in this case, as the non-completion of the building was caused by the act of the contractor, if the liens were not filed within the letter of the statute they are clearly within the spirit of the statute, as it would be grossly inequitable to hold that the plaintiffs are absolutely barred of all rights to the lien law, because the work on the building was permanently abandoned without their fault. The foreclosure of a mechanic's lien under the statute is an equitable proceeding, in which the powers of the court are invoked to mould the remedy, within the provisions of the statute, to suit the circumstances of the case. In this action the equities are with the plaintiffs. They furnished all the lumber and hardware used in the building, and ought not in justice to be prevented from acquiring and enforcing their liens, because the contractor abandoned his work. It was said in *Davis v. Bullard*, supra: "If, however, the contractor should abandon the work for any cause before completing the building under his contract, it is possible, and even probable, that the subcontractor might then, if not inequitable, consider

the building as completed, and obtain liens thereon within four months thereafter by complying with the provisions of sections 631 and 632 of the Civil Code. But so long as the contractor has not completed the work under his contract, but is still at work on the building under his contract, the building cannot be considered as having been completed, either as to the contractor or any subcontractor." In *Henderson v. Sturgis*, 1 Daly, 396, it was decided that "where a subcontractor is prevented from performing the whole of his contract with the contractor by reason of the failure of the latter, and an assignment by him of the contract for the benefit of his creditors, *held*, that he may acquire and enforce a lien for the value of his labor and materials performed and furnished up to the time when he was prevented." Jones on Liens (volume 2, § 1438) thus states the law: "The owner's or contractor's abandonment of the work upon a building is to be deemed a completion of it for the purpose of the filing of mechanics' liens by subcontractors, material-men, and laborers. 'It would be inequitable and unreasonable, and contrary to the spirit of the law, to hold that parties are absolutely barred of all rights to the lien law where the work is prematurely stopped or abandoned without fault of such parties. Such a construction would place material-men and laborers at the mercy of the dishonesty, fickleness, or misfortunes of the owner or contractor.'" Again, there was evidence before the court tending to show that, to complete the building when it was abandoned by Harris, it would have cost the owner \$250 only; therefore he was not only protected by the bond executed by Harris, but the amount necessary to complete the building was much less than the value of the materials furnished by the plaintiffs. We refer to this evidence as showing equities favorable to the plaintiffs. Further than this, there was some evidence before the court that Harris could not have performed his original contract with Stewart, because the latter frequently made changes therein. Of course, if Harris was prevented from carrying out the original contract on account of changes by Stewart, the latter cannot invoke the letter of the statute to defeat the liens which were filed. A person making a subcontract is presumed to make it knowing the agreement of the principal contractor, but no subsequent agreement of the principal contractor can be set up to the subcontractor's disadvantage. *Overt. Liens*, § 553. The judgment of the district court will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed. All the justices concurring.

(43 Kan. 612)

STOCKTON *et al.* v. GEISSLER.

(Supreme Court of Kansas. April 4, 1890.)

ADVERSE POSSESSION—EVIDENCE.

Acts of ownership—such as returning land for assessment, payment of taxes, going upon the

land, offering it for sale, openly and notoriously claiming it—may be given in evidence in connection with acts showing possession,—such as fencing and cultivating the land,—as tending to prove adverse possession.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Wyandotte county; O. L. MILLER, Judge.

Hutchings & Keplinger and *J. W. Jenkins*, for plaintiff in error. *J. O. Fife*, for defendant in error.

STRANG, C. Action in ejectment to recover the possession of lots 1 and 2, in block 127, in the old city of Wyandotte. Defendants answered by a general denial. The lots in question are a part of lands allotted by the Wyandotte commissioners under treaty of January 31, 1855, ratified February 20, 1855, with the Wyandotte Indians, to John Beaver, and by John Beaver and Susan Beaver, his wife, to John McAlpin, trustee for the Wyandotte City Company, July 22, 1857. It is admitted that the plat of the city of Wyandotte covers the lots in question, and shows them to be embraced in the John Beaver allotment. John Waller purchased the lots described in the plaintiff's petition at tax-sale, on the 6th of September, 1860, and about that time took possession of the same, and fenced and cultivated the lots more or less until the spring of 1875, when he died, some time between April 21st and May 19th of that year. April 21, 1875, he made a will, giving the lots in question to Rosina Waller, his wife. May 1, 1879, Rosina Waller conveyed the lots by deed dated May 1, 1879, to Annie B. Wood, which deed was recorded March 8, 1881. Annie B. Wood and George B. Wood, her husband, conveyed said lots to Thomas O'Keefe, by deed dated December 31, 1880, which was recorded the same day. June 6, 1882, Thomas O'Keefe conveyed the land to William Wogshom. March 7, 1883, William Wogshom conveyed the lots to E. E. Mandeville, and on the 7th day of August, 1883, Mandeville conveyed the same to Charles G. Geissler, the plaintiff below. The tax-deed of John Waller was void on its face. The plaintiff bases his title on the statute of limitations, alleging that he, and those under whom he claims, had the quiet, peaceable, notorious, and adverse possession of said lots for 15 years and more before the defendant below took possession of the same. The defendants below, John S. Stockton and A. W. Little, base their title to the lots upon a succession of conveyances, commencing with a deed by John McAlpin, trustee of the Wyandotte City Company, to the heirs of M. R. McDonald, deceased, dated September 16, 1868, and recorded June 15, 1885; followed by deed from the heirs of M. R. McDonald, deceased, to John S. Stockton, dated January 24, 1887; and deed from John S. Stockton and wife to A. W. Little, for an undivided one-half interest in the said lots, dated the 1st of February, 1887. The deed of John McAlpin, trustee, to the heirs of M. R. Mc-

Donald, lay in the office of the register of deeds of Wyandotte county from some time after it was executed, September 16, 1868, unrecorded, and without any file-marks thereon, until some time recently, prior to its being recorded, June 15, 1885. There was in pencil written on the back of said deed the words, "to be delivered on return of town company's certificate." The case was tried by the court and a jury. Verdict for the plaintiff that he was entitled to the immediate possession of the lots described. The jury found also specially as follows: "(1) Prior to 1862 was plaintiff, or any under whom he claims, in open and visible possession of the premises in question? Answer 1. Yes. (2) If the last question be answered in the affirmative, state the nature and character of such possession prior to 1862, and acts constituting the same. A. 2. By cultivating and paying taxes. (3) Subsequent to the fall of 1875, was the plaintiff, or any one under whom he claims, in the open and visible possession of the premises in controversy? A. 3. Yes. (4) If the last question be answered in the affirmative, state the nature of the facts constituting such possession, and, if such possession was indicated by acts, state by whom such acts were done, and when and for what purpose the same were done? A. 4. By the plaintiff paying taxes, building sidewalk, and taking parties on said premises to sell the same, and officiating generally: (5) If the jury find that the plaintiff has been in the open, notorious possession of the premises in question for fifteen years, state when said period began and terminated. A. 5. Possession began in 1860, and has not terminated legally." Motion to set aside the verdict, and for new trial. Motion overruled, and the ruling excepted to by the defendants below, and they bring the case here for review, and allege as grounds for reversing the case, the following errors of law occurring at the trial:

First. The admission of evidence excepted to by the plaintiff. The particular error complained of under this assignment, and the only one noticed by plaintiffs in their brief, is the allegation that the plaintiff below, Mr. Geissler, was permitted to testify in substance that, though he had not been on the lots with other persons in an effort to sell the same, he had a letter from Scott, his agent, saying that he (Scott) had done so. This is commented on in plaintiffs' brief, and attention is called to the fact that such evidence was made the basis of an instruction by the court to the jury. But turning to page 5, where such evidence in the record is pointed out, we conclude that counsel misconceived the evidence of Geissler, since the record shows that Geissler's evidence was not what counsel in their brief seem to think it was. The evidence pointed out in the record does not show that Geissler was permitted to testify that he had a letter from his agent, Scott, saying that he (Scott) had gone on the lots in question, with other persons in an effort to sell them. The

record shows that what Geissler did testify to was that Scott wanted to sell the lots: "That he had several men that wanted to buy them; and he kept writing me to ask me what I would take for them." This evidence would seem to be entirely different from what counsel thought it was, and therefore does not support this assignment of error; hence we conclude that, so far as this particular assignment is concerned, the record shows no error. The objection to this evidence as given came after the answer was in, and no motion to strike it out was made, and therefore its admission cannot be complained of.

Second. In the rejection of evidence offered by the plaintiffs. There is no specific error pointed out under this assignment, and we will not undertake to say there was error when none is pointed out. An examination of the record shows great liberality on the part of the trial court in the admission of evidence, and this seems to be particularly true with regard to evidence offered by the defendants below.

Third. In giving instructions to the jury objected to by the plaintiffs. The first complaint in regard to instructions is as to the third section of the first instruction, which reads as follows: "The following facts all tend to show adverse possession. By going upon real estate, and inclosing the same with a fence, or by plowing the land or otherwise improving it, or exercising acts of ownership over it, as offering it for sale, taking persons upon it, publicly claiming to be the owner thereof, paying the taxes on it, and, in fine, doing with it what any ordinary person does with his real estate." This instruction is objected to upon the theory that many of the things enumerated, as going upon the land, publicly claiming to be the owner thereof, paying taxes thereon, do not tend to show possession of any kind. While no one of these things may be said to be sufficient, standing alone, to establish possession, yet we think each tends to prove possession, and grouped together, and coupled with other facts which tend to show possession, as in the instruction complained of, are sufficient to establish possession, and that such possession is adverse. The next complaint refers to the last section of the first instruction, which reads as follows: "Any act by the person claiming possession, which would warn strangers that he claimed to be the owner of the property, would be sufficient in law to create adverse possession." This portion of the instruction, standing by itself, we think would be misleading, as indicating that a claim of possession is equivalent to possession itself. Any act by a person in possession which would warn strangers that he claimed to be the owner of the property would be sufficient in law to create adverse possession. The instructions as a whole contain a correct statement as to what constitutes adverse possession, what tends to establish such possession, and the length of time it must continue to be available in securing

title; and taken as a whole, and together with the other instructions, which were pretty full, and also liberal towards the defendants, and considered with the evidence in the case and the findings of the jury, we are inclined to think there is no such error disclosed as would warrant a reversal of the judgment in the case. There is no further specific error pointed out in plaintiff's brief in the instructions. An examination of all the instructions given and refused does not, we think, disclose error sufficient to authorize this court to interfere with the result of the trial in the court below.

The next complaint is that the verdict is not sustained by sufficient evidence. We think it is. Waller had the land assessed to himself in 1859. He paid the taxes in 1860 for the year 1859. The lots were under fence, and were being cultivated by him as early as 1861 or 1862. He continued to cultivate the land, and to have it fenced, until 1873, and there is some evidence by young Waller that they were under some fence as late as his leaving for Missouri, after the death of his father, in 1875. In 1875 Waller willed the property to his wife, which will was almost immediately probated, and soon after his widow deeded the property to Annie B. Wood, disclosing acts of ownership and control over the land that tend to show continual possession thereof. In 1879 and 1880 a sidewalk was placed along said lots, and a retaining wall built in front of them. The evidence is not entirely clear as to who paid for making the walk, but there is evidence of Anderson that he consented for Woods that the parties anxious for the walk should build it, and he would see that they were paid for it. It was built, and the best evidence on the subject was that it was built for the Woods. The city did not build it. After the death of Waller his widow paid the taxes on the lots, and his grantees continued to pay them down to the plaintiff below, and he has paid them since he purchased the lots. No one pretends to have been in possession of the lots, except Waller and those claiming under him, from the time he took possession down to the time they were taken possession of and fenced by defendants below, in 1886. We think the record discloses evidence to sustain the verdict of the jury and all the special findings. Counsel complain that the jury say possession commenced in 1860, and has not terminated legally. By the use of the term "legally" we think the jury meant to say that the possession taken by John Waller in 1860 had continued in him, and those who claimed under him, down to the time when the defendants below took possession of the lots and fenced them, and that such possession would have continued still had the defendants not wrongfully deprived him of it. What the jury may have thought about the manner in which the possession of the plaintiff below terminated is immaterial; but it is evident they thought, under the evidence, the possession of plaintiff below did not ter-

minate until the defendants took possession of the lots and fenced them; and we are not prepared to say that they are not justified under the evidence in so finding. However that may be, we think there is evidence sufficient to justify the jury in finding that John Waller and his grantees had open and adverse possession of the lots for more than 15 years, and that the plaintiff below was entitled to recover the possession of which he had been deprived. *Cartwright v. McFadden*, 24 Kan. 662; *Gilmore v. Norton*, 10 Kan. 492; *Campbell v. Coonradt*, 22 Kan. 704. We recommend that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered.

VALENTINE and JOHNSTON, JJ., concurring.

HORTON, C. J. I concur in the syllabus, but not in all stated in the opinion.

(43 Kan. 484)

HAVENS *et al.* v. DRAKE.

(Supreme Court of Kansas. April 4, 1890.)

PARTITION—PETITION—NOTICE—SERVICE ON INFANT.

1. Where a petition for the partition of real estate was filed with the clerk of the district court of the proper county in vacation, while chapter 162, Comp. Laws 1883, relating to partition was in force, and the petition was followed up by the notice prescribed by the provisions of that chapter, *held*, that the court had jurisdiction of the subject-matter, and of the parties to the action.

2. Under the provisions of section 3, c. 162, Comp. Laws 1883, the notice in a partition action was required to be at least "forty days previously to the term of the court next after the filing of the petition." Where the petition, under the provisions of said chapter 162, was filed more than 40 days previously to the term of the court rendering the judgment, and notice to answer was served more than 40 days previously to the term of the court rendering the judgment, but only 38 days were given in the notice in which to answer, and where the judgment was not rendered until more than 40 days after the notice was served, *held*, that the judgment rendered upon the notice is not void. The defect, if any, is voidable only.

3. Under section 3, c. 162, Comp. Laws 1883, relating to the partition of real estate, the persons notice to be given in an action for partition was required to be "in writing, to each and every person concerned, their agent or attorney." Where service in such an action was made upon an infant two years of age, whose father was dead, by delivering a certified copy of the written notice to the mother, having the charge and custody of the infant, in the presence of the infant, for said infant, and also by delivering a certified copy of the notice to the mother of the infant as his natural guardian, and where this was followed up by the appointment in the district court of a guardian *ad litem* for the infant, and where, subsequently, the regularly appointed and qualified guardian of the infant paid the infant's share of costs in the partition action, *held*, that the judgment rendered on such service upon the infant is valid, and binding upon him and his grantee.

(Syllabus by the Court.)

Error from district court, Bourbon county; C. O. FRENCH, Judge.

On August 20, 1886, C. F. Drake commenced his action against J. D. Havens, and in his petition alleged as follows: "That he is the owner of, and in the possession of, the

following described real estate situated in Bourbon county, Kan., to-wit, lot No. nine, (9,) in block No. one hundred and three, (103,) in the city of Fort Scott. The plaintiff further states that the defendant claims an interest in said real estate adverse to the plaintiff's, the exact nature of which claim of the defendant is not known to the plaintiff; but the plaintiff alleges that the claim of defendant, whatever it may be, is subordinate and inferior to that of the plaintiff. Wherefore, plaintiff prays that the said pretended interest of defendant in said real estate may be determined, and the same be declared invalid, and of no force and effect as against the estate, interest, and ownership of the plaintiff therein." Havens filed an answer admitting that Drake was in possession of the property, but alleged that he was the owner of an undivided one-half interest therein as the grantee of John E. Himoe, the sole heir of John E. Himoe, deceased, who, he alleged, prior to his death, was a joint owner with one A. R. Clark of the lot. Upon her application, Mrs. Hattie Ida Cheney was made a party defendant, and filed an answer claiming an undivided three-sixteenths of the lot as the surviving heir of her mother, Ida M. Anderson, who prior to her death had been the wife of John E. Himoe, Sr. She afterwards intermarried with R. C. Anderson. Upon the trial the court rendered the following judgment: "This day this cause came on for hearing. The plaintiff, C. F. Drake, appeared by his attorneys, J. D. McCleverty and A. A. Harris; the defendant J. D. Havens appeared by E. M. Hulett, his attorney. The defendant Hattie Ida Cheney appeared by her attorneys, W. W. Martin and P. J. Coston. And thereupon the court proceeded to hear the cause, and, after having heard all the evidence and the argument of counsel, and being fully advised in the premises, doth find the issues in favor of the plaintiff, and against both of the defendants, and doth find that the plaintiff is entitled to have his title quieted to the real estate mentioned in the pleadings, to-wit, lot No. nine, (9,) in block No. one hundred and three, (103,) in the city of Fort Scott, Bourbon county, Kan., as against any claim, title, or interest therein of the defendants, or either of them, and that the defendants, or either of them, are not entitled to have said real estate partitioned between them and the plaintiff. Wherefore, it is considered, ordered, and adjudged that the title of said real estate hereinbefore mentioned be quieted in the plaintiff, and that he hold, occupy, and possess the same free and clear of any claim, title, or interest of the defendants therein, or either of them, and that the defendants, or either of them, do not have any partitions of said real estate against the plaintiff. It is further considered, ordered, and adjudged that the sheriff of this county make a deed to the said real estate to the plaintiff, and that the plaintiff recover of the defendants his costs herein expended, for which execution may issue. And to each finding of

fact and conclusion of law, and to the judgment, the defendants each excepted." The defendants bring the case here.

E. M. Hulett, P. J. Coston, and W. W. Martin, for plaintiffs in error. A. A. Harris and J. D. McCleverty, for defendant in error.

HORTON, C. J., (*after stating the facts as above.*) This was an action in the court below, instituted by C. F. Drake against J. D. Havens, to quiet title to lot 9, in block 103, in the city of Fort Scott. Subsequently, upon her own application, Hattie Ida Cheney was made a defendant. C. F. Drake alleged in his petition that he was the owner of, and in the possession of, the lot described in his petition. J. D. Havens answered that he was the owner of an undivided one-half of the lot as the grantee of John E. Himoe, the heir of John E. Himoe, Sr., deceased. Hattie Ida Cheney answered that she was the owner of an undivided three-sixteenths of the lot as the heir of her mother, Ida Anderson, formerly the widow of John E. Himoe, Sr., deceased. The court made a general finding in favor of C. F. Drake, and granted the prayer of his petition. The defendants below bring this case to this court.

Drake has been for some years in possession of the lot, and has made lasting and valuable improvements thereon, of the value of \$6,000. The answers admitted Drake's possession. Prior to 1864, John E. Himoe, Sr., and A. P. Clark, were the joint owners of the lot. Some time in 1864, Himoe died, leaving his widow, Ida Himoe, and John Himoe, an infant, his only heirs. On July 28, 1866, A. P. Clark commenced proceedings against Ida Himoe and John Himoe, infant, for partition of the lot in controversy, and also lot 11, in block 103. On the day that A. P. Clark filed his petition for partition, the clerk of the court issued a notice to the defendants, Ida Himoe and her infant child, John Himoe, setting forth the substance of the petition. This was directed to the sheriff. The sheriff's return of service upon the notice is as follows:

"Received July 28th, 1866, and on the 4th day of August, 1866, I served this notice by delivering to Ida Himoe a copy of the same, duly certified, with all the indorsements thereon, and on John Himoe, infant, by delivering to Ida Himoe, in the presence of the infant, John Himoe, a duly-certified copy of this notice, and also a duly-certified copy to Ida Himoe as natural guardian of the said John Himoe, infant, all in Bourbon county, Kansas.

Fees: Service.....	\$1 25
Travel, 28 miles.....	2 80

\$4 05

"D. C. KNOWLES, Sheriff. By C. S. WHEATON, Deputy."

This was filed in the court by the clerk on August 6, 1866. W. W. Martin was appointed by the court guardian *ad litem* for John Himoe, infant. On the first day of the

October term of the court for 1866, judgment was rendered for the plaintiff, and partition ordered as prayed for. On the 4th day of October, 1866, the commissioners appointed to divide the property reported it was impracticable to do so, and returned its appraised valuation at \$700. On the 11th day of October, 1866, the court rendered judgment decreeing the fee-simple title in lots 9 and 11; to A. P. Clark, he having elected to take the property at its appraised value. The court further ordered that Clark pay to Ida Himoe, and to the guardian of John Himoe, infant, \$175 each, as their proportion of the appraised value of the lots. The costs were divided.

If the judgment in the partition action of A. P. Clark divested the defendants of all title to the lot in controversy, it is conceded that the judgment of the district court in this case must be affirmed; but the defendants contest the validity of the proceedings in that case. The errors complained of are as follows: *First*, the admission in evidence of the record in the case of partition of A. P. Clark v. Ida Himoe and John Himoe; and, *second*, the admission of the deposition of Clark, in which he testified he paid Ida Himoe and R. C. Anderson, guardian of John Himoe, infant, their proportion of the appraised value of the lots described in the partition action. The contention is that, under the provisions of chapter 162, Comp. Laws, 1862, Clark should have presented his petition to the district court of Bourbon county in term-time, and that the service of notice was insufficient, because the defendants had only 38 days in which to plead, and therefore that the court had no jurisdiction of the subject-matter or the parties; and, further, it is contended that there was no service upon John Himoe, infant, and for that reason all the proceedings are void.

The portion of the statute relating to the filing of the petition and the giving of notice was as follows: "Sec. 2. That any person or persons entitled to partition of his, her, or their estate or estates, under this act, may file his, her, or their petition in the district court, praying that partition of such estate or estates may be made, which petition shall set forth the nature of the title of the defendant, the tract or tracts of land, the tenements or hereditaments, of which partition is demanded, and, also the name or names, and place of residence, of each joint tenant, coparcener, or tenant in common, with such demandant, if they shall be known to such demandant; and if, on examination, it shall appear to the court that the demandant hath a legal right to any part of such estate or estates, the court shall proceed, in the term in which such petition may be filed, to order a partition to be made in the manner prescribed by the provisions of this act. Sec. 3. That the demandant in any petition shall give notice in some newspaper in general circulation in each county where the land lies, or shall give personal notice in writing,

to each and every person concerned, their agent or attorney, at least forty days previously to the term of the court next after the filing of his petition, setting forth the pendency and demand thereof. Sec. 4. That whenever it shall appear to the court that due notice hath been given as aforesaid, and no sufficient reason shall appear why partition should not be made, the court shall proceed to order the partition in favor of such demandant or all parties in interest, and shall issue their writ directed to the sheriff of their county, or, in case the estate or estates of which partition is sought shall be situate in more than one county, then to the sheriff of either of the counties in which the estates may be, commanding him, that, by the oaths of three judicious and disinterested freeholders of the vicinity, to be named by said court, he cause to be set off and divided to the demandant, or each party in interest, in said petition, such part and proportion of such estate or estates as the court shall have ordered." In view of the provisions of these sections, the partition proceedings are not void because of the failure to file the petition during term-time, or for insufficient notice. While the statute provides that "the court shall proceed, in the term in which such petition may be filed, to order partition," and also refers to the filing of the petition in the court, yet, as section 3 requires that notice shall be given "at least forty days previously to the term of the court next after the filing of the petition," it is clear that if a petition is filed in vacation, and notice is given thereof, as required by section 3, the court has jurisdiction both of the subject-matter and of the parties to the action. The petition was filed July 28, 1866,—more than 40 days before the convening of the October term of the court for 1866, at which the decree was entered. Service was made on the 4th day of August, 1866. The court had the petition before it at the time of the judgment; and, even if the defendants should have been given 40 days to answer, instead of 38, this, at most, is a voidable defect. It is not a defect that makes the judgment void. Judgment was not rendered until more than 40 days after service upon the defendants. *Dutton v. Hobson*, 7 Kan. 196; *Armstrong v. Grant*, Id. 285; *Simcock v. Bank*, 14 Kan. 529.

As to the service made upon John Himoe, infant, it appears that at the date of such service, he was only two years of age. The boy's father was dead, and his mother was his natural custodian and guardian. Two duly-certified copies were delivered to the mother by the sheriff, in the presence of the infant. One copy was for John Himoe, the infant, and the other copy was for Ida Himoe as his natural guardian. Section 3 of chapter 162 provided that personal notice, in writing, should be given "to each and every person concerned, their agent or attorney." Section 14, Id., further provided "that the guardian or guardians of any minor heir or

heirs shall be empowered, on behalf of their ward or wards, to do and perform any act, matter, or thing respecting the partition of any estate or estates under this act, and to elect, on behalf of such ward or wards, to take said estate or estates, when the same cannot be divided without injury, as mentioned in the eighth section of this act, and make payments therefor on behalf of said ward or wards; and such acts and things done by said guardian or guardians shall be as valid in law as if the same had been done by such ward or wards after his, her, or their arrival at full age." The service upon John Himoe, infant, as stated, was followed up by the appointment in the court of a guardian *ad litem* for him. The appearance docket also shows that the duly appointed and qualified guardian of John Himoe, on February 15, 1868, paid to the clerk of the district court \$4.05 as Himoe's share of the costs in the case. Clearly nothing more could have been done than was done to bring to John Himoe's notice the commencement of the action, or to more fully protect his rights and interests in the property. Rights of majority were conferred on John Himoe January 19, 1882. This action was commenced August 20, 1886; and Havens, who claims as grantee of John Himoe, filed his answer September 27, 1886. More than two years had expired after John Himoe had the rights of majority conferred upon him before the alleged title of Havens was presented in the court. Under these circumstances, we must hold that the judgment in the partition action, as to John Himoe, cannot now be attacked as void for want of service. *Robb v. Lessee of Irwin*, 15 Ohio, 699; *Delashmutt v. Parrent*, 39 Kan. 548, 18 Pac. Rep. 712.

It is immaterial whether the deposition of Clark was competent as testimony or not. The deposition tended to prove that Ida Himoe and the guardian of John Himoe were paid their portion of the appraised value of the lots in accordance with the judgment. The judgment, as rendered, gave to A. P. Clark the fee-simple title of lot 9. If, in this form, it was irregular, it certainly was not void. The court had jurisdiction of the subject-matter and of the parties; and, as that judgment is not here for review or reversal, for all the purposes of this case it must be considered valid and binding. After the judgment of the 11th of October, 1866, Ida Himoe—afterwards Ida Anderson—had no title to the lot in controversy. As Mrs. Cheney, the daughter of Mrs. Himoe, was not born until 1869, of course she cannot claim any title or interest in the property.

The point made that no title passed to Clark, because the sheriff had not made him a deed, is not tenable. He certainly obtained the equitable title to the property by the judgment, if nothing more. *Head v. Daniels*, 38 Kan. 1, 15 Pac. Rep. 911.

The court committed no error in admitting as testimony the record in the case of *Clark v. Ida Himoe et al.*, and in rendering judg-

ment for the plaintiff below. The judgment of the district court will be affirmed.

JOHNSTON, J., concurring. VALENTINE, J., not sitting, nor taking any part in the decision.

(43 Kan. 492)

CHENEY *et al.* v. RICHARDS.

(*Supreme Court of Kansas*. April 4, 1890.)

Error from district court, Bourbon county; C. O. FRENCH, Judge.

P. J. Coston and W. W. Martin, for plaintiffs in error. *A. A. Harris*, for defendant in error.

PER CURIAM. Under the authority of the case of *Havens v. Drake*, ante, 621, (just decided,) the judgment of the district court will be affirmed.

HORTON, C. J., and JOHNSTON, J., concurring. VALENTINE, J., not sitting, nor taking any part in the decision.

(43 Kan. 451)

PHINNEY v. BRONSON *et al.*

(*Supreme Court of Kansas*. April 4, 1890.)

MASTER AND SERVANT—ACTION FOR WAGES—EVIDENCE.

1. In a controversy as to whether work done by a civil engineer towards the construction of a railroad was performed for, and to be paid by, the railroad company, or by certain individuals, the pay-rolls made out by such engineer in the name of the company, showing the payment of certain sums of money to himself and others engaged in the work, are competent evidence, as tending to prove that the company, and not the individuals, was his debtor.

2. Where a person claims to have been employed for a stated time at a stipulated salary per month, and sues to recover for services rendered under such employment, and the defendant denies any liability, he may offer testimony tending to show that the plaintiff was at the same time engaged in the services of another.

3. A general charge given by the court to the jury having fairly presented the propositions involved, the failure of the court to instruct as to a phase of the case upon which an instruction might have been given, but which was not requested, is not a ground for reversal.

4. The evidence in the case held to be sufficient to sustain the verdict of the jury.

(*Syllabus by the Court.*)

Error from district court, Bourbon county; C. O. FRENCH, Judge.

Hill & Chenault, for plaintiff in error. *Ware, Biddle & Cory* and *W. C. Webb*, for defendant in error.

JOHNSTON, J. G. B. Phinney brought this action against Ira D. Bronson and A. M. Ayers to recover \$566.97, alleged to be due him for work and labor as a civil engineer, and for money paid out and expended by him for the benefit of defendants. Verdict and judgment were given in favor of the defendants, and the plaintiff contends here that the court erred in the admission of testimony and in charging the jury. Phinney was a civil engineer, and was elected chief engineer of the Kansas & Nebraska Central Railroad Company, and the work done by him was upon a proposed railroad running from Fort Scott to Topeka. That some work was performed by Phinney is conceded, but it was claimed by the defendants that he performed

the services for the railroad company, and was to look only to the railroad company for his compensation. The plaintiff states in his argument that "the real issue, as made below, was whether Phinney had an individual contract with Bronson and Ayers, and was to receive his pay from them, or whether he was too look to the Kansas & Nebraska Central Railroad Company for his pay." This issue was submitted to the jury upon the evidence, and was determined in favor of the defendants, and the evidence is quite sufficient to sustain the verdict.

A review of the testimony is unnecessary, and would be unprofitable. Error is assigned on the admission in evidence of certain pay-rolls made out in the name of the railroad company, showing the payment of certain sums of money to Phinney and other workmen. They were made out and signed by Phinney, and indorsed thereon is written: "We, the undersigned, hereby acknowledge that we have this day received of Ira Bronson the several amounts set opposite our names hereto respectively, to be applied towards the amount due us from the Kansas & Nebraska Central Railroad Company." The plaintiff, having made out these pay-rolls, in which it was made to appear that the claim existed against the railroad company, and having acknowledged that the money received from Bronson was to be applied on the amount due him from the railroad company, they were certainly competent as tending to show that his contract was with the railroad company, and that that company was his debtor, instead of the defendants.

An objection is also made to the admission in evidence of certain city warrants and bills for services rendered by Phinney to the city of Fort Scott. The plaintiff claimed that he was working for the defendants at a stipulated sum per month, and, so far as this testimony tended to show that he was in the service of another at the same time for which he claimed compensation from the defendants, it was material and competent. The defendants had filed a general denial, and any proof showing no liability, or which would reduce the amount claimed by the plaintiff, was properly admitted. The principal issue in the case, of course, was whether the company was liable or the defendants; and this having been determined in favor of the defendants, renders this testimony immaterial.

It is also claimed that the court erred in admitting evidence tending to show that there were two railroad companies in existence at that time planning to build railroads between Fort Scott and Topeka. Such a question was asked and allowed, but no answer was given, and hence there is no ground for complaint.

In the charge of the court the propositions involved in the controversy were very clearly placed before the jury. They were advised that, if the plaintiff contracted origi-

nally with the railroad company to work for it, and it was understood that the railroad company was to be responsible for the compensation, then the defendants were not liable for the work done under the contract. And in that connection the court further said: "If you should find that Phinney was elected chief engineer of the railroad company to perform the services he did perform, irrespective of any contract with Bronson, but simply looking to the railroad company for his pay, then he would not be entitled to recover in this action unless Bronson and Ayers, defendants, had obligated themselves in some way to him, in writing, for the services which he did perform." This instruction simply advised the jury that the liability of the defendants arose, if at all, either upon the original promise, or by a contract in writing to pay the debt of the company; and it states a correct principle of law. It is true we find no testimony in the record tending to show any written assumption by the defendants of the company's indebtedness, and hence what was said relating to their written obligation may be regarded as immaterial.

The main issue of the case in regard to whether there was an original promise by the defendants has been determined by the finding of the jury, and therefore the charge of the court upon the other branch of the case may be laid out of consideration. It is contended that some phases of the law respecting what constitutes an original promise was not presented to the jury in the charge of the court. A sufficient answer to this claim is that no other or additional instructions were requested by the plaintiff, and failing to make such request, he has no cause of complaint. *Douglass v. Geller*, 32 Kan. 499, 4 Pac. Rep. 1089; *State v. Pfefferle*, 36 Kan. 90, 12 Pac. Rep. 406.

Without stopping to inquire whether other instructions would have been applicable or proper, we think that under the evidence the case was fairly submitted to the jury by the general charge. The other matters referred to by counsel are not deemed of sufficient importance to require consideration. Judgment of the district court will be affirmed.

All the justices concurring.

(43 Kan. 464.)

KNOTE v. CALDWELL *et al.*

(Supreme Court of Kansas. April 4, 1890.)

TAX-DEEDS—DESCRIPTION—ADDITION TO TOWN.

Where a tax-deed describes the property conveyed as "Lot No. seventy-seven, (77,) Main street, in E. L. Lower's addition to the town of El Dorado, situated in the county of Butler and state of Kansas," and the evidence shows that Lower filed in the office of the register of deeds three different maps or plats of his addition or additions, each including and showing the property as described in the tax-deed, and the first map does not name or number the addition, and the second map names it "E. L. Lower's Second Addition," and the third map is substantially the same as the second map, and the certificate attached to the second map shows that the second map was filed partially to correct and supply an omission in the first map,

and the certificate attached to the the third map shows that it was filed partially to correct and supply a defect in the second map, and the taxes were levied, and the property sold for the taxes, long before the second map was filed, and while the property conveyed by the tax-deed is shown by all the maps, yet there is no property shown by either map that would answer to the description of the property described in the tax-deed except the property in controversy, *held*, that the description of the property in controversy as found in the tax-deed is sufficient.

(Syllabus by the Court.)

Error from district court, Butler county; E. D. STRATFORD, Judge *pro tem*.

H. H. Harris, Hamilton & Cubbison, and H. C. Sluss, for plaintiff in error. E. N. Smith, George Gardner, and C. A. Leland, for defendants in error.

VALENTINE, J. This was an action in the nature of ejectment, brought in the district court of Butler county by W. P. Knote against N. J. Caldwell and J. S. Caldwell, to recover lots 77 and 79 on Main street, in E. L. Lower's addition or second addition to the town of El Dorado. The case was tried before the court without a jury, and judgment was rendered in favor of the defendants and against the plaintiff; and the plaintiff, as plaintiff in error, brings the case to this court. The plaintiff claims title under a quit-claim deed executed to him on January 4, 1887, by E. L. Lower and wife, for the expressed consideration of one dollar. The defendants claim title under two tax-deeds, one for each lot, executed to James A. De War on May 11, 1878, upon a tax-sale made May 10, 1872, for the taxes of 1871, for the expressed consideration of the taxes paid for the years 1871 up to 1877, inclusive, and under a general warranty deed executed to N. J. Caldwell by De War and wife on May 24, 1878. The Caldwells have also been in the actual possession of the property ever since they received their deed therefor, paying all the taxes thereon; and they have also made lasting and valuable improvements thereon. It is their homestead. It is admitted by all the parties that E. L. Lower or Edward L. Lower was the original owner and patentee of the property in controversy, and indeed of all the land out of which all the several additions made by him to the town of El Dorado were created, by whatever name or number such additions may be designated.

The only question of importance presented in this case is whether the foregoing tax-deeds describe the land in controversy with sufficient accuracy to render them valid as conveyances. The tax-deed for lot No. 77 describes the property as follows: "Lot No. seventy-seven, (77,) Main street, in E. L. Lower's addition to the town of El Dorado, situated in the county of Butler and state of Kansas." The tax-deed for lot No. 79 contains the same description, except that where the words and figures "seventy-seven (77)" are used the words and figures "seventy-nine (79)" are used. The only alleged defect in these descriptions, as urged by the plaintiff,

is that where the words "E. L. Lower's addition" are used in the tax-deeds the words "E. L. Lower's second addition" should be used. In other words, the supposed defects are that the descriptions are incorrect because the word "second" is omitted from them. Each tax-deed being perfect in form, it is, of course, *prima facie* evidence of its own correctness. It must be presumed *prima facie* from the tax-deeds that in 1871, and subsequently thereto, there were town lots answering to the descriptions given to town lots Nos. 77 and 79 in the tax-deeds; and that these town lots were properly assessed and taxed, and sold for the taxes, by these descriptions. The question then arises, are these descriptions, as shown by the evidence outside of the tax-deeds, incorrect? The defendants offered to introduce in evidence three maps or plats, with proper certificates attached thereto, of additions to the town of El Dorado, all made, signed, and acknowledged by Edward L. Lower and his wife. The first was filed in the office of the register of deeds on July 6, 1870; the second was filed in the office of the register of deeds on December 11, 1877; and the third and last was filed in the office of the register of deeds on March 18, 1878. Each of these maps or plats showed the property in controversy as a part of the addition of which it was a map or plat. Each showed that the property was located at the south-east corner of a certain block of lots, and at the intersection of Main street and Eighth avenue; being west of Main street and north of Eighth avenue. So far as the property in controversy is concerned, and the block of lots in which it is contained and the streets adjoining it, the three maps or plats show precisely the same, though in other respects there are some differences between them. The first map, with the certificate attached thereto, does not give any name or number to the addition. The second map or plat, with the certificate attached thereto, is entitled "Plat No. 2, Lower's Addition." The certificate states that the addition shall be known as "E. L. Lower's Second Addition to the Town of El Dorado," and it also states as follows: "This plat is made to correct and supply an omission in the original plat of said addition, filed in the office of the register of deeds of said county, July 6th, 1870." The third map or plat is similar to the second, but the certificate attached thereto contains this additional clause, to-wit: "This plat is made to correct and supply a defect in the description and acknowledgment of a plat of said addition filed in the office of the register of deeds of said county on the 11th day of December, A. D. 1877, and recorded in Book A of Town Plats at page 44, made to correct and supply an omission in the original plat of said addition filed in the office of the register of deeds of said county July 6th, A. D. 1870." The first map, with its certificate, was erroneously excluded by the court below, at the instance of the plaintiff, and was not permitted to be in-

troduced in evidence. This was an error, however, against the defendants, and not against the plaintiff. The other two maps, with their certificates, were introduced in evidence. There was also much other evidence relating to E. L. Lower's addition to the town of El Dorado as it existed years before either of the other two maps was filed. It will be noticed that the second map was not filed until December 11, 1877, and it was then filed partially for the purpose of supplying an omission in the first map filed. It was filed more than seven years after the first map was filed, more than six years after the taxes were levied, and more than five years after the tax-sales were made upon which the defendant's tax-deeds are founded. The erroneous exclusion of the first map at the instance of the plaintiff, we think, is not fatal to the defendant's case. Aside from this first map, the other evidence shows that as early as 1870 there was, in fact, an E. L. Lower's addition to the town of El Dorado. The evidence also shows that the property in controversy was in such addition, and, in fact, in all of E. L. Lower's additions to the town of El Dorado, and that there is not now, and never has been, any other lots numbered 77 and 79 in any one of such additions than the lots now in controversy, and that these lots numbered 77 and 79 have always abutted upon Main street, and each of the maps filed so shows. Ever since July 6, 1870, the property in controversy has been in E. L. Lower's addition to the town of El Dorado, just as stated in the tax-deeds; and up to December 11, 1877, it was not in any other addition. After that time it might, perhaps, be proper to describe it as being in either E. L. Lower's addition to the town of El Dorado, or E. L. Lower's second addition to the town of El Dorado. Either description would, probably, now be good. Section 153 of the Tax Law reads as follows: "Sec. 153. In all advertisements, certificates, papers, or proceedings relating to the assessment and collection of taxes, and proceedings founded thereon, any description of lands which shall indicate the land intended with ordinary and reasonable certainty, and which would be sufficient between grantor and grantee in an ordinary conveyance, shall be sufficient." With reference to supposed imperfect descriptions, see the following cases: *Commissioners v. Johnson*, 23 Kan. 717; *Seaton v. Hixon*, 35 Kan. 663, 12 Pac. Rep. 22; *Cordes v. State*, 37 Kan. 48, 51, 14 Pac. Rep. 493; *School-Dist. No. 63 v. Chicago Lumber Co.*, 41 Kan. 620, 21 Pac. Rep. 599; *State v. Reno*, 41 Kan. 674, 21 Pac. Rep. 803; *State v. Sterns*, 28 Kan. 159; *Mumper v. Kelley*, ante, 558, (decided by this court on March 8, 1890.) The tax-deeds are valid upon their face, and nothing has been shown to render them invalid. The property in controversy is situated in E. L. Lower's addition to the town of El Dorado. It is also situated in E. L. Lower's second addition to the town of El Dorado; and it is also situated in E. L. Low-

er's third addition to the town of El Dorado, if the filing of a third map constitutes the creating of a third addition. In other words, each of these additions includes the property in controversy; and in each of these additions the property may be described as lots Nos. 77 and 79 on Main street; and there is no other property in any one of these additions that will answer to any such description. The judgment of the court below will be affirmed.

All the justices concurring.

(43 Kan. 444)

DONMYER *et al.* v. DONMYER.

(*Supreme Court of Kansas.* April 4, 1890.)

EXEMPTIONS—RIGHTS OF WIDOW.

1. Under the provisions of the last clause of subdivision 6, § 3, c. 38, Gen. St. 1889, relating to exemptions, a resident of the state, being the head of a family, has exempt from seizure and sale upon any attachment, execution, or other process the articles specifically named therein, such as the wagon, cart, or dray, etc., and, in addition thereto, "other farming utensils, including harness and tackle for teams, not exceeding in value three hundred dollars."

2. The widow is allowed to keep absolutely for the use of herself and the children of her deceased husband all personal property of the deceased which was exempt to him from sale and execution at the time of his death.

(*Syllabus by the Court.*)

Error from district court, Saline county; S. O. HINDS, Judge.

J. G. Mohler, for plaintiff in error. Lovitt & Stuman, for defendant in error.

HORTON, C. J. The district court ruled that Elizabeth Donmyer, as widow of Lewis Donmyer, deceased, under the provisions of the act respecting executors and administrators and the settlement of the estates of deceased persons, was entitled to keep absolutely, for the use of herself and children of the deceased, out of the estate of the deceased, the following articles of personal property, to be set apart to her without appraisalment, to-wit: "One Bain wagon, valued at \$55; two sulky plows, valued at \$45; one harrow, valued at \$10; and, in addition thereto, all other farming utensils belonging to said estate, not exceeding in value the sum of \$300." To this the executors of the estate of Lewis Donmyer, deceased, excepted, and bring the case here. Section 49, c. 37, Gen. St. 1889, provides: "In addition to her portion of her deceased husband's estate, the widow shall be allowed to keep absolutely, for the use of herself and children of the deceased, all personal property of the deceased which was exempt to him from sale and execution at the time of his death." Section 3, c. 38, Id., relating to exemption, reads: "Every person residing in this state, and being the head of a family, shall have exempt from seizure and sale upon any attachment, execution, or other process issued from any court in this state, the following articles of personal property: * * * Sixth. The necessary food for the support of the stock mentioned in this section for one year, either pro-

vided or growing, or both, as the debtor may choose; also, one wagon, cart, or dray, two plows, one drag, and other farming utensils, including harness and tackle for teams, not exceeding in value three hundred dollars." The question presented in the record is, does the \$300 worth of property mentioned in subdivision 6, § 3, include the articles specifically named therein, such as the wagon, cart, dray, etc., or does the subdivision exempt \$300 worth of property in addition to the articles therein named? Exemption statutes are to be liberally construed. *Mallory v. Berry*, 16 Kan. 293; *Rasure v. Hart*, 18 Kan. 340. Giving the statute a liberal construction, we think the district court ruled rightly in holding that the widow and children were entitled to the wagon, the plows, and harrow, and, in addition to those articles, "other farming utensils, including harness and tackle for teams, not exceeding in value three hundred dollars." In *Voorhees v. Patterson*, 20 Kan. 555, the question raised by this record was not before the court. The judgment of the district court will be affirmed. All the justices concurring.

(43 Kan. 469)

TAYLOR et al. v. DEVERELL.

(Supreme Court of Kansas. April 4, 1890.)

EQUITY—REFORMATION OF DEEDS—EVIDENCE.

1. A conveyance which, either through fraud or mistake, fails to express the actual agreement of the parties, will be reformed by a court of equity so as to correspond with the agreement, and corrected so that it will embrace all the land which it was agreed should be thereby conveyed.

2. A petition which states that it was agreed between grantor and grantee that certain land should be conveyed for a certain consideration, and, in order to describe it in the conveyance, the parties agreed to measure the width of the same, and that to do so the grantor furnished a tape-line which was used by them, and that the length of the tape-line was fraudulently misrepresented by the grantor, by reason of which the deed did not embrace all the land which it was agreed and understood should be conveyed, and the grantees was thereby misled, and induced to believe that the land was properly described, and to part with the consideration agreed to be paid for the same, states a sufficient ground for relief in equity, and for a reformation of the deed.

3. A general objection to testimony, admissible as to one defendant but not as to another, is not sufficient. The court should be asked to limit the application of the testimony to the one against whom it was competent.

4. The testimony in the case is held to be sufficient to sustain the judgment of the court.

(Syllabus by the Court.)

Error from district court, Saline county; S. O. HINDS, Judge.

This was an action brought by Bridgett Deverell against Sarah M. and Jasper Taylor to reform and correct the description in a certain conveyance of real estate theretofore made by the Taylors to the plaintiff. The cause was tried at the May term, 1887, and the court, upon request and after hearing the testimony, made the following findings of fact and of law: "(1) That the plaintiff was the owner of 16 acres of land in Saline county, Kan., and that she placed the same in the

hands of Carlin & Supple, real-estate agents of Salina, Kan., for sale. (2) That the defendant Sarah P. Taylor was the owner of a piece of land in the suburbs of the city of Salina, Kan., beginning east of Front street and on the north side of the Missouri Pacific Railroad; that this land was bounded on the north by an alley, west by Front street, south by the Missouri Pacific Railroad, and ending in a point at the east, and containing in all about two and one-half acres. (3) That the defendants were husband and wife. (4) That the defendants placed their land in the hands of Carlin & Supple, real-estate agents, for sale. (5) That Carlin & Supple, knowing the wants, introduced the parties, Robert Deverell, husband of plaintiff, and Jasper Taylor, of the defendants, who arranged for a trade of 160 acres of land of the plaintiff for a portion of the two and $\frac{1}{2}$ acres. (6) It was agreed that the defendant would deed to the plaintiff, in consideration of her 160 acres, an acre and a half of the west front of the two and a half acre tract. (7) That Robert Deverell and Jasper Taylor, in order to get the number of feet that piece would be, measured from the west line towards the east,—measuring with a tape-line 50 feet long; Robert Deverell carrying the end with the ring on, and Jasper Taylor carrying the rear end, having the number on the line. (8) They measured from the north-west corner through and along the north line fence, and Taylor took Deverell's knife, and cut a notch in the top board of the fence; (9) Taylor saying that it measured 166 feet. (10) They then measured from the west along a fence about the middle of the lot from north to south, and extending from the west line east to a point as far east as the notch on the north fence they had made; this point being at the east point, at the east end of the fence. (11) That Jasper Taylor told Mr. Supple, who made the deed, that the ground was 166 feet from east to west. (12) That Supple took the order of description from an old deed, and wrote '166 feet' in, as he had been told by Taylor. (13) Deed was made December 8, 1886; and on the 10th or 11th Supple delivered it to Robert Deverell, who placed it on record on the 10th day of December. (14) Some few days afterwards, Deverell was on the ground, and Jasper Taylor said to him, 'Your 166 feet only corner to those cherry trees,' pointing and referring to two trees near the north end, and in line with one that stood near the south line; and at that time Deverell disputed with Taylor, and showed him the notch that they had made in the north fence, and claimed all the land west of that notch, and a line running north to the end of the middle fence. (15) That the original amount of the land was to include all of the orchard. (16) That the 166 feet would leave the greater portion of the orchard on the east of the line, on the end that Taylor keeps. (17) That 224.06 feet east and 276 north and south would contain only one acre and 724-1815 of an acre, or less than one and one-half acres.

(18) That said deed should be changed so as to read '226 feet,' instead of '166 feet.' The court adjudged and decreed that the deed should be corrected by describing the piece of land to be the "west 226 feet" of the tract, instead of the "west 166 feet," as was described in the deed, and that the plaintiff be invested with the full and complete title to so much of the land as is thus described. A motion for a new trial was made and overruled, and the defendants bring the case to this court for review.

J. G. Mohler, for plaintiff in error. *H. S. Cunningham*, for defendant in error.

JOHNSTON, J., (*after stating the facts as above.*) After reading the record, we are prepared to concur in the conclusion of the district court. It is urged that the petition does not set forth facts which would warrant a reformation of the deed on account of the fraudulent representations and conduct of the defendants in the court below. It sets forth, in substance, that the parties agreed to exchange lands; Mrs. Deverell giving a quarter section for a small tract of land, of irregular shape, which appears to be in or adjoining the city of Salina. The latter was a portion of a $2\frac{1}{2}$ -acre tract, and it was agreed that Taylor should convey so much of the whole as extended from the west side to a certain named point; and to ascertain the dimensions of the tract so as to describe it in the conveyance, it was measured by Mr. Taylor and Mr. Deverell with a tape-line furnished by Taylor for that purpose. As they measured it, it was found to be 166 feet from the west side of the tract to the point agreed upon, and it was so described in the deed. The tape-line used was represented by Taylor to be 40 feet long, whereas it was longer, and the four lengths of the same and 26 feet more, which was the measure taken to the point agreed upon, made 226 feet instead of 166, as recited in the deed.

It is claimed that no fraud is alleged, nor any statement made that the Deverells relied on the representations of Taylor, or parted with their property by reason of his fraud. It is alleged, however, that Taylor misrepresented the length of the tape-line, and thus wrongfully deceived the plaintiff as to the actual extent of the premises, and that, by reason of his wrongful acts, Mrs. Deverell was induced to part with her title to a quarter section of land, believing that she was receiving in exchange the whole tract of land agreed upon, and that by his wrongful conduct she has been defrauded out of a tract of land $275\frac{1}{2}$ feet long and 60 feet wide, of the value of \$500. It is further stated that she would not have conveyed her 160 acres of land to the Taylors had she not believed that the deed made by the Taylors included and conveyed all the land pointed out, and which it was agreed the Taylors should convey to her. We think the petition states a cause of action. The deed from the Taylors does not express the agreement of the par-

ties, nor embrace the entire premises which it was agreed and understood should be conveyed; and this is alleged to have been the result of the fraudulent representations and conduct of Taylor. It is plainly charged that the plaintiff below was misled by the fraudulent misrepresentations of Taylor as to the length of the line used as a measure, and that by his deception she was induced to believe that the description placed in the deed covered the entire premises which the Taylors had agreed should be given in exchange for her land. A conveyance which, either through fraud or mistake, fails to express the actual agreement of the parties, will be reformed by a court of equity so as to correspond with the actual contract, and will be corrected so that it shall embrace all the land it was agreed should be thereby conveyed. It is true, as counsel for plaintiffs in error contend, that a party asking for a correction on the ground of fraud must have relied and acted upon the misrepresentation made, to entitle him to relief in equity. The petition, we think, clearly charges sufficient to show that the fraud and deception practiced by Taylor misled the defendant in error, and that it was solely through the fraud and artifice of Taylor that the premises were falsely described in the deed sought to be corrected. By the allegations of the petition, Taylor purposely and falsely stated a material fact, upon which Deverell relied, and was induced to act to her prejudice; and this is unjustifiable either in law or morals, and is sufficient ground for relief in equity.

It is further claimed that testimony was erroneously admitted during the trial of statements made by Mr. Taylor after the conveyance had been made and delivered, and after his agency for Mrs. Taylor had ceased. The legal title of the land was in his wife, and he represented her in its management and control, and in the negotiations and conveyance of the land to Deverell. He had an inchoate interest in the land, was made a party defendant, and was charged, jointly with his wife, with the fraudulent conduct which resulted in a misdescription of the premises agreed to be conveyed. It is not clear, from the testimony, that the statements objected to were made by him subsequent to the delivery of the deed. However that may be, we think the testimony was competent, at least against him as a co-defendant; and the question of limiting it to him was not suggested by the objections or the motions that were made. The cause was tried before the court alone, and we think the plaintiffs in error suffered no prejudice from the rulings upon the testimony.

It is next urged that the judgment is not sustained by the evidence. It is true, as claimed, that to sustain a reformation of a deed the testimony showing fraud should be clear and satisfactory to the court. There is considerable evidence in the record which clearly tended to establish the fraud charged in the petition. It is true that that offered

on the part of the plaintiffs in error was in direct conflict with that offered by Deverell, but this conflict has been settled by the court, and we must presume that it applied proper rules in determining the weight and credibility which should be given to the testimony. Evidently the testimony of the plaintiffs in error was not believed by the court; and, there being sufficient evidence to sustain the finding that was made, we cannot, under a prevailing rule of this court, disturb a finding so sustained. The judgment will be affirmed. All the justices concurring.

(43 Kan. 518)

FRANKLIN LAND CO. v. WEA GAS, COAL & OIL CO.

(Supreme Court of Kansas. April 4, 1890.)

LEASE OF HOMESTEAD—CONSENT OF WIFE.

1. Joint consent of husband and wife is necessary to give validity to a lease of a homestead, when such lease interferes with the occupancy and use of a homestead by the wife.

2. A lease of a homestead for the period of 25 years, with privilege of prospecting for gas, coal, oil, and other minerals, upon any or all portions of said homestead, at the pleasure of the lessee, and to erect derricks, engine-houses, and buildings for storage purposes, if needed, may interfere with the use and occupancy of the homestead by the wife, and therefore requires joint consent of husband and wife to give it validity.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Miami county; J. P. HINDMAN, Judge.

Mechem & Smart, for plaintiff in error. *Beeson & Baker* and *J. A. Hoag*, for defendant in error.

STRANG, C. Action to quiet title. July 23, 1886, Robert Dunn and wife, Gertrude, were the owners of a tract of 80 acres of land near the city of Paola, in Miami county, which they occupied as a homestead. On that day Robert Dunn leased said land to the Wea Gas, Coal & Oil Company for the period of 25 years, with the privilege of renewal at the expiration of said lease for another period of 25 years, giving said company the right to erect derricks, engine-houses, and other buildings necessary for use in drilling and prospecting for gas, coal, oil, and other minerals, for storing the product of its mines, and of excavating mains and laying pipes to conduct its oil and gas over said lands. March 1, 1887, Robert Dunn and wife made a contract for the sale of said land to J. L. R. Wadsworth, who afterwards assigned said contract to I. N. Boicourt. Dunn and wife afterwards, pursuant to said contract, conveyed the premises to said Boicourt, who subsequently conveyed the same to the plaintiff company. The contract from Dunn and wife to Wadsworth, and the assignment thereof by Wadsworth to Boicourt, both recited a lease from Robert Dunn to the Wea Gas, Coal & Oil Company. Boicourt and the plaintiff both knew of the lease by Robert Dunn to the defendant before obtaining any interest in said land. The trial was by the court, which

made special findings of fact and law, upon which judgment was rendered in favor of the defendant below. Motion for new trial; motion overruled; to which ruling the plaintiff excepted, and now comes here by his case made, seeking a reversal of the judgment of the district court, and, as grounds therefor, alleges that said court erred in rendering judgment in favor of the defendant below, when said judgment should have been in favor of the plaintiff below for the relief prayed for. *Second.* That the court erred in overruling the motion of the plaintiff for a new trial.

The findings of fact and of law of the trial court are as follows: "(1) That on the 23d day of July, 1886, and for a long time prior thereto, Robert Dunn was the owner of the south one-half of the north-west quarter of section 15, in township 17, of range 23, in Miami county, Kansas, except four acres, before that time conveyed by said Dunn to the Cordova Glass Company, and one and one-tenth acres conveyed to B. Miller, and the Missouri Pacific Railroad right of way. (2) That said Dunn then, and during all the times hereinafter mentioned, was and still is a married man, and the head of a family, occupying said land with his family as a homestead, except that the land mentioned in plaintiff's petition has not been in possession of or occupied by said Dunn or family since the conveyance to Boicourt, as hereinafter mentioned. (3) On the 23d day of July, 1886, said Dunn executed and delivered to the defendant company a written lease, a true copy of which is attached to defendant's answer, and marked 'Exhibit A,' and said lease was filed for record on the 27th day of April, 1887, in the office of the register of deeds of Miami county; that said lease was acknowledged on said 23d day of July, 1886, by said Dunn, before George Kingsley, a notary public of said county, but that said certificate of acknowledgment was not indorsed upon or attached to said instrument until long after the delivery thereof, but was made before said lease was filed for record; and that Robert H. Balding, president of the Wea Coal, Gas & Oil Company, did not sign said lease until some time after its delivery to defendant by Dunn. (4) That on the 1st day of March, 1887, Robert Dunn and Gertrude Dunn, his wife, executed and delivered to J. L. R. Wadsworth the contract attached to the answer of the defendant herein, and marked 'Exhibit B,' and upon the 5th day of March, 1887, said contract was duly acknowledged, and was duly recorded in the office of the register of deeds of said Miami county. (5) That on the 9th day of May, 1887, J. L. R. Wadsworth and wife assigned said last-mentioned contract to I. W. Boicourt, as shown in Exhibit C, attached to said answer. Said assignment was recorded in the office of the register of deeds of said county on the 13th day of May, 1887. On the 17th day of May, 1887, Robert Dunn and Gertrude Dunn, his wife, executed and delivered to I. W. Boicourt the deed set forth

in Exhibit D of defendant's answer. Said deed was acknowledged May 9, 1887, and recorded in said register's office, May 13, 1887. (6) On the 14th day of May, 1887, said I. W. Boicourt and wife executed and delivered to the plaintiff a deed of general warranty, conveying the land described in plaintiff's petition. Said deed was executed and delivered by and through J. E. Maxwell, as attorney in fact of the said I. W. Boicourt and wife, and was recorded in the office of said register of deeds, June 30, 1887. The power of attorney authorizing said Maxwell to execute and deliver said deed was recorded in said office May 13, 1887. (7) Said Franklin Land Company was organized as a corporation under the laws of the state on the 28th day of April, 1887. The directors of said company at the time of its organization were, and ever since said time have been, L. C. Wasson, I. W. Boicourt, W. C. Bradley, H. P. Faris, and L. M. Hair; and the officers of said company then were, and still are, L. C. Wassen, president; W. C. Bradley, secretary; I. W. Boicourt, treasurer; and the stockholders of said company at and ever since its organization were and are the directors above named, H. C. Mechem, H. C. Jones, and J. E. Maxwell. All of the above-named stockholders were interested in the purchase of the land in controversy except J. E. Maxwell, and contributed towards the payment for the land; said assignment from Wadsworth and wife to I. W. Boicourt having been taken to said Boicourt in trust for the persons [except J. E. Maxwell] who became the stockholders of the said Franklin Land Company. But said J. E. Maxwell was not originally interested in the purchase of said land, and became a stockholder and member of said company after the purchase of said land by Boicourt, and the delivery of the deed. (8) That said J. E. Maxwell acted as the agent of said Wadsworth in obtaining the contract from Dunn and wife to said Wadsworth, and acted as the agent of said Boicourt in obtaining a deed to said land from Dunn and wife to said Boicourt. (9) That within ten days after the execution and delivery of said lease from Dunn to defendant, the defendant entered upon said homestead premises, and erected thereon a derrick, and placed thereon an engine and other machinery and tools, and then and there commenced boring for gas, coal, oil, and other mineral, and has continued said work at intervals until within one month of the trial of this action, boring to a depth of 550 feet; and has expended in the prosecution of said work from \$1,500 to \$1,600, and that said derrick, engine, and other machinery still remain on said premises where originally placed, but are not on any part of the land owned by plaintiff, and mentioned in plaintiff's petition, and that the defendant has not done any work or act on the land mentioned in said petition under said lease, and has not at any time had possession of said premises described in said petition, except as above stated, so that said work is now temporarily suspended. (10) That said Rob-

ert Dunn is a member of said Wea Gas, Coal & Oil Company, and is the owner of said engine and machinery. (11) That at the time of the execution of said lease by said Robert Dunn to the defendant company said Gertrude Dunn knew of the execution of the same, and did not object to the execution of said lease by said Robert Dunn, and that she knew of the work having been done by the defendant on said homestead premises, but did not at any time make any objections thereto. (12) That at the time of the assignment of said contract by said J. L. Wadsworth and wife to said I. W. Boicourt, said Boicourt had actual notice of the existence of said lease, and of the entry of defendant company on said homestead premises, and work then performed by them under said lease. (13) That at the time of the execution and delivery of said deed from I. W. Boicourt and wife to the plaintiff, the plaintiff, by and through its president and treasurer, had actual notice of the execution and delivery of said lease by said Robert Dunn to defendant, and actual notice that defendant had entered upon said homestead premises, and there performed work and expended money under said lease. (14) On the foregoing facts the court finds for the defendant and against the plaintiff. *Conclusions of Law.* (1) That said lease, executed and delivered as aforesaid by said Robert Dunn to said defendant company, confers upon defendant a lawful right and license to enter upon the premises therein described, for the purpose of drilling, boring, and excavating upon and into said land, to obtain the oil, gas, coal, and other mineral substances lying under the surface of said soil, for the term of twenty-five years, and, under the conditions set out in said lease, so far and in such manner as shall not materially or unreasonably interfere with the occupation and use of said premises by said Dunn and family as a homestead; subject, however, to the limitation that the defendant cannot enter upon the surface of the land purchased and platted by plaintiff into lots and streets, or drill or sink shafts thereon, but is entitled to the gas, coal, oil, and other mineral under the surface of said land, platted as aforesaid. (2) That plaintiff is not entitled to the relief prayed for in its petition. (3) That defendant is entitled to a judgment against plaintiff for its costs herein expended."

The question in this case is raised by the inquiry, is the lease executed by Robert Dunn, July 23, 1886, to the Wea Gas, Coal & Oil Company, valid? If it is, the judgment of the court below should be affirmed. If not, such judgment should be reversed. Section 9, art. 15, of the constitution, ordains that a homestead shall not be alienated without the joint consent of the husband and wife, when that relation exists. Section 1, c. 38, Comp. Laws 1879, follows the above constitutional provision, and is identical with it.

The first question for consideration is

whether a lease, such as was made by Dunn to the defendant company, may be considered an alienation of the homestead, or any interest in the same. This court in *Coughlin v. Coughlin*, 26 Kan. 116, referred to and approved in *Pilcher v. Railroad Co.*, 38 Kan. 516, 16 Pac. Rep. 945, held that a lease of a homestead, under which the lessee takes possession of the premises in such a way as to interfere with the possession and enjoyment by the wife of the homestead, is such an alienation of the homestead as, under the constitution and statute above cited, requires joint consent of the husband and wife. Is the lease under which the defendant claims one that may interfere with the occupancy and use of the homestead by the wife of Robert Dunn. We think it is. Under it the defendant may occupy as much of the homestead as he thinks is necessary to erect thereon derricks and engine-houses; to prospect for gas, coal, oil, or any other mineral substance; and, if anything valuable is found, to erect buildings in which to store such product. Under such a lease the defendant has power, should it deem necessary or desirable, to occupy any part or the whole of the Dunn homestead. Thus, tested by the rule of this court, as established by the cases above cited, nothing short of the joint consent of Dunn and wife could render the lease in question valid. Does the record show such consent? Looking to the findings of fact, we fail to discover that there was any consent on the part of Mrs. Dunn; much less a joint consent with her husband. The court finds that at the time of the execution of said lease by Robert Dunn, his wife, Gertrude Dunn, knew of the execution of the same, and did not object to the execution thereof. This does not prove consent. She was not called upon to object. It was not a case where silence gives consent. No presumption from silence can be indulged by the court which affects adversely the rights of the wife in her homestead. To render such a lease valid it must affirmatively appear that she consented to the making of said lease, and that her consent was a joint consent with that of her husband. But it is asserted that on March 1, 1887, Dunn and wife jointly executed a contract of sale for said premises to J. L. R. Wadsworth, in which they jointly recognized the lease made by Robert Dunn to the defendant company, and thus ratified and jointly consented to such lease. The Wadsworth contract did recite a lease from Dunn to the defendant company, but we are unable to say it was the lease relied upon by the defendant herein. The lease recited in the Wadsworth contract differs very materially in some respects from the lease relied on. The lease set up by the defendant in its answer, and upon which it predicates its right to recover, reserves as a royalty to the Duns one-twentieth of the product resulting from any valuable discovery made pursuant to the purposes of the lease; while the lease recited in the Wads-

worth contract reserves as a royalty one-fifth of any such find. This variance between the real lease and the recital in the Wadsworth contract practically destroys any supposed ratification of the lease by the joint execution of the Wadsworth contract by Dunn and wife. If the lease by Dunn to defendant company was fully set out in the Wadsworth contract, so that no question of identity existed to render the matter of alleged recognition and ratification doubtful, still, in the absence of any finding by the court, which had the evidence before it, that Mrs. Dunn consented to the lease by her husband to defendant company, we would not feel justified in saying that there was such a joint consent by husband and wife to the lease in question as would render it valid. It is evident from the fact that the trial court made a finding that Mrs. Dunn knew of the execution of the lease by her husband to the defendant that she did not object to the same; that the court could find nothing further in the evidence upon which to base consent to such a lease on the part of Mrs. Dunn. Having made a finding on the subject, the court undoubtedly made it as complete as the evidence would warrant, and this conclusion is supported and reinforced by the fact that the trial court, upon the findings as made, rendered judgment for the defendant.

We do not think the doctrine of estoppel, contended for by the defendant, applies. We do not think Mrs. Dunn would be estopped, in a proceeding to set aside the lease in question, by the recital in the Wadsworth contract, even were the recital identical with the lease. The defendant was not a party to the Wadsworth contract, and did not in any way rely on the recitals therein. Its lease was made and accepted by it long before the Wadsworth contract was executed; and it knew nothing of the Wadsworth contract and recital, so far as the record shows, until said contract was placed of record, and then got its information in common with the rest of the world. It cannot be said that the defendant was at any time in any way affected adversely by the recital contained in the Wadsworth contract. If the recital in the Wadsworth contract fail, the defendant is no worse off than before. If Mrs. Dunn would not be estopped by reason of the recital in the Wadsworth contract, we do not see how her grantees could be estopped thereby. Nor do we think the plaintiff is estopped by any knowledge on its part of the existence of the lease by Dunn to the defendant. Plaintiff had a right, knowing of the lease, to rely upon its belief that it was void under the constitutional and statutory provisions relating to homesteads.

We recommend that the judgment of the district court be reversed, and the case sent back for a new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 434)

KIRKPATRICK v. GRAY.

(Supreme Court of Kansas. April 4, 1890.)

PROMISSORY NOTE—ACTION AGAINST SURETY.

The holder of a promissory note may, at his option, bring and maintain an action against one who signed the same as surety only, and cannot be compelled to bring in the principal debtor as a party defendant in order to have it determined who is primarily liable on the note, or to give the surety the benefit of the provisions of section 470 of the Code, as that section only applies in cases where the principal and surety are jointly sued.

(Syllabus by the Court.)

Error from district court, Harper county;
J. T. HERRICK, Judge.

George E. McMahon, for plaintiff in error.
Shepard, Grove & Shepard, for defendant in error.

JOHNSTON, J. This was an action to recover on a promissory note executed May 11, 1886, by J. St. Clair Gray, W. R. Kirkpatrick, and C. P. Aspinwall, for the sum of \$200, payable to the First National Bank of Anthony, Kan., 60 days after date, with interest at 12 per cent. per annum after maturity. Clara Gray, the wife of J. St. Clair Gray, brought this action against W. R. Kirkpatrick alone, alleging that she purchased the note from the bank on July 20, 1886, and that she was the owner and legal holder of the same. In his answer, Kirkpatrick alleged that J. St. Clair Gray was the principal debtor, and that he was surety only, and received no part of the consideration for which the note was given; that Gray was at the time of the commencement of the action, and still is, a resident of Harper county, within the jurisdiction of the court; and he asked that Gray be brought in and made a party defendant in the action; and that, failing in this, judgment should be rendered in favor of defendant for costs. It was conceded at the trial that Kirkpatrick signed the note, that the same was due and unpaid, but it was contended that he was a surety only, and that the action thereon could not be maintained against him alone, the principal being a resident of the county, and within the jurisdiction of the court. A general finding was made in favor of the plaintiff, and upon this the judgment sought to be reversed was based. There is a dispute between the parties in regard to whether Kirkpatrick is a principal maker or only a surety, but the view we take renders that an immaterial issue in this proceeding. The question to be determined is whether the owner and holder of a promissory note may bring his action against the surety alone, or can he be compelled to bring in the principal debtor in order that the judgment may be rendered against the one primarily liable, and that the property of the principal debtor shall be exhausted, as provided in section 470 of the Civil Code? The statute provides that "in all cases of joint obligations and joint assumptions of copartners or others, suits may be brought and prosecuted against any one or more of those who are so liable." Gen. St. 1889, par. 1101.

In section 39 of the Civil Code it is enacted that "persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and indorsers and guarantors, may all or any of them be included in the same action, at the option of the plaintiff." In *Whittenhall v. Korber*, 12 Kan. 618, it was decided that several makers of a promissory note were severally liable, and might be proceeded against separately, and if all were sued in one action the plaintiff might dismiss his action as to any one of the defendants, and proceed against the remaining defendants. *Swerdseger v. State*, 21 Kan. 475, was an action upon a recognizance, in which it was decided that an action may be maintained against the surety alone, without joining the principal as defendant; and it was also held that section 470 of the Code only applies where the principal debtor is one of the defendants, and does not take away the right given elsewhere to sue the surety alone. See, also, *Silvers v. Foster*, 9 Kan. 56; *Alvey v. Wilson*, Id. 404; *Jenks v. School-Dist.*, 18 Kan. 356. We see no conflict between sections 39 and 470 of the Code. Section 39 confers upon the plaintiff the option or privilege of suing any one of those who are severally liable on a promissory note, and section 470 simply provides for cases where the principal debtor and surety are jointly sued, and has no application where they are sued severally. See, also, *Wilkins v. Bank*, 31 Ohio St. 565. The Code affords ample remedies for the protection of a surety who is compelled to pay the debt of his principal. Civil Code, §§ 480, 529-531. The fact that Clara Gray was the wife of one of the makers of the note does not deprive her of any of the remedies afforded by the law. Judgment affirmed. All the justices concurring.

(43 Kan. 580.)

SANGER v. RICE et al.

(Supreme Court of Kansas. April 4, 1890.)

TAX-DEEDS—VALIDITY—MACADAM TAX.

1. Ordinarily, a tax-deed should be strictly construed; but where a tax-deed has been of record for more than five years, and the claimant under it has been in the actual possession of the property conveyed by it during all that time, making improvements thereon, and no person claiming to have any interest in the property at any time during the period that elapsed from the time when the taxes were first levied upon the property, till after more than five years had elapsed from the time of the recording of the tax-deed, has ever made any claim to the property as against the claimant under the tax-deed, but only a person claiming under a quitclaim deed, executed after more than five years had elapsed from the date of the recording of the tax-deed, and for the expressed consideration of only one dollar, has ever attempted to disturb the rights of the party claiming under the tax-deed, and where such tax-deed, if it were so construed as to make the facts therein stated correspond precisely with the actual facts, would necessarily be held to be valid, such tax-deed should be liberally construed for the purpose of upholding and enforcing it.

2. And further held, that the tax-deed in question does not show affirmatively, and upon its face, that the tax-sale certificate was assigned for only

a portion of the taxes remaining due and unpaid at the date of the assignment.

8. Where a tax-deed, executed in 1881, upon a tax-sale made in 1874 for taxes levied in 1873, recites that the assignment of the tax-sale certificate was made by the county, and does not specifically say that it was made by the county clerk, *held* sufficient.

4. Although a "macadam tax" levied and assessed by a city of the second class is only a "special assessment for improvements," yet it is such a tax that when certified by the city clerk to the county clerk, and placed on the county tax-roll, the property against which it is assessed may be sold for such tax, and a tax-deed may be executed upon such sale.

5. And such a tax-deed, if sufficient in form, will be *prima facie* valid.

(*Syllabus by the Court.*)

Error from district court, Bourbon county; C. O. FRENCH, Judge.

This was an action in the nature of ejectment, brought in the district court of Bourbon county on June 3, 1887, by David R. Rice against I. S. Sanger and others, to recover the N. $\frac{1}{2}$ of lot No. 12, in block No. 102, in Ft. Scott, Kan. Afterwards, Oscar Rice was substituted as plaintiff in the place of David R. Rice. The case was tried before the court without a jury, and the court made special findings of fact and conclusions of law, and upon such findings and conclusions rendered judgment in favor of the plaintiff, and against the defendant, for the property in controversy; but, on the other side, rendered judgment that the defendant Sanger was entitled to receive from the plaintiff, for taxes paid and improvements made by Sanger, the sum of \$871.78. It is not necessary to give a copy of the findings of fact or conclusions of law; but, as the principal question involved in this case is whether a certain tax-deed is valid or not upon its face, it will be proper to give a copy of such tax-deed. Such tax-deed, omitting the acknowledgment, reads as follows: "Know all men by these presents, that whereas, the following described real property, viz., north half of lot No. twelve, (12,) in block No. one hundred and two, (102,) in the city of Fort Scott, situated in the county of Bourbon and state of Kansas, was subject to taxation for the year A. D. 1873; and whereas, the taxes assessed upon said real property for the year aforesaid remained due and unpaid at the date of the sale hereinafter mentioned; and whereas, the treasurer of said county did, on the 21st day of May, 1874, by virtue of the authority in him vested by law, at the sale begun and publicly held on the first Tuesday of May, A. D. 1874, expose to public sale, at the county-seat of said county, in substantial conformity with all the requisitions of the statute in such cases made and provided, the real property above described, for the payment of the taxes, interest, and costs then due and remaining unpaid upon said property; and whereas, at the time and place aforesaid, there being no bidders for said property, said property could not be sold for the amount of taxes and charges thereon, and said N. half, lot 12, block 102, in the city of Fort Scott,

Kansas, was bid off by the county treasurer for the county of Bourbon for the sum of forty-one dollars and thirty-four cents, being the whole amount of taxes, interest, and costs then due and remaining unpaid on said property; and whereas, the said county of Bourbon did, on the 15th day of September, A. D. 1881, duly assign the certificate of the sale of the property, as aforesaid, and all its right, title, and interest to said property, to John F. Cottrell, of the county of Bourbon and state of Kansas, for the sum of one hundred and ninety-two and 59-100 dollars, in full of taxes, costs, and interest on said property for the year 1873, for macadam tax only; and whereas, over three years have elapsed since the date of said sale, and the said property has not been redeemed therefrom as provided by law: Now, therefore, I, L. B. Welch, the county clerk of the county aforesaid, for and in consideration of the said sum of one hundred and ninety-two dollars and fifty-nine cents, taxes, costs, and interest due on said lands for the years aforesaid, to the treasurer paid as aforesaid, and by virtue of the statute in such cases made and provided, have granted, bargained, sold, and by these presents do grant, bargain, sell, unto the said John F. Cottrell, his heirs and assigns, the real property last hereinbefore described; to have and to hold unto him, the said John F. Cottrell, his heirs and assigns, forever, subject, however, to all the right of redemption provided by law. In witness whereof, I, L. B. Welch, the county clerk as aforesaid, have hereunto subscribed my name and affixed the official seal of said county on the 16th day of September, A. D. 1881. [Seal.] L. B. WELCH, County Clerk." The defendant, Sanger, as plaintiff in error, brought the case to this court, making David R. Rice and Oscar Rice defendants in error. Since the case was brought to this court, Sanger died, and the action has been revived in the name of Jane Sanger, individually, and as administratrix.

J. D. McCleverty, for plaintiff in error.
Ware, Biddle & Cory, for defendants in error.

VALENTINE, J., (*after stating the facts as above.*) The substantial question involved in this case is, who owns the N. $\frac{1}{2}$ of lot No. 12, in block No. 102, in Ft. Scott? The title of the defendants in error, plaintiffs below, is as follows: It is admitted that William Shaeffer, prior to his death, and by a chain of title from the government down to himself, owned the property in controversy. After his death, and on April 23, 1887, his heirs, by a quitclaim deed, for the expressed consideration of one dollar, conveyed the property to David R. Rice; and on December 26, 1887, David R. Rice and wife, by a quitclaim deed, for the expressed consideration of one dollar, conveyed the property to Oscar Rice. The title of the plaintiff in error, defendant below, is founded upon a tax-deed executed by the county clerk of Bourbon county to

John F. Cottrell on September 16, 1881, for taxes of 1873, and recorded on September 19, 1881, and a quitclaim deed executed by Cottrell and wife to I. S. Sanger on July 10, 1882, and the actual possession of the property by Sanger and his grantor from the date of the tax-deed to the present time, and paying all the taxes and making improvements thereon. As the tax-deed had been of record for more than five years before this action was commenced, and as the parties holding under the same were in the actual possession of the property during all that time, and as, except for the tax-deed, the plaintiff below, Rice, would hold the legal title to the property, it is admitted by both parties that the only question involved in the case with regard to the title is whether the tax-deed is void or valid upon its face.

The facts of the case concerning the taxes and the tax proceedings, as shown by the evidence outside of the tax-deed, and stated very briefly, are substantially as follows: In the year 1873 the property in controversy was taxed for various purposes, and these taxes were placed upon the tax-rolls of Bourbon county. An amount was also assessed against the property by the city of Ft. Scott for macadamizing the street immediately in front of such property; which amount was also placed upon the tax-rolls of the county for that year, and was designated and known as a "macadam tax." All the taxes except this macadam tax were paid, and this macadam tax was not paid. On May 21, 1874, the property was offered for sale for this macadam tax; and, there being no bidders, it was bid off by the county treasurer for the county of Bourbon. On September 15, 1881, John F. Cottrell paid into the county treasury the sum of \$192.59, being the amount that would be required at that time to redeem the property from the taxes, and received a certificate therefor from the county treasurer; which certificate, and all the interest of Bourbon county in and to the property in controversy, were, for the consideration above named, assigned to Cottrell by the then county clerk of Bourbon county, and on the next day the tax-deed was executed by the county clerk to Cottrell. These facts are certainly sufficient, if the tax-deed properly states them, to give to the tax-deed holder a good title. It is claimed, however, on the part of Rice, that the tax-deed does not state the real facts, and that the facts which it does state render it void upon its face; and this, for the following reasons: *First.* It is claimed that the tax-deed shows that, prior to the time of the tax-sale, other taxes besides the macadam tax had been assessed and levied upon the property in controversy for the year 1873; that all these taxes were still due and unpaid at the date of the sale; that the property was sold for all such taxes; that they all remained due against the land up to the assignment of the tax-sale certificate; and that the tax-sale certificate was assigned, not for all of them, but for the macadam tax only. *Second.* It

is further claimed that the assignment of the tax-sale certificate was not made by the county clerk. *Third.* It is also claimed that a macadam tax is no tax at all, but only a "special assessment for improvements," and that there is no law authorizing a tax-sale or a tax-deed for special assessments. *Fourth.* It is also claimed that although the macadam tax is a special assessment for improvements, and nothing else, yet that under the law there can be no assessor in such a case; and that, as a tax-deed is *prima facie* evidence only "from the valuation of the land by the assessor, inclusive, up to the execution of the deed," (Tax Law, § 138,) a tax-deed founded only upon a special assessment for improvements cannot be evidence of anything; that, as there can be no assessor in such a case, there can be no starting point for the tax-deed to begin to be evidence of anything.

Ordinarily, tax-deeds should be strictly construed; but, under the circumstances of this case, we think the present tax-deed ought to be liberally construed, for the purpose of upholding and enforcing it. *First.* Public officers are always presumed to do their duty. *Second.* Section 139 of the tax law reads as follows: "Sec. 139. No irregularity in the assessment roll, nor omission from the same, nor mere irregularities of any kind in any of the proceedings shall invalidate any such proceeding, or the title conveyed by the tax-deed; nor shall any failure of any officer or officers to perform the duties assigned him or them, upon the day specified, work an invalidation of any such proceedings or of said deed." *Third.* Section 141 of the tax law reads as follows: "Sec. 141. Any suit or proceeding against the tax purchaser, his heirs or assigns, for the recovery of lands sold for taxes, or to defeat or avoid a sale or conveyance of land for taxes, except in cases where the taxes have been paid or the land redeemed as provided by law, shall be commenced within five years from the time of recording the tax-deed, and not thereafter." *Fourth.* The present tax-deed was recorded more than five years before this action was commenced, and during all that time the claimants under it had the actual possession of the property conveyed, making improvements on it. *Fifth.* And no person claiming to have any interest in the property at any time during the period that elapsed from the time when the taxes were first levied upon it in 1873, till after more than five years had elapsed from the recording of the tax-deed, has ever made any claim to the property as against the claimants under the tax-deed. *Sixth.* But only persons holding under a quitclaim deed, executed after more than five years had elapsed from the date of the recording of the tax-deed, and for the expressed consideration of only one dollar, have ever attempted to disturb the rights of the parties claiming under the tax-deed. *Seventh.* If the tax-deed should be construed so as to make the facts therein stated correspond precisely and exactly with the real facts of the case, then the

tax-deed would necessarily be held to be valid.

It is claimed by counsel for Rice that the tax-deed shows upon its face that other taxes than the macadam tax were assessed and levied upon the property for the year 1873, and that at the time of the tax-sale all these taxes so assessed or levied were still due and unpaid, and remained so down to the assignment of the tax-sale certificate, when such certificate was assigned to Cottrell for the macadam tax only. Now, really, there is nothing in the tax-deed that shows what taxes were levied or assessed upon the property except the macadam tax. Were there any others? It can hardly be said that the tax-deed shows it. And it is possible for all the ordinary taxes to be omitted from the tax-rolls of the county, and a special assessment for improvements, like a macadam tax, to be put on the tax-rolls; for the ordinary taxes in a city of the second class are founded upon an assessment made by the regular city assessor, and placed originally upon the tax-rolls by the county clerk; while special assessments, like macadam taxes, are founded upon an assessment made by three appraisers appointed by the mayor and council, and are certified by the city clerk to the county clerk, and then put on the tax-rolls. Besides, it is evident from the entire tax-deed, including all its parts, that the county clerk did not mean to say that there was any tax due upon the property at the time of the tax-sale other than the macadam tax; and such was not the fact. The second "whereas" is the only portion of the tax-deed from which it might be inferred that other taxes than the macadam tax were still due against the property and unpaid at the date of the tax-sale; and this is scarcely any evidence, for the object of that "whereas" is not to show what taxes are still due and unpaid, or to describe any of the taxes, but only to show that the property sold was subject to sale for delinquent tax; and one tax for this purpose is as good as twenty. Of course, the "whereas" should be broad enough in its statement to include all the delinquent taxes; but where it is too broad, as is claimed in this case, no particular harm can be done. But, suppose there were other taxes than the macadam tax still due against the property at the time of the tax-sale, may not a portion of them have been paid after the tax-sale, and before the assignment of the tax-sale certificate, leaving only the macadam tax still due against the property at the time the tax-sale certificate was assigned? We do not think that the tax-deed, in this respect, shows upon its face, and affirmatively, what counsel for Rice claims that it does; and certainly, at this late day, it should not be held to be void for any such reason.

We also think that the tax-deed sufficiently shows that the assignment of the tax-sale certificate was made by the county clerk of Bourbon county; for the tax-deed recites that it was duly assigned by Bourbon county, and it could not have been duly assigned by Bourbon county unless it was assigned by the

county clerk. The statutes require that when property is offered for sale for delinquent taxes, and when there are no bidders, the property shall be bid off by the county treasurer for the county; and when any person shall desire to purchase the county's interest in the property, and shall pay the amount required therefor, the treasurer shall issue to such person a tax-sale certificate, and the county clerk shall then assign the certificate to the purchaser, and such certificate and assignment "shall vest all the interest of the county in or to such land or town lot in such person." Tax Law 1868, § 91; Tax Law 1876, § 117. Prior to the tax law of 1876, the statute did not require that the tax-deed should state that the county clerk had assigned the tax-sale certificate; but it left the county clerk, in executing the tax-deed, to state the fact of assignment in any appropriate language which he might choose to use; and section 155 of the tax law of 1876 reads as follows: "Sec. 155. All matters relative to the sale and conveyance of lands for taxes under any prior statute shall be fully completed according to the laws under which they originated, the same as if such laws remained in force." See, also, *Watkins v. Inge*, 24 Kan. 612. We think that the tax-deed in this case fairly shows, by unavoidable implication, that the assignment of the tax-sale certificate was made by the county clerk; and such was the fact. In fact, everything was done that was necessary to be done in order to make the tax-deed a good tax-deed.

It is claimed, however, by counsel for Rice, that a "macadam tax" is no tax at all, but only a "special assessment for improvements;" and they further claim that there is no law authorizing a tax-sale for special assessments for improvements, and therefore that the tax-sale in the present case, and the tax-deed founded thereon, are absolutely void. Their principal authority for this claim is section 33 of the act of 1872 relating to cities of the second class, which reads, so far as it is necessary to quote it, as follows: "Sec. 33. The assessments made pursuant to the third clause of the second subdivision of the preceding section shall be known as 'special assessments for improvements,' and, except as hereinafter provided, shall be levied and collected as one tax, in addition to the taxes for general revenue purposes, and shall be certified by the city clerk to the county clerk, to be placed on the tax-roll for collection, subject to the same penalties, and collected in like manner, as other taxes under existing laws." Now, while it is true that a "macadam tax" is a special assessment for improvements, yet it is also a tax; and the section of law relied on by counsel for Rice to show otherwise shows that it is a tax, and also shows that it may be placed upon the tax-roll of the county for collection, and may be collected in the same manner as other taxes are collected under existing laws. See, also, section 43 of the act last mentioned.

But, after claiming that this "macadam tax" is no tax at all, but only an assessment, then they virtually claim that it is not an assessment; and this for the reason, as they claim, that there can be no assessor. It is true that the assessors in such cases are not called "assessors." They are called "appraisers." They are "three disinterested appraisers appointed by the mayor and council." Section 32 of the act relating to cities of the second class. They ascertain, appraise, and assess the value of the property; and upon this valuation the amount of the assessment or tax, or whatever it may be called, is fixed. This claim, that there are no assessors in a case of special assessments or "macadam tax," is made for the purpose of destroying the *prima facie* character of the tax-deed in this case; for the statute does not provide that a tax-deed shall be *prima facie* evidence, except "from the valuation of the land by the assessor, inclusive, up to the execution of the deed." Tax Law, § 138. We think the appraisers of the property, in cases like this, are virtually assessors, and therefore this point against the tax-deed can have no force. But, even if the appraisers are not assessors, still, if we call the macadam tax a "special assessment for improvements," there must be an assessor or assessors. There can hardly be an assessment without an assessor.

We have now considered every objection urged by counsel for Rice against the tax-deed, and we do not think that any one or more of them, or all together, are sufficient to defeat the tax-deed. The judgment of the court below will be reversed, and cause remanded for further proceedings. All the justices concurring.

(43 Kan. 497)

GERMAN INS. CO. OF FREEPORT, ILL., v. GRAY.

(Supreme Court of Kansas. April 4, 1890.)

INSURANCE APPLICATION—CONDITIONS OF POLICY—
WAIVER BY AGENT—PROOF OF LOSS.

1. In an application for insurance, where correct answers are given to a general agent of the company respecting incumbrances on the property of the applicant, and such agent fails to mention the incumbrances in the written application, but procures the signature of the applicant, accepts the premium, and closes the contract, the company will not be relieved from liability on account of misrepresentations in the application, although it was stipulated therein that it should be considered a part of the policy and a warranty by the insured of the truth of the statements which it contained.

2. A general agent of an insurance company can modify the insurance contract, or waive a condition of a written policy by parol.

3. A provision in an insurance policy respecting incumbrances on the property insured may be waived by the insurance company or its general agent; and this, although the policy contains a printed stipulation that no agent of the company or any person other than the president or secretary shall have authority to waive any of the terms or conditions of the policy, and all agreements by the president or secretary must be signed by either of them.

4. Where proofs of loss are taken by a duly-authorized adjuster of the company, who expresses satisfaction with the same, and states that he will

forward them to the office of the company, and that the loss will soon be paid, the insured has a right to assume, until notified to the contrary, that no other or different proofs will be required; and the failure of the company to object to them within a reasonable time precludes it from thereafter objecting that they are insufficient.

(Syllabus by the Court.)

Error from district court, Sumner county; J. T. HERRICK, Judge.

This was an action for loss by fire upon a policy of insurance executed December 4, 1885, insuring, among other property, the following, for the amounts named: Barn and shed, \$200; hay in barn, \$200; grain in barn and in stack on cultivated premises, \$1,500; farming implements, \$300. The fire occurred on May 28, 1886, and the property mentioned, which is alleged to be of the total value of \$2,200, was wholly destroyed by the fire. The plaintiff alleged that the contract of insurance was in full force at the time of the fire, and that the property was destroyed without any fault of his, and that he had fully complied with all the requirements and agreements of the contract, but the insurance company refused, and still refuses, to pay the amount of the loss. He demanded judgment in the sum of \$2,200, with interest from the time of the fire. The answer alleged that in the application for insurance by Gray he warranted that all the answers made by him to questions therein propounded were true; that, in response to a question in regard to what mortgages and incumbrances were upon the property, he failed to disclose a mortgage for \$5,749.35, dated March 23, 1885, in favor of John S. Woods; and, further, that Gray, after the issuance of the policy, and without the consent of the insurance company indorsed on the policy, and in violation of the terms of the policy, incumbered and mortgaged the property insured under the policy as follows: On May 15, 1886, he made and delivered a mortgage to A. Brennaman for \$3,110, upon the real estate on which the insured buildings stood, and upon 2,000 bushels of wheat in the granary, and about 300 acres of growing wheat; and, further, on December 22, 1885, that he made and delivered to Sumner County Bank a mortgage of \$700 on some farming implements and other articles covered by the policy. In his reply Gray admitted the existence and the making of the mortgages mentioned in the answer, but alleged that he gave a full statement of all the incumbrances on the property when the application for insurance was made, and also made known to the defendant that the mortgages would mature during the existence of the policy, and that he would be wholly unable to meet the indebtedness or remove the incumbrances, except by making and giving new mortgages, and renewing the incumbrances on the property; and he alleges that it was expressly stipulated and agreed between himself and the insurance company that he should be permitted to incumber his property, and that H. Steinbushel & Bro., the duly-authorized agents of the company, expressly

waived the condition written in the policy against incumbrances, and expressly agreed in behalf of the company that he should have the right, notwithstanding the printed stipulations, to renew and extend the mortgages and incumbrances upon the property, or any part thereof.

Upon the trial the jury returned special findings of fact with their general verdict, as follows: "Question. Were there any chattel mortgages on the wheat covered by the insurance policy sued on in this action at the time said insurance policy was issued and delivered to Anderson Gray? A. Yes. (5) Q. Did the said plaintiff at any time after the insurance and delivery to the said Anderson Gray of the insurance policy sued on in this action, and before the time plaintiff claims that the property covered by said policy was destroyed by fire, give to any person any chattel mortgage upon any of the property covered by said policy? A. Yes." (7) Q. Were there any chattel mortgages upon any of the property covered by the insurance policy sued on in this action at the time said plaintiff claims the said property was destroyed by fire? A. Yes." (10) Q. What was the value of each item of property insured at the time plaintiff claims the same was destroyed by fire? A. 2,000 bushels wheat, \$1,500; six tons hay, \$18; 2 two-horse Bain wagons, \$80; 1 piano-box single buggy, \$100; 1 ten-foot Hodge header, \$100; 1 Buckeye mower, \$40; 1 Bradley hay-rake, \$15; 1 corn-planter, \$45; 1 Wier double cultivator, \$15; 1 press wheat-drill, \$40; 2 one-horse wheat-drills, \$30; 1 wheat fanning-mill, \$30; barn, \$800; harness, \$55. (11) Q. What interest did the plaintiff have in and to each separate item of said property at the time he claims said property was destroyed? A. Wheat, owner; hay, owner; Bain two-horse wagons, owner; 1 piano-box single buggy, owner; header, owner; 1 mower, owner; 1 hay-rake, owner; corn-planter, owner; double cultivator, owner; press wheat-drill, owner; 2 one-horse wheat-drills, owner; fanning-mill, owner; barn, owner; harness, owner. (12) Q. What was the value of the plaintiff's interest in each item of said property at the time said plaintiff claims the same was destroyed by fire? A. Same as No. 10. (13) Q. Did the plaintiff read the written application for insurance which has been offered in evidence in the case before or at the time he signed the same? A. No. (14) Q. Could plaintiff at that time read writing and printing well enough to read such written application? A. Yes. (15) Q. Did plaintiff have an opportunity to read said written application before or at the time he signed the same? A. Yes. (16) Q. Did Anderson Gray, the plaintiff in this action, tell Mr. Steinbuschel, the agent of said defendant, at the time said written application for insurance was being written up, or before that time, of the existence of any mortgages upon any of the property covered by said insurance policy other than the one mentioned in said written application? A. Yes." (18)

Q. If you answer question 16 in the affirmative, then you may state if said agent of the defendant stated to plaintiff at that time that he would not mention such mortgages in said written application? A. Yes." (20) Q. If all the mortgages that were upon the said property, or any part thereof, so covered by said insurance policy, were not mentioned in said written application, state fully why they were not so mentioned, and all the reasons therefor, so far as you find that they were known to plaintiff at that time? A. Agent refused to put it in application, saying it was not necessary, because 'I issue my own policies and adjust the losses.' (21) Q. Was the plaintiff at any time authorized by said defendant to mortgage or remortgage the said property covered by said insurance policy after the said insurance was issued and delivered to said plaintiff? A. Yes. (22) Q. If you answer question No. 21 in the affirmative, you will then please state at what time said authority was given, and by what officer or agent such authority was given, and whether such authority was given orally or in writing? A. First, when application was made out; second, when policy was returned by Steinbuschel and brother, district agent. Orally. "We, the jury impaneled and sworn in the above-entitled case, do upon our oaths find for the plaintiff, and assess the amount of his recovery at \$2,018, with interest at 7 per cent. from July 28, 1886."

A motion for a new trial was made and overruled, and the court thereupon entered judgment in accordance with the verdict for \$2,125.95, with interest thereon from June 4, 1887, at the rate of 7 per cent. per annum. The insurance company brings the case here, alleging error, and asking a reversal of the judgment.

G. W. Barnett, George & King, and W. F. Rightmire, for plaintiff in error. *McDonald & Parker*, for defendant in error.

JOHNSTON, J., (after stating the facts as above.) The greater part of the testimony taken in the case was with reference to the extent and value of the property destroyed, and as to whether or not the fire was the result of the action of the insured. But these questions, as well as all others upon which there was a conflict of evidence, have been determined by the jury in favor of the insured. The insurance company now seeks to escape liability upon the ground that Gray failed to disclose the existence of incumbrances upon the property when he made the application for insurance, and also because he had incumbered the property after the policy was issued without the consent of the company indorsed thereon, and in violation of its provisions. The application for insurance was made on December 2, 1885, to Steinbuschel & Bro., of Wichita, who were agents of the company for that portion of the state in which the property was situated. They wrote the answers to the questions propounded to Gray, and the applica-

tion contained the statement that the answers made were true. The application only mentions one mortgage, but Gray testifies that he stated his indebtedness and the incumbrances on his property to the agents fully and in detail, telling them that it would be necessary for him to mortgage and re-mortgage his property in the conduct of his business during the time for which the insurance was contracted. This is disputed; but the jury sustain Gray, and find that the company was fully informed in respect to the existing incumbrances. The policy was not delivered by the agents at the time the application was made, but was sent by them to Gray at Conway Springs, Sumner county, near which place he resided. Soon after it had been so delivered, he discovered that it contained a provision that if the property should thereafter become mortgaged or incumbered, or, in case a change should take place in the title, the policy should be null and void. He immediately went to the agent, called his attention to the provision prohibiting the incumbering of his property, and insisted that it must be changed. After looking at the policy, Steinbuschel said that he would waive the condition relative to incumbrances, stating that he had authority for that purpose, and Gray, acting upon this waiver and agreement, mortgaged the property, as has already been stated. The incumbrances placed on the property, however, were mostly, if not entirely, the renewal and extension of debts and mortgages existing when the contract of insurance was made. In regard to the misrepresentations in the application, we must assume that Gray gave correct answers to all questions asked. There was no concealment nor deception on his part. Steinbuschel, authorized by and acting for the company, prepared the application, and purposely omitted a fuller statement concerning incumbrances. It was the fault of Steinbuschel or the company which he represented, and not of the insured, that the application did not contain a complete statement. Steinbuschel having authority, his act must be treated as the act of the company, and through him the company had knowledge of all the incumbrances. With this knowledge, the company accepted the risk, and the premium therefor, induced Gray to sign the application, which did not state the whole truth, and now, when the loss occurs, they cannot, under our decisions, insist on the breach of warranty or the untruth of the representations. *Sullivan v. Insurance Co.*, 34 Kan. 170, 8 Pac. Rep. 112; *Insurance Co. v. Pearce*, 39 Kan. 396, 18 Pac. Rep. 291; *Insurance Co. v. Barnes*, 41 Kan. 161, 21 Pac. Rep. 165; *Protective Union v. Gardner*, 41 Kan. 401, 21 Pac. Rep. 233.

It is next contended that the giving of the subsequent mortgages by the insured avoided the policy; and in that connection it is urged that error was committed in admitting testimony of the verbal agreement modify-

ing the terms of the policy, and waiving its conditions. We think the waiver must be upheld, and the point made by the company overruled. The agents who made the agreement were more than mere local or soliciting agents. They fully represented the company within a certain district; were authorized to solicit insurance, receive moneys and premiums, issue and renew policies; and the testimony is that they appointed subagents and adjusted losses. Only a short time previous to the making of the contract in question, they adjusted a loss under another insurance policy issued by the same company to Gray, and paid him the amount of the loss. Gray had a right to assume, and we may fairly assume, that they were general agents of the company. In this state the courts have taken a liberal view with reference to the power of agents, and especially where they were representing foreign companies, which can only act through their agents, and where the agent is practically the principal in the making of contracts. *Insurance Co. v. McLanathan*, 11 Kan. 549, and cases above cited. Being general agents, empowered to make and renew contracts, they stood in this respect in the place of the company, and certainly must be held to have the power to modify the same, or to waive any of the conditions in the contract which they had made. We are referred to *Insurance Co. v. Gibbons*, 22 Pac. Rep. 1010, where the power of the agent to waive a condition was denied. In that case the agent had no authority from his company except as a soliciting agent, and it did not appear that he had any authority to issue policies, and he did not even countersign them when issued. In that case, however, it was said that "it has generally been held that where a person in procuring an insurance upon his property acts in good faith, and without any knowledge of any limitations upon the authority of the agent of the insurance company effecting the insurance, such person may assume that the agent is a general agent of the insurance company for that purpose; that he stands in the place of the company; and that the company will be bound by any terms or conditions or any waiver of terms or conditions which the agent may agree to while acting for the company in consummating the insurance." If it was within the power of the company, acting through its agents, to waive a condition or change the contract, it surely might do so by a parol contract, and might even waive the provisions stated in the policy with reference to the manner of altering or waiving its terms and conditions. In *Insurance Co. v. Earle*, 33 Mich. 143, the court, in considering the question whether an agent of a company might change the conditions of a policy by parol, wherein it was provided that it could only be done upon the consent of the company written thereon, held that the written policy might be changed by parol, and stated that "a written bargain is of no higher legal degree than a parol one. Either may vary

or discharge the other, and there can be no more force in an agreement in writing not to agree by parol than a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it." See, also, *Insurance Co. v. Fahrenkrug*, 68 Ill. 463. In the present case, as in some of the cases cited, it was stipulated in the policy that no agent of the company, or any other person than the president or secretary, should have authority to alter or waive any of the terms or conditions of the policy, or make any indorsement thereon, and all agreements of the president or secretary must be signed by either of them. This provision, however, may be modified by the company to the same extent as any other, and whatever the company can do may be done by its general agents.

Reiner v. Insurance Co., 42 N. W. Rep. 208, was a case somewhat similar to the one we are considering. In that case the policy provided that the application should form a part of the policy and a warranty by the assured. In the application for insurance it was stated that the property insured was not incumbered, but it appeared that the property was mortgaged, and that the insured informed the agent of the company of the existence of the mortgages, and he falsely wrote the answers therein, and the application was signed at the request of the agent. In the policy issued was a provision that "no act or omission of the company, or any act of its officers or agents, shall be deemed, construed, or held to be a waiver of a full and strict compliance with the foregoing provisions of the terms and conditions of this policy, except it be a waiver or extension in express terms and in writing, signed by the president or secretary of the company." It was held that the action of the agent, with knowledge of the existence of the mortgage, was binding upon the company, and a waiver of the condition of the policy against incumbrances; and this, notwithstanding the limitation of authority of such agent expressed in the provision quoted on the face of the policy. Speaking of the restriction, the court said: "We must hold, however, that such attempted restrictions upon the power of the company or its general officers or agents, acting within the scope of their general authority, to subsequently modify the contract and bind the company in a manner contrary to such previous conditions in the policy are ineffectual. Especially is this true in respect to a foreign insurance company whose officers are practically inaccessible to the assured." Citing *Gans v. Insurance Co.*, 43 Wis. 108; *Insurance Co. v. Gallatin*, 48 Wis. 36, 3 N. W. Rep. 772; *Shaffer v. Insurance Co.*, 53 Wis. 361, 10 N. W. Rep. 381; *Lamberton v. Insurance Co.*, 39 N. W. Rep. 76; *Willcuts v. Insurance Co.*, 81 Ind. 308; *Steen v. Insurance Co.*, 89 N. Y. 326; *Richmond v. Insurance Co.*, 79 N. Y. 230; *Eastern R. Co. v. Relief Fire Ins. Co.*, 105 Mass. 570; *Insurance Co. v. Green*, 57 Ga. 469; *Insurance Co. v. Earle*, 33 Mich. 143.

The court, proceeding further, says: "Of course, an insurance company, and especially a foreign insurance company, in making contracts of insurance, and adjusting, settling, and paying losses, must act through its agents, if at all. To hold that, in such negotiations between such general agents and the assured, the latter is bound, but that in the same transaction the company, the agent's principal, cannot be bound by reason of having incapacitated itself and them, by previous stipulations, from agreeing to anything contrary to the conditions contained in the original contract, is, under most policies, in effect to hold that there is no mutuality in such contracts, and that the powers of such general agents are limited to the obtaining of premiums, and then defeating the enforcement of the policies upon which they were paid." It is clear that the company was not so bound but that it might modify any contract which it had made, or waive any of the conditions contained therein; and this may be done through its general agents. The knowledge of *Steinbuschel & Bro.* in this case was the knowledge of the company, and their act was its act. When *Gray* applied for the insurance he informed the company with reference to the incumbrances, as well as his necessity and purpose to continue them. Knowing these facts, the premium was accepted, and the policy issued. Subsequent to the issuance of the policy, there was an express agreement that he might renew his mortgages as he had informed the company it would be necessary to do, and the renewal of the incumbrances did not in any material degree affect the risk which the company took. Accepting his statement, as the jury have done, we must assume that he acted in good faith with the company and its agents, and that he was induced by the agreements and action of the company to believe that he was warranted in renewing the mortgages. After receiving and retaining the premium, knowing the purpose and necessity of *Gray* to renew the incumbrances, and after a specific agreement waiving that condition of the policy, and authorizing him to renew the incumbrances, and after remaining silent and allowing him to proceed as though he was insured, until a loss occurs, the company will not be heard to repudiate its contract or to deny its liability. We are aware that the authorities are not uniform upon the subject of waivers in policies like this one, but forfeitures are not favored in the law, and the view we have taken of the power of a general agent to waive the condition of a policy is more satisfactory to us, and is sufficiently supported. In addition to the authorities already cited, see the following: *Young v. Insurance Co.*, 45 Iowa, 377; *King v. Insurance Co.*, 72 Iowa, 310, 33 N. W. Rep. 690; *Morrison v. Insurance Co.*, 6 S. W. Rep. 605; *McGurk v. Insurance Co.*, 16 Atl. Rep. 268; *Insurance Co. v. Gallatin*, 48 Wis. 36, 3 N. W. Rep. 772; *Bartlett v. Insurance Co.*, 41 N. W. Rep. 601; *Key v. Insurance Co.*, Id. 614; *Aid Ass'n v. Sweet-*

ser, 19 N. E. Rep. 722; 2 Wood, Ins. §§ 422, 525.

It is further contended that a forfeiture occurred by reason of the failure of Gray to send proofs of loss to the company. It is shown that immediately after the fire he notified Steinbuschel & Bro. of the loss, and they stated that they would at once inform the company. Within a few days an adjuster of the company, whose authority is not denied, came to Gray's place, and requested him to go before an officer and make proof of loss. The proofs were reduced to writing, signed, and sworn to, and delivered to the adjuster; and there is testimony to the effect that he expressed satisfaction with them, and stated that he would forward them to the company's office, and would return in a few days, and settle the loss. This testimony was submitted to the jury under the following directions: "There is evidence tending to show that these statements were taken by said Winne as the agent of said company, and sent to said company, and it will be a question for the jury to determine whether such statements and proofs are such as are required by the policy; and, if not, whether the plaintiff was justified under the circumstances in believing, and did believe, that the proofs were satisfactory to the agent of the company and to the company, and that no further proofs would be required; and if the jury find from the evidence that the plaintiff was justified in believing, and did believe, that the proofs furnished to said Winne were satisfactory to him and to the company; and further find that such proofs and statements were sent to the company by said Winne, and that the company made no objection thereto, and requested no further proofs to be made by the plaintiff within a reasonable time, and within the sixty days after the fire,—the jury would be justified in finding that defendant had waived the making of further proofs of loss. If, at the time such affidavits and statements were made at the request of said Winne, it was understood between said agent and said plaintiff that such statements and affidavits should not constitute the proofs required by the policy, and should not be considered as a waiver of such proofs, and that by taking such statements and affidavits said Winne should not and did not waive the making of the proofs in accordance with the provisions of the policy, then the jury would not be justified in finding that the taking of such statements and affidavits by said Winne, or that the acts and conduct of said Winne at the time of taking such statements and affidavits, constituted a waiver of the proofs required by the policy." The testimony was sufficient to sustain the finding of the jury. Neither the adjuster nor any one representing the company returned the proofs, or claimed that they were insufficient. The company recognized the loss, took all the proofs it deemed essential to an adjustment, and, instead of claiming that they were insufficient, expressed satis-

faction with them, and stated that the loss would soon be paid. Assuming the existence of the facts stated, we think the assured had a right to assume, until notified to the contrary, that no other or different proofs would be required. There are some criticisms in regard to the refusal of the court to give instructions, but what has already been said in the opinion disposes of the material objections that are made. The charge of the court fairly submitted the questions involved to the jury. Finding no error, the judgment of the district court will be affirmed. All the justices concurring.

(43. Kan. 477)

LEMON v. DRYDEN.

(*Supreme Court of Kansas. April 4, 1890.*)

LIMITATION—PLEADING—AMENDMENT—VERDICT.

1. When it appears upon the face of a note that it is barred by the statute, and the only evidence that it is not barred is a payment alleged to have been made, and that payment is denied under oath, the allegation of payment is material, and it is necessary for the plaintiff to prove the payment in order to recover.

2. When there is nothing in the special findings of a jury in conflict with the general verdict, it is not error for the court to enter judgment in accordance with the general verdict.

3. An amendment of an answer may be allowed, after verdict, in furtherance of justice.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Doniphan county; R. C. BASSETT, Judge.

Albert Perry, for plaintiff in error. *Webb & Raymond*, for defendant in error.

GREEN, C. This action was commenced on the 17th day of August, 1887, upon a promissory note, alleged to have been given in May, 1861, for the sum of \$336, by James E. Dryden. The suit was against the administratrix of Dryden. A credit of \$25 was alleged to have been made upon the note in September, 1883. The answer denies, under oath, the execution of the note, the alleged payment of \$25, and, further, alleges that the note was barred by the statute of limitations. A trial was had before the district court of Doniphan county on the 5th day of January, 1888. A jury having been impaneled, the plaintiff asked the court to exclude all the evidence under the second, third, fourth, and fifth counts of the defendant's answer, on the ground that the facts stated in said counts did not constitute a defense. This motion was overruled by the court as to the second, third, and fourth counts, and sustained as to the fifth. The jury returned a general verdict in favor of the defendant, and special findings of fact—*First*, that James E. Dryden, in May, 1861, at Elwood, Kan., executed a note to B. J. Keeny, and delivered the same to A. M. Ferguson, for the plaintiff; *second*, that James E. Dryden did not make a payment of \$25 on said note in September, 1883; *third*, that the amount of the note, principal and interest, was \$1,411.87, at the rendition of the verdict. Upon the rendi-

tion of the verdict and special findings, the plaintiff filed his motion for judgment. On the 9th day of January following, the defendant filed her motion for judgment on the findings; and on the 17th day of January following the plaintiff offered to remit \$41 on the special findings of fact; pending which motion the defendant asked leave to amend her answer by denying in the paragraph in her answer which set up the statute of limitations the alleged payment of \$25 on the note sued upon, which said motion was allowed by the court, and excepted to by the plaintiff. The court then overruled the plaintiff's motion for judgment, which was excepted to, and allowed the motion of the defendant, and entered judgment for costs against the plaintiff in the sum of \$115.85. No motion for a new trial was made. Since the rendition of the judgment, B. J. Keeny has died, and the action has been revived in the name of W. T. Lemon, as administrator.

The *first* error claimed by the plaintiff is that there was no proper plea of the statute of limitations. This position, we think, is hardly tenable, upon the issues as made in this case. The answer filed, *first*, denied the execution of the note sued upon; *second*, a denial of the payment of \$25 in September, 1883; and, in the fourth paragraph of the defendant's answer, the statute of limitations was pleaded. The note having been given in 1861, and no action commenced thereon until the 17th of August, 1887, it would be barred upon its face, and the payment of \$25, alleged to have been made in 1883, is the only allegation in the petition to show that it was not barred. This payment was denied under oath, and, we think, this of itself was sufficient to present the issue, under the rule laid down in the case of *Zane v. Zane*, 5 Kan. 135. If this payment was not made the claim of the plaintiff was barred. This was fairly made an issue by the pleadings, and the jury found against the plaintiff in special finding No. 2. The law upon this finding declares that the note was barred, and no judgment could be rendered in favor of the plaintiff, if the payment was not made. The plaintiff, as appears from the verdict of the jury, failed to prove a cause of action, and the defense, in our judgment, was complete.

Second. The plaintiff claims that the court erred in refusing to render a judgment in his favor upon the special findings. The general verdict was for the defendant. While the jury found that this note was executed by Dryden in May, 1861, there was a finding against the plaintiff as to the payment alleged to have been made in September, 1883. The special findings were consistent with the general verdict. The finding of the jury that the amount of the note at the date of the rendition of the judgment was for a certain sum is wholly immaterial. It could not, in any event, be construed that any sum was due upon the obligation sued upon.

As to the *third* ground of error, the court allowed the defendant to amend her answer

after the jury had returned a verdict. We cannot say that this is error, as the evidence is not preserved in the record. The court may allow an amendment, in furtherance of justice, before or after judgment, when such amendment does not change substantially the claim or defense. Section 139, Code Civil Proc.; *Hawley v. Histed*, 10 Kan. 269. While no motion was made for a new trial in this case, we have considered the errors of record which have been called to our attention, and find that there was no error in the rulings of the court below. We recommend that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 619)

SMITH v. BOARD COUNTY COM'RS BOURBON COUNTY *et al.*

(Supreme Court of Kansas. April 4, 1890.)

NOVATION — RAILROAD CONTRACTOR — COUNTY BONDS — LIMITATION.

1. Where A. is indebted to B., and B. is indebted to C., and promises to pay C. when he obtains his money from A., and C. has no legal or equitable assignment of B.'s claim against A., and no judgment against B., and there is no privity between C. and A., C. cannot recover from A. the debt due from A. to B.

2. Where a railroad company has a claim against a county for the recovery of bonds upon a subscription to its capital stock, a creditor of the company who is a stranger to the county, and has no legal or equitable assignment of the claim of the railroad company, cannot maintain an action against the county to recover the bonds in payment of its claim against the railroad company, prior to the rendition of a judgment against the company; and such a creditor is not entitled to maintain such an action against the county, although he joins, as a defendant in the action, the railroad company which is indebted to him.

3. On the 13th of October, 1870, the board of county commissioners of Bourbon county subscribed for \$150,000 of the capital stock of the Ft. Scott & Allen County Railroad Company, of which the Ft. Scott, Humboldt & Western Railroad Company is the successor. Upon the completion of the road-bed of the railroad company from Ft. Scott to the western line of Bourbon county, on or before the 1st day of July, 1872, the bonds of the county were to be issued to the railroad company in payment of the subscription. On the 6th day of June, 1871, S. entered into a written contract with the railroad company to grade and complete the road-bed in Bourbon county, and in payment thereof was to receive from the railroad company \$125,000 of the bonds of that county. S. had no contract with the county; his contract being a personal one with the railroad company. S. performed his contract with the railroad company prior to June 30, 1872, and was entitled to payment from the railroad company, under the terms of the contract. After the road-bed was completed, in June, 1872, the railroad company demanded of Bourbon county the bonds in payment of its subscription. The county refused to issue or deliver the bonds, and soon after burned them. *Held*, as the railroad company completed its contract with Bourbon county on or before June 30, 1872, and had demanded the bonds on that date, its cause of action then accrued, and under the statute of limitations its action for the bonds, or the recovery of the same, was barred in five years. *Held, further*, that so long as S. had no legal or equitable assignment of the bonds of the county from the railroad company, and so long as there was no privity between him and the county, he had no right or cause of action against the county for the bonds. *Held*,

also, that until S. had obtained judgment against the railroad company, or a legal or equitable assignment of its claim for the bonds, he could not maintain any action against the county for the bonds, and joining the railroad company as defendant in such an action gave him no additional right or cause of action against the county.

4. Where a plaintiff has no right or cause of action against a defendant, and no claim, title, or interest in the subject-matter stated in his petition, and brings his action in a court that has no jurisdiction of the defendant, and when he is in all respects a stranger to the defendant, the pendency of such an action will not entitle him to the saving provisions of section 23 of the Civil Code, although, after the dismissal of his action, he obtains such an interest in the subject-matter of the prior action as would entitle him to maintain an action thereon, but for the statute of limitations.

(Syllabus by the Court.)

Mandamus.

H. E. Long, for plaintiff. *E. M. Hulett* and *E. F. Ware*, for defendant.

HORTON, C. J. After the motion to quash the alternative writ issued in this case was sustained at the July term for 1889, the plaintiff, with leave of the court, filed two amendments to the writ. To the writ as amended the defendants have filed another motion to quash. We shall refer to the statute of limitations only, as we think that disposes of the case. The writ, as demanded, recites that the plaintiff completed the road-bed in accordance with the terms of his contract, prior to the 30th day of June, 1872; that on or about June 30, 1872, he became the owner of, and entitled to receive, the bonds referred to; that on the 30th day of June, 1872, the Ft. Scott & Allen County Railroad Company, of which the Ft. Scott, Humboldt & Western Railroad Company is the successor, demanded of the board of county commissioners of Bourbon county the bonds voted on August 24, 1869; that on the next day, July 1st, the board declined to issue and deliver the bonds; and that on the 12th day of August, 1873, the board destroyed and burned the bonds, which had been partially prepared for delivery. The plaintiff attempts to avoid the five-years statute of limitations by alleging that he commenced two suits in the United States circuit court for the district of Kansas to recover the bonds. One suit was commenced in 1874, against the Ft. Scott, Humboldt & Western Railroad Company, Bourbon county, and the commissioners of that county. The prayer of the bill was that the Ft. Scott, Humboldt & Western Railroad Company be decreed to assign its claim for the bonds of Bourbon county to the plaintiff, and that the board of county commissioners of that county be decreed to issue them to him. A demurrer was sustained to the bill. An appeal was taken to the supreme court of the United States, and at the October term of the court for 1878 the ruling of the United States circuit court was affirmed. The United States supreme court, speaking through Mr. Justice SWAYNE, said: "There is no privity between the county of Bourbon and the complainant. There has been no assignment, legal or equitable, to him by the railroad company of its

claim against the county. If there had been an assignment, the circuit court could not have taken jurisdiction of the case, because the assignor, if there had been no assignment, could not have maintained a suit upon the thing assigned in that forum. Rev. St. 109; *Sere v. Pitot*, 6 Cranch, 332;" *Smith v. Railroad Co.*, 99 U. S. 398. This opinion was filed in March, 1879.

On the 5th of December, 1879, the plaintiff recovered a judgment against the Ft. Scott, Humboldt & Western Railroad Company in the circuit court of the United States for the district of Kansas for \$267,113.19, besides costs, on which judgment an execution was issued, and returned unsatisfied; the corporation being insolvent. On the 28th of January, 1880, and within one year after the judgment of the United States supreme court of March, 1879, was rendered, affirming that the United States circuit court for the district of Kansas had no jurisdiction of the first suit, the plaintiff filed another bill in the circuit court of the United States for the district of Kansas against the Ft. Scott, Humboldt & Western Railroad Company and Bourbon county. The remedies sought were that the company should be ordered to assign to the plaintiff its claim against Bourbon county, and a decree against the county ordering it to issue the bonds, and to deliver them to the plaintiff, to be credited upon his judgment at their face value. This bill was also dismissed by the court. The plaintiff appealed to the supreme court of the United States from the ruling of the United States circuit court; and at the October term of the court for 1887 that court rendered the judgment that, "so far as the bill sought the relief prayed for against Bourbon county and its commissioners, the circuit court was without jurisdiction." *Smith v. Bourbon Co.*, 127 U. S. 105, 8 Sup. Ct. Rep. 1043. This opinion was filed in May, 1888. After the opinion was filed, the bill of plaintiff in the United States circuit court for the district of Kansas was dismissed against Bourbon county, and the commissioners of that county, for want of jurisdiction; but the circuit court entertained the bill as against the railroad company for the assignment of its right to the issue of the bonds of Bourbon county. On the 5th day of December, 1888, the United States circuit court rendered judgment that the right to have issued to the railroad company \$125,000 of the county bonds of Bourbon county be assigned to the plaintiff, with the power to bring an action in his name, or in the name of the railroad company for his benefit, against Bourbon county, and the commissioners of that county, to obtain the issue and delivery of the bonds.

The action in this court was brought December 31, 1888, within one year after the rendition of the judgment of the supreme court of the United States of May, 1888. On account of the pendency of the foregoing suits, it is again claimed that this action was commenced in time, under the provisions of section 23 of the Civil Code. That section

reads: "If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or if he die, and the cause of the action survive, his representatives, may commence a new action within one year after the reversal or failure." On the 6th of June, 1871, the plaintiff entered into a written contract with a railroad company, of which the Ft. Scott, Humboldt & Western Railroad Company is the successor, to grade a road-bed from the city of Ft. Scott, in Bourbon county, to Humboldt, in Allen county. In payment of the work to be performed under this contract by the plaintiff, the railroad company agreed to pay or deliver to plaintiff \$125,000 of the bonds of Bourbon county. Prior to June 30, 1872, the plaintiff had fully completed his contract, and was entitled to his payment therefor from the railroad company. The allegation in the amended writ that plaintiff, on or about June 30, 1872, became the owner of the bonds of Bourbon county, must be construed with the other allegations contained in the writ. The bonds were never delivered to the railroad company nor the plaintiff. The plaintiff had no contract with Bourbon county, or the commissioners of that county. His contract was with the railroad company only. After plaintiff had completed the road-bed, he was a creditor of the railroad company, but not a creditor of Bourbon county. After the railroad company had fully performed its contract with Bourbon county, it had the right to claim the bonds. This, and nothing more. Prior to December 5, 1888, the plaintiff had no assignment, legal or equitable, to him by the railroad company of its claim against the county. Even at that time there was no transfer or assignment of any bonds. The court merely decreed that "the right to have issued to the railroad company \$125,000 of the county bonds of Bourbon county, as set forth in the bill of complaint herein, be, and the same is hereby, assigned to the complainant; and full power is hereby given to complainant to bring an action in his name, or in the name of the said railroad company for his benefit, against the county of Bourbon, to obtain the issue and delivery of the bonds described in the bill of the complainant." The plaintiff did not recover its judgment against the Ft. Scott, Humboldt & Western Railroad Company until the 5th of December, 1879.

If the suit commenced in the United States circuit court in 1874 be considered as a creditors' bill, it stated no cause of action whatever against Bourbon county. The rule is that a judgment must be obtained, and certain steps taken towards enforcing or perfecting the judgment, before a plaintiff is entitled to a suit of that character. In *Tennent v. Battey*, 18 Kan. 324, it was decided that a plaintiff who had an attachment lien upon the property could not prosecute an action to set

aside an assignment embracing the property attached until he had obtained judgment against the debtor. There was no privity between the plaintiff and the county of Bourbon; and before the rendition of the judgment of December 5, 1879, the plaintiff had no right, legal or equitable, to commence or maintain any action against Bourbon county for the bonds, or the issuance of the bonds. Prior to the 5th day of December, 1879, the five-years statute of limitations had run against the railroad company. At that time any action by the railroad company or its assignees, or any creditor of the railroad company, against Bourbon county for the bonds was barred. "It is quite apparent," says Judge WALKER, for the court, in *Bank v. Magness*, 11 Ark. 343, "that the intention of the framers of the act [similar to section 23 of the Code] was to secure that class of suitors from loss who, from causes incident to the administration of the law, are compelled to abandon their present action, whether by their own act or the act of the court, when either would leave them a cause of action yet undetermined, by giving them a reasonable time in which to renew such action. * * * The remedy was evidently intended to be co-extensive with the evil, and will be so held, unless some sensible reason to the contrary can be shown." We think that the provisions of section 23 should be given a liberal construction; but where a plaintiff has no debt or legal or equitable claim against the defendant, and has no interest whatever in the subject-matter of the action, he cannot be considered as having "an action undetermined" to renew or revive. He is not within the letter or the spirit of the statute.

This action, commenced since the judgment of December 5, 1879, and the assignment of December 5, 1888, is not a continuation of the suit of 1874. In that suit, the plaintiff, on the face of his pleading, had no legal or equitable title or claim to the bonds of Bourbon county. In this action, his claim to the bonds is based upon the judgment of the 5th of December, 1879, and the subsequent judgment of December 5, 1888. *Meath v. Commissioners*, 109 U. S. 268, 3 Sup. Ct. Rep. 284; *Tiffin v. Leabo*, 52 Mo. 49; *Sidener v. Galbraith*, 63 Ind. 89. Therefore, as this action is not a continuation of the suit commenced in the United States circuit court in 1874, the plea of the statute of limitations of five years is sufficient, and bars any recovery. Counsel for plaintiff refers to *Seaton v. Hixon*, 35 Kan. 663, 12 Pac. Rep. 22, as authority that, even if his suit of 1874 in the United States circuit court was prematurely brought, his present action is saved by section 23 of the Code. In that case, while the action was prematurely brought, Hixon had a claim and a lien for materials furnished by him as subcontractor upon the building owned by Seaton. He had an interest in the subject-matter of the action. His action was merely premature, because commenced within less than 60 days after the completion of

the building, which, under the statute, is too soon. That case, therefore, differs materially from this. In this case the plaintiff had no lien upon the bonds in controversy, nor any legal or equitable claim against Bourbon county prior to December 5, 1879.

Plaintiff further insists that, as the railroad company refused to bring an action against Bourbon county to recover the bonds, he had a right to commence a suit in the United States circuit court to protect his interest and the interest of the railroad company. In other words, he contends that he stands in the same position as if his suit of 1874, in the United States circuit court, had been brought by the railroad company against the county. Neither the provisions of the Code nor the authorities support any such conclusion. The plaintiff had no action or cause of action against Bourbon county when he filed his bill in the United States circuit court in 1874, and the courts had no jurisdiction over Bourbon county. He could not champion the cause of the railroad company against Bourbon county, because he was a stranger to the county. In the suit of 1874, the plaintiff was not a proper party with the railroad company to recover the bonds from the county, because at that time he had no judgment against the railroad company, nor any legal or equitable claim against the county; therefore the plaintiff gained nothing by that suit, and could not keep alive the action or cause of action of the railroad company against Bourbon county by making the railroad company and Bourbon county defendants. The action or subject of action of the railroad company against Bourbon county was never litigated, and has never been in litigation, until the statute of limitation ran against it. The action was barred in 1877.

If all of the allegations in his petition are true, the plaintiff might have obtained a judgment in proper time against the railroad company, and then, within the statute of limitations, have instituted a creditors' bill against Bourbon county. This remedy he did not pursue. Without having any action or cause of action or right of action against Bourbon county, he commenced a proceeding in 1874 against that county; but this proceeding, being prior to the judgment of December 5, 1879, was futile and useless as against the county. It amounted to nothing. The suit of 1874 does not protect him under section 23. That suit could not, under any possible pleading, or in any state or federal court, have resulted to the interest or benefit of plaintiff. It was founded upon no debt or claim against the county. It is not possible for an alleged action, or an alleged cause of action, which has no existence, and can have no existence, to survive. The motion to quash must be sustained, and judgment will be rendered in favor of the defendants, and against the plaintiff.

VALENTINE, J., concurring. JOHNSTON, J., having been of counsel, did not sit.

STATE v. SULLIVAN.

(Supreme Court of Kansas. April 4, 1890.)

EMBEZZLEMENT OF DEED—INFORMATION—CONTINUANCE.

1. Where a motion is made for a continuance in a criminal case, on account of the absence of one of the defendant's counsel, and it appears that he is represented by two attorneys at the time, it is not material error for the court to overrule the motion.

2. An information, under section 84 of the crimes act, which charges that one G. S. then and there, unlawfully, feloniously, and with the intent to defraud, did embezzle and convert to his own use a certain warranty deed, the property of M. J. C., which said deed was in writing, being the act of M. J. C. as grantor, and made to G. S. as grantee, and duly acknowledged, purporting to convey, and did convey, the S. E. $\frac{1}{4}$ of section 29, township 28 S., of range 25 W., in the county of Hodgeman, is sufficient to support a sentence against a motion in arrest of judgment.

(Syllabus by Green, C.)

Commissioners' decision. Appeal from district court, Hodgeman county; J. C. STRANG, Judge.

S. W. Vandivert and G. P. Kline, for appellant. L. B. Kellogg, Atty. Gen., and T. S. Haun, for appellee.

GREEN, C. Grant Sullivan was convicted in the district court of Hodgeman county, under section 84 of the crimes act, of embezzling a deed from Malcolm J. Cox, and was sentenced to the penitentiary for the period of two years. He appeals to this court, and challenges the validity of the judgment of the court below upon a number of errors assigned in the brief of counsel for appellant; but the record, as brought here, presents but two questions which we can consider. There was no motion made to quash the information filed against the defendant, and no exceptions taken to the instructions to the jury; hence we can consider but two questions in the record.

First. The assignment of error made by the appellant upon the court's refusal to grant a continuance. The record discloses the fact that, upon this case being called for trial, an application was made by the defendant for a continuance, on the ground that the counsel who appeared for him at the preliminary examination was unable to be present at the trial; and that he had not had an opportunity to communicate to other counsel the facts material to his defense. The application was not made for a continuance of the case for the term, but simply to enable the defendant to properly prepare for his defense. There was no showing made as to when the counsel who had appeared for him at the preliminary examination would be able to be present in court; neither was there any showing that his presence was absolutely necessary. The affidavit filed by the defendant stated that his counsel was confined to his bed with a broken leg. From the very nature of the injury, the defendant must have known that he could not appear, and, such being the fact, it was his duty to get other counsel. The record shows that the

defendant was represented by able counsel, and that the nature of the case was such that it would not require a great deal of time to communicate to them the nature of his defense. The matter of granting a continuance rests largely within the discretion of the trial court, and the record fails to disclose any abuse of that discretion. There was no error in refusing the application for a continuance.

Second. The second ground of error is properly raised upon the motion made by the appellant in arrest of judgment. And in deciding this question we will also dispose of the objection which was made by counsel to the introduction of any evidence on the ground that the information did not state facts sufficient to constitute an offense. The language of the information is as follows: "I, the undersigned, prosecuting attorney of said county, in the name, by the authority, and on behalf of the state of Kansas, give information that on the 30th day of July, A. D., 1888, in said county of Hodgeman and state of Kansas, one Grant Sullivan then and there unlawfully, feloniously, and with intent to defraud, did embezzle and convert to his own use a certain warranty deed, the property of Malcolm J. Cox,—which said deed was in writing, being the act of Malcolm J. Cox as grantor, and made to Grant Sullivan as grantee, and duly acknowledged, purporting to convey and did convey the southeast quarter ($\frac{1}{4}$) of section twenty-nine, (29,) township twenty-three (23) south, of range twenty-five (25) west, in the county of Hodgeman and state of Kansas, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Kansas." The section of the crimes act upon which the information was based, reads: "If any person steal or embezzle any will of real or personal property, or any deed or other instrument of writing, being or purporting to be the act of another, by which any right or interest in real or personal property shall be or purport to be assured, transferred, or conveyed, or in any way changed or affected, shall be adjudged guilty of grand larceny, without reference to the value of the instrument so stolen or embezzled, and shall be punished by confinement and hard labor not exceeding five years, or in the county jail not less than six months." Gen. St. 1889, vol. 1, par. 2216. Does this information state a public offense, under the provisions of the statute just quoted? Taking into consideration the fact that no motion had been previously made to quash the information, is this information good, upon a motion in arrest of judgment? It clearly and aptly states the offense in the language of the statute. The deed was the property of Malcolm J. Cox, until it was delivered to the grantee; and, while the information shows that the deed was made to the defendant, the allegations of the information were that it was the property of the grantor, and we think that the deed

was his property until it was delivered to the grantee, and are clearly of the opinion that the information states a public offense, under the statute quoted. In any event, we do not think the objection good, upon a motion in arrest of judgment, because all technical irregularities should be disregarded. The principle is well established that defects in an information which might be held bad on a motion to quash, if one was made in time, are not always sufficient after a verdict of guilty. *State v. Knowles*, 34 Kan. 393, 8 Pac. Rep. 861; *City of Kingman v. Berry*, 40 Kan. 625, 20 Pac. Rep. 527; *State v. Rook*, 42 Kan. —, 22 Pac. Rep. 626. Further complaint is made of certain instructions given by the court, but no exceptions were made, and we cannot consider them here. The record discloses no errors upon the part of the trial court for which a reversal should be had. We would therefore recommend that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 419)

ARD v. PRATT.

(*Supreme Court of Kansas.* April 4, 1890.)

PUBLIC LANDS—HOMESTEAD AND PRE-EMPTION ENTRIES.

1. The officers of the land department are especially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption; and for mere errors of judgment upon the weight of evidence in a contested case before them the only remedy is by appeal from one officer to another of the department, and perhaps, under special circumstances, to the president.

2. Where a person comes to a United States local land-office, intending to homestead 160 acres of land, and makes his application, and tenders the fees therefor, but is informed by the register that his land is situated within the granted limits of a railroad company, and that he can homestead only 80 acres of the land, and, acting upon this advice, utterly abandons the intention of taking a homestead, and makes a pre-emption filing upon 80 acres of the land, he must subsequently show a compliance with the requirements of the pre-emption law to prove up and make payment on the 80 acres.

3. Where a person, having the qualifications of a pre-emptor, attempts to secure title to a tract of land under the pre-emption law, by filing thereon, and his pre-emption filing is subsequently canceled on account of his non-compliance with the provisions of the statute and the regulations of the United States land department concerning residence and improvements, he cannot afterwards claim the land as a settler under the homestead law, if an adverse claimant has, in the mean time, intervened, and obtained a legal right thereto.

(*Syllabus by the Court.*)

Error from district court, Allen county; **L. STILLWELL**, Judge.

Benton, Scott & Campbell, A. L. Allen, and William Lawrence, for plaintiff in error. *Hutchings & Keplinger*, for defendant in error.

HORTON, C. J. This was an action brought by C. H. Pratt against N. L. Ard to recover the possession of the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of

section 2, township 26, range 20, in Allen county. The case was tried by the court without a jury. The trial court found for the plaintiff, and the defendant brings the case here. A patent for the land was issued on the 3d day of November, 1873, to the Missouri, Kansas & Texas Railroad Company. It is conceded that whatever title to the land passed by the patent to the railroad company is in Pratt by virtue of a conveyance from the company to him. Ard claims an equitable title to the land, and possession thereof, under the provisions of the land laws of the United States. It appears from the record that Ard went upon the land in controversy, and also the N. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 11, township 26, range 20, the last of June, 1866. He broke 2 acres of prairie and 3 hedge-rows on the land. He went to the United States land-office at Humboldt, in this state, on the 14th day of July, 1866, to make a homestead application, and tendered the fees therefor to the register. At that time, he was a single person over 42 years of age, a citizen of the United States, and had never had the benefit of the homestead or pre-emption laws. Watson Stewart, the register, informed him that the land was situated within the granted limits of the Leavenworth, Lawrence & Galveston Railroad, and that he could only homestead 80 acres. The register also advised him that he could make a pre-emption filing on 80 acres of the land, and build a house thereon, and then prove up, and pay for it at \$2.50 per acre; that afterwards he could homestead 80 acres more, and by that plan obtain 160 acres. As the register would not allow Ard to homestead 160 acres, he made a pre-emption filing on the 80 acres in dispute. In the fall of 1866, he rebroke 2 acres of the land, hauled rails in the winter of 1867, and in the spring of that year built a rail-pen on the land. Up to that time he had no house on the land, but lived a half mile west, sleeping upon it once in a while, by a pile of rails. About the 1st of July, 1867, he went to the local land-office for the purpose of changing his pre-emption filing into a homestead. The register, N. S. Goss, told him he could not make the change, as all of the land had been withdrawn for the railroad, and that, if he should change his pre-emption filing, the land would revert to the railroad. He then asked the register if he could pay for the land under the pre-emption law. The register said to him he could pre-empt if he had a house on the land within 6 months from the time of making his filing, and was living on the land. He informed the register that it was about 8 months before he had erected a house on the land, and the register replied "he could not prove up and pay for the land, as he had not complied with the law." He applied to the local land-office to make proof and payment on August 9, 1872. A hearing was ordered by the local officers, and the case set for the 9th of September, 1872, and when it was heard both he and the railroad company appeared. The application

of Ard was rejected by the local land-officers and the United States land commissioner. He appealed to the secretary of the interior. The secretary on November 5, 1878, affirmed the decision of the commissioner of the land-office.

It is admitted that said section 2 was selected by the Missouri, Kansas & Texas Railroad Company as indemnity land on April 14, 1873; that it was patented to the Missouri, Kansas & Texas Railroad Company on the 3d day of November, 1873; that the land is over 12 miles from the Missouri, Kansas & Texas and the Leavenworth, Lawrence & Galveston Railroads; that it was patented to the Missouri, Kansas & Texas Railroad Company on the 3d day of November, 1873; that the railroad company filed a map for a definite location of its road on December 6, 1866; that the land is covered by the letters of withdrawal of the United States land commissioner of March 19, 1867, and April 30, 1867, marked "B" and "C," in case of Neer v. Williams, 27 Kan. 58, 59. The patent issued to the railroad company, and under which Pratt claims, must be regarded as valid and sufficient to convey the land, unless the facts of this case clearly show that the defendant is entitled to the particular tract in dispute under the land laws of the United States. Kansas City, L. & S. K. R. Co. v. Attorney General, 118 U. S. 682, 7 Sup. Ct. Rep. 66; Brewster v. Railroad Co., 25 Fed. Rep. 243; U. S. v. Railway Co., 37 Fed. Rep. 68; Burnham v. Starkey, 41 Kan. 604, 21 Pac. Rep. 624. To overcome the title conveyed by the patent, Ard must have shown that the land was not only subject to pre-emption or homestead, but that he had fully complied with all the requirements of either the homestead or the pre-emption law. Upon the hearing or contest over the land had before the local land-officers on September 9, 1872, the decision upon the facts of the case was against Ard. It was then determined that he had not complied with the provisions of the pre-emption law. The United States land commissioner, under the date of November 19, 1877, after an examination of the evidence transmitted to him by the local land-officers, wrote them as follows: "It does not appear just when Ard first had a dwelling-house, or took up his actual residence, on the land. It is clear, however, that he did not, within the time prescribed by the pre-emption law, make proof and payment; nor does it appear that he attempted to do so. I am of opinion that, from his own admissions, Ard did not, at the date the right of the road attached, have such a valid, subsisting claim as would have been capable of being perfected into complete title, or would have excepted the land from the grant to the company. Ard's application to make proof and payment is therefore rejected, and the title of the company, under its patent, will not be disturbed."

The general rule is that the decision of the United States land-officers upon controverted

questions of fact, in the absence of fraud, imposition, or mistake, is conclusive. *Johnson v. Towsley*, 13 Wall. 86; *Shepley v. Cowan*, 91 U. S. 330. If those officers misconstrue or misinterpret the law, their decision is subject to review and reversal, as the courts in such cases give relief. It is unnecessary, upon the question of pre-emption, to determine whether the withdrawals of the land on March 19, 1867, and April 30, 1867, by the department of the interior, were valid or not. Upon the failure of Ard to comply with the pre-emption law, his right under his pre-emption filing ceased, and, so far as his pre-emption was concerned, the land reverted to the United States or to the railroad company. Afterwards the United States conveyed its title to the railroad company, and the company to Pratt. Therefore Ard has not shown, upon the facts, that he is entitled, in law or in equity, to the tract in dispute by reason of his pre-emption filing. It was said in *U. S. v. Railway Co.*, supra, by BREWER, J.: "These observations of the supreme court admonish me that a patent once issued from the general government is not lightly to be disturbed, and that the perfect title supposed to be conveyed thereby must always be upheld, unless it be manifest that there has been in its issue a clear departure from the authority granted. If this be true in respect to a recent patent, much more it is true in reference to a patent so old as this."

We next come to Ard's claim under the homestead law. When he made his pre-emption filing on the 14th of July, 1866, he accepted the advice of the register of the land-office, and utterly abandoned his intention of homesteading. If the withdrawals of the land from private entry in 1867 were sufficient to defeat a settlement for the purpose of a homestead while the order was in force, even if improperly issued, then Ard obtained nothing under his homestead claim, because he abandoned that claim on the 14th of July, 1866. *Wolsey v. Chapman*, 101 U. S. 755. If the withdrawals of the land in 1867 were without authority of law, and not sufficient to defeat a homestead settlement, yet Ard can make no claim under the homestead law, because it was too late to initiate any homestead right after his pre-emption filing had failed. The land had been then legally selected by the railroad company. An adverse claimant had intervened and obtained rights. In whatever view we may consider the case, it does not appear that Ard so complied with either the pre-emption or homestead law as to obtain any legal or equitable claim to the land conveyed by the patent. It is urged that as the officers of the local land-office, in their conversations with Ard, gave him advice upon which he acted, he has rights and equities which are paramount to the patent title. Patents from the United States ought not to be brushed easily away upon oral conversations between claimants and the United States land-officers. "Parties place faith, and should place faith, in the

action of the government, and rely upon the title which its patent conveys." *U. S. v. Railway Co.*, supra. The local land-officers had no authority or power to dispose of the land otherwise than in accordance with the laws of the United States and regulations of the general land-office. If Ard accepted voluntarily the advice given, he cannot complain. If he did not wish to accept the rulings of the local land-officers, he should have appealed from any objectionable order. *Burnham v. Starkey*, supra.

Finally, it is requested that, if there is any doubt as to Ard's equitable title in the land, this case be continued to await the decision of the supreme court of the United States in the case of *U. S. v. Railway Co.*, involving the validity of a patent. That case antedates this. The final decision in this case does not rest with us. This case is simply passing through this court on its way to the supreme court of the United States. We do not think that the final decision by the supreme court of the United States should be delayed by the refusal of this court to pass upon the law questions presented. The land troubles in Allen county are of so serious a nature that all legal questions involved in this and similar cases should be finally disposed of as speedily as possible. In our opinion, Pratt has the legal title, and is entitled to possession of the land under the acts of congress referred to in the letters of withdrawal and the patent of November 3, 1873. It is also our opinion that Ard has not brought himself within any provisions of the acts of congress relating to the public lands, so as to hold possession, or to give him any legal or equitable title to the land as a homesteader or pre-emptor. The judgment of the district court will be affirmed. All the justices concurring.

(43 Kan. 425)

ARD v. BRANDON.

(*Supreme Court of Kansas. April 4, 1890.*)

PUBLIC LANDS—PRE-EMPTION AND HOMESTEAD ENTRIES.

Where a person makes a pre-emption filing upon 80 acres of public land, and claims the same under the pre-emption law, he cannot, before final proof, claim another 80 acres of land under a homestead entry, as residence is essential, both under the pre-emption and homestead laws.

(*Syllabus by the Court.*)

Error from district court, Allen county; *L. STILLWELL, Judge.*

Benton, Scott & Campbell, A. L. Allen, and William Lawrence, for plaintiff in error. *Hutchings & Keplinger*, for defendant in error.

HORTON, C. J. This was an action brought by Alexander Brandon against N. L. Ard to recover the possession of the N. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 11, township 26, range 20, in Allen county. Judgment was rendered for the plaintiff, and against the defendant, and Ard brings the case here. Brandon claims

title to the land through conveyances under a patent issued by the state of Kansas to the Missouri, Kansas & Texas Railroad Company on the 19th day of May, 1873. The railroad company filed its map of location on December 6, 1866. The land was actually selected by the Missouri, Kansas & Texas Railroad and the Leavenworth, Lawrence & Galveston Railroad on the 8th day of August, 1872. This selection was approved on April 10, 1873, under the act of Congress of March 3, 1863. The land was selected as indemnity land, and is over 12 miles from both roads.

In view of the recent decisions of *Burnham v. Starkey*, 41 Kan. 604, 21 Pac. Rep. 624, and *Ard v. Pratt*, ante, 646, (just decided,) but little need be said in this case. Ard claims to have settled upon the land in July, 1866. On the 14th of July, 1866, he went to the local land-office at Humboldt, and made his application to homestead the same, and tendered the fees. The register, Watson Stewart, informed him that the land was situated within the granted limits of the railroad, and that he could homestead 80 acres only. Instead of homesteading or filing upon the land in dispute, he made a pre-emption filing on the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 2, township 26, range 20, being 80 acres. The land in controversy had already been withdrawn under the act of congress of March 3, 1863. *Neer v. Williams*, 27 Kan. 58, 59. It is not necessary in this case to determine whether the withdrawal was valid or not. See, however, 5 Land Dep. Dec. 655; *Clements v. Warner*, 24 How. 394; *Bullard v. Railroad Co.*, 7 Sup. Ct. Rep. 1151; *Wolsey v. Chapman*, 101 U. S. 755-769. After having the conversation with the register, Ard elected to pre-empt another 80 acres of land. He did not insist upon his right to take the 160 acres. He took no appeal as to this land. He therefore abandoned the land as a homestead, and initiated a pre-emption upon another 80 acres. Residence is essential under both the pre-emption and homestead laws. As Ard claimed another 80 acres under pre-emption, he could not, at the same time, and before final proof, claim the land in dispute as a homestead. *Krichbaum v. Perry*, 5 Land Dep. Dec. 403. After his pre-emption filing failed upon the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of said section 2, on account of his non-compliance with the law, it was too late to make a homestead settlement upon this land. It had already been selected by the railroad company. The rights of that company had intervened to his prejudice, even if the prior withdrawal was not valid. The judgment of the district court will be affirmed. All the justices concurring.

(43 Kan. 427)

WOOD v. BEACH.

(Supreme Court of Kansas. April 4, 1890.)

PUBLIC LANDS—RAILROAD GRANTS—PRE-EMPTIONS.

1. Purporting to act within the provisions of the acts of Congress of March 3, 1863, (12 St. U. S. 772,) July 1, 1864, (13 St. U. S. 339,) and July 26, 1866 (14 St. U. S. 389,) granting lands to the state

of Kansas for railroad purposes, the department of the interior of the United States withdrew in 1867 all the odd sections within the limits of 20 miles of the located route of the railroads. In 1870, W. settled upon one quarter of an odd section so withdrawn, and made improvements thereon. During that year he made application to the local land-office to file on the land, but was informed that the land had been withdrawn, and his application was rejected. He continued to reside upon the land, and to make improvements thereon, and was upon the land when it was selected by the railroad companies, on August 8, 1872, but he took no appeal from any ruling or order of the local land-office. A patent was issued for the land to the Missouri, Kansas & Texas Railroad Company on May 19, 1873. Held, that the grantee of the railroad company has the legal title to the land, and is entitled to possession thereof, as against W.

2. Held, further, that W. never acquired any legal or equitable title to the land, either as a homestead or pre-emptor, under the acts of congress relating to public lands.

(Syllabus by the Court.)

Error from district court, Allen county; L. STILLWELL, Judge.

Benton, Scott & Campbell, A. L. Allen, and William Lawrence, for plaintiff in error. *Hutchings & Keplinger*, for defendant in error.

HORTON, C. J. This was an action in the court below, brought by J. M. Beach against Mary E. Wood, to recover the possession of the N. E. $\frac{1}{4}$ of section 1, township 26, range 20, in Allen county. Judgment was rendered for the plaintiff, and against the defendant, and Mrs. Wood brings the case here. The husband of Mrs. Wood, C. B. Wood, deceased, made a settlement upon the land on June 8, 1870, and made lasting and valuable improvements. J. M. Beach claims title through conveyances from the Missouri, Kansas & Texas Railroad Company and the Leavenworth, Lawrence & Galveston Railroad Company. The patent for the land was issued May 19, 1873. It appears from the record that the land is in the indemnity strip of the Missouri, Kansas & Texas and the Leavenworth, Lawrence & Galveston Railroad Companies. The land was withdrawn by the department of the interior on March 19, 1867, and April 30, 1867. The first order of the department was received at Humboldt on April 3, 1867, and the second on May 10, 1867. In the letter of March 19, 1867, from the department of the interior to the register and receiver at Humboldt, it was said, among other things, that: "You will, upon its receipt, proceed to mark on your plats the limits thereon designated, and will reserve from sale, location, or entry of any kind, except in case of *bona fide* pre-emptions initiated prior to withdrawal, all the odd-numbered sections within the ten-mile limits, and all the vacant lands between the ten and twenty mile limits. The even sections within the ten-mile or granted limits you will withdraw from private entry, and the same will only be subject to pre-emption and homestead entry at the rate of \$2.50 per acre until regularly offered at public sale, except in cases of *bona fide* pre-emptions where settlement was made prior to this withdrawal, wherein the party may make proof, and pay

for the same at \$1.25 per acre." In the letter of April 30, 1867, from the department of the interior to the register and receiver at Humboldt, it was also said: "Under date of March 19, 1863, I transmitted to you a diagram showing the designated line of route, with the ten-mile or granted limits of the Leavenworth, Lawrence & Galveston Railroad, for which a grant of land is made to Kansas by the act of congress approved March 3, 1863. By my letter accompanying the diagram, I ordered, with the approval of the secretary, that the odd sections within said limits should be withheld from further sale or location, pre-emption or homestead entries, except where inceptive pre-emption rights had attached prior to withdrawal, and directed that the even sections should be held subject to pre-emption and homestead entry at \$2.50 per acre. Herewith I inclose a map of the actual location of the route of said road, with that portion of the ten and twenty mile limits designated by sectional lines as falling within your district. You will now withhold from sale or location, pre-emption or homestead entries, all the odd sections within the limits of twenty miles, as laid down in the accompanying diagram; the even sections within the ten-mile limits being held at \$2.50, as under the former withdrawal." See *Kansas City, L. & S. K. R. Co. v. Attorney General*, 118 U. S. 682, 7 Sup. Ct. Rep. 66. The land was selected by the railroad companies on August 8, 1872, and approved April 10, 1873. At the time of the selection, Wood, with his family, was living on the land, but his settlement was not made until after the withdrawals of 1867.

Even if the withdrawals of the land in the indemnity strip by the department of the interior in 1867 were not fully authorized by the statute, so long as the order of withdrawal was actually in force it probably was sufficient to defeat any settlement for pre-emption or homestead. It was said in *Wolsey v. Chapman*, 101 U. S. 755: "It is conceded that the lands in controversy were actually reserved from sale by competent authority when the selection was made under the act of 1841. They were reserved, also, in consequence of the act of 1846. The proper executive department of the government had determined that, because of doubts about the extent and operation of that act, nothing should be done to impair the rights of the state above the Raccoon fork until the differences were settled, either by congress or judicial decision. For that purpose an authoritative order was issued, directing the local land-officers to withhold all the disputed lands from sale. This withdrew the lands from private entry, and, as we held in *Kiley v. Wells*, [not reported,] was sufficient to defeat a settlement for the purpose of pre-emption while the order was in force, notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal." When Wood, in 1870, made application to the local land-office at Hum-

boldt to file upon the land, he was informed the land had been withdrawn, and his application was rejected. Subsequently he renewed his application to the local land-officers, but never appealed from any of the rulings or decisions of that office. It does not appear that he tendered the fees at the time of his applications. He held possession of the land, but otherwise acquiesced in the ruling of the local land-officers. He never appealed to the land department at Washington. One of the duties of that department, in cases relating to the public lands, is to correct errors of law and of fact committed in the local land offices, when properly brought to its attention. *Krichbaum v. Perry*, 5 Land Dep. Dec. 403; *Burnham v. Starkey*, 41 Kan. 604, 21 Pac. Rep. 624; and *Ard v. Pratt*, ante, 646, just decided.) The judgment of the district court will be affirmed. All the justices concurring.

(43 Kan. 431)

STATE v. DONALDSON.

(Supreme Court of Kansas. April 4, 1890.)

CRIMINAL LAW—PLEAS IN ABATEMENT—GRAND JURY.

An indictment was found by a grand jury composed of two jurors whose names did not appear on the assessment rolls of the preceding year, and other jurors who resided in a city of the second class, and who had not yet registered for that year as voters, and still other jurors against whom no objections could be urged, and no corruption is shown or claimed. *Held* that, on a plea in abatement, it must be held that the grand jury was a legal and valid jury.

(Syllabus by the Court.)

Appeal from district court, Rice county; ANSEL R. CLARK, Judge.

J. H. Ricksecker, Lasley & Borah, and *D. A. Banta*, for appellant. *L. B. Kellogg*, *Atty. Gen.*, and *J. W. Brinkerhoff*, for appellee.

VALENTINE, J. This was a criminal prosecution against Charles B. Donaldson for selling intoxicating liquors in violation of law. The prosecution was based upon an indictment found by the grand jury on January 10, 1889. The defendant filed a plea in abatement, which upon the hearing thereof upon its merits was overruled by the court. Afterwards the case was tried upon its merits before the court without a jury, a jury having been waived, and the court found the defendant guilty upon the first count of the indictment, and sentenced him to pay a fine of \$100, and to be imprisoned in the county jail 30 days, and from this sentence the defendant appeals to this court. The only question presented to this court is whether the court below erred or not in overruling the defendant's plea in abatement. The plea was tried upon an agreed statement of facts, which showed, among other things, that the names of two of the grand jurors appeared upon the assessment rolls of the preceding year in the list of residents, but did not appear anywhere else on such assessment rolls, nor did such jurors appear to have

been assessed for that year. The agreed statement of facts also showed that others of the jurors were residents of the city of Lyons, a city of the second class, and that they had not yet registered as voters at the time when they served as grand jurors. The only grounds urged for a reversal in this case are that the names of two of the grand jurors did not appear on the assessment roll of the preceding year, and that some of the other jurors resided in a city of the second class, and that they had not yet registered for the year 1889 as voters. The indictment was found on January 10, 1889. It seems to be admitted that all the grand jurors were competent in every other respect, and that, except for the irregularities above mentioned, they were regularly drawn, summoned, impaneled, and sworn. Section 79 of the Criminal Code reads as follows: "Sec. 79. No plea in abatement, or other objection, shall be taken to any grand jury duly charged and sworn, for any alleged irregularity in their selection, unless such irregularity, in the opinion of the court, amounts to corruption, in which case such plea or objection shall be received." In the case of *State v. Marsh*, 13 Kan. 596, 600, the court, in commenting upon this section, used the following language: "And we think this section means that whatever body is duly charged and sworn as a grand jury, and recognized as such by the court, is to be taken, like any other officer or tribunal, as a *de facto* jury, whose acts are valid as to the public; and that no objection to the manner of its creation will be recognized unless it be one that implies corruption. A *de facto* prosecuting attorney legally prosecutes; a *de facto* judge legally tries and sentences; and a *de facto* grand jury may with equal propriety legally indict." The decision of this court in the case of *State v. Skinner*, 34 Kan. 256, 8 Pac. Rep. 420, seems to be conclusive upon the question now presented. In that case it seems that the names of some of the grand jurors were not found upon the assessment rolls of the previous year, but it was nevertheless held that although in that regard the essential provisions of the statute were disregarded, yet that such disregard was not a sufficient ground upon which to sustain a plea in abatement, unless it be further shown that such disregard amounted to actual corruption, and it was held that such was not the case. See, also, the cases of *Montgomery v. State*, 3 Kan. 263; *In re Tillery*, 43 Kan. 188, ante, 162, (decided by this court, Feb. 8, 1890;) and *State v. Copp*, 34 Kan. 522, 9 Pac. Rep. 233. Since this last-mentioned case was decided, section 74 of the Criminal Code has been amended so that the judge now, instead of the sheriff, as formerly, selects the talesmen to fill up the grand jury. Laws 1887, c. 167, § 2; Gen. St. 1889, par. 5138. The defendant refers to the case of *State v. Jenkins*, 32 Kan. 477, 4 Pac. Rep. 809, but that case is not applicable. Nothing was decided in that case with reference

to the selection or the validity of a grand jury. It has reference solely to the validity of a petit jury, and the question was raised in that case before the jury acted, and even before they commenced to act, and not afterwards, as in this case. Section 79 of the Criminal Code can have no application to petit juries, and there is no section of any statute that has any such sweeping force in curing irregularities in the summoning, drawing, or impaneling of petit juries as section 79 of the Criminal Code has with reference to the drawing, summoning, impaneling, swearing, and the actions of a *de facto* grand jury which has found an indictment, and with reference to such indictment. But, even where a petit jury has acted and found a verdict, the fact that one of the jurors was not a qualified elector, for the reason that he had not resided in the state six months, this fact not being known until after verdict, will not render the verdict invalid, nor even so irregular as to require a new trial. *State v. Hinkle*, 27 Kan. 308. The judgment of the court below will be affirmed. All the justices concurring.

(43 Kan. 439)

STATE v. McLAIN.

(Supreme Court of Kansas. April 4, 1890.)

INTOXICATING LIQUORS—ILLEGAL SALE—INFORMATION—AMENDMENT.

1. On a criminal appeal, when the record shows that the verdict of the jury is supported by some evidence, and has received the approval of the trial judge, this court will not set it aside.

2. It is not error for the court to allow an information to be amended, by inserting the name of the defendant in the body of the same, before the defendant pleads thereto.

(Syllabus by Green, C.)

Commissioners' decision. Appeal from court of common pleas, Sedgwick county; JACOB M. BALDERSTON, Judge.

Martin & Eckstein, for appellant. *L. B. Kellogg*, Atty. Gen., and *W. S. Morris*, for appellee.

GREEN, C. Bert McLain, with one Walter Rowley, was convicted of keeping and maintaining a place where intoxicating liquors were kept for barter and sale, under section 4, c. 165, Sess. Laws 1887, in the court of common pleas of Sedgwick county. McLain alone appeals. But two questions are raised by counsel for the appellant in their briefs: *First*. That there was no evidence to justify or support a verdict of guilty in this case. *Second*. That the court erred in permitting the county attorney to insert the names of the defendants in the body of the information during the arraignment.

Upon the first ground of error, that the evidence introduced did not connect the defendant with the offense charged in the information, we have to remark that this is a question of fact, and not of law, and this court cannot retry the case. We simply pass upon the record, as presented to us. We might say, however, in passing, that the

evidence in this case discloses the fact that a joint was kept up-stairs in a back room of a two-story brick building on Water street, in Wichita; that the defendant was found there by the officers; that he went into the place, and refused to open the door and admit the officers. Witnesses testified that they knew Bert McLain and Walter Rowley's place of business; that it was on Water street, near the middle of the block south of the post-office, between First and Douglass avenues, in a brick building, two stories high, with a blacksmith shop on the ground floor; that the defendant's place of business was up-stairs; that there were indications of a joint, such as an ice-box, keg of beer, some bottles, glasses, and general fixtures; that the defendant was frequently seen in front of this building; that when the door was opened by the officers 14 or 15 men were found there; that there was a bar, part of a keg of beer, glasses, and one bottle with a little whisky in it; that beer had been purchased there from a person behind the bar, whose face was known, but not his name, and, if either one of the defendants, it was McLain, and the impression of the witness was that it was McLain. We have carefully examined the evidence, as presented to us in the record, and do not feel that we are justified in disturbing the verdict of the jury, inasmuch as it has received the approval of the trial court.

The second ground of error complained of is disposed of by a reference to section 72 of the Code of Criminal Procedure, which authorizes the amendment of an information, in matter of substance or form, at any time before the defendant pleads thereto. The record shows that the defendants informed against refused to plead, and, while the county attorney was reading the information, it was discovered that the names of the defendants were not in the body of the information. Thereupon he asked leave of the court to insert the names of each of the defendants in the body of the information; and, the defendants still refusing to enter a plea to the information, the court directed a plea of not guilty to be entered for them. We fail to see any error in this ruling of the court. It is recommended that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 627)

CALLAN v. CITY OF JUNCTION CITY et al.

(Supreme Court of Kansas. April 4, 1890.)

MUNICIPAL CORPORATIONS—EXTENSION OF LIMITS—CONSTITUTIONAL LAW.

Section 1 of chapter 69 of the Session Laws of 1886 is not unconstitutional because it delegates legislative power to a judicial officer. The findings of fact made by a judge of the district court by virtue of that statute are the exercise of judicial power.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Geary county; M. B. NICHOLSON, Judge.

H. J. Humphrey, for plaintiff in error.
Thomas Dever, for defendants in error.

SIMPSON, C. This case was commenced in the district court of Geary county to restrain the city of Junction City, a city of the second class, and the other defendants in error, who were appointed appraisers to assess damages occasioned by laying out and opening streets through the land of the plaintiff in error, from further proceedings. An application was made to the district judge to grant a temporary restraining order, all parties being represented by counsel, and the writ was denied. The case is here to review the order denying the temporary writ. The case was heard below on the petition, answer, and reply; and the facts admitted by the pleadings are as follows: The land of the plaintiff in error is a three-cornered tract, containing about 28 acres. This tract of land was embraced within the corporate limits of the city by an ordinance approved July 9, 1889, that reads as follows: "An ordinance relating to and extending the corporate limits of the city of Junction City. Whereas, a petition in due form has, in manner provided by law, been presented to the Hon. M. B. NICHOLSON, judge of the district court of Geary, formerly Davis county, Kansas, asking said M. B. NICHOLSON, as judge of said district court, to make findings as to the advisability of extending the corporate limits of the city of Junction City so as to include therein the body of land adjacent to said city, and commonly known as 'Callen's Field,' the particular description thereof being as follows, to-wit: Lot two, (2,) section one, (1,) town twelve (12) south, range five (5) east of the sixth (6th) principal meridian in Kansas. And, whereas, said M. B. NICHOLSON, as judge of the district court of Geary, formerly Davis county, Kansas, on the 18th day of May, 1887, at the city of Council Grove, in Morris county, Kansas, upon the hearing of the matter contained in said petition, did find as follows, to-wit: (1) That it will be to the interest of the city of Junction City to extend the corporate limits thereof so as to include therein the body of land adjoining said city, more particularly described as follows, to-wit: Lot two, (2,) section one, (1,) town twelve (12) south, range five (5) east of the sixth (6th) principal meridian in Kansas, and generally known as 'Callen's Field.' (2) That it will be no manifest injury to the owners of the aforescribed land to have the same included within the corporate limits of said city of Junction City. And whereas, upon appeal taken from said findings to the supreme court of the state of Kansas by the owners of said described land, the said supreme court duly found and ordered and adjudged that it had no power to reverse, vacate, set aside, or modify said findings: Therefore, be it ordained by the mayor and

councilmen of the city of Junction City: Section 1. The corporate limits of the city of Junction City are hereby extended so as to include therein the body of land adjacent to said city, more particularly described as follows, to-wit: Lot two, (2,) section one, (1,) town twelve (12) south, range five (5) east of the sixth (6th) principal meridian in Kansas, and generally known as 'Callen's Field.' Sec. 2. This ordinance shall take effect and be in force from and after its publication once in the Junction City papers. CHAS. P. FOGELSTROM, Mayor. Approved July 9, 1889. (L. s.) Attest: J. B. CALLEN, City Clerk." This ordinance is pleaded by the defendants in error as justification for their acts. The reply of the plaintiff in error to this answer alleges that the statutes and ordinances under and by virtue of which all proceedings were had and acts done are, and were at the time, unconstitutional and void, and all of said proceedings were had without authority of law, and are null and void. The contention of the plaintiff in error is this: That section 1 of chapter 69 of the Laws of 1886 is unconstitutional for the following reasons: "*First.* That, as no remedy is provided for the aggrieved party by appeal to any court or tribunal whatever, it is in conflict with section 1, art. 14, of the constitution of the United States, and thus deprives a person of property without the due process of law. *Second.* It is in conflict with article 7 of the constitution of the United States, in this: that there is no provision made nor an opportunity given whereby a party at interest may obtain a trial by jury. *Third.* For the reason given, it is unconstitutional, being in violation of section 5 of the bill of rights of the state of Kansas, by violating the right of trial by jury. *Fourth.* That the compensation provided for by law for property taken for public use, as followed in this case, is inadequate, unjust, and an unconstitutional method, inasmuch as the appraisers provided for by law are authorized to take into consideration the benefits to be derived by, as well as the damages incurred to, the owner. *Fifth.* Said law of 1886 is unconstitutional, and in violation of section 18 of the bill of rights of the state of Kansas, which provides that 'all persons, for injuries suffered in person, reputation, or property, shall have remedy by due course of law and justice administered without delay.' This proceeding takes private property for public use without just compensation. *Sixth.* It is in conflict with section 4 of article 12 of the constitution of the state of Kansas, which provides that 'no right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation.' *Seventh.* Said law of 1886 is unconstitutional, and in violation of section 1, art. 2, of the constitution of the state of Kansas, in attempting to

delegate a legislative power to the judiciary. *Eighth.* The law is a special one, conferring corporative power."

As to the first objection assigned, it is only necessary to say that the change of the *status* of a tract of land from a farm to city lots, by the exercise of a power granted cities to extend their limits, is not a deprivation of property without due process of law. As to the second and third objections, it may be remarked that, if the extension of the limits of a city is a purely legislative power, as the plaintiff in error claims, such a power is not exercised by means of a jury trial. To the fourth objection a sufficient answer is found in the statement that neither the statute we are considering, nor the ordinance passed in pursuance of it, has anything to do with the question of compensation. He might raise the question embraced in the objection on an appeal from the award of the commissioners. The fifth objection mingles legislative and judicial considerations, but the pith of it is contained in the last sentence; but it must be obvious to all that a mere change in the use of land from agricultural to city purposes is not taking private property for public use. The case of Commissioners v. O'Sullivan, 17 Kan. 58, holds that section 4, art. 12, of the constitution of this state has application only to canals, railroads, and other similar cases in which some corporation takes a use or benefit in the land other than that enjoyed by the public. It is claimed in the eighth objection that the law is a special one, but this is entirely unsupported. By the express terms of the act, it applies to all cities of the second class.

This leaves the seventh objection to contain the spinal marrow of the contention of the attorneys of the plaintiff in error,—that by this statute the legislature attempted to delegate a legislative power to a judicial officer. The legislature of this state has in express terms conferred upon the judges of the district courts the power to hear and determine whether a proposed ordinance of a city of the second class, extending its limits so as to embrace certain described tracts of land, will be to the interest of the city, and will cause no manifest injury to the persons owning the land. If the findings of the district judge are in favor of the extension, the city is then empowered to pass such an ordinance. If the findings are against the extension, the city has no power to enact that ordinance. While the mode of procedure prescribed by the act conferring the power is different from that provided in the commencement and conduct of an ordinary action, yet all the essential features and requirements of that "due process of law" that is necessary to give vitality, force, and effect to judicial proceedings everywhere are scrupulously observed. The ordinance must be published in the official paper of the city a certain length of time, so as to give notice to all persons whose property interests are in any manner changed or affected by its oper-

ation. All such persons are given the right and opportunity to be heard on the question, and to offer evidence to show the injurious operation of the ordinance. The judge has power, after such a hearing, to approve, disapprove, or modify the proposed ordinance, and to make findings which, in effect, control the extension of the limits of the city. It would seem that by its terms the section in question does not require the judge to perform any other duty than one purely judicial in its character. The precise question, however, is that, while the exercise of the power conferred is through the instrumentalities of a court, with a close assimilation to the mode and manner of the ordinary exercise of judicial power, the power itself is legislative, and not judicial; that the manner of its exercise does not change the character of the power; that this is legislative power, although attempted to be exercised by the judge, and is violative of, and repugnant to, that distribution of power made by the constitution among the co-ordinate branches of the state government. This question is one about which courts of last resort differ, their decisions being both contradictory and antagonistic. It being a question of doubt, therefore, it should be resolved against the plaintiff in error, as it is a well-settled rule that the action of the law-making power must in all cases be applied, unless it is manifestly in contravention of the constitution. In favor of the jurisdiction under statutes similar in scope and expression to our own, see the following cases: *Kayser v. Trustees*, 16 Mo. 88; *Blanchard v. Bissell*, 11 Ohio St. 96; *Borough of Little Meadows*, 35 Pa. St. 335; *City of Wahoo v. Dickinson*, (Neb.) 36 N. W. Rep. 813; *Burlington v. Leebrick*, 43 Iowa, 252. Against the jurisdiction, see the cases of *City of Galesburg v. Hawkinson*, 75 Ill. 152; *Shumway v. Bennett*, 29 Mich. 453; *State v. Simons*, (Minn.) 21 N. W. Rep. 750; *People v. Carpenter*, 24 N. Y. 86. There may be other cases, but these are sufficient to indicate the conflict on the question. Our own view can be expressed in a few sentences.

The power to create and regulate municipal corporations, define, extend, or limit their boundaries, and commit to them certain subjects for local regulation, is the exercise of a purely legislative authority. An organic command requires this legislation to be applicable to classes, and not special as to each municipality. A general law is passed authorizing cities of the second class to extend their boundaries so as to include adjacent territory, on certain conditions, or depending on certain facts. The existence of these conditions or of these facts are made the subject of judicial inquiry and determination; and this is done to protect the property interests of the land-owners, and not to commit the whole control to a city council whose interests in the city might induce arbitrary action against the land-owner. In other words, the judge says in each case whether or not the

conditions authorizing the absorption by the city exists as to this particular piece of land. The legislature can confer on the city council power to make a local regulation, and this necessarily involves discretion as to what it shall be; but the question as to whether that discretion has been exercised within the limitations of the power delegated is a judicial question, pure and simple, and nothing else. This section of the statute does not confer upon the judge the power to extend the limits of the city in the first instance, but only to approve or disapprove the ordinance of the city making the extension. If that part of the section requiring the district judge to make and certify the findings had been omitted, and the city council had then passed an ordinance to extend the limits of the city so as to include this land in controversy, could it be doubted but that the owner, in a proper action instituted for that purpose in the district court of Geary county, could contest with the city its power, under the delegated authority, to include these tracts of land? We think not. To avoid separate suits of this character by individual land-owners, and before property interests are affected and perplexing complications arise, this section provides for a determination of the rights of all the parties in one action. The practical effect of this statute is to submit to the district judge, in advance of its enactment, the question of the legality of the city ordinance. The legislature of this state can only create and regulate municipal and other corporations by general laws. It cannot either enlarge or reduce the corporate limits of a city of the second class (*Gray v. Crockett*, 30 Kan. 138, 1 Pac. Rep. 50; *Wyandotte v. Wood*, 5 Kan. 603) by special enactment. It is manifestly absurd to contend that, when any one of the cities of the second class want to extend their limits so as to include adjacent territory, the only manner in which it can be done is by a legislative enactment extending the limits of all the cities of the second class in the state. The particular necessities of each city of the second class are such that, coupled with our constitutional provisions, the only manner in which their corporate limits can be extended is by a general law authorizing the extension on such terms and conditions as will not result to the injury of owners of adjacent property, or will not empower a city government to arbitrarily include agricultural land within the corporate limits. These very things the statute we are considering attempts to do, by making the existence of equitable conditions dependent on the findings of a judicial officer, and regulating the power of the city council to make such an extension by such findings. Such questions are not always open to judicial inquiry. It would be difficult to state circumstances under which the courts would not be open for a resident of a city, or an adjacent land-owner, to contest the validity of any action of the city government that does injury to his property, whether within or without

the corporate limits. The manner of the extension, and the terms and conditions upon which the extension can be made, must be determined by the legislature; but whether the manner has been observed, the terms complied with, or the conditions exist, in the very nature and essence of things, are judicial questions. The effect of this statute is to anticipate litigation, and to decide in advance, after due notice and a proper hearing, the very questions that adjacent land-owners, who consider themselves aggrieved, might otherwise seek to have determined by various forms of action. This statute, like almost every other legislative act, may by its practical operation provoke judicial inquiry as to its meaning, requirements, or effect, or as to the power of the legislature to pass it. Similar statutes have been in force in this state for years, and cities of the third class have been organized by judges of the district courts. Certain powers have been conferred upon the probate judge with reference to these matters. *Mindenhall v. Burton*, 22 Pac. Rep. 548. We had occasion in the case of *City of Emporia v. Smith*, 42 Kan. —, 22 Pac. Rep. 617, to say that "no good reason has been given, and we do not believe that a good reason can be given, why the law complained of is unconstitutional." It is true that the question now discussed was not presented in this case, but we did consider and determine in that case that the legislature could confer on cities of the second class the power to so extend their limits as to include adjacent land that had been subdivided into lots and blocks. On the general propositions involved, the case of *Kirkpatrick v. State*, 5 Kan. 673, is in harmony with what we have said in this case.

All these considerations are influential in controlling our opinion in favor of the exercise of the power conferred by the statute on the district judges of the state. The question of homestead does not arise. There is no averment in the petition that the land was occupied as a homestead. It is recommended that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 533)

In re LATTA.

(Supreme Court of Kansas. April 4, 1890.)

INSANITY—INQUEST—HABEAS CORPUS.

1. Where a person adjudged to be insane, and committed to an asylum, seeks to be released from custody upon a writ of *habeas corpus*, the only question to be considered is whether the court had jurisdiction to render the judgment and make the order that were rendered and made. Mere errors and irregularities in that court cannot be reviewed or corrected in a *habeas corpus* proceeding.

2. A complaint having been made before a justice of the peace that L. had made a felonious assault upon another, and stating that he was of unsound mind, the justice issued a warrant reciting the allegations of the complaint, including the statement that L. was of unsound mind, and commanding that he be brought before some magistrate of the county, there to be dealt with accord-

ing to law; and this warrant was filed in the probate court. A statement was entered by the probate judge on the records of his court that one T. filed information from a certain justice of the peace that L. was insane, and dangerous to be at large, and ordering that an inquest thereon be held. In addition, the probate judge reduced to writing, and placed in the hands of the sheriff, an order which recited that information had been filed in the probate court that L. was insane, and a person of unsound mind, and commanded him to bring L. into the probate court on a certain day, then and there to hear and answer what might be alleged, and to abide the judgment of the court in the premises. Upon this order he was brought into court, a hearing had before a jury duly impaneled, and was adjudged to be insane. Held, in a proceeding in *habeas corpus*, that the foregoing was sufficient to confer jurisdiction upon the probate court to hold the inquiry and render the judgment.

(Syllabus by the Court.)

Habeas corpus.

J. M. Mason and John W. Day, for petitioner. L. B. Kellogg, Atty. Gen., for respondent.

JOHNSTON, J. The petitioner represents that he is illegally restrained of his liberty, and unlawfully confined at the Kansas State Insane Asylum at Ossawatimie by A. H. Knapp, the superintendent of the asylum, and he seeks a release by the writ of *habeas corpus*. Upon an inquest held May 21, 1885, before the probate court of Wyandotte county, William R. Latta was declared to be insane, and a fit person to be confined in the insane asylum. He was taken to the insane asylum at Topeka, where he remained until March, 1886, when he was discharged from the asylum as not restored to his right mind, and sent to California to remain with friends who resided there. He subsequently returned to Kansas, and on December 16, 1889, an application was made to the probate court for an order committing him again to the asylum, for the reason that he was still insane, and so disordered in his mind as to endanger the person and property of those with whom he came in contact. Upon this application a writ was issued commanding the sheriff to bring Latta into the probate court, when an examination was had, which resulted in an order directing that he be sent back to the insane asylum. Immediately thereafter an affidavit was filed by several parties before the probate court alleging that Latta had been restored to his right mind, and should not be recommitted to the asylum. The probate court thereupon determined that a hearing should be had upon the facts alleged, and directed that a jury be impaneled to inquire into the facts. On December 28, 1889, a jury was impaneled, and numerous witnesses were examined in regard to the mental condition of the petitioner, and the jury found that he had not been restored to his right mind. The court thereupon adjudged that Latta had not been restored to his right mind, and was now insane, and incapable of managing his own affairs, and directed that he be recommitted to the insane asylum. He then applied to the judge of the

district court of Wyandotte county for a writ of *habeas corpus*; and after a hearing, in which considerable testimony was offered, the application was denied. Failing there, another application for a discharge upon a writ of *habeas corpus* has been presented here.

The only question we can consider is whether the probate court of Wyandotte county had jurisdiction to render the judgment and make the order that were rendered and made. Mere errors and irregularities in that court cannot be reviewed or corrected in this proceeding. The writ of *habeas corpus* cannot be employed to review the rulings of a court acting within its jurisdiction. If that court had jurisdiction, the inquiry is ended here; and hence many of the matters discussed by counsel, and which might have been inquired into on appeal or proceeding in error, cannot be considered on this application.

It is contended that the inquest of May 21, 1885, in which the petitioner was adjudged to be insane, was not based on a sufficient information to give the probate court jurisdiction. While the inquest was initiated in a somewhat informal and peculiar manner, we think the preliminary steps were sufficient, when taken together, to give jurisdiction. It appears that a complaint was made before a justice of the peace, charging that Latta had made a felonious assault upon one Tabler, and also stating that he was of unsound mind. Upon that, a warrant of arrest was issued, reciting the allegations of the complaint, including the statement that he was of unsound mind, and commanding that he be brought before some magistrate of the county, there to be dealt with according to law; and this warrant was filed in the probate court. The following was formally entered on the records of that court: "Now comes C. Tabler, and files information from Rezin Wilcoxon, J. P., that one William R. Latta, of Wyandotte county, is insane, and dangerous to be at large. It is therefore ordered by the court that inquiry thereon be had; and ordered that said William R. Latta be brought into court, and that *venire* and subpoena issue, returnable May 21, 1885, at 2 o'clock P. M. [Signed] R. E. CABLE, Probate Judge." The following order to the sheriff was issued by the probate judge, and made a matter of record: "Whereas, information has been filed in the probate court of Wyandotte county, aforesaid, that one William R. Latta, of and in the county of Wyandotte, is insane, and a person of unsound mind, these, therefore, command you that you bring the said William R. Latta into the probate court aforesaid, at the court-room in the court-house in the city of Wyandotte, on the 21st day of May, 1885, at 2 of the clock in the afternoon of that day, if he be found in a condition to bring into the court, then and there to hear and answer what may be alleged, and to abide the judgment of the court in the premises, and that you certify how you executed this writ."

This order was signed by the probate judge, and the seal of his court attached; and there is an indorsement thereon that the order was received on the 20th day of May, 1885, and served on the following day by bringing Latta into court.

There are two methods of instituting an inquest,—one, where an unofficial person gives information in writing to the probate court that any one is insane, and asks that an inquiry be had, and, if the court finds that there is good cause for the exercise of its jurisdiction, it shall cause the facts to be inquired into by a jury, (Gen. St. 1889, par. 8677;) the other, where any judge of the probate court, justice of the peace, sheriff, coroner, or constable shall discover any person, a resident of his county, to be of unsound mind, it is made his duty to apply to the probate court for the exercise of its jurisdiction, and the same proceedings shall be had as in the case of an information by unofficial persons, (Gen. St. 1889, par. 8680.) The latter provision does not expressly require that the information shall be in writing; but, inasmuch as it is a proceeding which affects the liberty of the citizen, it is safer to require that the information given by the officer should be in writing, or should be reduced to writing by the probate judge to whom it is communicated. In the present case the information comes from a justice of the peace, and the probate judge commits the same to writing, and in the entry which he makes recites that Latta is "insane, and dangerous to be at large." Upon this information he directed that an inquiry be had. The same matter is also reduced to writing in the order directed to the sheriff, wherein it is recited that information has been given that Latta is insane, and a person of unsound mind, and in which the court directs that he be brought before the court upon a certain day for the purpose of holding an inquiry. These matters were all in writing, and made a matter of record in the probate court. Together, they fairly informed all interested parties of the claim that Latta was insane, and that an inquiry was to be held respecting his sanity. Such proceedings are somewhat summary and informal in their character. The statute prescribes no special form of information, and does not even provide that it shall be verified by the oath of the person giving the information. The substantial requirement is that it shall be such as to satisfy the court that there is good cause for the exercise of its jurisdiction, and also to fairly inform the party and his friends of the nature and purpose of the inquest. If this requirement was met, defects in the form of statement and irregularities in the course of the inquiry cannot avail now, and in this proceeding. In criminal cases the fact that a necessary averment of an information is imperfectly stated, or stated in very general terms, will not be held bad after verdict and judgment, although it might have been held insufficient on demurrer or motion to quash. *State v. Knowles*, 34 Kan.

393, 8 Pac. Rep. 861. In this matter we think enough was set forth in the writings mentioned, although defectively stated and presented, to confer jurisdiction upon the probate court. Although it is earnestly urged that a mistake has been made with reference to the sanity of the petitioner, it appears that the inquiry was open and public, and the judgment rendered was regular; and, if any error was committed in the hearing, no attempt was made to correct the same upon appeal or by review. Then, again, it appears that a very thorough examination was made in December, 1889, with regard to the present condition of Latta's mind; it being alleged in an affidavit that he had been restored to his right mind, and was not insane. Several days were consumed in the inquiry, and scores of witnesses were examined; and it was then found that he had not been restored to his right mind, and was then insane. No appeal has been taken from this judgment, and it stands unreversed. If a mistake has been made, as claimed, the statute affords ample remedies to re-examine and retry the question whether he is insane, and a fit person to be confined in the asylum. The writ of *habeas corpus*, however, cannot be converted into a proceeding for a review or retrial of the facts. The petitioner will be remanded. All the justices concurring.

(43 Kan. 352)

WALBURN *et al.* v. CHENAULT.

(Supreme Court of Kansas. March 8, 1890.)

SUPERSEDEAS BONDS—ACTIONS—PARTIES—PAID-UP STOCK.

1. A petition filed in an action brought to recover on a *supersedeas* undertaking, which describes in a general way the execution of the undertaking, the action in which it is given, and the liability which has arisen thereon, and then attaches a copy of the same as an exhibit, which is specifically referred to and made a part of the petition, is not insufficient because the undertaking is not again set out at length in the body of the petition.

2. Where the judgment superseded was assigned, with an agreement that the proceeds should be paid to several parties, and in which the assignee has a beneficial interest, he may, when a liability arises on the undertaking, bring an action thereon, in his own name, without joining with him all the parties who are to receive a part of the proceeds of the judgment, and for whose benefit the action is in part prosecuted.

3. The assignment is not rendered invalid for the reason that the attorneys who obtained the judgment claim a lien thereon, and that the assignment was made subject to such lien.

4. Where property is conveyed to a corporation in payment for certain shares of its capital stock, and the transaction is made a matter of record, and subsequently approved and ratified by all the officers and stockholders of the corporation, such shares will, in the absence of fraud, be treated as full paid; and especially so in a case where a party afterwards purchases the same shares of stock, and subsequently becomes a creditor of the corporation by purchasing its mortgage bonds with the full knowledge of the nature and terms of the original transaction, and such party or his assignee thereafter seeks to enforce a liability against holders of such stock, on the ground that it was not full paid.

(Syllabus by the Court.)

v.23 p.no.11—42

Error from district court, Bourbon county; C. O. FRENCH, Judge.

On November 14, 1887, Waller Chenault brought an action against A. W. Walburn and C. F. Drake, to recover upon a *supersedeas* bond. The following is a copy of the petition:

"The said plaintiff above named, for a cause of action against the said defendants, A. W. Walburn and C. F. Drake, says: That at the regular September term of this court, 1885, on the 5th day of October, 1885, in a case then pending in the district court of Bourbon county, state of Kansas, wherein Francis Tiernan was plaintiff, and the St. Louis, Fort Scott and Wichita Railroad Company was defendant, the said Francis Tiernan recovered a judgment against the said St. Louis, Fort Scott and Wichita Railroad Company for the sum of twenty thousand one hundred dollars and fifty cents, and the costs of said suit, amounting to five hundred dollars. That afterwards the said railroad company took the said case to the supreme court of the state of Kansas upon proceedings in error, and filed a *supersedeas* bond or undertaking in said district court, as provided by law in such cases, to secure the payment of said judgment, interest, and costs, should the same be affirmed in said proceedings in error in the supreme court; upon which said undertaking the said defendants A. W. Walburn and C. F. Drake were sureties for said railroad company. A copy of said undertaking is hereto annexed, marked 'A,' and made a part hereof. Afterwards, for a valuable consideration, the said Francis Tiernan assigned and transferred the said judgment and said undertaking to this plaintiff, who is now the legal owner and holder thereof. That in said supreme court such proceedings were had that said judgment was affirmed by said supreme court, and the liability of said defendants thereby accrued upon said undertaking for the payment of said judgment, interest, and costs. That these defendants and the said railroad company refuse to pay said judgment, interest, and costs, or any part thereof. That of the said judgment, the sum of thirteen thousand six hundred and fifty-three dollars and thirty cents bore interest at the rate of ten per cent per annum, and the sum of six thousand four hundred and forty-seven dollars and twenty cents bore interest at the rate of seven per cent per annum, from the date of rendition thereof. Wherefore plaintiff demands judgment against said defendants for the sum of twenty thousand six hundred dollars, with ten per cent interest thereon from October 5, 1885, and for costs herein." Here follows Exhibit A.

On January 3, 1888, the defendants filed their answer, a copy of which is as follows:

"(1) The defendants, for answer, deny all, each, and every allegation in plaintiff's petition contained.

"(2) The defendants, for a second and fur-

ther answer, say that the St. Louis, Fort Scott and Wichita Railroad Company was incorporated under and by virtue of the laws of the state of Kansas on February 23, 1880, for the purpose of building a line of railroad from Fort Scott in a westerly direction, with a capital stock of \$2,000,000, divided into 20,000 shares, of \$100 each. That afterwards an amended charter was filed fixing the capital stock at \$7,000,000, divided into 70,000 shares, of \$100 each. The defendants further say that on the 18th day of January, 1887, in a certain suit then pending in the circuit court of the United States for the district of Kansas, in which the Union Trust Company of New York was complainant, and the St. Louis, Fort Scott and Wichita Railroad Company and John F. Dillon and George J. Gould, trustees, were defendants, in the original bill, and John F. Dillon and George J. Gould, trustees, were complainants, and the St. Louis, Fort Scott, and Wichita Railroad Company and the Union Trust Company of New York were defendants, in the cross-bill, the said Dillon and Gould, by the decree of said court, recovered a judgment against the said St. Louis, Fort Scott and Wichita Railroad Company for the sum of \$1,077,428.25; and afterwards, on the 27th day of May, 1887, the said court rendered a further decree confirming the sale of the railroad and property of the said St. Louis, Fort Scott and Wichita Railroad Company, (made in pursuance of the terms of said decree of January 18, 1887,) wherein and whereby it was ordered, adjudged, and decreed that the said John F. Dillon and George J. Gould, trustees, have execution against the St. Louis, Fort Scott and Wichita Railroad Company for the sum of \$1,107,386.48, with interest thereon from that date at the rate of — per cent. per annum which said judgment is still in full force and wholly unsatisfied; and there is now due thereon the said sum of \$1,107,386.48, together with the interest thereon as herein stated. The defendants further say that the said Dillon and Gould, trustees, caused an execution to be duly issued against said railroad company, and the same to be placed in the hands of the marshal of the district of Kansas, which was duly returned, "no goods or chattels, lands or tenements, found whereon to levy." And defendants say that said railroad company was then and now is wholly insolvent, and did not then have, nor has it now, any property out of which any portion of said judgment could be collected. The defendants further say that the said Dillon and Gould, trustees, have assigned and transferred the said judgment to these defendants, who are now the owners and holders thereof. The foregoing allegations are introductory to this, the second count of this answer, and form a part of the succeeding count hereof. The defendants, further answering, deny that the judgment obtained in the case of Francis Tiernan against the said

St. Louis, Fort Scott and Wichita Railroad Company, and the undertaking executed by these defendants with reference thereto, have been assigned and transferred to the plaintiff for a valuable consideration; and they deny that the plaintiff at the time of the commencement of this action was the legal owner and holder thereof. They say that said pretended assignment was made for the purpose and with the intent of defeating the collection of any claim which these defendants might have against said Tiernan, and was and is colorable, fraudulent, and void, and that it was made, if at all, with the intent to hinder, delay, and defraud the creditors of said Tiernan of their just and lawful debts. The defendants, further answering, say that the said Tiernan, on the 13th day of February, 1881, procured to be issued to him, and as the president of said railroad company did issue to himself, \$1,200,000 of the capital stock thereof, without having paid anything therefor; and on the 5th day of February, 1883, procured to be issued, and as the president of said railroad company issued, to himself \$8,000 of the capital stock thereof, without having paid anything therefor whatsoever, but that the same was issued wholly without consideration. The defendants further say that, at the time of the issuance of said stock to the said Tiernan, the plaintiff was acquainted with all the facts concerning the same, and participated in the issuance thereof. Wherefore these defendants pray that the said Tiernan and the plaintiff be required to pay for said stock so issued to said Tiernan an amount equal to any claim which the plaintiff may have against these defendants, and that the said amount so required to be paid by said Tiernan and the plaintiff for said stock be set off against any claim which the plaintiff may have against these defendants.

"(3) For a third and further answer, the defendants say that all of that portion of the second count assigned as introductory is true, and it is by reference made a part of this count; and, further answering, defendants say that on the 3d day of February, 1883, at which time the plaintiff was the treasurer of the St. Louis, Fort Scott and Wichita Railroad Company, he procured to be issued to himself, without any consideration being paid therefor, \$100,000 of the capital stock of said railroad company, and the plaintiff accepted the stock so issued, and received the benefit thereof. Wherefore the defendants pray that the plaintiff be required to pay the par value of said stock, to-wit, \$100,000, to the end that the same may be applied towards the payment of the judgment which these defendants have against the said railroad company; and, if it shall be found that these defendants are indebted to the plaintiff, then so much of said sum of \$100,000 may be set off against such indebtedness as equals the same, and that the defendants may have judgment against the plaintiff for the bal-

ance. And the defendants pray for all such other, further, and different relief as in law, equity, and good conscience they are or may be entitled to."

The reply of the plaintiff was a general denial of the allegations of the answer. The case was submitted to the court without a jury, and, on February 28th, a judgment was rendered in favor of the plaintiff for \$24,843.65. The defendants complain of the judgment, and ask for a reversal.

J. H. Richards and *A. A. Harris*, for plaintiffs in error. *J. D. McCleverty* and *E. M. Hulett*, for defendant in error.

JOHNSTON, J., (after stating the facts as above.) On October 5, 1885, Francis Tiernan recovered a judgment in the district court of Bourbon county against the St. Louis, Fort Scott & Wichita Railroad Company for \$20,100.50, and the railroad company, desiring to have the case reviewed in the supreme court, gave a *supersedeas* undertaking, with *A. W. Walburn* and *C. F. Drake* as sureties. That judgment was assigned to *Waller Chenault*, and affirmed in this court. When the case was finally determined, the railroad company was insolvent, and the assignee of the judgment thereupon brought this action against the sureties on the *supersedeas* undertaking, and obtained the judgment now sought to be reversed.

One of the points made by the plaintiffs in error against the judgment is that the petition did not state facts sufficient to constitute a cause of action. The only basis for this claim is the omission of a copy of the undertaking from the body of the petition. In stating the facts upon which the plaintiff relied, the pleader described, in a general way, the undertaking, the action in which it was given, the result of the action, and the liability which has arisen on the undertaking. He then attaches a copy of the undertaking, and expressly states that it is made a part of the petition. What more is required? The copy of the instrument is attached to the petition, and is also made a part of the same. We think the petition was sufficient. Civil Code, §§ 118, 123.

Another point is that the action is not brought by the real party in interest. The Tiernan judgment was assigned to *Chenault* in writing, as follows: "This instrument witnesseth that, for value received, I hereby assign to *Waller Chenault* the benefit of the judgment obtained by me in the case of *Francis Tiernan vs. The St. Louis, Fort Scott and Wichita Railroad Company*, obtained in the district court of Bourbon county, Kansas, in October, 1885. The said judgment is for about \$19,000; and the entire judgment is assigned, subject, however, to a reservation of the unpaid attorneys' fees, *E. M. Hulett* and *J. D. McCleverty*, yet unpaid in said case. This September 24, 1887. FRANCIS TIERNAN." An entry of the assignment was also appended to the judgment on the jour-

nals of the district court in which the judgment had been given. The consideration for the assignment was a large indebtedness of *Tiernan* to *Chenault's Bank*, or the bank of which he was president; and it was agreed that the proceeds of the judgment should be applied in payment of the indebtedness, and to the discharge of an attorney's lien which had attached to the judgment. The assignment was absolute, and is such as to vest in the assignee the whole legal title. He had such a beneficial interest in the proceeds of the judgment that he could bring an action in his own name, without joining other parties, who by collateral agreement might be entitled to a share of the proceeds. Under section 28 of the Code, it is provided that an action may be brought by a "person with whom or in whose name a contract is made for the benefit of another, * * * without joining with him the person for whose benefit it is prosecuted." The assignee was authorized to receive the proceeds of the judgment, and the assignment is such as to afford complete protection to the plaintiffs in error against a second action by other persons interested in the proceeds of the judgment, and to whom the assignee may be required to account. The plaintiffs in error were not limited or cut off from any defense by reason of the assignment, and the absence of parties to whom the assignee must account cannot cause any future embarrassment to the plaintiffs in error. In *Williams v. Norton*, 3 Kan. 295, it was held that where a note was assigned to one with a beneficial interest in the proceeds of the same, and with an understanding that he was to receive the money on it, such person was the real party in interest, within the meaning of the Code, and might sue in his own name, although he was not entitled to apply to his own use the whole of the proceeds. *Allen v. Brown*, 44 N. Y. 228; *Pom. Rem. § 132*. The action was properly brought in the name of the assignee, and no prejudice could result to the plaintiffs in error by his failure to join other parties interested in a part of the proceeds of the judgment, or by his failure to allege his liability to them.

The further point, that the judgment was only partially assigned, cannot be sustained. Prior to the assignment, the attorneys who obtained the judgment claimed a lien thereon for their services, but, according to the testimony, the entire judgment was assigned, and was transferred subject to the lien. It cannot be regarded as a splitting up of the judgment to the annoyance of the debtors, which the law prohibits. The assignee is placed in the position of the assignor, and a discharge can be obtained by the debtors in the same way as though *Tiernan* still held the judgment. *Chenault* takes the whole judgment by the assignment, but, as we have seen, he is required to apply a portion of the proceeds to the discharge of the attorneys' claim.

It is next contended that, "if the plaintiffs in error are liable in this action on the *super-*

sedes bond, they are entitled to, have so much of their claim against Tiernan on account of the illegal issue of stock as equals the amount due on the bond set off against the same." This involves one of the questions that was considered and disposed of in the case of *Railroad Co. v. Tiernan*, 37 Kan. 606, 15 Pac. Rep. 544. The principal facts are fully stated in that case, and it is needless to repeat them at length here. It appears that Tiernan and his associates, who had purchased the franchises and road-bed of the Fort Scott, Humboldt & Western Railroad Company, organized the St. Louis, Fort Scott & Wichita Railroad Company, in 1880, with an authorized capital of \$7,000,000. After the organization was perfected, the new company purchased the property and franchises of the old for \$200,000 in cash or bonds, and \$3,600,000 of the capital stock of the new company. The stock was issued and delivered, in accordance with the terms of the sale, among the owners of the old road, but only a part of the cash payment was made. The purchase of the property of the old company was ratified and approved on the 6th of March, 1881, at a meeting of the stockholders of the new company, all of the stock voting in favor of the ratification. Subsequently the company proceeded with the construction of the railroad, but in 1882 Tiernan, who was president of the company, in behalf of himself and his associates, entered into negotiations with the Missouri Pacific Company or with Mr. Gould in behalf of that company, for the sale of the stock which they owned, and the contract was made by which the stock and interest of the Fort Scott road was transferred to the Missouri Pacific Company for \$125,000. This contract was consummated and the transfer completed in February, 1884. In addition to the stock purchased by the Missouri Pacific people, they also came into possession of mortgage bonds issued by the Fort Scott Company for the construction of its road, and, default being made, the mortgage was foreclosed in the United States circuit court, and a judgment rendered against the Fort Scott Company for \$1,107,386.48. An execution was issued on this judgment, which was returned unsatisfied, and the Missouri Pacific people have assigned the judgment to Walburn and Drake, the sureties on the *supersedeas* undertaking, to protect them from liability on such undertaking, and also with a view of using the same as a set-off against the claims of Chenault in the present action.

With this judgment as a basis, the plaintiffs in error now claim that the shares of stock taken by Tiernan in exchange for the property sold to the railroad company, as well as those purchased by Chenault from Hill, one of the members of the company, were not fully paid; and that Chenault, for himself and as the assignee of Tiernan, may be required to account for that which was not paid, to the extent of his judgment. They seek to have the contract by which the stock

of the railroad company was issued in exchange of the old road-bed and other property set aside as fraudulent in this indirect manner, and that, too, where the stock has long since been transferred to the parties whom the plaintiffs in a certain sense represent. We have only mentioned some of the leading facts in the case, for the reason that a more detailed statement has been given and commented on in *Railroad Co. v. Tiernan*, 37 Kan. 606, 15 Pac. Rep. 544; and the conclusions there reached control to a great extent the disposition of the present case. It is true, as claimed, that the value of the property given by Tiernan and his associates for the stock was far below its par value; but the stock of the company at that time was of little value. The transaction received the consent and ratification of all the stockholders, and, as was determined in *Railroad Co. v. Tiernan*, supra, it was fair and open in all respects. The character of this transaction was a subject of consideration in the case of *Stewart v. Railroad Co.*, 41 Fed. Rep. —, before the circuit court of the United States for the district of Kansas, where FOSTER, J., held that the transaction must be closely scrutinized, and must have been free from fraud or collusion, and characterized by entire good faith. He remarked: "It does not appear in this case that there was any deception or fraud practiced by the parties. The property was open to inspection, and the approximate cost of constructing it was easily obtainable. Its value to the company for the purpose desired was not difficult to ascertain. I find no evidence of any representations as to its value or cost or purchase price made by the parties selling; but there is record evidence that the board of directors, several months after the sale, and with full knowledge of the transaction, formally approved and ratified it, and not only that, but subsequently, at a meeting of all the stockholders, the transaction was again ratified. Now, who was defrauded or deceived?"

In both of the cases last mentioned, the good faith of this transaction was inquired into and sustained. Although the amount of stock issued for the purchase of the property was large, it had only a nominal value, and it was delivered and treated by all parties as full paid. The fact that the property was overvalued will not, in the absence of fraud, create a liability against the stockholders. There is no testimony showing false statements by Tiernan or his associates, or any concealment of facts or suppression of the truth by them. Every officer, stockholder, and party who had any interest in the company was acquainted with the nature of the transaction and the terms of sale. The records of the corporation disclose all the facts pertaining to the sale, and even the parties who subsequently purchased stock, and the mortgage bonds upon which the judgment sought to be set off was rendered, were not deceived or defrauded with respect to the contracts or capital of the company. There

were no creditors of the company then existing, and the mortgage bonds upon which the judgment was rendered against the corporation were not issued for years afterwards, and not until after the stock and property of the railroad company had been purchased by the Missouri Pacific people. It is true that the unpaid subscription to the capital stock of a corporation constitutes a trust fund for the benefit of the creditors. It is also true that when, by any fraudulent device, stock not paid for is issued, the holder thereof may, in a proper proceeding, be required to account either to the corporation or its creditors for that which is unpaid. This is not a proceeding, however, against the stockholders, for the record discloses that Tiernan and Chenault parted with their stock in February, 1884, and transferred it to the parties in whose favor the judgment was rendered. Neither is it a direct action against stockholders to set aside the contract of sale on account of fraud, but this branch of the case is in fact a re-examination of the question determined in *Railroad Co. v. Tiernan*, supra, except that the defense, instead of being presented by the former parties, is now presented by their assignees. *Phelan v. Hazard*, 5 Dill. 45, was an action brought by a creditor against a shareholder, after the corporation had become insolvent and had been dissolved. Property had been given to the corporation in payment of shares of stock which it was claimed were not full paid. The record of the corporation showed the whole transaction, and that the property was by agreement received as the consideration for the stock which was issued as full paid. The proof showed that the shares were paid for exactly as they were originally agreed to be paid for, by a conveyance of property to the corporation, and it was held that the stock must be regarded as paid for and the agreement conclusive unless rescinded or impeached for fraud, and this could not be done unless the attack was directly made. Judge DILLON, who rendered the opinion, stated "that the contract is valid and binding upon the corporation and the original share-takers, unless it is rescinded or set aside for fraud, and that, while the contract stands unimpeached, the courts, even where the rights of creditors are involved, will treat that as a payment which the parties have agreed should be a payment."

In addition to the finding in the former case, that the transaction was made in good faith and without fraud, we have the general finding of the district court upon like facts in the present case, in favor of the defendant in error, which must be treated as another finding that the transaction was free from fraud. Judge THOMPSON, in a discussion regarding the payment of stock by conveyance of property, states the following conclusion: "A corporation may take in payment of its shares any property which it may lawfully purchase. Such a transaction is not *ultra vires* or void, but is valid and binding upon

the original share-takers and upon the corporation, unless it is rescinded or set aside for fraud. While such a contract stands unimpeached, the courts, even where the rights of creditors are involved, will treat that as payment which the parties have agreed should be payment." *Thomp. Liab. Stockh.* § 134, and cases cited. If the stock is treated as full paid, then, in the absence of fraud, there can be no liability against either the former or the present stockholders. Under the findings of the court, the stock in question must be regarded as full paid; but, even if it was not, then the liability, if any, would arise against the purchasers of the stock from Tiernan and his associates, who are the present holders, and who transferred the judgment in question to be used as a defense by plaintiffs in error. When the parties purchased stock from Tiernan and his associates, they knew how it had been acquired, and the manner and extent of payment that had been made; and, if the conveyance of the property was not full payment of the stock, they knew that fact. The transfer of the stock, with notice that it was not full paid, shifts the liability from the outgoing to the incoming stockholders. The vendee is substituted not only to the rights, but to the liabilities, of the vendor, and while he holds the stock may be called upon for the unpaid subscription. *Ang. & A. Corp.* § 534. The vendees of the stock in this case not only had a complete understanding of how the stock was purchased and paid for, but it also appears that they only paid to Tiernan and his associates \$125,000 for stock of the par value of \$3,500,000. They became creditors of the corporation after they had purchased the stock, as the bonds upon which the judgment was rendered were dated November 1, 1884, and the stock contracted for in 1882 was fully transferred in February, 1884. From these facts it is clear that the transaction complained of could not, in any event, be regarded as a fraud upon them, or upon the assignees of their claim. It is unnecessary to discuss the principles which would apply if the transaction had been found to be fraudulent, or what would be the rights of an innocent stockholder or creditor against a stockholder who obtained his shares fraudulently, without making payment for the same, in a case where the proper proceeding was instituted to set aside the fraudulent transaction, and compel the stockholder to pay the amount due upon his shares. Nor need we enter again upon a discussion of what has already been determined in *Railroad Co. v. Tiernan*, supra. We find no error in the record, and hence the judgment of the district court will be affirmed. All the justices concurring.

(19 Or. 71)

DURBIN v. KUNEY et al.

(Supreme Court of Oregon. April 7, 1890.)

JOINT DEBTORS—CONTRIBUTION—LIMITATION.

1. The right of contribution affects only the relation of the co-debtors or sureties between them.

selves, and is entirely distinct from and independent of the contract with the creditor. The contract is made for the benefit of the creditor, and simply expresses the relation between the co-debtors and the creditors.

2. The right of contribution does not spring from contract, but rests on general principles of natural justice, that, when one has discharged a debt or obligation which was a common charge for the benefit of all, he has a right to call upon his co-debtors for contribution.

3. Nor does it matter, in regard to the right of contribution, whether the parties are jointly or severally liable, nor whether they are bound by the same or separate instruments, or whether they knew of each other's engagements or not, nor whether they are liable in the same or different amounts, provided their obligation be assumed in respect to one and the same transaction.

4. The right of contribution arises only when one has paid more than his proportion of the debt; and that is the time when the statute of limitations begins to run.

(Syllabus by the Court.)

Appeal from circuit court, Marion county; R. P. BOISE, Judge.

This action was brought against the defendants for contribution. The facts are in substance these: On the 15th day of August, 1879, the plaintiff, Durbin, and the defendants, Kuney & Sayers, parties to this action, gave two promissory notes of that date to R. M. Wade & Co., each for \$162.50, due in three and fifteen months after date, respectively, and signed by all the parties, in payment for a harvester purchased by them; and the plaintiff, Durbin, paid off both notes as follows: On September 24, 1881, he paid R. M. Wade & Co. \$203.63, the amount then due on the three-months note. On May 20, 1883, he paid R. M. Wade & Co. \$80; September 6, 1886, \$59.15; November 3, 1887, \$116.10,—which constitute the various sums paid on the other note, and judgment which was rendered against the parties. As one cause of defense, the defendant Sayers pleads that the note paid off on September 24, 1881, by the plaintiff, Durbin, is barred by the statute of limitations. A motion was made to strike out this defense, which was overruled by the court; and on the trial of the cause the court gave the following instructions, to which exceptions were taken: "If plaintiff has paid off and taken up one of the notes in the complaint more than six years before the commencement of this action, he cannot recover, in this action, any of the money so paid on that note, because a cause of action accrued at the time of such payment, and expired by the statute of limitations before commencement of this action;" "that, if the statute of limitations has run against one note, that note is out of this case; and that the utmost that the plaintiff can recover, in that event, would be one-half of the money paid on the other note." There was judgment for defendants, and plaintiff appeals.

S. T. Richardson and M. W. Hunt, for appellant. Geo. H. Burnett, for respondents.

LORD, J., (after stating the facts as above.) The facts disclose that the notes were found-

ed upon one transaction, and were given for one debt; but the instruction treats the right of the plaintiff to recover contribution as dependent on the contract, expressed by the notes, and subject to the statute of limitations according to the order of their payment. The right of contribution affects only the relations of the joint debtors or sureties between themselves, and is entirely distinct from and independent of the contract with the creditor, and cannot be varied by an act of his. The contract is made for the creditor, and for his benefit, and is intended simply to express the relation between the joint debtors or sureties and the creditor. It depends more upon a principle of equity than upon contract; the fundamental principle being that, whenever persons are *in equali jure*, a common liability is a common charge. The justice of the rule is manifest. It rests upon the broad principle of justice that, when one has discharged a debt or obligation which was a common charge for the benefit of all, he has a right to call upon his co-debtors for contribution. Originally, it was enforceable only in courts of equity, but in later days courts of law have assumed jurisdiction on the ground of an implied promise on the part of each joint debtor or surety to contribute his share to make up the loss. 4 Amer. & Eng. Cyclop. Law, p. 1 et seq. The remedy in equity, in many respects, is superior; being more extensive and more effectual in its operation than a court of law. But the theory of an implied contract upon which courts of law assumed jurisdiction, DENIO, J., thought "assumed for the purpose of enforcing the equitable principle of contribution, and not upon the idea that any such contract actually exists." Barry v. Ransom, 12 N. Y. 466. So that, in a case where contribution on principles of natural justice ought to be enforced, the right to it exists in equity and law; for, as Baron EYRE says: "If we take a view of the cases, both in law and equity, we shall find that contribution is bottomed and fixed on general principles of justice, and does not spring from contract, though contract may qualify it." Dering v. Earl of Winchelsea, 1 Cox, 321, 2 Bos. & P. 270. And this general principle of justice is, says Judge Story, "As all are equally bound, and are equally relieved, it seems but just that in such a case all should contribute in proportion towards a benefit obtained by all; * * * since no one ought to profit by another man's loss where he himself has incurred a like responsibility." 1 Story, Eq. Jur. § 493. And he says, also, that "it matters not, in case of a debt, whether the sureties are jointly and severally bound, or only severally, or whether their suretyship arises under the same obligation or instrument, * * * if all the instruments are for the same identical debt." Id. § 495. In Norton v. Coons, 3 Denio, 132, BRONSON, C. J., said: "The doctrine of contribution among sureties is founded on a general principle of equity and justice. Sureties are in

æquali jure, and must bear the burden equally. Contribution may be enforced whether they were bound jointly or severally, by the same or by different instruments, and although the party who sues did not know, at the time he became a surety, that the defendant was also a surety. The order of time in which they became bound is not a material inquiry. The only question is whether they were in fact sureties for a principal debtor, and in relation to one and the same transaction. Courts of law have borrowed their jurisdiction on this subject from courts of equity; and along with it they have taken the maxim that equality is equity." So that it may be said, in regard to the right of contribution, that it does not matter whether the parties are jointly or severally bound, or only severally, nor whether they are bound by the same or separate instruments, or whether they knew of each other's engagements or not, nor whether they are liable in the same or different amounts, provided their obligation be assumed in respect to one and the same transaction. *Chaffee v. Jones*, 19 Pick. 260; *Aspinwall v. Sacchi*, 57 N. Y. 331; *Armitage v. Pulver*, 37 N. Y. 494; *Warner v. Morrison*, 3 Allen, 566.

It is clear, then, that the doctrine of contribution does not depend upon contract, but is bottomed and founded on principles of natural justice. The contract upon which they are co-debtors or sureties only expresses the relation between them and their creditor, and is entirely distinct from the right of contribution, which exists between themselves. The notes were made to R. M. Wade & Co., and expressed the relation between them as joint debtors and creditors; but they were made for the benefit of the creditor, and represented but one debt. The right of contribution to the co-debtor paying more than his share does not rest upon the notes, but on the broad principles of justice, that when he discharged the debt which they were equally bound with him to discharge, and removed thereby a common burden, it is but just that they should refund to him a ratable proportion.

The facts concede that it was agreed between the plaintiff, Durbin, and his co-debtors, the defendants, that he was to pay one-half of the debt; and, as between them, his payment has reference to it, and not to the contract or notes, and his right to contribution arises as soon as he pays more than his share of such debt. "The right of action for contribution among co-sureties accrues when one has paid more than his proportion of their liability. * * * It is an equity which springs up at the time the relation of co-sureties is entered into, and ripens into a cause of action when one surety pays more than his proportion of the debt" for which they were bound. *Camp v. Bostwick*, 20 Ohio St. 337; *Bonham v. Galloway*, 13 Ill. 68; *Ponder v. Carter*, 12 Ired. 242. And when the plaintiff paid more than his proportion of the debt a cause of action ripened;

and that is the time when the statute of limitations begins to run. *Mills v. Hyde*, 19 Vt. 59; *Boardman v. Paige*, 11 N. H. 431.

According to the facts, at the time when the plaintiff paid the \$203.63, he only paid one-half of the whole debt; and it is indisputable, if the defendants had paid the other half, that the plaintiff would have no right of contribution; and therefore he had not paid more than his proportion, and until then a right to contribution cannot arise. And, as the statute of limitations does not begin to run until the plaintiff has paid more than his proportion of that debt, it did not begin to run when he paid the sum of \$203.63. His right of contribution is not measured by, nor founded upon, the notes, but on the payment of more than his proportion of the debt which the notes represented. He is not substituted to the place of the creditor, and seeking relief on that basis, for in that case the instruction might be correct; but his equity springs out of the debt as to which he and the defendant stand *æquali jure*, and must bear the burden equally. We think, therefore, the instructions were erroneous statements of the law as applicable to the facts, and the judgment must be reversed, and a new trial ordered.

(18 Or. 550; 20 Or. 28)

STATE ex rel. HEATH v. KRAFT.

(Supreme Court of Oregon. March 19, 1890.)

CITY COUNCILMAN—QUALIFICATION—SECRECY OF BALLOT.

1. Sections 24 and 27 of the charter of the city of Albina, (Sess. Acts 1889, pp. 240, 241,) when construed together, require a person elected as councilman of the city to qualify on or before the first Monday in July next after his election, and a failure to do so may work a forfeiture of his office; but forfeitures are never favored, and, before such forfeiture could be claimed or enforced by the city, its officers must have performed all the duties imposed by the charter in relation to such election and qualification. *Held* further, in case of a tie vote for councilman on the face of the return, the duty to qualify does not arise until the result of the election shall be finally determined in some mode provided by law.

2. When, on the face of the returns of an election for councilman of the city of Albina, two candidates had an equal number of votes, if such votes were all legal, there was a tie, and no election. But, if illegal votes were cast for both or either of the candidates, the election was not thereby vitiated, but the true result could only be known by deducting the illegal votes; and in such case the person elected is not bound to anticipate the result of an investigation by taking the official oath before it could be ascertained whether he was elected or not.

3. Where the charter of a municipal corporation makes the common council the judges of election and qualification of its members, but not the final or exclusive judges, the jurisdiction of the courts remains, and the remedy conferred on the council is cumulative. But, *quære*, is not such legislation prohibited in the state by article 7, § 9, of the constitution?

4. The secrecy of the ballot is for the lawful voter only, and not for the spurious. The public policy involved does not extend to the voter who has voted illegally. He may be required to disclose for whom he voted, and in any case the exemption from obligation to disclose the character of his vote can be claimed only by the voter himself. If, when the question is put to him as a witness, he sees fit to answer it, there is no objection to his testimony.

5. Where the trial court erred in the admission of evidence, and the appellate court can clearly see that it was impossible for such evidence to have injured the appellant, the judgment will not be reversed.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

The object of this proceeding is to try the title to the office of councilman of the city of Albina, in Multnomah county. The complaint, in substance, alleges that on the 19th day of June, A. D. 1889, a general election was duly held for councilman in each of the wards of the city of Albina, to elect one councilman for the term of one year, and one councilman for the term of two years; that at said election the relator, George W. Heath, and the said defendant, were candidates for the office of councilman for the term of one year in the Second ward of said city; that at said election the relator received the greatest number of votes for said office in said ward, and was thereby duly elected to be a member of the common council of said city for the period of one year from the 1st day of July, 1889; that on said last-named day the defendant usurped said office of councilman, and has ever since continued to withhold the same from the relator. The defendant's answer, after denying the material allegations of the complaint, alleges as a further and separate defense that the said George W. Heath did not, by the first Monday in July, next after his alleged election to the office of councilman for the term of one year, in the Second ward of said city Albina, nor at any time, qualify therefor, by either taking or filing with the police judge of said city any oath of office, whereby he was, and should have been, deemed to have declined said office, and did decline such office, and that there was a vacancy therein. For another and separate answer the defendant alleges that on the 1st day of July, 1889, there was a vacancy in the office of member of the common council of the city of Albina, from the Second ward of said city, for the term of one year, commencing on said 1st day of July, upon a failure of the voters of said ward to elect an incumbent for said office at the general election held in said city on the third Monday in June, 1889, and also by the failure of any person elected to said office to qualify therefor as required by law; and thereupon, on said 1st day of July, 1889, the defendant was duly appointed by the common council of said city to fill said office from said last-named date until the first Monday in July, 1890, and thereupon the defendant, within five days thereafter, to-wit, on the 2d day of July, 1889, duly qualified for said office, by taking and filing with the police judge of said city the oath of office by law in such case required, and then entered upon, and has ever since continued in, the discharge of the duties of said office to which he was so appointed. By the reply it appears that the relator and defendant were both candidates for said office at said general elec-

tion, and that the judges and clerks of said election wrongfully, and contrary to the fact, certified and returned that the relator and the defendant had each received an equal and the highest number of votes cast for councilman in said ward, and that there was no election; that thereafter, and within the time for qualifying for said office, the relator appeared before the police judge of said city of Albina and offered to qualify by taking and filing the requisite oath of office; but said police judge wrongfully refused to permit said relator to take or file said oath, or to qualify. The new matter in the answer is denied by the reply. A trial resulted in a judgment of ouster against the defendant, from which he has appealed to this court.

P. L. Willis, for appellant. Henry E. McGinn, Dist. Atty., and Paul R. Deady, for respondent.

STRAHAN, J., (after stating the facts as above.) Several questions were presented by counsel for the appellant, which will be separately noticed. Counsel for appellant argue that the relator, having failed to take and file his oath of office with the recorder on or before the first Monday in July next after his election, forfeited his office, if he were otherwise entitled to it, and created a vacancy which the common council was entitled to fill by appointment. It being substantially admitted on the record that the relator did not so qualify, if this contention can be sustained, it must reverse the judgment, and terminate this case. Section 24 of the act incorporating the city of Albina provides. (Sess. Acts 1889, p. 240:) "The term of office of every person elected to office under this act shall commence on the first Monday in July next after his election, and terminate accordingly, except as otherwise provided in this act; and by such time such person must qualify therefor by taking and filing with the police judge the oath of office. * * * or he shall be deemed to have declined, and the office considered vacant." Section 25 prescribes the form of the oath. Section 27 relates to vacancies in office, but does not declare that a failure to qualify within the time specified shall create a vacancy; but section 28 declares: "A vacancy in any office caused by the failure of any person elected to qualify therefor as prescribed in section 24, or made by or consequent upon the judgment of any court, or consequent upon a failure to elect, or in any of the cases specified in section 27, must be filled as follows." And then follows a statement of how vacancies shall be filled. Construing sections 24 and 28 together, it was the manifest intention of the legislature to declare a forfeiture in case the officer elected failed to qualify within the time prescribed by section 24. But forfeitures are never favored, and, before such forfeiture could be claimed or enforced by the city, its officers must have performed all the duties imposed upon them by the charter; and, when the relator applied to the police judge, to take and file the

proper oath of office before him, that officer was bound to discharge the duty of administering such oath, and filing the same in his office. It is doubtless true the oath might be taken before any officer authorized to administer oaths, but it could not be filed elsewhere than with the police judge. If the construction contended for is sound, the police judge might cause a forfeiture of any office in the city by simply locking up his office, and disappearing from the city, during the day or time such oath must be filed, thus rendering it impossible to comply with the charter within the time limited. It is claimed that his refusal to administer and file the oath of office within the time has the same effect. It was in effect suggested that the consequences might have been avoided by the relator by going before some other officer, and taking the oath of office, and then offering to file the same with the police judge. Still another objection to the appellant's contention: Sections 19 and 20 of the charter provide a canvassing board for the city, whose duty it was to certify the result of the election; and by that certificate it appeared that each of them received 53 votes. If these votes were all legal, there was no election; but if illegal votes were cast on either or both sides, the election was not thereby vitiated, but the true result could only be known by deducting the illegal votes in each or either case. In such event, I do not think that the person elected was bound to anticipate the result of an investigation by taking the official oath before it could be ascertained whether he was elected or not. In such case, I have no doubt the qualification might be postponed until after the result of the election was ascertained in some one of the ways provided by law.

2. This brings us to another question necessary to be considered. Section 22 of the charter is as follows: "A certificate of election is primary evidence of the facts therein stated; but the council is the judge of the qualifications of mayor and of its own members, and, in case of a contest between two persons claiming to be elected thereto, must determine the same, subject, however, to the review of any court of competent jurisdiction." Counsel for appellant insisted that this section vested the jurisdiction now invoked in this case in the common council in the first instance, and that the court could only review the action of the council. It must be observed that this charter does not vest the council with exclusive or final jurisdiction over the subject. If it did, the case would be governed by *Simon v. Common Council of Portland*, 9 Or. 437. But here the council is simply vested with jurisdiction which is neither final nor exclusive, with the power of review in the courts. That power would have existed in the courts without the saving clause in the charter. Where the remedy given before the council is not made final nor exclusive, it must be regarded as merely cumulative, leaving the jurisdiction already vested in the courts under the general statutes unaffected; and this

view of the law is fully supported by *People v. Hall*, 80 N. Y. 117. But is not the legislature restrained, by article 7, § 9, of the constitution, from divesting the jurisdiction of the circuit courts over any inferior court, officer, or tribunal?

3. Upon the trial in the court below the state introduced evidence tending to prove that Dawson, Roenick, Glover, Sealy, and Shriver voted at said election for councilman, and that they were not legal voters. They were then severally called and questioned as to for whom they voted, and several of them testified that they voted for Kraft; to which evidence the defendant objected, and duly saved proper exceptions. This presents a new question in this state, and one that is conceded to be important. There can be no doubt that one important object of the system of voting by ballot is secrecy, so that the voter may freely exercise his choice, uninfluenced by power, station, or the conditions by which he is surrounded; but this protection extends to the lawful voter only, and not to the spurious. It is the lawful voter around whom the law throws its protection, and not to him who assumes to exercise the sacred prerogative of a voter without being duly qualified. *McCrary. Elec. § 459*, states the rule thus: "It is very clear that the rule which, upon grounds of public policy, protects the legal voter against being compelled to disclose for whom he voted, does not protect a person who has voted illegally from making such disclosure. To give to that rule this wide scope would be to make it shield alike the right and the wrong, the honest and the dishonest. It was intended to protect the inviolable secrecy of an honest ballot, and thus the purity of the ballot-box. It was not intended to be used in aid of the schemes of corrupt men to defeat the will of the people. It follows that, having proven that A. voted at the election in question, and that he was not a legal voter, he may be required to testify as to the person or persons for whom he voted." This authority would seem to effectually dispose of this exception, but there remains another answer, equally as conclusive and satisfactory. The exemption from obligation to disclose the character of his vote can be claimed only by the voter himself, and the question can, therefore, be put to the witness; and, if he sees fit to answer, there is no objection to the testimony. *Paine, Elec. § 766*.

4. If the ballots that were offered in evidence had been introduced for the purpose of overturning an official count, then, clearly, the plaintiff did not identify them, or show their careful preservation, so as to entitle them to be introduced in evidence, (*Fenton v. Scott*, 17 Or. 189, 20 Pac. Rep. 95;) and I am strongly disposed to think that there was not enough shown to introduce them for any purpose. But they in no manner affected the result to the detriment of the defendant. On the contrary, he appears to have gained one vote by their introduction. In such case,

the error, if error it was, was harmless. We can clearly see that the party complaining was not, and could not have been, prejudiced by the introduction of the improper evidence. We do not, therefore, feel called upon to reverse the judgment for that reason.

These were all of the questions made in this court, and their examination requires an affirmation of the judgment appealed from.

(18 Or. 557)

DE WITT v. KELLY.

(Supreme Court of Oregon. March 24, 1890.)

EXECUTION AGAINST GARNISHEE.

The proceedings of a sheriff upon an execution against a garnishee under subdivision 1 of section 284 of the Code are not affected by the act amending the attachment law, approved October 21, 1878, constituting section 157 of the Code.

(Syllabus by the Court.)

Appeal from a decree of the circuit court for the county of Multnomah, given upon the pleadings in the suit; the plaintiff therein having failed to file a reply to the new matter of defense set up in the answer.

The suit was against the defendant, as sheriff of said county, to enjoin him from selling certain real property belonging to the plaintiff, situated in the city of Portland, under and by virtue of an execution issued upon a judgment recovered in an action brought by Rosenfeld, Smith & Co., a corporation formed under the laws of the state, and against one F. M. De Witt. The plaintiff claimed that the proceeding of the sheriff was illegal, and that the sale of the property would cast a cloud upon her title to it, and cause her irreparable damage. The defendant filed an answer to the complaint denying the allegations therein,—that he had no authority to levy upon and sell the property, and that a sale of it would cast a cloud on plaintiff's title to it, and cause damage to plaintiff,—and for a further defense alleged that, at the time of the commencement of the action brought by Rosenfeld, Smith & Co. against said F. M. De Witt, a writ of attachment was issued therein against the property of the latter, and, said writ of attachment having been served on the plaintiff herein, she made to said sheriff a written answer thereto, or certificate, as follows: "In the circuit court of the state of Oregon for the county of Multnomah. Rosenfeld, Smith & Co., plaintiff, v. F. M. De Witt, defendant. To the Sheriff of Multnomah County: In answer to the garnishment served on me in the above-entitled cause, I say that at the date, to-wit, 11th of February, I did owe the defendant, F. M. De Witt, \$1,000, but did not have any property belonging to him. [Signed] MRS. OTELIA DE WITT." That said answer was made a part of the sheriff's return upon said writ, and was filed in said court, and became a part of the judgment roll in said action. That on the 1st day of July, 1889, a judgment was entered in the action against F. M. De Witt, and in favor of Rosenfeld, Smith & Co., for the sum of \$5,641.88, with

interest and costs, and that in and by said judgment it was ordered and adjudged that the property attached be sold or applied in the payment of said judgment. That on the 24th day of September, 1889, an execution upon the said judgment was issued and delivered to the sheriff for service. That upon receipt of said execution the sheriff demanded of said garnishee, Otelia De Witt, the payment of said \$1,000 admitted to be due to the said F. M. De Witt, and, she having failed and neglected to pay the same, he, the said sheriff, duly levied upon the property described in the complaint, and advertised it for sale. The plaintiff filed a demurrer to the said answer for the reason that it did not state facts sufficient to constitute a defense or counter-claim. The court overruled the demurrer, and, the plaintiff having failed and refused to file a reply to the new matter of defense, rendered a decree against the plaintiff dismissing her complaint, which is the decree appealed from.

Milton W. Smith, for appellant. F. R. Strong, for respondent.

PER CURIAM. The appellant's counsel contends: *First*. That Rosenfeld, Smith & Co., in the original attachment suit, when Otelia De Witt answered that she owed \$1,000, should have taken judgment on that answer against her, so that she might be protected from a second payment thereof. *Second*. That, having elected to take an order for the sale of the attached property, the plaintiff in the original attachment suit could not proceed to sell the property of the garnishee without first having obtained title to the property attached; that section 157 of the Code, as amended by the act of October 21, 1878, changed the former rule concerning attachments, and, if the plaintiff in the attachment proceedings elected to take this remedy, it should have acquired title of claim against Otelia De Witt before proceeding against her,—citing *Carter v. Koshland*, 12 Or. 492, 8 Pac. Rep. 556. The statute does not permit a plaintiff in an attachment suit to take judgment against a garnishee on account of a debt owing by the garnishee to the defendant in the suit except where the latter refuses to furnish to the sheriff a certificate of the indebtedness, or when the certificate given is unsatisfactory, as provided in section 152 of the Code, as it is only in those cases that the proceedings provided for in sections 163, 165, 166, and 169 of the Code can be invoked. Hence the rule laid down in *Carter v. Koshland*, 12 Or. 492, 8 Pac. Rep. 556, and as modified in the same case in 13 Or. 615, 12 Pac. Rep. 58, has no application to the facts in this case. Here the appellant, after being garnished, gave a certificate admitting the indebtedness, which authorized the sheriff, under subdivision 1 of section 284 of the Code, it appearing that the debt was due, and she not having paid it to the sheriff on demand, to levy on her property for the amount thereof.

It is very questionable whether the new matter in the answer is sufficient to show that the debt in question was duly levied upon by the respondent as sheriff under the writ of attachment; but, as no objection is taken to the proceeding on that ground, the court does not feel called upon to consider it. The decree appealed from will therefore be affirmed.

(19 Or. 45)

BUSH v. CITY OF PORTLAND.

(*Supreme Court of Oregon. March 24, 1890.*)

**MUNICIPAL CORPORATIONS—DRAINAGE OF STREETS
—SURFACE WATER.**

1. A municipal corporation is not liable to an owner of land situated within its corporate limits for not permitting surface water which had been accustomed to flow over the land to be turned down the gutters of one of its streets in order to prevent its flowing in its former course, although the improvement of the street obstructed its flow in the direction in which it naturally ran.

2. Where the city of P. improved one of its streets running north and south, and thereby turned surface water which had been accustomed to run down a slope, on the west side thereof, across the same and a certain other piece of land, to where it emptied into a creek which ran across the land, and the improvement of the street turned the water down the gutter on the west side of the street, where the city authorities first designed it to run permanently, but, it being subsequently ascertained that the course of the water down the gutter was injuring the street and abutting lots below, the said authorities turned it across the street, and by means of a box gutter conveyed it through said land to the said creek near where it formerly ran, and B. thereafter, having purchased the land, diverted its course down the gutter on the east side of the street, where it ran until complaint was made by the abutting lot-owners on that side of the street, when the city authorities turned it back again into the said box gutter, and the evidence failed to show that the street was not properly improved, or that conveying the water through the box gutter was more injurious to the land than it would have been if allowed to flow in its natural channel course, *held*, that B. was not entitled to recover damages against the city in consequence of the turning of the water from the gutter of the street into the box gutter.

3. A municipal corporation is not liable to an owner of real property for an indirect injury to the property occasioned by the improvement of its streets, where the injury is a necessary consequence of the improvement, and the work is properly performed.

(*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county.

The respondent commenced an action in said court against the appellant, a municipal corporation, for the recovery of damages. He alleges in his complaint that he was the legal owner and in possession of a certain tract of land situate in the corporate limits of the city of Portland; that on or about the 15th day of December, 1888, the said appellant, by its agents, officers, and employes, wrongfully and unlawfully cut the gutters on Fifteenth street, and caused large quantities of surface water to flow over and across the said land, whereby the soil thereof was being washed off, to his damage, etc. The appellant filed an answer to the complaint denying that it, by its agents, officers, or em-

ployes, or otherwise, did the act therein complained of. And for a further defense averred that in the year 1888 the respondent wrongfully and unlawfully constructed an open gutter or drain in Fifteenth street, and caused the said surface water referred to in the complaint, which was then flowing, and had for many years prior thereto been flowing, over and across said lands, to flow down the same, which, being insufficient to convey the water, caused great damage and injury to the property holders living along the line of said street; that thereupon the officers of the city cut said gutter or drain so constructed by respondent, and caused said surface water to flow over and upon said land, the same being a street and highway, to-wit, Mill street; that said cutting of said drain was done to prevent damages to owners of property on said Fifteenth street, and was the same cutting complained of in the complaint. The respondent filed a reply denying the new matter set up in the answer. The case was tried by jury, who returned a verdict in favor of the respondent and against the appellant for the sum of \$50, upon which the judgment appealed from was entered.

W. H. Adams, for appellant. *C. M. Idleman*, for respondent.

THAYER, C. J., (after stating the facts as above.) It appears from the bill of exceptions herein that about the year 1884 the city of Portland caused Fifteenth street to be improved in front and west of the land described in the complaint, and caused a stream of water, which ran a considerable quantity in winter-time, but was dry during the summer, to run down the open gutter on the west side of said street. Said gutter, however, overflowed as soon as the winter rains came, and washed out a large amount of earth, thereby damaging the street and property below. That thereupon parties supposed to be in the employ of the city constructed a box gutter across said street, and across the land in question, to the bed of a larger creek, which flowed through said lands from the south. Said land at that time was owned by one A. Meir, who continued to own it until the year 1888. Meir made no objection to the water being turned upon the land, and it was running across the same, in the box gutters, at the time of its purchase by the respondent. As soon as the latter purchased the land, he constructed, without any permit from the city authorities, an open gutter down the east side of said Fifteenth street, and turned the water into the same. Soon thereafter complaint was made to the superintendent of streets of the city, by property owners on said street, about the water running down the street where respondent had turned it, and he ordered it turned back; and parties came and sawed his open gutter in two, and turned the water back on respondent's land, where it was when he constructed the gutter. It also appears from the bill of exceptions that the creek which

flowed across respondent's land from the south was a continuous stream, having quite a wide channel, and emptied into what is known as "Tanner's Creek;" that the said surface water, before the said improvement of Fifteenth street was made by the city, flowed across the land within a few feet of the place where it was made to flow by the construction of the box gutter, and that it spread out over more ground as it formerly ran than it did after it was confined. Nor was there any evidence tending to show that the running of the water affected the land more injuriously by being confined in a box sewer than it did when allowed to run at large, although said Meir testified that he considered the box gutters a damage to the property. Nor was there any evidence of damage to the land by the flowing of the water across it, except that a witness for the respondent was allowed by the court to be asked what it would cost to take care of the water turned upon the land, to which he answered that it would take \$60 or \$70 to take care of it. This testimony, however, was taken under an objection interposed by appellant's counsel, and an exception was taken to the ruling of the court thereon. There was also evidence tending to show that the gutters along the sides of said Fifteenth street were allowed to become clogged with mud and gravel, and that, if kept clean, they would convey away all the water. After the respondent rested his case, counsel for appellant moved for a nonsuit on the ground that the water in question was surface water, and the city was not liable for its flowing on respondent's land in any event, and that the appellant had not been shown to be connected with the turning of the water upon the land, and no damages were proven to have been sustained by respondent. The court overruled the motion, and the appellant's counsel excepted to the ruling.

It is quite evident that the improvement of Fifteenth street by the city necessarily interfered with the natural flow of the surface water which ran from the west side of the street eastward over the land in question to the creek, which ran through the land from the south. The street ran north and south, and when graded the water was turned northward down the gutter, on the west side of it. The city authorities intended in the outset to use that gutter as a means of conveying away the water which came down from the west; but it was soon ascertained that it would be impracticable to do so, as it affected the street and lot-owners below seriously. They then resorted to the method of running the water across the street at the most convenient point, and from thence, by means of the box sewer, through the respondent's land to the said creek, at or near the place where it had formerly flowed. The respondent, after purchasing the land from Meir, conceived the idea of turning the water down the east-side gutter of the street, and thereby preventing

its running across his land, which he proceeded to do. The result was that it affected the lot-owners below on that side of the street, and caused complaint to be made to the city authorities, who thereupon turned it back again through the box gutter. Upon what ground the respondent, in view of the facts, could predicate a right of action against the city, is very difficult to discover. The city had an undoubted right to improve the street; and, unless it was guilty of negligence in the execution of the work, the respondent had no legal cause for complaint. Parties owning property within the corporate limits of a city are necessarily compelled to submit to many inconveniences which the grading and improvement of streets occasion. Building up a city is liable to incommode the owners of land situated within it in certain respects, but they are amply compensated therefor by the enhanced value of the property, and by numerous benefits they indirectly receive in return. The owners cannot be deprived of the property, nor of its permanent enjoyment, without just compensation, but they may be compelled to use it in conformity with general regulations established to promote the welfare of the community.

The learned circuit judge who presided at the trial of the case instructed the jury that they were to decide from the evidence whether the water in question was surface water or a well-defined stream, and, if they found that it was a well-defined stream, with a marked channel, then, if the appellant had diverted it from its natural channel, and caused it to flow in a channel not substantially the same as that in which it naturally flowed, and the respondent had sustained damages thereby, the appellant was liable for such damages, and their verdict should be for the respondent, in the amount to which he had been damaged thereby. This instruction was not authorized by the pleadings or evidence in the case. The water was described in both complaint and answer as surface water which flowed during the rainy season, and there was no evidence that the respondent was damaged in consequence of its course being diverted from that in which it had been accustomed to run. There was not, in fact, any evidence that there had been a material diversion of its course. Confining it in a box gutter rendered it less liable to do damages to the respondent's land than if it were allowed to spread over the land. Municipal corporations have been held liable for damages resulting to private property where, in the improving of their streets, they have interfered with the flow of a natural stream of water; but the evidence in this case does not show that the water in question constituted a natural stream, nor was it so claimed by the respondent's counsel at the hearing. The judgment appealed from must therefore be reversed, and the case remanded to the circuit court, with directions to dismiss the complaint.

(19 Or. 59)

RAYBURN v. HURD *et al.*

(Supreme Court of Oregon. March 31, 1890.)

COSTS—ALLOWANCE—AMOUNT OF RECOVERY—
SET-OFFS.

1. In an action, upon a contract, to recover money or damages, the plaintiff is not entitled, under the Code of Civil Procedure, to costs and disbursements unless he recover \$50 or more, except it be an action involving an open and mutual account, and the sum total of the accounts of both parties exceed \$150.

2. Where, in an action upon a note to recover an amount due thereon exceeding the sum of \$50, the defendants, by pleading a counter-claim, reduced the amount of the recovery to a less sum than \$50, *held*, that the plaintiff was not entitled to recover costs and disbursements in the action. *Held, further*, that the decision of this court in *Roberts v. Carland*, 1 Or. 333, construing the former statute of the territory of Oregon in regard to the allowance of costs and disbursements, had not been followed by the courts of the state in the construction of the provisions of the Code upon the subject, and could not be, without doing violence to the language of the legislature.

(Syllabus by the Court.)

Appeal from circuit court, Benton county.

The respondent commenced an action against the appellants, in the county court of Benton county, to recover upon a certain note, for the payment of money, executed by appellants to one J. C. Young, for the sum of \$350, and assigned to respondent. The appellants filed an answer in the action, in which they set up counter-claims against the note arising out of matters of indebtedness alleged to be due them from Young at the time of his assigning the note to respondent, amounting to \$360.94. The case was tried in the county court, and judgment recovered therein in favor of the respondent, from which judgment the appellants took an appeal to the said circuit court, where the action was tried by jury, who returned a verdict for the respondent for \$20.06, upon which a judgment was entered in his favor, and costs and disbursements allowed him by the court; from which allowance of costs and disbursements the appeal herein was taken.

J. R. Bryson and W. S. McFadden, for appellants. *J. W. Rayburn*, *pro se*.

PER CURIAM. The respondent contends that, as his claim amounted to \$350, and was reduced by offsets to the amount recovered, he was entitled to costs and disbursements, although he failed to recover \$50; and he cites *Roberts v. Carland*, 1 Or. 333, in support of his contention. Subdivision 3 of section 549, Civil Code, provides when a plaintiff shall be entitled to recover costs and disbursements in an action for the recovery of money when the amount of the recovery is less than \$50, to-wit: "In an action involving an open mutual account, when it appears to the satisfaction of the court, that the sum total of such accounts of both parties exceed \$150." In all other actions for the recovery of money or damages the plaintiff is not entitled to recover costs and disbursements unless he recover \$50 or more. Except, in actions for assault, battery, and like cases, he is entitled to recover as much costs and dis-

bursements as damages, where the recovery is less than \$50; and, in an action to recover the possession of personal property, where he recovers property, or the value thereof, and damages for its detention, in all less than \$50, he is entitled to recover costs and disbursements equal to the sum of such value and damages. Subdivision 5, § 549, Code. In this case the respondent was not entitled to recover costs and disbursements under any of the provisions of the Code. Such was the effect of the decision of this court in *Lockwood v. Hansen*, 16 Or. 102, 17 Pac. Rep. 575. The decision in *Roberts v. Carland*, *supra*, was made under the former territorial statute, the provisions of which were similar in many respects, in regard to the allowance of costs and disbursements to those of the Code; yet it has never been followed by the state courts, and cannot be, without doing violence to the language of the legislature upon the subject. The decision of the circuit court appealed from will therefore be reversed, and the case remanded to that court, with directions to allow costs and disbursements in favor of the appellants.

(19 Or. 117)

WINDSOR v. SIMPKINS.

(Supreme Court of Oregon. April 14, 1890.)

PARTITION—WHO MAY MAINTAIN.

One who is not in possession of land cannot maintain partition against one in possession, who purchased before the suit from a third person then in possession, believing that he was obtaining a full title, and who has at all times since denied plaintiff's right of, and excluded him from, possession.

Appeal from circuit court, Polk county; *R. B. Boise*, Judge.

Suit for partition by Benjamin Windsor against Hiram Simpkins. The complaint was dismissed, and plaintiff appeals.

Geo. G. Bingham, for appellant. *W. H. Holmes*, for respondent.

PER CURIAM. The circuit court properly dismissed the appellant's complaint. The parties to the suit were not holding and in possession, as tenants in common, of the premises in controversy. There was no unity of possession between them regarding the said premises. According to the referee's report, Alfred Simpkins, who had purchased the premises, and was in possession of them, claiming to be the owner thereof in good faith, sold and conveyed them by warranty deed to the respondent long prior to the commencement of the suit; and the latter paid the consideration price therefor, "and in good faith believed that he was getting the full and complete title thereto, and has at all times since denied the rights of possession of the appellant, and excluded him therefrom." The appellant had no seisin of the premises, either in law or in fact, and must recover possession of them in a proper action before he will gain such a standing in court as will enable him to maintain a suit for the partition thereof. The decree appealed from must be affirmed.

(39 Or. 61)

FORBES v. WILLAMETTE FALLS ELECTRIC CO.

(Supreme Court of Oregon. March 31, 1890.)

MECHANICS' LIENS — ELECTRIC POLES AND WIRES — EVIDENCE — TIME-CHECKS.

1. Poles set in the ground, connected together by wire in the usual way for the transmission of electricity for the purpose of light and power, constitute a structure, within the meaning of section 3669, Hill's Code, and a lien attaches for labor performed on such structure under employment by the contractor.

2. Time-checks given by the contractor to the laborer, though not conclusive against the owner of the structure, are declarations of the defendant's agent in the line of his employment, and are to be considered and weighed for whatever they are worth; and, if their effect be not countervailed in some way, may be sufficient proof of such claim.

3. The statute allows the court to tax an attorney's fee in favor of the plaintiff in case of the foreclosure of a lien. Held that, when 15 liens were foreclosed in one suit, \$10 for each claim was not unreasonable.

4. On the subject of interest in such case, *Milling Co. v. Riley*, 1 Or. 183, approved and followed.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.

This is a suit to enforce a number of liens for labor. It is alleged one Stromach had a contract with the defendant corporation to dig holes, and place the poles therein, and stretch the necessary wires on the same, from, at, or near the city of Portland to a point at or near Oregon City. The said wires were to be used by the defendant corporation for the purpose of transmitting light and power from the company's works, at the falls of the Willamette river, to the city of Portland, and for other electrical purposes. The plaintiff, as well as the others whose claims were assigned to him, rest their claim to enforce this lien on the fact that Stromach had a contract with the defendant corporation to do the work which they performed, and that he employed each of said parties, at a fixed rate of wages per day, to assist in its performance.

J. C. Moreland, for appellant. *G. D. Young*, for respondent.

STRAHAN, J., (after stating the facts as above.) The plaintiff's right to the remedy which he seeks must depend upon the statute. Section 3669, Hill's Code, provides: "Every mechanic, artisan, machinist, builder, contractor, lumber merchant, laborer, and other person performing labor upon, or furnishing material of any kind to be used in the construction, alteration, or repair, either in whole or part, of, any building, wharf, bridge, ditch, flume, tunnel, fence, machinery, or aqueduct, or any other structure or superstructure, shall have a lien upon the same for the work or labor done or materials furnished by each, respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent; and every contractor, subcontractor, architect, builder, or other person having charge of the construction, alteration, or repair, in whole or in part, of any building or other

improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this act." The principal question litigated on this appeal is whether or not this statute gives a lien for labor against the property described in the complaint; in other words, do these poles planted in the ground, connected together with wires and insulators, constitute a structure, within the true intent and meaning of this statute? In answering this question, but little aid can be had from the decisions of other states; for the reason that no general principle of law is involved, and such decisions have generally turned upon the special or peculiar phraseology of the particular statute. Without attempting to indulge in any refined distinctions or definitions, and having in view the object and purpose of the enactment in question, I think it may properly be held that the poles, wires, insulators, etc., mentioned in the complaint, constitute a structure, within the meaning of the statute, and that the same is subject to a lien for labor performed thereon. In reaching this conclusion, we do not find it necessary to go as far as the court did in *Helm v. Chapman*, 66 Cal. 291, 5 Pac. Rep. 352, where it was held that a mine or pit sunk within a mining claim was a structure, within the meaning of the statute giving a lien on a building, improvement, or structure.

2. Some question was made as to the insufficiency of the evidence to establish some three or four of these claims, but I think the objection cannot be sustained. It is shown that Stromach had a contract with the defendant corporation to do the work; that these men each worked on the job under the directions of Stromach or his foremen, and received time-checks showing the amount due each; that they filed proper notices of lien; and in most cases the exact number of days, and the amount agreed to be paid, is fully proven. The defendant offered no evidence, and what was offered by the plaintiff does not seem to be discredited in any way. Stromach's time-checks are not conclusive against the defendant, but they are declarations of the defendant's agent in the line of his employment, and are to be considered for what they are worth. Any dishonesty or bad faith on his part in the transaction would greatly impair their credit, and weaken their force; but we perceive nothing of that kind in this case.

3. The statute allows the court to tax an attorney's fee in favor of the claimant in case of the foreclosure of liens under the act; and in this case the court allowed a fee of \$10 for each claim. We do not think this an unreasonable sum.

4. The respondent claims interest on each claim from the date of the filing of notice. There seems to be no valid objection to this claim, and it will be allowed. It was said by this court in *Milling Co. v. Riley*, 1 Or. 183, that claims for which mechanics may have liens are certainly as much entitled to draw interest after they become due as any other; and we cannot think that for the recovery of such in-

terest it would be necessary to bring a separate suit, or take a separate judgment, but conclude that interest may be computed on lienable demand, and a lien awarded for the entire amount. The decree will therefore be modified so as to allow lawful interest on each demand from the date of filing notice of the lien, and in all other respects the decree is affirmed.

(5 N. M. 435)

NEWCOMB et al. v. WHITE et al.

(*Supreme Court of New Mexico. Jan. 28, 1890.*)

APPEAL—WEIGHT OF EVIDENCE—MASTER'S REPORT—EQUITY—DISMISSAL—EXCEPTIONS.

1. The finding of the court on matters of fact has the same effect as the verdict of a jury; and it will not be disturbed unless there has been some gross mistake, or flagrant injustice done.

2. If a master's report involves matters of account, an appellate court can consider exceptions only to particular items, or classes of items.

3. Comp. Laws N. M. § 1857, which provides that "the plaintiff in any suit pending in the district court may at any time, in the vacation of said court, file in the clerk's office of said court a written dismissal of his suit," applies only to common-law actions, and in equity suits leave to dismiss must be obtained of the court.

4. In an equity suit, where a written dismissal has been filed, but no leave to dismiss has been obtained, and complainant continues to prosecute his suit, the dismissal will be presumed to have been withdrawn.

5. Comp. Laws N. M. § 2197, which provides that "exception to the decision of the court upon any matter of law arising during the progress of the cause, or to the giving or refusing of instructions, must be taken at the time of such decision. In equity causes, no exception shall be required,"—refers to bills of exceptions in common-law causes, and not to exceptions to a master's report in equity causes.

Error to district court, Grant county.

Elliott & Pickett, for plaintiffs in error.
G. D. Buatz, for defendants in error.

LEE, J. This is a petition, filed in chancery, to foreclose four mechanics' liens, upon a certain frame building situated on the S. E. $\frac{1}{4}$ of section 3, in township 18 S. of range 14 W. of P. M. of New Mexico, near the boundary line of the town-site of the town of Silver City, in Grant county, N. M., and commonly known as the "Newcomb's Mill," for work and labor performed on said mill building by the defendants in error, George A. White and others. To this petition the plaintiffs in error filed a demurrer to so much of said petition as attempted to set up a lien and enforce the same in favor of one of the original complainants, namely, Charles C. Harris. Upon the demurrer as to White there was no action of the court below. Plaintiffs in error then filed their answer to said petition, denying the material allegations of the same. The defendants in error then filed a general replication to said answer; and thereupon the cause was referred to A. H. Harlee, as special master in chancery, to take the proofs and report the equities of the cause to the court. The master proceeded to take the proofs, and reported to the court that the defendant in error Milton Barnes was entitled to the sum of \$115, with

interest at 6 per centum per annum from the 2d day of January, 1886; John Hastings was entitled to the sum of \$532, with interest from the same date; and that the said defendants in error were entitled to a lien on the property described in the original petition. To this report of the master, the plaintiffs in error filed objections and exceptions, which were overruled by the court below, and the master's report confirmed. The plaintiffs in error appeal to this court.

The plaintiffs in error assign four errors, the first of which is that the property is not sufficiently described in the bill of complaint, or notice of lien attached thereto. We do not think this objection well taken, in point of fact. The description of the property which is set forth in the foregoing statement of facts shows the property to have been fully and minutely described; and, as counsel for the appellants stated in their argument of the cause that they did not insist upon this point, we need not consider it further.

The plaintiffs in error, in their second assignment of error, insist that William H. Newcomb, one of the appellants, should have been allowed his claim of set-off of \$500 against the claim of Robert Black, one of the defendants in error. This was a question for the court trying the cause to determine from the preponderance of the evidence adduced; and the finding of that court on matters of fact has the same force and effect as the verdict of a jury, and this court will not disturb it, without there was some gross mistake, or flagrant injustice done. *Blauvelt v. Woodworth*, 31 N. Y. 285. Where an issue of fact is made, and evidence is offered for and against the same, this court has no authority to review the evidence, and determine that the weight of it was, other than as found by the court or jury trying the case below. We can only re-examine the law as the judge has pronounced it, upon the state of facts as presented to him. *Hyde v. Booraem*, 16 Pet. 169; *Bond v. Brown*, 12 How. 254.

If the master's report involves matters of account, exceptions should be taken to the particular items, or class of items, objected to, (*Ransom v. Winn*, 18 How. 295;) and, to make the exception available, it must appear that there was a ruling by the court upon it in some way affecting the decision appealed from, (*Railroad Co. v. Smith*, 21 Wall. 255.) The record before us shows that there was no exception taken by the plaintiffs in error to any item of account contained in the master's report, and therefore there is no question under this assignment of error which this court can consider.

The third assignment of error is as follows: "The master erred, in his report, in finding that Hastings and Black should receive four dollars per day for wages of the men who worked on said property, while said Hastings and Black paid said men but three dollars per day." This assignment attempts to bring in review by this court the construction given by the court below to a verbal contract

introduced in evidence before the master, and construed by the chancellor; but, as the record shows that no exceptions were taken at the time, we must presume that the construction given to this verbal contract by the chancellor was correct. This court will not examine evidence to ascertain whether the lower court or jury was justifiable in finding as it has done. *Gregg v. Moss*, 14 Wall. 564; *Express Co. v. Ware*, 20 Wall. 548.

The fourth assignment of error is as follows: "The master erred in making any report in reference to the claim of complainant White, one of the defendants in error, for the reason that he (the master) had no jurisdiction over White's claim; the said White having dismissed the same, and filed his dismissal with the clerk of the court, as required by law. White's dismissal was before the master." This could hardly be regarded effective, in the face of White's proceeding in the cause at a period subsequent to the one mentioned in this assignment. On page 146 of the record we find the following: "And now comes the complainant George A. White, and excepts and objects to that portion of the report of the special master in the above cause wherein the said master fails to find in favor of said complainant in his report of the amount of his said claim, and also of the lien thereof, who prays the master to allow the same, and sustain these exceptions. *ASHENFELTER and BANTZ, Solicitors for Plaintiff.*" The following statute is relied upon to support this exception: "The plaintiff, in any suit pending in the district court, may, at any time in the vacation of said court, file in the clerk's office of said court a written dismissal of his suit; and said cause from that date shall be considered as dismissed at the cost of said plaintiff, and judgment shall be entered accordingly at the ensuing term of the district court." *Comp. Laws N. M. § 1857.* This section applies only to common-law causes. In a chancery proceeding, where a complainant has brought in other parties, whose equitable rights and interests have become involved in the cause, it becomes a question for the court to determine, whether he will be allowed to dismiss his case, and, if so, on what terms. Even if the statute applied to equity causes, as the record in this cause shows this party in the active prosecution of his case to the end, the presumption necessarily follows that he waived his application to dismiss. From the record before us, it appears that there were no exceptions taken to any of the rulings of the court below. In such a state of the record, it must be apparent that there is no question before this court for review. The judgment of the court below is affirmed, with costs.

LONG, C. J., and McFIE and WHITEMAN, J.J., concur.

ON A MOTION FOR A REHEARING.

LEE, J. The appellant in this cause files a motion for a rehearing, upon the ground

that this court gave too much weight to the findings of the master on issues of fact, in saying such conclusions would be presumed by this court to be correct. We did not state in the opinion, or intend to be understood, that we would not look into all the evidence to ascertain if the equities as set forth in the bill have been sustained. But, in questions of fact, to be determined from conflicting testimony, the master, who saw the witnesses, —observed their manner,—is better able to determine the weight their testimony is entitled to; he being in the better position of applying intelligently the aphorism of the Roman tribunal, that "witnesses should be weighed, not counted." In support of the proposition, we referred to the case of *Blauvelt v. Woodworth*, 31 N. Y. 285. It is objected that it was not a chancery case. It was a suit to foreclose a mechanic's lien. It was on the equity side of the court. It was referred to a referee or master, to take proofs and make findings. One question was whether the contract price of the work in question had been paid, and the court in that case said: "As we have no authority to disregard the findings, they are conclusive against the claim that the defendant has paid the debt." The same rule has always been recognized and applied in this territory. In *Huntington v. Moore*, 1 N. M. 503, the court said: "This report is based upon the finding of the facts before him, and this court will not review the report of the master as to his finding of the facts only for error of law appearing in the report." We think this court ought not to reverse upon a mere difference of opinion as to the weight and effect of conflicting testimony. To warrant a reversal, it must be clear that the lower court committed an error, and that a wrong has been done to the appellant. We cannot say as to either point that the court below clearly committed an error, or that such a proposition is sustained by a preponderance of the evidence.

It is also contended that, this being a chancery suit, it is not necessary to take exceptions to the rulings under the statute; and we are referred to section 2197 of the *Compiled Laws* in support of the position. That section reads as follows: "Exception to the decision of the court upon any matter of law arising during the progress of the cause, or to the giving or refusing of instructions, must be taken at the time of such decision. In equity causes, no exception shall be required." The exceptions referred to in this section, when taken at the time as provided, and afterwards made out, settled, and signed by the judge trying the case, constitute the bill of exceptions. Such a bill is not required in equity causes, and never was. "A bill of exceptions is altogether unknown in chancery practice." *Ex parte Story*, 12 Pet. 340. It could serve no purpose in an equity suit, where the proceedings and evidence all appear in the record. In chancery proceedings, objections are made to the rulings and decisions of the masters. They are brought to

the attention of the chancellor by exceptions to the master's report. Rule No. 86 provides that no exceptions to the master's report shall be entertained by the court unless based upon objections filed with the master. Rules Sup. Ct. p. 50. Exceptions to the master's report should specify, article by article, the point excepted to, and should distinctly point out the rulings or conclusions which it seeks to reverse. They should be specific, and not general. Exceptions that merely express dissatisfaction with the findings of the master are too general, and may be disregarded by the court. See *Story v. Livingston*, 13 Pet. 359. And again the same court says: "The findings of the master are *prima facie* correct. Only such matters of law and of fact as are brought before the court by exceptions are to be considered, and the burden of sustaining the exception is on the objecting party." *Medsker v. Bonebrake*, 108 U. S. 72, 2 Sup. Ct. Rep. 351. It was a part of the duties of the master to ascertain the amounts due from one party to the other in this case. Accounts referred to the master are not investigated by the court. See *Harding v. Handy*, 11 Wheat. 103. For the reasons above indicated the motion for a rehearing will be overruled.

WHITEMAN, J., concurs.

(6 Utah, 317)

BROUGH v. RICHARDS *et al.*

(*Supreme Court of Utah*. Jan. 14, 1890.)

APPEAL—TIME OF TAKING.

Under Comp. Laws Utah, 1888, § 8685, providing that an appeal from an order granting or refusing a new trial may be taken within 60 days after the order is made and entered, the court cannot grant an extension of time beyond the 60 days.

Appeal from district court, third district.

Action by Theodore Brough against D. Richards and W. E. Mighell, trading under the firm name of Mighell & Richards. Plaintiff appeals from an order granting a new trial.

M. M. Kaighn, for appellant. Hoge & Burmaster, for respondents.

ANDERSON, J. This is an appeal from an order of the third district court granting a new trial. The order was made and entered on the 8th day of July, 1889. On the 16th day of July, 1889, the plaintiff was granted, by consent of parties, "thirty days' additional time within which to file and serve a bill of exceptions and statement on appeal, and notice of appeal; and proceedings in the case are in the mean time stayed." On the 15th day of August following, on motion of plaintiff and by consent of parties, the court granted plaintiff 15 days' additional time; and on the 28th day of August, on motion of plaintiff, he was granted another 15 days' additional time. On the 14th day of September, 1889, the record recites that, "on motion of M. M. Kaighn, attorney for plaintiff, and good cause being shown, it is ordered that said plaintiff be, and he is hereby,

allowed an extension, and thirty days' additional time within which to serve notice of appeal and statement on appeal and bill of exceptions herein. On the 4th day of October, 1889, the plaintiff perfected his appeal by filing in the clerk's office a notice of appeal, an undertaking, statement, etc. The defendant now moves this court to dismiss the appeal because not taken and perfected within the time fixed by statute.

The statute provides that an appeal, from the district court to the supreme court, from an order granting or refusing a new trial, may be taken within 60 days after the order is made and entered in the minutes of the court, or filed with the clerk. Comp. Laws 1888, § 3635, subd. 3. In this case the appeal was not taken until 88 days after the order appealed from was made and entered. We think the order of the district court granting an extension of time within which plaintiff might perfect his appeal beyond the time allowed by the statute was unauthorized. The motion to dismiss the appeal is sustained, and the appeal dismissed.

BLACKBURN and HENDERSON, JJ., concur.

(3 Wyo. 335)

WOLCOTT v. BACHMAN.

(*Supreme Court of Wyoming*. Feb. 5, 1890.)

For majority opinion, see ante, 72.

SAUFLEY, J. I dissent from the opinion delivered by the chief justice. In presenting the reasons for my dissent, I will, for the sake of convenience, mention Wolcott as the defendant, and Bachman as the plaintiff; such being their attitude towards each other in the trial court. The instruction given by the district court, which is made the ground of reversal, is as favorable to the defendant as either the pleading or the proof warrant. It is, moreover, and seemingly, in restraint of plaintiff's right of recovery, expressed in cautionary language stronger than need be. There may be records before this court which exhibit acts of oppression, on the part of the strong towards the weak, more offensive to the law than does this, but I have not seen them. Nor do I recall, during the course of my experience at the bar, the conduct of any one in authority more clearly outside the line of duty,—more obviously beyond the scope of legitimate power. I propose to show—*First*, that under the pleading the district court could not have given an instruction different in legal intendment from the one given; and, *second*, that if the answer of the defendant to the charge of false imprisonment had been in avoidance instead of by common traverse, still, under the proof, the court could not have given a different instruction.

Considering the last proposition first, it will be necessary to succinctly state the chief facts as they appear of record. In the month of May, 1887, Bachman, being then a young man of about 20 years of age, was residing

in the village of Douglass, Wyo. In this month he was arrested on a charge of grand larceny, preferred by a worthless character, who was himself subsequently sent to the penitentiary. The warrant was issued by Justice Mecum, and the trial had, on a change of venue, before the defendant, Justice Wolcott. The examination resulted in a discharge of Bachman. At the conclusion of this investigation, Justice Wolcott, without any charge being made against Bachman, without any evidence heard, without even the form or pretense of a trial, conceived the idea of sending Bachman to jail for three months, and finding him \$100, on the supposition that he was a vagrant. I will here quote a part of the testimony of Mr. Nichols, the prosecuting attorney in the grand larceny examination, and a part of the testimony of Mr. Camplin, who represented Bachman. The defendant, Wolcott, did not testify.

In reply to a question by plaintiff's counsel, asking what transpired at the conclusion of the investigation of the larceny charge, Mr. Nichols said: "He [Wolcott] said a great deal. He called the gentleman up, and lectured him for quite a long time. He then made the remark that he was going to sentence him to pay a fine of \$100, and imprisonment in the county jail at hard labor for three months, on the ground that he was a vagrant. He said it was not probably just in accordance with law to do that. Ordinarily, a man ought to be charged with that offense, but inasmuch as the man was before him, he would waive the technicalities of the law, and would assume the responsibility, and did not want any advice from the prosecuting attorney. *Question.* Did you attempt to advise him? *Answer.* I did. He said he was running that himself, and would take the responsibility. *Q.* Did you hear the defendant make a demand for a trial,—the defendant in that case and the plaintiff in this case. *A.* It is my recollection that his counsel demanded it, and I think the defendant said something about it, and objected to being sentenced without a trial, and wanted a trial. *Q.* Do you know whether or not it was refused by the defendant, Wolcott? *A.* Yes, sir; I know that he said he could not have any trial." In a few minutes after this extraordinary proceeding had ended, Nichols met the justice in front of his office, and remonstrated with him on the illegal course he had taken, and asked an explanation. To this Wolcott responded that they did not try cases in this territory according to law, but took a short cut sometimes; that he knew he had not followed the law, but he did it thinking it necessary,—the law didn't cut any figure in a case of that kind. The attorney then tried to induce the justice to go back and vacate the order he had made, but he refused, saying he would take his chances; that he didn't like for men to live as Bachman, that it did not make any difference about the law; that the county ought not to be put to

the expense of a trial; that he knew he had not proceeded according to law, but he was going to teach Bachman a lesson, and was going to see that his order was carried out.

Mr. Camplin proves substantially the same as Mr. Nichols as to the occurrence in the justice's room, with this addition: that he made a written protest against a condemnation without trial. This protest is copied into the record, and has this indorsement: "The above recital is correct, and the demand therein made denied. [Signed] FRANK WOLCOTT, Justice of the Peace."

W. F. Mecum, called on behalf of Wolcott, testified that, after the hearing had been completed on the charge of larceny, the justice called on Bachman to stand up, and proceeded to question him. After he got through with his interrogatories he said: "I will discharge you from the preliminary investigation, but I will find you guilty of vagrancy." It was then that the defendant and his counsel demanded a trial on this charge, and protested against the order of fine and imprisonment being made without an accusation and without a hearing.

It will be observed that the justice does not elicit any information from Bachman during the larceny investigation, nor while Bachman was a witness, if, indeed, he was a witness, at all, (the record not disclosing that fact,) but he compels Bachman to arise, and then begins the inquisition. Acting on answers made under compulsion, but not under oath; not pursuant to any legal charge or accusation; refusing to the prisoner a trial; hearing no witnesses for or against him; confessing that he was acting without law and against law; and boastfully announcing his assumption of responsibility,—the justice ordered that the prisoner be fined \$100, and imprisoned three months at hard labor. He is not content with entering this order formally on his docket, but, after delivering it to his associate, whose place he had temporarily filled, he both advised and directed the associate to issue a *mittimus* committing Bachman to jail. The *mittimus* was issued, and the prisoner confined in jail from three to four weeks, when he was released by order of Associate Justice BLAIR, of the supreme court, on a writ of *habeas corpus*. Thereupon a suit was brought by plaintiff against defendant, Wolcott, for false imprisonment; the trial resulting in a verdict and judgment for plaintiff. The instruction given by the trial court, (his honor, Chief Justice MAGINNIS,) which is held to be erroneous by the majority of this court, is in full thus:

"Gentlemen of the jury: This is an action for false imprisonment, brought by the plaintiff against the defendant. If you find the facts to be such as are set out in the petition and the claim of the plaintiff, those facts, if proven to your satisfaction, by a preponderance of the evidence, would constitute, and do constitute, a case of false imprisonment. The plaintiff must prove, in order to sustain

his case, the fact of an imprisonment. He must prove that as to this defendant it was caused by the act of defendant himself, or it was caused by the act of another person who was instigated, directed, or controlled by the defendant. That is to say, a person is guilty of false imprisonment who himself imprisons, without process of law,—without authority of law. So you must find from the facts in this case that there was an imprisonment, and that it was done either by the defendant himself, or by him through the person who did cause the imprisonment. Of course, these matters must be proved by a preponderance of the evidence of the plaintiff. As I said in the beginning, if you find as a fact that this plaintiff was imprisoned in the Albany county jail upon a commitment or *mittimus* issued by Justice MECUM, of this county, and you find that that commitment was in pursuance of a supposed or alleged sentence of a justice of the peace sentencing this man to be imprisoned for the alleged crime of vagrancy, if you find those to be the facts, then I charge you that would be false imprisonment, as to Mecum, upon its face. You are not, however, trying Mecum. You must further find that Mecum was directed or controlled by this defendant." The remainder of the charge relates to the elements of damage.

The first criticism of this instruction contained in the prevailing opinion is that "it assumes that a justice of the peace does not have jurisdiction to commit to the county jail for vagrancy, and in so doing it palpably misstates the law." I am unable to perceive that there is any such assumption. It simply assumes, as the trial judge was clearly justified in assuming, that, if a certain state of facts were shown to exist, they constituted a case of false imprisonment. The judge might, without offense to any principle of jurisprudence, have gone further, and assumed that, in a country regulated by fixed and enlightened law, no person, however exalted his station, is clothed with either the legal or moral right to imprison another, "to teach him a lesson," or for any other arbitrary purpose. No justification of the act was pleaded, and none was proven, or attempted to be proven. A justice of the peace holds an examining trial of a person charged with felony. He finds that the charge is not sustained. He dismisses the accusation, and then of his own motion proceeds to interrogate the prisoner touching his vocation. The prisoner answers that he is a musician, and earns \$2.50 per night playing for saloons; that he has a mistress, from whom he occasionally gets money when short. The judicial ire is at once aroused. His sense of propriety is offended. In righteousness and in judgment he is moved to "teach the prisoner a lesson." He refuses him a trial; refuses him even the poor privilege of defending against an unformulated, unverified suspicion; and causes him to be hurried off to prison. On this state of facts, the majority

of this court are of opinion that the trial court assumed that a justice has no jurisdiction of vagrancy. The majority are further of the opinion that it should have been left to the jury whether Bachman voluntarily submitted himself to the jurisdiction of the justice. I fully concede that, if an inferior tribunal has jurisdiction of the person and of the offense charged, no mistake of his own, however egregious, will make him liable to an action for false imprisonment. But the proposition that Wolcott had jurisdiction of the person of Bachman is, to my understanding, without the slightest foundation, either of fact or law. The record he made himself on the justice's docket shows that there was neither accusation, warrant, arrest, witness, evidence, nor trial. The record affirmatively discloses—a record, too, signed by his own hand—that he refused the prisoner a trial. True it is that a justice has jurisdiction of the offense of vagrancy; but, because of this, can a magistrate imprison a citizen without trial, or even the form of trial, and more especially where that citizen has not been brought before him on a charge, and then excuse himself upon the ground that he had jurisdiction of the offense of which he supposed the citizen to be guilty? This would be worse than nonsense. Where would such things end, if such be the law? A justice has jurisdiction, as an examining court, of the crime of murder. Suppose he should, without information lodged, without warrant, without testimony, without trial, and after refusing a trial, commit a person to jail on suspicion that he was guilty of the crime. Could he be excused on the ground that he had jurisdiction to examine and commit for felonies?

"In this case," proceeds the prevailing opinion, "one point of contention was as to whether the plaintiff had submitted himself to the jurisdiction of the justice, and this, being a question of fact, should properly have been submitted to the jury; but by the court's charge they were precluded from in any manner, considering the matter of jurisdiction." I am unable to perceive any such point of contention in the record. Not a question of fact was raised looking to this point. There is not one witness who offered to speak of the transaction in the justice's room who did not declare in unqualified and unmistakable language, that both the prisoner and his counsel protested against the judgment of condemnation without trial. If an earnest and perhaps indignant, protest against condemning unheard one against whom no accusation is brought, can be tortured into the equivalent of a voluntary submission to jurisdiction, then I confess that I am led into a new field of jurisprudence, which I have not hitherto had the honor to explore. Beside, there is a fact more potential than any other, which shows that there was no such point raised in the trial court. That fact is that the defendant was then represented by counsel of zeal and distinguished ability, and that counsel,

as this record shows, offered but one instruction, excepting an instruction partly on exemplary damage, which is as follows: "To entitle the plaintiff to recover for the alleged imprisonment, there must have been an absence of probable cause. There is a probable cause for a person's arrest when the person arrested is probably guilty of the offense for which the arrest is made." This was quite properly refused, and none other was asked. In argument before the court the proposition was advanced that Bachman's demand for a trial when he was first informed by the justice that he proposed to impose the punishment was such a submission to the jurisdiction of the justice as to bar all action for false imprisonment. But it occurred to me at the time, as I supposed it did to the majority, that such contention was made, as does sometimes occur, in the extreme zest of advocacy. Certainly, the record fails to show that the point was raised in the trial court; and equally certain is it, according to my interpretation of language, that no testimony was heard from which it might have been raised.

To have given the defendant jurisdiction of the person of plaintiff, there should have been, in the absence of a voluntary submission, an information or complaint under oath, lodged with him, charging that plaintiff is a vagrant. Section 1025 of the Revised Statutes provides that, "upon complaint made under oath by any resident of the county before any justice of the peace within whose jurisdiction such person may be found, it shall be the duty of such justice to issue a warrant * * * for the apprehension of such person so charged, * * * and any person found guilty of being a vagrant * * * shall be punished," etc. Section 3620, c. 3, tit. "Jurisdiction and Procedure in Criminal Cases," reads: "Justices of the peace, in their respective counties, have jurisdiction of, and may hear, try and determine, all public offenses, less than felony, except as otherwise provided by law, in which the punishment prescribed by law does not exceed a fine of \$100, and imprisonment for six months in the county jail, on information or complaint under oath, saving to the defendant the right of appeal to the district court." Section 3621: "Criminal actions, for the commission of a public offense, may be commenced before a justice of the peace, by an information subscribed and sworn to, and filed with the justice." Section 3622, "Such information must contain, * * * *Third*, a statement of the acts constituting the offense in ordinary and concise language, and the time and place of the commission of the offense, as near as may be." Subsequent sections provide that, when brought before the justice, "the charge against him must be distinctly read;" his plea entered on the docket; a jury given him, if demanded; and, if found guilty upon the issue made by the charge and the plea, sentence shall be imposed. Almost every section in chapter 3 was ruthlessly violated by the justice, who

imposed the sentence of fine and imprisonment. But that which is most important is that many of the errors were such as to make not simply a voidable, but an absolutely void judgment. By the requirements of sections 1025, 3620-3622, there can be no doubt that the charge or complaint under oath is indispensable to the exercise of jurisdiction. It is as necessary, as the service of a summons in a civil action, to give the court jurisdiction to render a personal judgment. Without it, a justice has no more authority to proceed with a trial than a district court has to try and condemn a man for murder without an indictment. Such being unquestionably the law in this territory, and there not being even the shadow of a pretense that a charge of vagrancy has been made against Bachman, what reason, founded in either written law or practical common sense, could there have been in submitting any question to the jury other than the fact of imprisonment, the connection of Wolcott with it, and the amount of damages. It was for the court to determine from the proof (on a proper state of the pleadings) whether the conduct of the justice was within the limit of his jurisdiction. The jury had nothing to do with this. The court did determine it, and, to my mind, his conclusion was so obviously correct that I perceive no room for a contrary opinion.

2. But even if there had been testimony upon which the trial court might have predicated an instruction based upon the voluntary submission of Bachman, the pleadings in this case would not have authorized it. The petition was in the usual form for false imprisonment. The answer of the defendant was in these words: "Comes now the defendant, and for answer to the petition of plaintiff herein denies each and every allegation in said petition contained." Under this answer, I hold that, even if it be not obnoxious to the charge of ambiguity, nothing is put in issue except those questions which were submitted by the trial court to the jury, to-wit, the fact of imprisonment, the connection of Wolcott with it, and the amount of damages. By the Civil Code of Wyoming, (section 2457,) "the answer shall contain—*First*, a general or specific denial of each material allegation of the petition controverted by the defendant; *second*, a statement of any new matter constituting a defense, counter-claim, or set-off, in ordinary and concise language." The answer in this case is a type, pure and simple, of what is called, in code pleading, a "general denial,"—a form of pleading loose enough when legitimately employed, but which by the common practice of the profession has been perverted to uses outside the range of many of the accepted rules of pleading. But conceding, for the moment, that this answer is faultless in form, let us see what is put in issue. Under the nomenclature of the common law, an action for unlawfully imprisoning was trespass. It is commonly supposed that the "general denial" of the Code is the same, in effect, as the "general issue,"

under this ancient system of pleading, the only difference being in name. In the first place, the supposition is incorrect; and, in the second place, if correct, it would, as applied to the case in hearing, cut the defendant off from any complaint of the instructions. The "general issue" in trespass is "Not guilty." If this be the form of the answer, then, in the language of Mr. Stephen in his work on pleading, "it evidently amounts to a denial of the trespasses alleged, and no more. Therefore if, in trespass for assault and battery, the case be that the defendant has not assaulted or beat the plaintiff, it will be proper that he should plead the general issue; but, if his case be of any other description, the plea will be inapplicable." Pages 159, 160. In Gould, Pl. c. 6, § 44, the author says: "According to the strict original principles of the common law, no defenses would appear to be admissible in any case, under the general issue, except such as go in denial of the truth of the declaration; and therefore all special matters of defense which admit, but go in avoidance of the declaration, would seem to require special pleas in bar, as being inconsistent with the general issue." "In trespass, whether to the person, personal property, or real property, the general issue was 'not guilty.' In injuries to the absolute rights of persons, this only put in issue the act complained of; but in injuries to the relative rights, and to personal and real property, it put in issue the existence of the right, and the commission of the act complained of." Chit. Pl. (10th Amer. Ed.) 606. Again, on page 658: "In all actions for trespass, whether to the person, personal or real property, matter in discharge or in confession and avoidance of the action must be specially pleaded. * * * The plea of not guilty, therefore, is proper in trespass to persons, if the defendant committed no assault and battery or imprisonment; but in trespass to persons; *son assault demesne*; moderate correction; *mallice manus imposuit*, to preserve the peace; or a justification in defense of the possession of real or personal property; or by authority of law without proof, as a private individual; or under civil process, either *mesne* or *final*, of superior, inferior, or foreign courts,—must always have been pleaded specially. A plea of justification is to enumerate and cover the whole, or the plaintiff, without a special replication or new assignment, will be entitled to a verdict for the trespasses proved, and not justified; for whoever assaults and imprisons another, (except in some cases, under particular statute hereafter noticed,) must justify himself by showing specially to the court that the act was lawful. A plea justifying the arrest of plaintiff upon the ground that a felony had been committed, and that there was reasonable grounds to suspect and accuse the plaintiff, must distinctly state the specific reasons for suspecting the plaintiff. And a plea justifying assault and imprisonment on the ground of a breach of the

peace committed by the plaintiff must show that a breach of the peace was continuing, or show facts from which a renewal of the breach was to be apprehended, and as little as possible should be left to inference. There are positive rules of law, in order to prevent surprise to the plaintiff at the trial by the defendant then assigning various reasons and causes for imprisoning the plaintiff, of which he had no notice, and which consequently he could not be prepared to meet at the trial, on the plea of not guilty, on fair and equal terms with respect to the evidence and proof of facts." The exception referred to by the author in the above quotation was by virtue of an act of parliament passed during the reign of George IV., which allowed mayors, constables, justices, and other peace-officers, in actions against them for anything done by virtue of their offices, to plead the general issue, and give special matter in evidence. This was a repeal of the common-law rule to that extent, and the party so pleading was required by the statute to insert on the margin of the plea the words, "By the statute." So it appears, beyond all cavil, that, except as modified by statute or rules of court, an officer or other person, who desires to avail himself of special matter in defense, must plead in bar, by way of confession and avoidance.

In the present lax system of pleading prevailing in this jurisdiction, a quotation from the report of the common-law commissioner, on which the rule of Hil. T. 4 Wm. IV., was founded, is not inapt. In treating of the use of the general issue, the commissioners say: "Consisting, as that plea does, of a mere summary denial of the case stated by the plaintiff, and giving no notice of any defensive allegation on which the defendant means to rely, it sends the whole case on either side to trial, without distinguishing the fact from the law, and without finding the exact question or questions of fact to be tried. It not unfrequently, therefore, happens that the parties are taken by surprise, and find themselves opposed by some unexpected matter of defense or reply, which, from the want of timely notice, they are not in due condition to resist." "Another ill consequence attendant upon the general issue is that, as the true point of decision has not been evolved in the pleading, it becomes the business of the judge to extract it from the proofs and allegations before him, to sever correctly the law from the facts of the case, and again the facts admitted from those in controversy, and to present the latter in a distinct shape to the jury for their consideration,—an analysis which the rapidity and tumult of a trial at *nisi prius* renders extremely difficult, and which is often defectively conducted." These observations, founded as they are in both reason and experience, apply with peculiar force to our customarily loose habits in pleading the general denial, and they should surely work a restraint upon the intelligent and honest practitioner in the abuse of that plea,

and its habitual prostitution to such an extent that in many instances the wisest judge will be totally unable to tell whether the party who verifies it is swearing to a statement of fact or a conclusion of law. And this is specially true of the answer of the defendant in this case, as will more fully appear in the sequel of this opinion. When he denies each allegation of the petition, it defies all legal acumen whether he denies the fact of the imprisonment, or, admitting the fact, denies simply his liability.

But the general denial of the Code is not the same as the general issue at common law. Pleas in bar are not susceptible of any other division than (1) pleas of traverse or denial; (2) pleas by way of confession and avoidance. One of the chief objects in abolishing the general issue, and substituting in lieu of it the answer, of which the general denial is a subdivision, was to avoid the resulting inconvenience of the conflict between this rather illogical traverse and the approved rules of pleading, and to compel parties litigant to make their issues by opposing an averment of a fact with a denial of the averred fact, instead of opposing the averred fact by a denial of the liability which may be inferred from the fact. The general denial, to be correct as a pleading, should contain precise, certain, and substantial denials; and when this is done it is none the less clear in its application to each adverse allegation than it would be if the allegations were repeated in detail, and a formal denial made to each of them.

In this respect it is unlike the general issue, which is a mere negative of the result of plaintiff's averment, taken collectively, involving only a denial of their united legal effect. For instance, the general issue, in an action of replevin, was the plea of *non cepit*; in detinue, *non detinet*; in debt on bond or other specialty, *non est factum*; in *assumpsit*, *non assumpsit*; in trespass, not guilty. The last plea extended was in this form: "And the said defendant says he is not guilty of the said trespass above laid to his charge, or any part thereof, in manner and form as the said plaintiff hath complained, and of this he puts himself on the country." The slightest reflection will enable one to discern the difference between these pleas and the general denial. The point intended to be made is (1) that as pleas they are radically different from each other; and (2) that, even if they were the equivalents of each other, matter of justification cannot be given in evidence under them, either at common law or under the Code. Indeed, the language of the Code would seem to settle the question: "The answer shall contain (1) a general or a specific denial of each material allegation; * * * or (2) a statement of any new matter constituting a defense, counter-claim, or set-off." Now, if matter of avoidance can be given in evidence under the general traverse, what need is there of any other form of answer? Why did not the legislature eliminate

from the second paragraph the word "defense," so that it might read, "a statement of any new matter constituting a counter-claim or set-off?" The supreme court of Massachusetts in *Mulry v. Insurance Co.*, 5 Gray, 541, has thus formulated the rule: "Whenever a defendant intends to rest his defense upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out in clear and precise terms in his answer; and as the plaintiff is not bound to aver anything which tends to defeat his action, or which shows that his claim is illegal or void in its inception or otherwise, all such matters must be set out and averred in the answer." Unless the defendant has stated a matter of defense in his answer, he cannot take advantage of it, though disclosed by plaintiff's testimony. In discussing this subject, Bliss, Code Pl. § 327, states the rule thus: "The true rule is, as will hereafter be more fully shown, that, under a denial, the defendants should be permitted to show no fact that does not go to disprove the fact denied. Evidence of facts which admit the act charged, but which avoid its force or effect, or which discharge the obligation, is inadmissible; but, on the other hand, facts may be proved, although apparently new matter, which, instead of confessing or avoiding, tends to disprove those alleged by the plaintiffs." "A general traverse under the Code authorizes the introduction of no evidence on the part of a defendant except such as tends directly to disprove some fact alleged in the complaint." *Benedict v. Seymour*, 6 How. Pr. 298. "The general rule on this subject is that any fact which avoids the action, and which the plaintiff was not bound to prove in the first instance in support of it, is new matter." *State v. Williams*, 48 Mo. 210. It thus appears that, under the scope of a general denial, a defendant may, without specially pleading them, give evidence of facts which tend to disprove the facts alleged by his adversary.

Now, what facts are alleged by the plaintiff in this case? They are these: His imprisonment; the duration of it; the instigation of it by the defendant; the amount of money expended by him to obtain a restoration to liberty. The averment that the imprisonment was unlawful, or without right and authority, although a proper averment, is not an allegation of fact. It is a mere characterization of the injury complained of. So it results, under the rule, that by his general denial the defendant could give evidence of any fact which controverted either one or all of the opposing facts, but the permission goes no further. Let another test be applied,—the test of the rule laid down by the supreme court of Missouri, cited *supra*. I suppose it will be conceded that, in the opening of his case, all that is required of plaintiff is to submit such evidence as will make a *prima facie* case. In an action of false imprisonment, what makes a *prima facie* case? Simply the imprisonment, and the defen-

dant's connection with it. It is true that false imprisonment is a mixed question of law and fact. Whether there was a detention of a party against his will is a question of fact. Whether the authority under which it was effected was lawful or not is a question of law. But all the plaintiff need do in the first instance is to prove the imprisonment. The action is unlike the civil action to recover damages for malicious prosecution. The first is trespass; the latter is case. In the latter, the plaintiff must both allege and prove malice and want of probable cause. They are the gist of the action. The failure to prove either would authorize a nonsuit. In trespass for false imprisonment neither malice nor want of probable cause need be either alleged or proved. They are not the gist of the action. In the language of Lord MANSFIELD in *Johnstone v. Sutton*, 1 Term R. 544: "There is no similitude or analogy between an action of trespass or false imprisonment and this kind of action. An action of trespass is for the defendant's having done that which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution which, upon the stating of it, is manifestly legal." Take for illustration the action of slander. While it is usual for the plaintiff to allege good character, and necessary to allege that the words, were falsely spoken, he is not permitted to prove character in the first instance, nor need he prove the untruthfulness of the words in the first instance. His *prima facie* case is made by proving simply the utterance of the defamatory language. If the defendant desires to prove the truth of the words, he cannot do so under a general denial, although the plaintiff in his petition has averred that they were false. The truth of them can only be proven under a plea of justification. In an indictment for false imprisonment, to maintain it the prosecutor must prove the imprisonment. "But all the prosecutor has to prove is the imprisonment, for that is presumed to be unlawful until the contrary is shown. It is for the defendant to justify it by proving that it was lawful." 2 Archb. Crim. Pr. & Pl. 94.

Now, the logic of the situation is that, since Bachman was not required in the first instance to prove anything but the imprisonment, the mere denial of his adversary did not put in issue any question of legal authority, for, if it had, Bachman would have been required to offer proof on that subject in advance, and such proof, beside, as would have given him a *prima facie* standing on that branch of the case,—a requirement which, as a proposition of law, is lacking in the support of any respectable authority.

I desire now to present an objection to defendant's answer which goes to its sufficiency as a pleading in the case under consideration. The petition, in substance, charges that the defendant caused plaintiff to be imprisoned in the county jail for the space of 30 days, without any cause whatever, and without any right or authority to do so. To this the

defendant pleads the general denial already quoted. Now, here is one indivisible charge of imprisonment for 30 days without authority. In grammar one may so analyze it as to separate it into propositions, but in the science of pleading the allegation is a unit. The defendant, in effect, says: "I deny that I caused you to be imprisoned in jail thirty days without authority." This is surely the true import and effect of the answer, which simply denies each allegation. To show the defect of the plea, is anything further needed than its bare statement? What does it deny? Is it the imprisonment, the duration of it, or the want of authority? There occurs to me the familiar illustration of where the defendant pleaded, in an action of trespass, that the plaintiff's daughter gave him license to enter the house, and he did so by that license. The plaintiff replied that defendant did not enter by that license. This was held to be a negative pregnant, and that the plaintiff should have traversed the entry by itself, or the license by itself, and not both together; for the traverse might imply that a license was given, though the defendant did not enter by that license. It was therefore pregnant with an admission that the license was given, although the license was not expressly admitted; and the effect was to leave it in doubt whether the plaintiff meant to deny the license, or the entry by virtue of the license. So it is here left in doubt whether Wolcott meant to deny the imprisonment, or to admit it, and deny that it continued 30 days. "This imperfect traverse [the negative pregnant] is sometimes seen where one is called on to answer an allegation of several facts connected by the copulative conjunction, and he answers or replies denying them *in hæc verbis*, which admits that some of the facts may be true. There is no traverse of any one fact, but of the whole, as connected or happening together. But the negative pregnant is oftener seen when the statement contains an allegation of a contract or transaction as made or happening upon a day named, when time is immaterial and the traverse covers the day. In such case, it is doubtful whether the party intends to deny the date merely, or the act or transaction. It is treated as a denial of the former, and the denial is pregnant with the admission of the latter, and hence there is no good issue. "Notwithstanding the provision of the Code requiring the courts to be liberal in its construction,—a provision sometimes ignored altogether, and sometimes made an excuse for tolerating great looseness and irregularity,—there is a special reason, in states in which it is necessary to make oath to pleadings, why a negative pregnant should not be tolerated. No one could be convicted of perjury who should swear to such a denial, as it is uncertain what fact he intended to deny." Bliss, Code Pl. § 332. It was not at all material to plaintiff's right of recovery whether he was imprisoned one day or 30 days. The duration affected only the *quantum*, not the right, of recovery. It

is but the veriest truism to say that the object of an answer is to present a defense. It might have been true in fact that plaintiff was imprisoned but 29 days, and so the defendant, knowing this, might have denied the length of the confinement, but such denial would not have presented a defense.

The answer is faulty in this further respect, that it is a denial of a legal conclusion. The defendant denies that he caused plaintiff to be imprisoned without authority. This is clearly erroneous, and is not allowed by any system of pleading. In making an issue, the defendant must controvert a statement of a fact, and has nothing to do with a legal conclusion.

It seems idle to enlarge further on these questions. I have been led to do so to this limited extent on account of what seems to me to be an abuse of pleading which has grown up in the courts of the territory, and chiefly the abuse of the general denial. It must be apparent that it is not infrequently used as a sham pleading, and that there is a liability under the prevailing practice to use it as a device to defeat a just cause by interposing a denial in such form as that an indictment for perjury cannot reach the offender. In discussing the general denial, Judge HOAR, of Massachusetts, is quoted as saying: "We can imagine that so concise and comprehensive a form of denial, if commonly adopted, might lead to abuses, and are not surprised to find a difference of opinion as to its admissibility existing among judges *ad nist prius*. If any attorney should adopt it where he was not instructed by his client that there were sufficient grounds to contest all the averments to which it would apply, the practice would be highly censurable and inconsistent with professional duty. It would also be in the power of the court, where there could be any doubt as to the facts thus put in issue, to require, upon the plaintiff's motion, a more exact and detailed answer, or to postpone the trial on the ground of surprise." *Submarine Co. v. Burnett*, 1 Allen, 411. I do not question that a general denial may be a good plea when it presents a complete and unambiguous traverse of an opposing allegation. But the instances are many where this is impossible. The averments of the petition are quite often and necessarily accompanied by a statement of the way, the manner, the time, or place in which the act complained of, or the transaction relied upon, was done. In such cases, a general denial, if of the form here adopted, would be necessarily defective. And yet the incautious pleader, though he may have a perfect defense, having his mind fixed upon the liability sought to be imposed on him, denies legal conclusions, instead of the facts from which the conclusions flow.

Entertaining the opinions herein expressed, I differ very widely, of course, from my associates. If I had any reason, from an inspection of the record, to believe that Justice WOLCOTT was actuated by a sincere, though mistaken, opinion, that he was pursuing a

legal course in his harsh treatment of the plaintiff, I might not perhaps have felt it to be a duty to emphasize my dissent by a written opinion. I have never felt favorably disposed to that rule of law which distinguishes between a court of superior and a court of inferior jurisdiction, in respect of the responsibility which attaches to the incumbent of the one, and from which the incumbent of the other is freed. But since the proof shows incontestably that the defendant acted, not only without jurisdiction, but that he did so consciously, defiantly, and against better advice, I think that public interest demands that he should be made to feel the hand of the law.

(3 Ariz. 143)

CHEYNEY S. SMITH, Treasurer.

(Supreme Court of Arizona. March 24, 1890.)

TERRITORIAL LEGISLATURES—LENGTH OF SESSIONS.

Rev. St. U. S. § 1852, as amended December 23, 1880, providing that "the sessions of the legislative assemblies of the several territories * * * shall be limited to sixty days' duration," means 60 legislative working days, exclusive of Sundays, holidays, and days of intermediate adjournment, and not 60 consecutive days. WRIGHT, C. J., dissenting.

Application for *mandamus*.

C. F. Ainsworth, for plaintiff. Clark Churchill, Atty. Gen., for defendant. Ben. Goodrich, *amicus curiæ*.

SLOAN, J. The plaintiff herein applies to this court for a peremptory writ of *mandamus* to compel the defendant, as territorial treasurer, to pay the amount of a certain warrant drawn by the territorial auditor in favor of plaintiff, as authorized by subdivision 15 of section 1 of an act commonly known as the "Appropriation Bill," passed by the fifteenth legislative assembly, and approved by the governor on the 10th day of April, 1889. This action is brought for the purpose of having a judicial determination as to the validity of said act, it being contended that at the date of the passage and approval thereof the fifteenth legislative assembly had no legal existence, for the reason that the limit of time within which it could by the organic law lawfully remain in session had expired, and therefore it had become at said date *functus officio*. The journals show that the fifteenth legislative assembly began its session on the 21st day of January, 1889, and adjourned *sine die* upon the 10th day of April, 1889, being the date of the approval of said act. The journals further show that the assembly was in actual session but 48 working or legislative days, the last day being denominated the forty-eighth day of the session. The restriction upon the length of the sessions of the legislative assembly is found in section 1852, Rev. St. U. S., as amended December 23, 1880. Said section, as amended, reads as follows: "The sessions of the legislative assemblies of the several territories of the United States shall be limited

ited to sixty days' duration." Said section, being in its terms mandatory, must be so construed. It therefore remains for us to determine which of the two views as to the proper construction to be placed upon said section contended for at the hearing of the case we should adopt, viz., upon the one hand that the session of the legislative assembly is limited therein to 60 consecutive days from the day upon which the assembly convenes; or, upon the other hand, that the session is limited to 60 legislative or working days, exclusive of Sundays, public holidays, and days of intermediate adjournment. After the careful consideration the great public interests involved in this controversy demands, we have arrived at the conclusion that the latter view must prevail.

Said section is part of the organic law of the territory. It is proper to consider, therefore, the relation which the organic act, and other acts of congress amendatory or supplementary thereto, bear to the government of the territory. It was argued at the hearing of this case that congress had granted to the legislature of a territory certain limited powers, and restricted their exercise to the particular mode and manner expressed in its grant; that this grant is in every instance to be strictly construed; and that, the legislature having acted in a particular manner, no inference is to be drawn therefrom that it has theretofore acted within the limit of its delegated powers. We think the true view is that the organic law of a territory bears the same relation to the government of the territory as the constitution of a state sustains to the people of the state. The supreme court in *Bank v. County of Yankton*, 101 U. S. 129, say: "The organic law of the territory takes the place of the constitution as the fundamental law of the local government." If the view we have given be correct, then it follows that the same rules of construction apply, and like effect must be given to any part of the organic law as would apply and be given to a similar provision in the constitution of a state. A well-established rule is that the contemporaneous construction of a constitutional provision put upon it by the authority for whose guidance it was intended, particularly if acquiesced in for a long term of years, should be followed by the courts. See *U. S. v. Bank*, 6 Pet. 39; *Caldwell v. Carrington*, 9 Pet. 103; *Edwards v. Darby*, 12 Wheat. 206. That this rule applies to the construction of the organic acts of the territories is asserted by Chief Justice CHASE in the case of *Clinton v. Englebrecht*, 13 Wall. 434. In speaking of the power of the legislature of Utah to legislate with reference to the practice of the courts in the matter of juries, he said: "This uniformity of construction by so many territorial legislatures of the organic acts, in relation to their legislative authority, especially when taken in connection with the fact that none of these jury laws have been disapproved by congress, though any of them would be an-

nulled by such disapproval, confirms the opinion warranted by the plain language of the organic act itself, that the whole subject-matter of jurors in the territories is committed to territorial regulation." A provision in the organic law of New Mexico, which by the act organizing the territory of Arizona was made applicable to the latter, was to the effect that no session of the legislative assembly could exceed the term of 40 days. The first legislative assembly of the new territory convened, by proclamation of Gov. Goodwin, on the 26th day of September, and remained in session until the 10th day of November, 1864, a total of 46 consecutive days. Deducting 10 Sundays that intervened between the day upon which the assembly first met and the day upon which it finally adjourned, and we find that it was in session 40 working or legislative days. After 40 consecutive days had expired, the more important acts of the session were passed; among them being what was known as the "Howell Code." Under the provisions of this Code of laws, the government of the territory was for the most part administered until it was superseded by the Code of 1887. The validity of these laws was never questioned, and the courts, as well as subsequent legislatures, recognized them as equally operative and binding with the other acts of this session. If it be contended that the act of 1880, amending section 1852, Rev. St., is to be construed differently from the provisions of the organic act of New Mexico on the same subject, and that legislative construction upon the latter provision cannot, therefore, be considered, we find that the first legislative assembly to meet after said act took effect, viz., the eleventh legislative assembly, convened upon the 3d day of January, 1881, and finally adjourned upon the 12th day of March following, a total of 69 consecutive days. Deducting, as before, the intervening Sundays, and we find that the assembly was in actual session upon 60 working or legislative days. Sixty consecutive days from the beginning of the session ended with March 3d. After said date an act was passed fixing the date for the convening of subsequent legislatures. This act was followed and acquiesced in by succeeding assemblies, until the act of 1887 again changed the date of the beginning of the sessions. Among other acts was one creating the county of Graham; another, providing for the issue of bonds and the levy and collection of taxes; others were passed amending the revenue laws and the statute of limitations. During the session the council directly gave its assent to this legislative construction in rejecting a resolution to adjourn at the end of the 60 consecutive days. Thus the legislative construction from the beginning has been uniform that the sessions are limited to 60 days of actual session. In the case of *Moog v. Randolph*, 77 Ala. 608, the supreme court of Alabama distinctly recognized the rule that the practical construction of the legislature will govern in a case

of this kind, and gave a like construction upon the term "days," in a similar provision of the constitution of that state.

In construing the constitutional provision that the general assembly shall not remain in session longer than 50 days, Justice SOMERVILLE in that case said: "I am satisfied that 'fifty days' means fifty legislative working days, exclusive of the Sundays and other days upon which the senate and house concur in refusing to sit by joint resolutions of adjournment. This question has been repeatedly considered by the judiciary committees of the senate and house of representatives at successive sessions of the general assembly since the adoption of the constitution; and other reports concurring in this view have in each instance been adopted by those bodies. Even if we regard the question a doubtful one, we would hesitate to depart from this settled legislative construction of the fundamental law, especially in view of the serious consequences which would necessarily flow from it."

But, aside from the legislative construction, we think a consideration of the subject-matter, as well as the evident purpose and intent of the act of 1880, warrants the interpretation we put upon it. Congress certainly contemplated that emergencies might arise that would render legislation between fixed dates practically impossible. At any rate, that upon Sundays and holidays no legislation could or would be done. If the purpose was to include these, other language more clearly expressing this intent would very probably have been used. A distinction should be made between statutes which restrict the number of days upon which acts may be performed and those which merely fix the ulterior limit of time within which a single matter may be transacted. In the former, Sundays and other days when labor or business cannot be transacted are usually excluded; in the latter, these are usually included, unless expressly excepted. Thus it has been held that Sundays, not being judicial days, are not to be considered as days of a term of court. *Read's Case*, 22 Grat. 924; *Bank v. Williams*, 46 Mo. 17; *Chicago v. Iron Works*, 93 Ill. 223. There appears no good reason why the same rule should not apply to the construction of the term "days," when applied to matters to be transacted by legislative assemblies.

Were we in doubt as to the correctness of the above construction, what would be the duty of the court in the premises? The legislative assembly, a co-ordinate branch of the government of the territory, acting under like solemn obligations and responsibilities with ourselves, has passed the act the validity of which is in question, which act has been approved by the governor, who has taken a like oath to support the constitution and laws of congress, and now are we to declare it invalid? If we believe that the legislature, in attempting to legislate after March 21st, clearly, palpably, and plainly violated the

fundamental law of the territory, then most unquestionably it is our duty to so declare. While this is true, we must bear in mind that among the fundamentals of the law almost, is the proposition that "we can declare an act of assembly void only when it violates the constitution (or organic law) clearly, palpably, plainly, and in such manner as to leave no doubt or hesitation on our minds." *Sharpless v. Mayor, etc.*, 21 Pa. St. 164. In *Adams v. Howe*, 14 Mass. 345, the court say: "We must premise that so much respect is due to any legislative act solemnly passed and admitted into the statute book that a court of law which may be called upon to decide its validity will presume it to be constitutional until the contrary clearly appears, so that in any case of the kind substantially doubtful the law would have its force. The legislature is in the first instance the judge of its own constitutional powers, and it is only when manifest assumption of authority or misapprehension of it shall appear that the judicial power will refuse to execute it." In *Kentucky* it has been held that if it be doubtful or questionable whether the legislature has exceeded its limits the judiciary cannot interfere, though it may not be satisfied that the act is unconstitutional. *City of Louisville v. Hyatt*, 2 B. Mon. 178. To the same effect, among others, are the following cases: *City of Lexington v. McGuillan's Heirs*, 9 Dana, 514; *Cooper v. Telfair*, 4 Dall. 14; *Tyler v. People*, 8 Mich. 333; *State v. Cummings*, 36 Mo. 277.

In view of this well-settled rule recognized in the foregoing cases, apart from the view we take of the organic law, viz., that the legislature is limited in its sessions to 60 working or legislative days, and not to 60 consecutive days, as contended, we would hesitate before holding that the legislature had in this instance transcended its powers, and violated the fundamental law of the territory, especially when we consider that this, in effect, would be to annul many of the laws now in force, and thus disturb and unsettle the public credit, destroy private rights, and bring disaster upon the territory. From the foregoing considerations, we hold that, the appropriation bill passed by the fifteenth legislative assembly, and approved April 10, 1889, is a valid law, and that the plaintiff is entitled to his writ. The writ will issue.

KIBBEY, J., concurs.

WRIGHT, C. J., (*dissenting*.) The court, in the majority opinion, rightly hold that section 1852 of the United States Revised Statutes, as amended, is mandatory in its terms; but the opinion holds that, when congress said in said section that the sessions of the said legislative assemblies of the various territories should "be limited to sixty days' duration," it meant 60 legislative working days, and not 60 consecutive days. We are unable to concur in this view; and we now proceed to analyze this section, and endeavor to

show that the language employed by congress necessarily limits sessions of territorial legislative assemblies to 60 consecutive days; and therefore that the fifteenth legislative assembly of this territory, having begun its session on the 21st day of January, 1889, was not, and could not have been, without permission of congress, in legal session on the 10th day of April, 1889. There is no dispute as to the facts. The said fifteenth legislative assembly having begun its regular session at the time fixed by law, viz., on the 21st day of January, 1889, 60 consecutive days from that date expired on the 21st day of March, 1889; and it is admitted that the act in question was passed on the 10th day of April, 1889. So that the only and vital question is, was said assembly in legal session on the said 10th day of April, 1889? Clearly, it was not. That assembly was wholly and simply a creature of the national legislature. It was the nursing of congress, drawing the milk of its existence from congressional maternity, and living, moving, and having its being in the will of congress, as expressed in the federal statutes. It therefore had no real legal being outside of those statutes. Necessarily it existed, if at all, according to their provisions. To those statutes, then, to the expressed will of congress, the creator, must we look for the definition of the rights and powers of the creature. The section of the federal statute containing the principal and expressed limitation upon the duration of the sessions of territorial legislative assemblies is, of course, said section 1852, as amended in 1880. There are other sections of that statute, however, which shed light upon the true meaning of this one. The purpose, the intention, of the law-maker is of the first importance. We shall have obtained a true solution of the main question involved in this case, when we determine correctly, if we may be able to do so, precisely what congress meant by the language it employed in this section. It reads: "The sessions of the legislative assemblies of the several territories of the United States shall be limited to sixty days' duration." Is the latter clause mandatory or directory? The court incidentally say it is mandatory in its terms, but the conclusion arrived at indicates that a discretion is implied. We are unable to perceive how this can be; because, if the meaning of this language is clear and indubitable and is mandatory, it admits of but one true construction, being susceptible of but one true meaning. Yet the court say: "It remains for us to determine which of the two views, as to the proper construction to be placed upon said section, contended for at the hearing of the case, we should adopt, viz.: Upon the one hand, that the session of the legislative assembly is limited therein to 60 consecutive days from the day upon which the assembly convenes; or, upon the other hand, that the session is limited to 60 legislative or working days, exclusive of Sundays, public holidays, and days of intermediate adjournment."

The decision then construes the language to mean 60 legislative working days, exclusive of Sundays, holidays, and days of intermediate adjournment. It seems to us that, if this construction is correct, it makes the language necessarily directory, and not mandatory; for the reason that 60 legislative working days, exclusive of Sundays, holidays, and days of intermediate adjournment, would necessarily make the session endure longer than 60 consecutive days; and therefore, as the greater includes the less, while the session might endure for 70 or 80 consecutive days, counting Sundays and other days of intermediate adjournment, in order to consume 60 legislative working days the limitation might also be construed to mean 60 consecutive days. In other words, the real point of difference is plaintiff's counsel contend that the above language is directory only, and admits of discretion, while the defendant's counsel, and the friend of the court, contend that it is mandatory, and admits of no discretion. For it is here to be observed that the most earnest and strenuous arguments of plaintiff's learned counsel, including the very able argument of Asst. U. S. Atty. Gen. Shields, filed herein, were that the said language is directory only. So that it seems to us to be primarily essential to a satisfactory solution of the problem in hand to first determine absolutely, if possible, whether this language is mandatory, or directory only.

Now, at the outset, we say this language is so clearly mandatory that it is really surprising that any one should question its true import. It might be observed that no mandatory phrase or sentence was ever employed that was not also, in a measure at least, directory. When God said, "Let there be light," He both directed and commanded, and the glory and blessing of that subtle agent covered the void earth. If the teacher says to the pupil, "Get your lesson," it is both a direction and command. If the father says to the son, "Go to the stable and bring my horse, by the back gate, into the yard," the language is also a direction and command; but if the son should bring the horse into the yard by the front, instead of the back, gate, we apprehend there would still be a substantial execution of the power or authority conferred. We mean there is quite a difference between the power conferred and the exercise of that power. The grant of power is generally mandatory, while the phraseology indicating the manner of its exercise is often construed to be only directory, and therefore the irregular exercise of a power would not necessarily render the act performed void. We think most of the cases, where language apparently mandatory has been construed to be directory, will be found upon critical examination to be where there has been an irregular or improper exercise of the power granted, rather than the attempt to exercise a power not conferred. For instance, the election cases referred to by the learned

counsel for the plaintiff. In the case at bar the power granted to the legislative assembly by congress was to hold a biennial session for only 60 days, and the attempt to hold longer than 60 days was attempting to exercise a power not conferred. Mandatory language may be, and is often held to be, directory; directory language seldom is, and rarely is held to be, mandatory. The one is used generally in a permissive sense; the other, in a prohibitive or negative sense. "Thou mayst be saved" is permissive; "Thou shalt not kill," is prohibitive. The one imports discretion, the other does not. Mandatory language is generally that which superiors employ in addressing inferiors. It is generally used where the party using it has the power to control the action of the party to whom it is addressed. Hence the intention of the party using the language should control the construction put upon it, unless the language employed is so absurd or dubious in meaning as to render such intention absolutely uncertain and indefinite. It is the language of the parent to the child, of the teacher to the pupil, of the master to the servant, the principal to the agent. Now, congress is the principal or master,—the superior; the legislative assembly is the agent or servant,—the inferior. It is for the principal or master—the superior—not only to direct, but to command; and it is for the agent or servant—the inferior—not only to follow, but to obey. Wherever congress has intended to give this agent—this inferior—a discretion in action, its language is so clearly directory as not to admit of doubt. This, however, has rarely happened, and but few instances can be found, for now we assert that, with almost unbroken uniformity, wherever congress, in legislating for the territories, has spoken with reference to the various powers, duties, sessions, etc., of the territorial legislatures, it has used the word "shall" in not simply a directory, but in a mandatory, sense. Let us see: Section 1842, Rev. St. U. S., says: "Every bill which has passed the legislative assembly of any territory shall, before it becomes a law, be presented to the governor," etc. Is this not plainly mandatory? Would any one pretend that, if the legislative assembly were to attempt to pass a law without presenting it to the governor, it would be worth the paper upon which it was written? Again, section 1846 of said statutes in its first sentence says: "The legislative power in each territory shall be vested in the governor and the legislative assembly." Can there be any discretion here? May the legislative power exist elsewhere? Further, we read in the same section: "The legislative assembly shall consist of a council and house of representatives. The members of both branches of the legislative assembly shall have the qualifications of voters as herein prescribed. They shall be chosen for the term of two years, and the sessions of the respective legislative assemblies shall be biennial. Each legislative assembly

shall fix by law the day of the commencement of its regular sessions. The members of the council and of the house of representatives shall reside in the district or county for which they are respectively elected." Here we have the use of the word "shall" recurring seven different times in this one section; and all referring directly to the qualifications, powers, duties, sessions, etc., of the members of the territorial legislative assemblies; and is there any possible room for the faintest doubt that, in each instance, the word is used in its absolute, mandatory sense? It is not that the assembly may consist of a council and a house, but it shall so consist; not that the members of both branches may have the qualifications of voters, etc., but they shall have such qualifications; not that they may be chosen for two years, but they shall be; not that the sessions may be biennial, but that they shall be; not that each legislative assembly may fix by law the day of the commencement of its regular sessions, but it shall fix the day; not that the members may reside in their respective districts or counties, but they shall reside therein. Again, the latter part of section 1886, Rev. St. U. S., reads: "No session of the legislature of a territory shall be held until the appropriation for its expenses has been made." Does this mean that such session may be held, whether the appropriation be made or not? On the other hand, is not the inference irresistible that, unless such appropriation were first made, such session would be void? In other words, is not the appropriation a condition precedent to the legal existence of the session? And still again, section 1888 of said statutes reads: "No legislative assembly of a territory shall, in any instance or under any pretext, exceed the amount appropriated by congress for its annual expenses." Here, again, congress has clearly indicated its purpose to be to limit the sessions of the legislative assemblies to a definite period of 60 days' duration; for appropriations are made upon a basis of 60 days; and we know of no instance where the *per diem* of members, or expenses incurred for longer periods than 60 days, have been paid. This section, then, sheds light upon the meaning of congress, when it employed the language, "shall be limited to sixty days' duration," and we think it, and other instances referred to, clearly indicate the legislative intent; that congress said just what it meant, and meant just what it said, when it declared, in plain, unambiguous language, that the sessions of the legislative assemblies of the several territories of the United States shall be limited to 60 days' duration.

If it had been the intention of congress to rest any discretion; if its purpose had been that the session might be indefinite in duration, but that congress would only pay for 60 days of it,—would not the language of the statute have been something like this: "The sessions of the territorial legislative assembly

blies may continue longer, but in no event will the United States pay the expenses thereof for more than sixty days?" And is it not in a measure a reflection upon the wisdom and intelligence of the federal law-makers to impute a doubt to the meaning of the simple, but significant, language they employed? Congress was passing a fundamental law for the guidance of one of the three co-ordinate branches of youthful governments, whose people, being of the frontier in a large measure, were not supposed to be so critical in their civilization and learning as in the older communities. Is it reasonable to suppose that congress, in passing this fundamental law, which in its operation was to so seriously affect the people in these frontier governments, would use language of intricate, doubtful, ambiguous, or double meaning? Rather, is it not most reasonable to suppose that congress intended to use language of the simplest, most certain, and unequivocal meaning? And is this not exactly what congress has done? Is there any possible room for construction in determining the true meaning of the phrase, "Shall be limited to sixty days' duration?" Is it not, therefore, clear and certain, beyond reasonable doubt, that congress intended to use the above language, not simply in a directory, but in a mandatory, sense? It will be observed that there are two words in this phrase which are controlling, and which make its meaning absolute, viz., the words "limited" and "duration." The word "limited" means narrow, restricted. It is synonymous with the word "circumscribe;" and that word means to inclose within a certain limit; to hem in; to confine; to bound; to limit; to restrict, etc. Mr. Webster defines the word "duration" to mean the power of enduring; continuance in time; "the portion of time during which anything exists." Adding the latter definition of the word "duration" to the phrase, it then would read: "Shall be limited to an existence of sixty days." Is it not evident that the great primal purpose of congress was to control within fixed, definite limits the sphere of legislative action in these territories? And that when the session began it should continue to exist, to endure, for only 60 days from the day of beginning? Is there any room for construction here? Or, rather, can there be but one true construction? Is the true meaning of this section at all doubtful? Does it not necessarily mean that, whatever the time fixed by the legislative assembly for the session to begin, it could not continue to exist, as a legal organized body, longer than 60 days from said beginning? Sixty days of lawful session; 60 days of legal, organized existence, that is all. It means 60 days, counting one after another, including Sundays, holidays, and any days of temporary adjournment. If congress had meant to exclude these days from the limit of 60 days' duration, it would have said so. How plain the language; how simple, how certain the meaning. Although adjournments are had, the ses-

sions go on. This is fundamental. Mr. Blackstone says: "An adjournment is no more than a continuance of the session from one day to another, as the word itself signifies." [1 Bl. Comm. 186.] If Sundays, days of temporary adjournment, etc., were not to be counted as days of the session, then for those days the session would not endure. Is it not plain that, if Sundays, holidays, and all other days of temporary adjournment are not to be counted as parts of the session, the legislature would not be in session during such days, and that it would necessarily have to possess the power to hold any number of distinct sessions? But congress has only conferred power to hold one session, of 60 days' duration. How, then, can it hold more than one session? Again, to state it a little differently, if Sundays, days of intermediate adjournment, etc., are not included as parts and parcels of the session, the time measured by these days being no part of such session, the session necessarily ceases for that time; but the only and true meaning of the language used by congress is that, when the session begins, it endures, continues to exist, for 60 days only from said beginning. So that it is simply impossible that there could be but one regular, legal session of the territorial legislative assembly; and it is just as impossible that that session could legally exist, endure, for a period longer than 60 days from its beginning.

Another, and we think a potent, reason why congress intended by the language used to limit the duration of the session of the legislative assembly to 60 days from its beginning, is that the history of the times, at and recently before the passage of the act, was rife with complaints of extravagance and reckless expenditure in more than one of these legislative assemblies; so that, construing this statute in the light of surrounding circumstances and contemporaneous history, we say that it is evident that the purpose of congress was to absolutely control, to circumscribe, to hem in, to restrict within fixed definite limits, these legislative assemblies as to the period of their existence; and to fix beyond the line of cavil or discussion the fact that the session could only exist, endure, for 60 days from its beginning. Hence the days of its possible existence were with unerring certainty numbered. By the volition of the members of the legislative assembly its session might die before the expiration of the full number of days; but, at all events, it could not live, endure, beyond them. The measure of its existence, the day, the hour, of dissolution, was marked upon the dial-plate in unmistakable phrase. Hence we say again that congress not only used the language of said section in a directory, but more emphatically in a mandatory, sense. To us the language used imports no possible discretion as to the limitation of the period beyond which the session cannot exist. It has but one true meaning. It means the actual hours, days, weeks, etc., elapsing—the one after the other

—from the time of the beginning of the session till 60 days, of 24 hours each, have passed. For obvious reasons, the time of beginning was immaterial; but, for equally obvious reasons, the time of ending was material. Congress had to pay the bills of expense, which could not be affected by the beginning of these sessions, but would necessarily be seriously affected by their endings,—by the periods of their duration. While, therefore, it is evident that a discretion was intended as to the time of their beginning, it is equally evident that none was intended as to the time of their ending. The limit is fixed, definite, and certain. They may stop this side of the limit. They cannot go beyond it. It is not pretended that the legislative assembly had any inherent power to convene, call itself into legal session, after dissolution; and yet, as we have already seen, if this be not so, how can days of intermediate adjournment be excluded from the session, without the session itself becoming necessarily dissolved? And therefore the assembly would necessarily have to possess inherent power to call itself back into legal session. But the principle is quite a general one that no legislative bodies have this inherent power. When the legislatures of the states end their sessions, they can only reconvene by authority of the governor. When congress adjourns, the president alone can call one or both branches of it back into legal session. And even the British parliament itself has no inherent power of convention after dissolution; the queen may prorogue it, and it cannot of itself reconvene. So that, as the supreme court of Dakota says in *Treadway v. Schnauber*: "The territorial legislature is a creature of congress. Its powers, duties, and sessions are defined and limited by the act organizing the territory, and the amendments thereto, and it derives no life or power from any other source. It is authorized to hold a biennial session of not to exceed forty (now sixty) days, and there is no provision * * * to extend the session beyond the time specified." See 1 Dak. 249. The court seem to rely upon the decision of the supreme court of Alabama in *Moog v. Randolph*. See 77 Ala. 608. But it must be remembered that the limitation there referred to was upon the sessions of a state legislature, which had given repeated legislative constructions to the limitation contained in the constitution of Alabama, all to the effect that the 50 days' limitation meant 50 legislative working days; and that the court followed that construction—as Mr. Justice SOMERVILLE, who delivered the opinion of the court, said—because of the serious consequences that would ensue; the court holding that it would be reluctant to depart from such construction in doubtful cases, the question being no longer *res integra*.

We fully agree with the court, in the case at bar, that, where laws have long been acquiesced in,—where substantial rights have grown up and vested under them,—it is a

well-settled policy of the courts not to disturb them, though they may not have been legal or constitutional originally. This was, as we have just seen, the true reason for the decision in the Alabama case; it was also the reason for the Oregon decision. But this doctrine cannot obtain here. The acts of the fifteenth legislative assembly, passed after the expiration of the 60 consecutive days from the beginning of its session, have not been acquiesced in. The validity of those acts has been questioned ever since their passage. The contention over them has superinduced the very litigation at bar. And because it is the policy of the courts not to disturb illegal or doubtful acts, long acquiesced in, for the reason that substantial rights have vested, and evil consequences might ensue, does it follow that the courts ought to uphold illegal or doubtful acts, because substantial rights might vest in the future? We are free to say that in our opinion the various laws, passed by the first and the eleventh legislative assemblies of this territory, after the expiration of 60 consecutive days from their beginning, should not be disturbed simply because they have been long acquiesced in. But should that view control the action of the court in the case at bar? If it should, then the courts could pass upon the validity of no legislation, because evil consequences might follow *in futuro*. The court is not called upon to give a construction retroactive in its effects, but to say whether or not we will truly decide a living vital issue. Nor will it do to say there has been a uniform legislative construction on this subject by our legislative assemblies. If the first and eleventh legislative assemblies of this territory construed the limitation to be 60 legislative working days, presumably the other 13 legislative assemblies of the territory construed it to mean 60 consecutive days; for we must infer that, if any of the remaining 13 legislative assemblies had construed the limitation to be 60 legislative working days, this resource would have been drawn upon to strengthen the position taken. At all events, it is absolutely certain that a number of those assemblies did construe the limitation to be 60 consecutive days. And therefore the territorial legislative construction put upon the limitation lends neither force to the argument, nor strength to the position.

For the first time the supreme court of this territory is called upon to put its construction upon the purview of that limitation. That construction should be according to the true tenor and effect of the statute, unaffected by past illegal acts, acquiesced in, or rights to be hereafter affected under them. This is plainly so, for all legal questions and rights, arising under the acts of the fifteenth legislative assembly, passed after the expiration of the 60 consecutive days, are still *res integra*. But, even to the modified extent to which the Alabama case goes, it seems to stand alone. Every other state legislature, so far as we have been able to learn, whose

sessions have been, or are, limited by their constitutions to a certain number of days, seems to have entertained no doubt that the limitation meant consecutive days. The constitution of Missouri (article 4, § 16) provides that "the members of the general assembly shall severally receive from the public treasury such compensation for their services as may, from time to time, be provided by law, not to exceed five dollars per day for the first seventy days of each session, and after that not to exceed one dollar per day for the remainder of the session," etc. This constitution was adopted in 1875, and every general assembly of Missouri, that has held a legislative session since, has construed the 70 days' limitation to mean 70 consecutive days from the beginning of the session. Section 17, art. 5, of the constitution of the state of Arkansas, adopted in 1872, provides that "the regular biennial sessions [of the general assembly] shall not exceed sixty days in duration, unless by a vote of two-thirds of the members elected to each house of said general assembly," etc. It will be observed that the words of limitation in this section are very similar in their import to the words of limitation upon the session of the territorial legislative assemblies, contained in section 1852 of the United States Revised Statutes as amended. The one says "shall not exceed sixty days in duration," the other says, "shall be limited to sixty days' duration." Every general assembly of Arkansas that has held a session since the adoption of this constitution, has construed this limitation to mean sixty consecutive days. And in *Trammell v. Bradley*, 37 Ark. 374, the supreme court of that state have passed directly upon the meaning of this limitation; and they use this emphatic language: "The regular biennial session of the legislature had begun on the 10th of January, 1881. During the session by concurrent resolution, not signed by the governor, the session 'was extended and continued' until twelve o'clock m. on the nineteenth of March, 1881. The session, if not properly extended, expired on the ninth of March, and the act having been passed after that period, would be invalid." To say that the words, "shall not exceed sixty days in duration," are mandatory, and mean 60 consecutive days, including Sundays, holidays, and any days of intermediate adjournment, and that the words "shall be limited to sixty days' duration," are not mandatory, and mean 60 legislative, working days, is to make a judicial distinction without a judicial difference. And it must be further observed that, wherever the courts of last resort in the territories have incidentally passed upon this question, they have indicated their view to be that the limitation was intended to be 60 or other number of consecutive days; i. e., that when the session begins every day must be counted as a part

of the session, till the 60 or other number of days elapse. See *Territory v. Clayton*, (Utah,) 18 Pac. Rep. 628; *Territory v. Scott*, (Dak.) 20 N. W. Rep. 401; *Stevenson v. Moody*, (Idaho,) 12 Pac. Rep. 902; *Treadway v. Schnauber*, 1 Dak. 249. See also, *State v. Arrington*, (Nev.) 4 Pac. Rep. 735; *Bank v. County of Yankton*, 2 Dak. 365, 101 U. S. 129; and *Bank v. State of Iowa*, 12 How. 1.

But if the question were doubtful, if the courts had expressed or intimated views that are conflicting, we should unhesitatingly hold that the opinions of the attorney general of the United States, delivered on the 16th days of March and July last, have put the question beyond the line of discussion. This is the great law officer of the government. In passing upon federal statutes, his opinions, next to the positive judicial determination by the great tribunal of final resort, (the supreme court of the United States,) are entitled to the highest consideration, and should have the binding force of exalted authority. In an official opinion rendered to the honorable the secretary of the interior, on the 16th day of July last, the Honorable W. H. H. Miller, attorney general of the United States, referring to letters of the governor and secretary of Arizona, bearing dates of June 2d and 26th, respectively, said: "I am unable to find in either any question of law which is not covered by the opinions of this department rendered to you under dates of March 16, May 29, and June 19, 1889. The first of these opinions was to the effect that, under the act of congress, which is the organic law of the territory, the session of the legislature of Arizona is limited to sixty consecutive days. The corollary to this conclusion seems clear, that any attempted legislation after that time would be nugatory." This language was uttered subsequently to the reception by the attorney general of the "memorandum" of the assistant attorney general, Shields, filed with the argument of the learned counsel for the plaintiff herein. This is apparent from the face of each. It must therefore be regarded as a reassertion and indorsement of the views expressed by the attorney general in his opinion of March 16, 1889, on the same subject; and as already indicated, we regard these opinions by the attorney general as decisive of the main question involved in the case at bar. With the attorney general, we hold that any attempted legislation, after the expiration of the 60 consecutive days, was nugatory. The fifteenth legislative assembly of this territory, having by operation of the law of its being been dissolved after the 21st day of March, 1889, on the 10th day of April, 1889, it had ceased to have a legal, organized existence, and could therefore pass no valid acts. Hence it is our conclusion that the prayer of the petition should be denied.

(1 Wash. St. 73)

BROTTON v. LANGERT et al.

(Supreme Court of Washington. Feb. 5, 1890.)

COMMUNITY PROPERTY—LIABILITY FOR PERSONAL JUDGMENT AGAINST HUSBAND.

Under Act Wash. T. 1879, entitled "Property Rights of Married Persons," community real estate cannot be sold to satisfy a personal judgment recovered against the husband for having, as constable, wrongfully sold property under execution. STILES, J., dissenting.

Appeal from superior court, Pierce county; FRANK ALLYN, Judge.

E. W. Taylor, for appellant. Judson, Sharpstein & Sullivan, for appellees.

DUNBAR, J. The appellant, by her complaint filed in the district court of Pierce county, sought to prevent a judgment lien being extended over community real estate, and to obtain a writ of injunction to prevent the appellee from selling the community property of appellant under and by virtue of judgment obtained by the appellee Charles Langert, in a suit against appellant's husband as constable, he, as said constable, having sold personal property in which appellee had a special property, in execution against a person other than appellee. The appellant obtained a temporary restraining order. On the hearing of the case, appellee demurred to the petition, and assigned as grounds of demurrer that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the case dismissed, from which orders and decrees the appellant appealed to this court. In this case it is conceded that the property is community property, and that the judgment obtained against M. Brotton was a personal judgment for a tort. Hence the primary question involved is whether or not community real estate is exempt from execution on a judgment rendered against an individual member of the community, when the debt for which the judgment was obtained was not incurred for the benefit of the community. The community, composed of husband and wife, is purely a statutory creation, and to the statute alone must we look for its powers, its liabilities, and its exemptions. Nor are we much enlightened by quotations from the common law in relation to the property rights and liabilities of husband and wife; for, while we ordinarily look to the rules and maxims of the common law to aid us in the construction and analysis of statutes, it was plainly the intention of the legislature, in the session of 1879, in the passage of the chapter denominated "Property Rights of Married Persons," to depart from the common law, and breathe into legal existence a distinct and original creation, partaking somewhat of the nature of a partnership and of a corporation, but differing in some essentials from both, and this creature is termed a "community." The statute alone determines who the members of the community shall be, the manner in which it shall acquire property, and defines and limits, not only the powers of the members of the community over said prop-

erty, but protects it from acquisition by others, excepting in the manner specified. It also lays down its own rule of construction, and the language of the act itself is: "The rule of common law, that statutes in derogation thereof are to be strictly construed, has no application to this chapter. This chapter establishes the law of this territory respecting the subject to which it relates, and its provisions, and all proceedings under it, shall be liberally construed with a view to effect its object." Then the pertinent and vital question becomes, what was the object sought to be effected?

Section 2396 of the Code provides that "every married person shall have the same right and liberty to acquire, hold, enjoy, and dispose of every species of property, and to sue and to be sued, as if he or she were unmarried;" and section 2398 abolishes all laws imposing civil disabilities upon a wife which are not imposed upon a husband; and succeeding sections define what separate property is, and provide how it may be acquired, and in what manner disposed of. So far the evident object of the law is to place husband and wife on an equal footing in relation to property matters. Section 2409 is as follows: "Property not acquired or owned, as prescribed in sections 2400 and 2408, acquired after marriage by either husband or wife or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof." This section discriminates in favor of one spouse, only so far as is actually necessary for the transaction of ordinary business. Section 2407 provides that the expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately. Section 2410 reads as follows: "The husband has the management and control of community real property, but he shall not sell, convey, or incumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance, by which the real estate is sold, conveyed, or incumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife: provided, however, that all such community real estate shall be subject to the liens of mechanics and others, for labor and materials furnished in erecting structures and improvements thereon, as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon."

Construing all the provisions of the chapter together, we cannot escape the conclusion that the object of the law was to absolutely protect (so far as is consistent with the transaction of ordinary business, as we before observed) one spouse from the misdeeds, improvidence, or mismanagement of the

other, concerning property which is the product of their joint labors. It is in the nature of an exemption, and, as has been well said, "exemption laws are upheld upon principles of justice and humanity." The statute provides the ways in which this property can be alienated: (1) The voluntary alienation by the husband and wife joining in the deed; (2) by making it responsive to certain demands constituted liens by the statute; and there is no other way contemplated. In fact, the very object of the law is to prevent its alienation in any other way. It expressly provides that the husband shall not sell, convey, or incur it, and he will not be allowed to do by indirection or fraud that which he is directly prohibited from doing. The practical result to the non-contracting spouse would be the same whether the law allowed the other spouse to directly convey the property, or allowed the title to pass through the medium of a sale on an execution flowing from a judgment to which he or she was not a party. It is the results the law regards; the modes are not important. If the theory of the appellee is correct that a personal judgment against the husband will become a lien on the community real estate, then certainly there is no meaning to the proviso to section 2410; for the liens there specified would attach without the proviso. If a judgment which is not obtained for a community debt becomes a lien upon community real property without any special proviso, why make a special proviso for a judgment which is obtained for a community debt? It is very evident that the intention of the statute was that community real estate should not be subject to liens on any judgments, excepting those mentioned in the proviso and for the causes mentioned in section 2407, and these exceptions are founded in reason and right; because the labor and material furnished by mechanics in erecting structures on the land enhance the value of the community realty, thereby benefiting the community, and becoming practically a community debt; and the reason for charging the expenses of the family, or the education of the children to the community, are too obvious for discussion. It was held by the supreme court of Oregon in the case of *Smith v. Sherwin*, 11 Or. 269, 3 Pac. Rep. 686, that the wife could not be held liable in an ordinary action for goods sold and delivered, when such goods were sold upon the order of the husband, although the same were devoted to family use, under a statute which provides: "Contracts may be made by a wife, and liabilities incurred, and the same enforced, by or against her to the same extent, and in the same manner, as if she were unmarried;" and which further provides that the property of both husband and wife shall be chargeable with family expenses,—being substantially the same as sections 2396, 2407, Code. This decision was based on the ground that the complaint did not affirmatively show that the goods were sold for the benefit of the

family. In the case of *Andrews v. Andrews*, 3 Wash. T. 286, 14 Pac. Rep. 68, the court says: "So long as there is only a judgment or a judgment lien confessed or suffered by the husband alone, the community interest in real estate is not affected, unless in fact the debt upon which the judgment was given was a community debt. The force and qualification of the lien of a judgment to which the husband only is a party, as affecting community real estate, is given in section 2410 of the Code, by way of proviso to the restriction on the power of the husband to alienate or incur such property. In the statute itself, the wife and all the world had notice of the limitation of such a lien as regards such property. Indeed, the judgment not being determinative of any issue as to the character of the property which is to be included in its lien, the husband himself would be at liberty to contest the extension of the lien over community real estate." But we are met by arguments in the brief of counsel for appellee, asserting that this construction of the statutes will lead to unsettling business relations, and many suppositious cases of hardship to creditors are earnestly dwelt upon; but this is a branch of the subject entirely within the jurisdiction of the legislature. Once it is conceded that this is a rightful subject for legislation, which will scarcely be denied, there is no limit to legislative authority, and it is not the province of a court to speculate or theorize upon the practicability or impracticability of the laws, or the good or bad effects which may result from such laws. These are subjects for legislative consideration, and not for judicial determination. We think the judgment obtained against *Brotton* was not a judgment for a community debt; that the petition did state facts sufficient to constitute a cause of action; and that the sale should have been restrained. It follows that the judgment will be reversed, and the cause remanded to the court below, with instructions to proceed in accordance herewith.

ANDERS, C. J., and HOYT and SCOTT, JJ., concur.

STILES, J. I dissent. It was contended in this case that the "community debts" mentioned as chargeable upon community real property in the act of 1881 (Code, § 2410) do not include a judgment against a husband who was a constable, and who, while acting as such officer, took property in execution upon which there was a chattel mortgage, and sold the property so that it became scattered and lost to the mortgagee, the judgment being for damages for that wrong. The act in question nowhere undertakes to say what a community debt is, nor does it use any language by which it can be said that a community debt is to be anything different under this act from what it was under the previous community property statutes of 1869, 1871, 1873, and 1879. "Debts" are spoken of in all these acts as liabilities to pay, with-

out any regard to the technical difference between "debts" and "torts." In numerous instances in each of them, there are negative provisions like these: "The earnings of the wife are not liable for the debts of the husband;" "the separate property of the husband (or wife) is not liable for the debts of the wife (or husband) contracted before marriage;" and, in sections 2400 and 2408 of the act in question, the separate property of husband and wife is not subject to the "debts or contracts" of the other. Would it be contended that, because these terms "debts" and "contracts" are used, and no reference is made to "torts," therefore the separate property of the husband and wife would be liable for the torts of the other? In section 25 of the act of 1879, the term "debts" was used as synonymous with "judgment or decree," no matter for what cause of action rendered. And so here, while there may possibly be some purely personal wrongs by a married person that should be first compensated out of the separate property of the wrong-doer, where, as in the case at bar, the constable was pursuing his usual avocation for the benefit of the community, and not maliciously, but through a mistaken idea of his duty, he incurred a liability to recompense the mortgagee, I see no reason whatever for holding this not to be a liability or debt for which the community real estate is, by the statute, answerable. The fact that the result of the liability has not been to the pecuniary advantage of the community certainly can make no difference in a court of justice, where advantages are not material. A good or a bad bargain cannot make the difference between right and wrong, and the community of husband and wife has not yet become so helpless a thing that we need presume in its favor, as though it was a minor or an imbecile. Under all former community property acts this judgment could have been made out of community property, without any statute provision on the subject. Section 19 of the act of 1871, which was the least liberal of all these acts, had this provision: "When real estate, common property, shall be sold for indebtedness of the wife or the husband only, no more shall be sold than shall be necessary to satisfy the indebtedness and cover costs;" etc. Yet under that act the husband could not sell community property without the wife's joinder. By the act of 1879, no real property, either separate or community, could be sold, incumbered, or in any way disposed of without the joinder of the husband and wife in the instrument; but I have never heard or read a suggestion that under that act a separate debt of either husband or wife could not be collected out of the separate real property of either, without the consent or deeds of the other. Obviously, it was considered by the framers of that act that the matter of the voluntary alienation of lands had nothing to do with the rights of creditors, and while they hampered the husband and wife to an excessive degree, as be-

tween themselves, they placed no restrictions against the collection of just debts. Yet if we were to hold in this case that because the husband cannot sell, convey, or voluntarily incumber without the wife's joinder, no liability incurred by him, as this one was, can be charged against community property, then we should be bound to hold, in any case arising under the act of 1879, that without the wife's consent, by deed, the husband's debt incurred before marriage could not be collected out of his real property acquired before marriage, for the language of the two acts is precisely alike.

The only ground urged for the decision of the majority seems to be under the claim that the wife has a veto upon voluntary conveyances and incumbrances of community real estate for her protection against her husband, and that the husband must not be allowed to do that by fraud or indirection which he cannot do directly. The same argument would apply to the incurrence of every debt under the act of 1879, and to the collection of antenuptial debts as well. But there is no question of fraud in this case, and there is now no propriety in using that argument. Here the question is simply whether the wife shall, while she is fully protected in the possession of her separate property, and of her earnings, take her share of the risk that her husband will conduct the business of the community without loss; nay, it is not that only, but whether the husband himself shall be allowed to hide behind the ample skirts of his wife, in case of his "torts," to the ruin of the victim of his ill-advised action. So far as the proviso at the end of section 2410 is concerned, I fail to see what importance it has there. It is merely declaratory of what would be the law without it, and adds no force to the section of the act. It is a literal copy of a section in the act of 1879, and had all the force in that act which it has in this. It has been argued, however, that since this proviso says that liens for labor and materials and judgments for community debts are chargeable upon community real estate, it is to be taken as an instance of *expressio unius, alterum excludit*, and therefore no other obligation is to be recognized. But let it be remembered that the maxim quoted is a common-law maxim, and the argument is one for strictness of construction; whereas it is one of the requirements of the act in question that the common-law rules of construction are not to prevail here, and that all its provisions are to be construed liberally, but liberality can certainly not be predicated of a ruling that shields property from levy for a debt of the owner.

A community debt, within the meaning of the act of 1881, ought to be any liability incurred by either husband or wife during their marriage, and which is not a separate debt by its express terms, or by reason of its being patently for the exclusive benefit of the separate property of the party contracting it.

This has been substantially the construction put upon the term ever since the community property laws have existed here, by the business men of the state as well as the legal fraternity. To depart from it now will, in my judgment, greatly disturb the safety of business interests, and unsettle titles to an alarming extent, and to hold with the appellant is not logically necessary, under the terms of the statute. I cannot believe that it was the intention of the legislature of 1881 to withdraw all this community real estate from liability for accommodation indorsements, guaranties, and especially official bonds, as well as the hundred engagements that married men enter into every day, but which have no relevancy to their community interests, and cannot be said to benefit them. It is said that these obligations can be made good by securing the signature of the wife, but I deny it. If the signature of a husband to the bond of a county treasurer does not make the obligation collectible out of his community real property, because the debt is not one for the benefit of the community, it is idle to say that adding the signature of the wife will change the character of the debt, and make it so collectible; and so on. The combinations and confusions are endless, if this doctrine is once announced.

The judgment should be affirmed.

(83 Cal. 553)

TROPE v. KERNS. (No. 11,186.)

(Supreme Court of California. April 5, 1890.)

MORTGAGE—FORECLOSURE—ATTORNEYS.

1. A mortgagee who purchases the mortgaged premises at foreclosure sale is not restricted in gaining possession of the premises to a writ of assistance, but may bring ejectment.

2. Plaintiff and defendant stipulated as to what the judgment in a foreclosure suit should be. Afterwards plaintiff's attorney, in the absence of plaintiff and without his knowledge or consent, changed the stipulation by agreement with defendant and his attorney so as to make the judgment include less land than it originally included. The decree, by inadvertence, was drawn according to the original stipulation. *Held*, that the judgment would not be disturbed, as the power to make such a change was not within the implied authority of an attorney.¹

3. Where a mortgage purports to convey the whole of a lot in fee, but the mortgagor has made a prior conveyance of a part of it to a third person on condition that he would maintain a well and water-tank on the premises, and the well is afterwards closed and the tank removed, the mortgagee who purchases at a subsequent sale under a decree of foreclosure acquires title to the whole of the premises under Civil Code Cal. § 2930, which provides that "title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt in like manner as if acquired before the execution."

In bank. On rehearing. For former opinion, see 20 Pac. Rep. 82.

Action of ejectment by F. H. Trope against Peter Kerns. Defendant appeals. For for-

mer report see 20 Pac. Rep. 82. Civil Code Cal. § 2930, provides that "title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt in like manner as if acquired before the execution."

R. M. F. Soto, (*Herman & Soto*, of counsel,) for appellant. *Geil & Morehouse*, for respondent.

McFARLAND, J. Ejectment for a lot of land in Salinas city. Judgment went for plaintiff, and defendant appeals upon the judgment roll. Plaintiff claimed title through the foreclosure of a mortgage executed to him by defendant which included the said lot. Plaintiff was the purchaser at the sale under the decree of foreclosure, and, the time for redemption having expired, he received a sheriff's deed for the premises.

1. Defendant, in addition to a denial of the averments of the complaint, made a plea in abatement founded on the point that, as plaintiff might have had a writ of assistance in the foreclosure suit, therefore he cannot maintain ejectment. This point is not tenable. A writ of assistance is a summary proceeding which a plaintiff may sometimes advantageously avail himself of; but such proceedings are not *res adjudicata* as to many questions that may arise, and a right to the writ does not deprive a party of the fuller remedy afforded by an ordinary action. The cases cited by appellant are not in point, and we have been referred to no case which restricts a party to a writ of assistance.

2. Defendant filed a cross-complaint, which stated certain facts upon which he contends the decree of foreclosure should have omitted a certain part of the eastern end of the lot, and that, by mistake, such part was included in the decree, and that the mistake was not discovered until the commencement of this action. With respect to this matter the court finds these facts: In the foreclosure suit the defendant herein, Kerns, and his assignee in insolvency, Franks, and certain other persons were made parties defendant. All the defendants suffered default except Kerns and Franks, who filed demurrers to the complaint. Afterwards an agreement was made between the plaintiff and said Kerns and Franks "that said demurrers were to be withdrawn, and plaintiff was to be permitted to take a judgment and decree for the sale of the land described in the complaint herein; and thereupon findings and decree were drawn up in accordance with said agreement, and also a stipulation embodying the agreement of said parties as aforesaid; that afterwards, on the 27th day of April, 1880, the attorneys of the respective parties, and also defendant Kerns, appeared in open court, and said attorneys agreed to alter and change said stipulation by inserting therein these words: 'To the base of J. B. Iverson's tank frame. 'And the same was so altered and changed, and then and there the same was signed by said attorneys of plaintiff and defendants; but neither the

¹ Concerning the extent of the implied authority of an attorney, see *Daniels v. City of New London*, (Conn.) 19 Atl. Rep. 573, and note; *Lock Co. v. Harwell*, (Ala.) 6 South. Rep. 750, and note; *Haverty v. Haverty*, (Kan.) 11 Pac. Rep. 364, and note.

said F. H. Trope nor the said Franks, assignee, were in court, or at anytime consented thereto or had any knowledge thereof." The mortgage also included other land than that described in the complaint. It is further found that the judgment was entered in accordance with the original stipulation of the parties, which embraced the whole of the lot, and not in accordance with the change which the attorneys made or attempted to make, by which a part of the lot would have been excluded from the decree. The attorneys intended the decree to conform to their alteration of the stipulation, but by inadvertence of the said attorneys it followed the original stipulation; and "at no time or place did plaintiff, Trope, or defendant, Franks, assignee, know of any change in said stipulation, or authorize said change, and the said judgment and decree was entered as they intended and as they had agreed, and not otherwise."

Waiving the questions whether defendant lost by laches any right which he might have had to reform the judgment, and whether the matters set up in his cross-complaint could be used as a defense or remedy in this present action, we think that the judgment in the foreclosure suit should not be disturbed. To what extent, and under what circumstances, an attorney can compromise and give away the rights or property of his client is not entirely clear. The subject will be found fully discussed, and many authorities cited, in *Preston v. Hill*, 50 Cal. 48. The decisions which go the furthest in maintaining such power on the part of an attorney admit that as an abstract proposition a mere general retainer does not give the power, but go upon the theory that, nothing appearing to the contrary, it will be presumed that the attorney acted with the consent and under the direction of the client. But the attorney has no power to make the compromise against or without the consent of the client, if that want of consent is known to the opposite party. *Id.* And we think that the case at bar comes fairly within the latter principle. Here the defendant had made an express stipulation with plaintiff himself as to what the judgment should be. He knew what the latter's mind was in the premises, and he knew that plaintiff went away with the expectation that judgment would be entered in accordance with the stipulation. Under these circumstances he had no right to presume that the attorney changed the stipulation with the consent of his client.

3. A few years before the execution of the mortgage the defendant Kerns conveyed to one Iverson a small piece of the eastern end of said lot upon condition that Iverson would erect, keep, and maintain a well, water-tank, and appurtenances necessary to supply the tank with water, and permit Kerns, his heirs and assigns, to use all the water that he or they might require, the estate granted to terminate when Iverson ceased to maintain said well and tank and supply such water. Iverson

constructed the well and tank, and furnished the water until January, 1883, when he closed the well, removed the tank, and ceased to use the land. Under these facts appellant argues that plaintiff, by virtue of his mortgage and its foreclosure, did not acquire any title to the part of the lot thus conveyed to Iverson upon condition as aforesaid; and a good deal of learning is ingeniously expended on the point. But appellant mortgaged the whole lot in fee, and is estopped from denying that the estate mortgaged is less than an estate in fee-simple, and the sale under the decree carried any subsequently acquired title. *Association v. Viera*, 48 Cal. 572; *Orr v. Stewart*, 67 Cal. 275, 7 Pac. Rep. 693. Plaintiff also claims title under a sale from Franks, assignee in insolvency of defendant; but it is unnecessary to discuss that title. The findings were sufficient, and we see no error in the record. Judgment affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.; PATERSON, J.; FOX, J.

(88 Cal. 539)

HOWELL v. SLAUSON. (No. 13,218.)

(*Supreme Court of California*. March 31, 1890.)

INDEMNITY SCHOOL LANDS—FILING TRANSCRIPT.

1. A list of lands selected by the state as indemnity for the loss of school lands, prepared and certified by the general land-office of the United States, and transmitted by it to the local land-office, vests the title to the lands in the state as effectually as a patent, and the title so transferred relates back to the date of the selection of the land by the state. *McCreery v. Haskell*, 7 Sup. Ct. Rep. 176, followed.

2. A transcript of the original list of the indemnity lands selected by the state, which transcript is prepared in the general land-office, and transmitted by it to the local land-office, and which is subsequently treated as properly authenticated both by the local and general land-offices, cannot be attacked because of the alleged spurious signature of the commissioner of the general land-office in an action to quiet title by a patentee of the United States against a purchaser from the state of a quarter section of the listed land.

3. An indorsement on the transcript, "Received and filed December 5, 1871," and testimony by the register of the local land-office that he received the transcript from the general land-office, and that it was deposited as part of the records of the office, is sufficient evidence of filing in the local land-office, though it lacks a file-mark.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

W. T. Williams, for appellant. Houghton, Silent & Campbell, for respondent.

GIBSON, C. This action was brought to quiet title to a portion of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 18, township 2 S., range 13 W., S. B. M., and to recover the possession thereof. Defendant had judgment; from which, and an order denying a new trial, plaintiff appeals.

The plaintiff claims title by virtue of mesne conveyances from L. Ketchum, a patentee of the United States; and the defendant, under similar conveyances from F. S. Clough and

P. H. Newbill, patentees of the state of California, and also by his own adverse possession, and by virtue of a judgment of the late district court of the seventeenth judicial district, rendered in an action involving the right to the possession of the premises in dispute, prosecuted by Clough and Newbill against Ketchum. The facts, as shown by the findings, are these: April 22, 1868, the plat of the survey of the land in question was filed in the United States land-office at San Francisco; the land then being within the San Francisco land-district. Afterwards, on the formation of the Los Angeles land-district, which included the same land, the plat was, on November 21, 1871, transferred to and filed in the office of that district at Los Angeles. On the same date that the plat was filed in the San Francisco office, the state of California selected the quarter section, including the land in question, in lieu of other lands, which selection was approved on November 24, 1871, and on the same date duly listed and certified over to the state as an indemnity in lieu of school lands granted to the state, which were included within a private land claim. L. Ketchum, on September 10, 1869, being then entitled to pre-empt land under the laws of the United States, entered and settled upon the quarter section above mentioned; and on April 5, 1876, upon payment of the government price, he received a certificate of purchase for it as such pre-emptioner. Subsequently, on the 13th of November, 1880, a patent for the land was issued to him by the United States. An application to the register of the state land-office to purchase the same quarter section was duly made by one Charles Whipple, a competent person, prior to the 18th day of April, 1872, on which date a certificate of purchase therefor was issued to Whipple. This certificate was assigned and transferred to Clough and Newbill, July 16, 1872. It appears, from the evidence, that on May 24, 1873, a patent for the land was issued by the state to Clough and Newbill. The findings further disclose that L. Ketchum remained in possession of the premises until September 12, 1873, on which date he was removed by the sheriff on a writ of execution issued upon a judgment of the late district court of the seventeenth judicial district, rendered in an action brought by Clough and Newbill against him to recover the possession of the property, since which time Clough and Newbill and their grantees have retained the exclusive possession of the property.

The question arising upon these facts is whether the United States parted with its title to the quarter section in controversy before L. Ketchum, through whom appellant claims, entered and settled upon the land as a pre-emptioner. The assumption of the appellant with regard to this question is, and it constitutes his main contention, that as the document received in evidence, against his objection, as proof of the listing of the land in

question to the state of California, was not shown to be the original record, nor a certified copy of the original record, no other evidence of such listing having been offered, there was no evidence that the land had ever been listed to this state. The certificate and approval appended to the list are as follows: "Department of the Interior. General Land-Office. 24th November, 1871. It is hereby certified that the tracts described in the foregoing lists are embraced in the original lists now on file in this office of lands selected as indemnity for deficiencies in the townships named, which indemnity school selections are authorized in the above-cited acts of congress of March 3, 1853, February 26, 1859, and July 23, 1866. It is further certified that said tracts have been examined and compared with the township's plat of tract-books of this office, and that the indemnity is improperly due to the townships for which selected, are found to be subject to selection, and are free from conflict, and it is therefore recommended that the lists be approved, subject to any valid interfering rights which may have existed at the date of selection. WILLIS DRUMMOND, Commissioner. Department of the Interior, 24th November, 1871. The foregoing list is hereby approved, subject to any valid interfering rights which may have existed at the date of selection. C. DELANO, Secretary." The foregoing certificate shows that the document is a transcript of the original list retained on file in the general land-office, and is, we think, sufficient in form. The second paragraph of the certificate is not clear, but it is evident that the word "improperly" used in it is either a clerical or typographical error, as, taken in connection with the context, the negative prefix to the word should be omitted. When so read, its meaning is clearer. Regarding the reception of the document from the general land-office, H. O. Austin testified: "I was register of the land-office of Los Angeles in 1871, and for two years before that time. I remember that there was in the office a list, No. 1, Indemnity School Selection. [Upon being shown a list introduced in evidence,] I believe that to be the original document, as filed in the district land-office by myself, some time in 1870 or '71. I received it as register of the United States land-office of Los Angeles district from the commissioner of the general land-office at Washington." J. D. Bethune, the register of the land-office at Los Angeles, who produced the document, testified that, although he did not find any filing mark upon it, he found it on file in his office; that it was delivered to him as a part of the records of said office, and "was much worn, soiled, and torn, and no seal appeared upon it." In an attack upon the genuineness of the signature of Commissioner Drummond, J. L. Ayers testified that he was familiar with the signature of the latter, had frequently seen him write, and had corresponded with him, and the sig-

nature referred to, purporting to be that of Willis Drummond, was not genuine. Ex-Register Austin's testimony tended to corroborate this witness as to the character of the same signature. Whether the signature was genuine or not, it is now too late to attack the document on account of any defect in the authentication of it. It was made in, and transmitted from, the department of the United States government, where the duty to make and transmit it resided. The register of the land-office at Los Angeles treated it as having been properly authenticated, and it is evident that it was so regarded by the general land-office, from the fact that the commissioner, by a letter of instruction to the register and receiver of the Los Angeles district, filed in their office May 25, 1885, attempted to cancel the list to the extent of the quarter section in contest here.

We think the state had a right to rely upon the presumption that the officers of the general land-office properly performed their official duty in listing and certifying the lieu land in question to it. The *Eureka Case*, 4 Sawy. 319.

It is also urged that the list was never filed in the land-office at Los Angeles, but this indorsement appears upon it: "Los Angeles Land-District, List No. 1, received and filed December 5, 1871;" and that it was so received and filed is established by the testimony of ex-Register Austin, above quoted. His testimony would be sufficient without the indorsement, because a paper is deemed to be filed when presented at the proper office, and deposited with the papers therein. *Tregambo v. Mining Co.*, 57 Cal. 501. When the list was made, certified, and transmitted in this case, it conveyed the legal title to the state as effectually as a patent would have done; and the title so transferred related back to the date when the selection was made, and reported to the local land-office. *McCreery v. Haskell*, 119 U. S. 327, 7 Sup. Ct. Rep. 176. In that case it was said: "Where, by reason of the loss of the school sections, a selection is made of other lands, the list certified operates upon the selection as of the day when made and reported to the local land-office, and cuts off, as would a patent in such cases, all subsequent claimants." The facts of that case and this are somewhat similar. There the plaintiff's claim of title rested upon a patent of the United States dated October 29, 1879, based upon an alleged pre-emption of the land, upon which he had settled December 21, 1869, filed his declaratory statement therefor November 28, 1871, and received his certificate of purchase in April, 1876; while that of one of the defendants, who was the real party in interest, was deraigned from the state of California through a patent of the latter to one Keller, dated March 4, 1874, which was based upon a certificate of purchase of the land given December 21, 1871. The selection of the land was made by the state on the 22d

of April, 1868; as the court said: "Nearly one year and eight months before the alleged settlement of plaintiff." It was accordingly held that plaintiff had no title. It does not appear in the report at what time the land was listed and certified over to the state; but, as the land was actually listed and certified over, the date was immaterial, in view of the fact that the selection by the state had been made prior to plaintiff's attempt to pre-empt the land. In the case at bar the selection of the lieu land in question was made by the state on the 22d of April, 1868, and the subsequent listing of it by the United States vested the title in the state as of that date; consequently, Ketchum acquired no right to the land by his attempt made thereafter to acquire the same as a pre-emptioner, and the patent of the United States issued to him as such pre-emptioner conveyed nothing. *McCreery v. Haskell*, supra; *Pratt v. Crane*, 58 Cal. 533.

The attempt of the commissioner of the general land-office to cancel the state's selection of the land and the listing of the same to the state by the United States, above referred to, made 13 years after the state had sold the land to Whipple, was fruitless, because the United States had, as we have seen, parted with all its title to the land when the same was listed to the state. *Tubbs v. Wilhoit*, 73 Cal. 61, 14 Pac. Rep. 361. The same result would follow even if we assume with appellant, in accordance with the certificate of the commissioner and the approval of the secretary of the interior, appended to the list, that the approval of the state's selection of the land was subject to valid interfering rights at the date of the list, because, as we have seen, Ketchum, through whom appellant claims title, had made no connection with the title of the United States prior to the date when the state initiated its right by selecting the land, and reporting the same to the proper authorities.

From the foregoing, we think it apparent that the trial court was correct in its conclusion of law to the effect that at the commencement of the action the defendant held the legal title to the land, and was rightfully in possession of it.

The other conclusion reached with regard to the title acquired by the defendant and his predecessors by adverse possession adds nothing to defendant's legal title, because such possession was held under the legal title; and, as the plaintiff and his predecessors had no title to the land, there was no title in them that an adverse possession could overcome. Again, as the claim of title made by them was not coupled with the possession of the land claimed, it therefore amounted to nothing more than a mere assertion of an adverse claim that time could not ripen into a prescriptive title; for no claim of title without actual and exclusive possession for the period prescribed by the statute of limitations will create a title by prescription.

We advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(83 Cal. 521)

JACKSON *et al.* v. TORRENCE *et ux.*, (two cases. Nos. 18,133, 13,175.)

(Supreme Court of California. March 31, 1890.)

HUSBAND AND WIFE — COMMUNITY PROPERTY — SPECIFIC PERFORMANCE.

1. Though Civil Code Cal. § 164, which provides that land acquired after marriage by either husband or wife is community property, unless purchased with the separate estate of either, raises a presumption that property conveyed to a wife after marriage is community property; yet the record of a deed conveying land to the wife for a recited consideration is notice to third persons of the extent of her claim to the property, whatever it may turn out to be, and, if she has paid for it out of her separate estate, either in whole or in part, she may hold it in the same proportion on making proof of the fact.

2. In an action against a husband and wife for the specific performance of a contract for the sale of land conveyed to the wife after marriage, the fact that the intending purchasers caused the contract of sale to be drawn up in terms which would bind the wife as well as her husband, that they left the contract with her to be executed, and that she took a leading part in the preliminary negotiations, conclusively shows that the purchasers had actual notice that the wife claimed an interest in the land; and a finding to the contrary will be rejected.

3. Evidence that a wife, out of her separate estate, furnished four-fifths of the money used in making the first payment on land purchased, and that the balance was paid for out of the income of the property, warrants a finding that the wife owned such an undivided proportion of the property as the funds furnished by her bear to the whole price.

4. A wife to whom land is conveyed after marriage is not estopped from asserting her title thereto by the fact that during negotiations by her husband for its sale she stood by without informing the intending purchasers of her interest; it being the policy of the law (Civil Code Cal. §§ 1098, 1186) to permit no alienation of a married woman's land except by deed acknowledged by her on examination separate and apart from her husband, and after its contents have been fully explained to her.

5. Under Civil Code Cal. §§ 1098, 1186, which provide that no estate in the land of a married woman shall pass "by any grant purporting to be executed or acknowledged by her," unless her acknowledgment is taken after an examination separate and apart from her husband, and after she has been informed of the contents of the instrument, an unacknowledged executory contract by a married woman for the sale of her land will not be specifically enforced.

6. Where a husband and wife, owning separate and undivided interests in an hotel and saloon business, enter into an executory contract for its sale as an entirety for a fixed sum, and the contract is void as to the wife because not acknowledged by her, the husband will not be compelled to convey his undivided interest, as it cannot be inferred that when he entered into the contract he intended to leave his wife a co-tenant with the purchasers.

In bank. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

F. E. Baker and E. R. Bush, for plaintiffs.
Geo. P. Harding and A. L. Hart, for defendants.

BEATTY, C. J. The defendants are husband and wife, and the suit is to compel specific performance of the following agreement: "For and in consideration of the sum of \$500 to us in hand paid by C. F. Thomas and George H. Jackson, the receipt whereof is hereby acknowledged, we, the undersigned, do hereby agree that on the 1st day of February, 1886, we will execute and deliver to said C. F. Thomas and George H. Jackson, or their assignees, a good and sufficient deed to all that real property in the town of Woodland, county of Yolo, and state of California, known as the 'Capital Hotel Property,' bounded on the north by Otto Schluer, east by Galbraith, south by Main street, and west by First street, together with all and singular the furniture, fixtures, busses, harness, and all the personal property belonging to said hotel, whether enumerated or not, except one piano, sewing-machine, feather bed, two chairs, and on that day to give to said C. F. Thomas and George H. Jackson possession of the same. The said property to be clear of all taxes, assessments, commissions, liens, or incumbrances whatsoever: provided always, and this agreement is upon the express condition, that the said C. F. Thomas and George H. Jackson, or their assigns, shall on that day pay to us the further sum of nineteen thousand five hundred dollars, (\$19,500;) and, if the said C. F. Thomas and George H. Jackson, or their assigns, shall fail or neglect to pay the said sum on that day, then and in that case we agree to return to them the said sum of \$500, without interest, on said day, and, after the said sum is so returned, this agreement to be void. Dated Woodland, January 8, 1886. M. H. TORRENCE. ESTHER TORRENCE." The superior court found that the wife and the community owned separate interests in the premises, and made a decree compelling a conveyance by the husband of the community interest upon payment of its estimated proportion of the agreed price, but refused a decree as to the interest of the wife, upon the ground that she, not having acknowledged the execution of the contract to sell, was not bound by it. The husband, in Case No. 18,133, appeals from the decree compelling him to convey, and from an order denying his motion for a new trial. The plaintiffs in Case No. 13,175 appeal from so much of the decree as adjudges the wife to be the owner of a separate interest in the premises, and denies them any relief as against her. Both appeals have been submitted, and will be considered together.

The facts upon which the controversy depends are as follows: The Capital Hotel, referred to in the contract, is a three-story building situated on lot 1, in block 2, of the town of Woodland. This lot is a rectangle, and fronts south 60 feet on Main street, and west 150 feet on First street. It is bounded on the north by the lot of Schluer, and on the east by the lot of Galbraith. But, although it is a single lot, and covered by one building, it was not all acquired by the defendants

at the same time, and is subdivided in a very unusual manner. In December, 1880, and subsequent to the marriage of the defendants, John Smith, by grant, bargain, and sale deed, conveyed all of said lot to Esther Torrence, saving and excepting the first story of the building standing on the east 20 feet of the south 60 feet of said lot, known as "Dickinson's Saloon." Subsequently, on September 5, 1881, David Burns, by grant, bargain, and sale deed, conveyed to M. H. Torrence and his wife, Esther Torrence, the east 20 feet of the south 60 feet of said lot. Neither of these deeds contained any expression as to how the granted premises should be held by the grantees; but the first recited a consideration of \$10,000 paid by Esther Torrence, and the second a consideration of \$3,500 paid by M. H. and Esther Torrence. Both deeds were recorded in Yolo county long before the date of the contract with the plaintiffs above set out. There was some conflict in the evidence as to whose money paid for the property, but the court found that, of the \$10,000 paid for the parcel first described, \$3,200, 8-25, was of the separate property of the wife, and the balance was of the community funds. As to the second parcel, the saloon, it was found that the entire purchase price was paid out of the community funds. As a conclusion from these findings, it was held that the wife owned as her separate estate 8-25 of the hotel property, including the two upper stories over the saloon, with the furniture, busses, etc., and that the balance belonged to the community. It was found that the saloon property was worth \$4,000, and the hotel property, \$16,000. The husband, in support of his appeal from the order denying his motion for a new trial, assails these among other findings of the superior court: but, as they are attacked upon the ground that they are injurious to his wife, in awarding her a smaller separate interest in the property than she was rightfully entitled to, and as she has not appealed, it is doubtful if he could be heard to make the objection. At all events, it will be assumed for the present that the wife and the community owned the property in the respective proportions as found by the superior court. Such being the case, on the 6th day of January, 1886, they entered into the following written agreement with one W. M. Coward: "Woodland, January 6, 1886. W. M. Coward is hereby employed, exclusively, to sell our hotel, complete, with furniture and buss and harness, situated on the north-east corner of Main and First streets, Woodland, Cal., on or before three months from date. Price, \$20,000. Cash, \$——. Secured by mortgage on the property, \$——. Interest on deferred payments, —— percent per annum. Term of credit, ——. Agent's commission, 2½ per cent. I hereby agree to advertise the above property, and use all diligence in effecting a sale of the same. M. H. TORRENCE. ESTHER TORRENCE. W. M. COWARD." Indorsed: "Property reserved,—piano; two chairs, plush covered; one sewing-

machine; one feather bed." On the following day, Coward notified them that he had made a sale of the property for \$20,000 to the plaintiffs, and that he had received \$500 on account of the purchase. The parties were brought together, and discussed some details as to time of giving possession, division of accruing rents, etc., whereupon plaintiffs drew up, or procured to be prepared, the contract above set out, which was left with the defendants for their examination. On the following morning, the day it bears the date, they delivered the contract to the plaintiffs, signed but not acknowledged. Mrs. Torrence was never asked by either of the plaintiffs to acknowledge her execution of the contract, and it would seem that none of the parties at that time supposed an acknowledgment was necessary in order to make it binding upon her. The \$500 mentioned in the agreement was not paid to the defendants, but was retained by Coward, pending the consummation of the transfer. Within a few days after their execution of the contract the defendants manifested a disposition to repudiate it. The plaintiffs and Coward were claiming that it embraced the saloon as well as the hotel property, but the defendants claimed that they had understood and intended that the saloon should be reserved. The superior court finds that this was a mere pretense on their part, put forward as an excuse for evading performance of their contract; and we accept this conclusion, although, when the situation of the property, and the mode of its acquisition, are considered with reference to the terms of the written authority to Coward and the written contract with plaintiffs, the claim of defendants does not appear to be wholly unreasonable.

On the 1st of February, 1886, at the time stipulated, the plaintiffs made a tender to defendants of the balance of the agreed price of the property, \$19,500, and demanded of them a deed conveying the entire premises, which demand the defendants, and each of them, refused. The findings are not perfectly explicit as to this demand and refusal; but we do not understand that there was any offer by plaintiffs to pay except upon the express condition that both defendants should unite in a conveyance sufficient to transfer all the interest of each of them in the entire property, viz., the whole of said lot 1, with the whole of the buildings and the personal property used in connection with the hotel. Their tender and demand having been refused, plaintiffs commenced this action. In their complaint they alleged, *inter alia*, that M. H. Torrence was on and prior to January 8, 1886, the owner of the whole of said lot 1. They set out the contract of that date in terms; alleged that the premises therein described were the same as said lot 1, and that Esther Torrence, although not the owner of any interest therein, was asserting some claim of interest. They prayed for a decree compelling both defendants to convey, and quieting their title as against Esther Torrence. The

defendants answered, denying that M. H. Torrence was the exclusive owner of the property, and alleging that Esther Torrence was sole owner of the hotel property, and joint owner with M. H. Torrence of the saloon property. They also alleged that they did not know the contract embraced the saloon property, or they would not have signed it, and that Esther Torrence, discovering that mistake, and divers misrepresentations in regard to the sale, had, without the advice or procurement of her husband, refused to acknowledge her execution of the contract, or to perform it. Other matters of defense were alleged which it is not necessary to mention.

Upon most of the matters put in issue by the pleadings the findings of the superior court were in favor of the plaintiffs, and the defendant Torrence attacks many of the findings as being wholly unsupported by the evidence. We shall have occasion to notice one or two of these specifications in discussing the legal questions presented by the case, but in this general statement shall mention only one point upon which we think the court failed to find correctly.

Finding 14 is as follows: "That the said deed from said Smith to Esther Torrence was a deed of grant, bargain, and sale, and purported to convey the premises described therein to said Esther Torrence in consideration of the sum of \$10,000, without any specification therein that she should take, or have, or hold the same as or for her separate property or estate, or as a gift from her said husband, or from said Smith; that said deed was duly recorded in the office of the county recorder of Yolo county on the 17th day of December, 1880, and plaintiffs had notice of the record of said deed, but neither of the plaintiffs had any notice, either actual or constructive, of a claim on the part of defendant Esther Torrence, of any separate interest in or to any of the property in controversy, until after the commencement of this suit." This finding, in addition to being in conflict with the allegation contained in complaint, that Esther Torrence was asserting a claim to an interest in the property, is self-contradictory. It is simply impossible that the plaintiffs could have been without constructive notice of her claim, with the deeds of record purporting to convey it to her. All intending purchasers or incumbrancers were bound to take notice that the property was hers in the proportion that it had been paid for with her funds, and what that proportion was they were bound to know at their peril. It is true that, with respect to conveyances to married women expressing a valuable consideration, and made prior to the recent amendment to section 164¹ of the

Civil Code, (St. 1889, p. 328,) the presumption is that the property conveyed belongs to the community, and is subject to the control and disposition of the husband alone. But this is a mere rule of evidence, fixing the *onus probandi* in cases where the question of ownership is in litigation, and is entirely consistent with the doctrine that every purchaser has notice, her deed being of record, of the extent of her claim to the property, whatever it may turn out to be, and that if she has paid for it out of her separate estate, either in whole or in part, she may always claim it and hold it in the same proportion upon making proof of the fact. *Ramsdell v. Fuller*, 28 Cal. 44, 45. And so, also, it will be her separate property if paid for by her husband with community funds, and by his direction, and for the purpose of a gift, conveyed to her. *Peck v. Brummagim*, 81 Cal. 441. And see *Kraemer v. Kraemer*, 52 Cal. 802; *Moore v. Jones*, 63 Cal. 12; *Schuyler v. Broughton*, 70 Cal. 282, 11 Pac. Rep. 719; *McComb v. Spangler*, 71 Cal. 418, 12 Pac. Rep. 347; *Loring v. Stuart*, 79 Cal. 200, 21 Pac. Rep. 651. In view of these authorities it certainly cannot be denied that plaintiffs were put upon inquiry as to the claims of Mrs. Torrence; and there is not a *scintilla* of evidence, nor any pretense, that plaintiffs ever made any inquiry whatever, or that the defendants, or either of them, ever volunteered any information by which they were misled. But, besides this constructive notice, the testimony shows very conclusively that both of the plaintiffs knew at and before the execution of the contract that Mrs. Torrence claimed an interest in the property. They do not even deny that they knew she made some claim. Jackson, it is true, says that during the negotiations about the property neither of the defendants informed him what interest Mrs. Torrence had in the property, and that nothing was said about any separate interest; and Thomas testifies that he had no knowledge of any separate interest of Mrs. Torrence. But this means nothing more than that they made no inquiry, received no information, and, therefore, did not know what her interest was. It does not mean that they were ignorant that she made some claim; and it is very evident they could not, consistently, have taken such a position. According to the most obvious construction of the findings, they had not only constructive notice of the form of the conveyances. They had actual knowledge of the contents of the record. But whether this is the meaning of the finding or not, and whether or not the plaintiffs had seen the written authorization given to Coward to negotiate the sale, which, as we have seen, was signed by both husband and wife, the plaintiffs show by their own testimony that she took a leading and active part in the negotiations preceding the drawing of the contract; that they caused the contract to be drawn up in terms which would make it her contract as well as her husband's; that they left it with her to

¹ Civil Code Cal. §§ 162, 163, provide that all property owned by either husband or wife before marriage, and that acquired afterwards, with the rents and profits thereof, or by gift, devise, or descent, shall be separate property. Section 164 provides: "All other property acquired after marriage, by either husband or wife, or both, is community property."

be executed. Why should they have done these things if they were ignorant that she made any claim to a separate interest in the property? Evidently, they were not ignorant. They had both actual and constructive notice; and so much of the fourteenth finding as declares the contrary must be rejected in considering the appeal.

With this general statement of the facts of the case we will proceed to consider such of the assignments of error as require discussion. By the decree, the defendant M. H. Torrence is compelled to convey to the plaintiffs all of the community interest in the property as found by the court upon payment of the agreed price of \$20,000, less 8-25 of the estimated value of the hotel property, less also the \$500 paid at the date of the contract, and less the community interest in the estimated value of the rents and profits of the whole property from the 1st day of February, 1886, the date when, by the terms of the contract, the plaintiffs were to have possession. It is further decreed that the plaintiffs be let into possession of the property, to hold the saloon exclusively, and the hotel and personal property in common with Esther Torrence, 17-25 to them, and 8-25 to her.

The first point made by plaintiffs in support of their appeal is that the superior court erred in not finding that the whole of the property belonged to the community. We think the findings of the court on this point are not only fully sustained by the evidence, but that it would have sustained findings much more favorable to the wife. She is found to be the owner of only 8-25 of the hotel property. But the evidence shows that the price of this parcel was \$10,000, paid \$4,000 in cash, balance on time. Of the cash payment, she contributed out of her separate funds \$3,200, and her husband only \$800. In other words, she paid in cash 8-25 of the whole price, and four-fifths of the cash payment. The balance was paid out of what they jointly earned in keeping the hotel. Certainly, she owned no less proportion of the property than her cash payment bore to the whole price. Indeed, she was entitled to more. She was entitled to interest on her cash payment, and to have the amount of such interest computed as a part of her contribution to the purchase. And the court might have found, upon the testimony of the husband, that he intended to and did make his wife a gift of the whole hotel property. His testimony is to the effect that he so intended, and that the deed was made to her by his direction. There is no evidence that he was indebted to any one at the time; and, if he was free from debt, he had the right to give her the property, and could make the gift effectual by simply directing the conveyance to be made to her. *Peck v. Brummagim*, 31 Cal. 441; *Dow v. Mining Co.*, Id. 653; *Ingersoll v. Truebody*, 40 Cal. 603; *Woods v. Whitney*, 42 Cal. 359; *Higgins v. Higgins*, 46 Cal. 263. This evidence of the defendants, to the effect that it was intended

between themselves that the wife should be sole owner of the hotel property, is the only direct evidence of their intentions, and is diametrically opposed to the contention of plaintiffs that Esther Torrence intended to contribute her \$3,200 to the common stock, and that on the purchase of the hotel everything became, and continued thenceforth to be, community property. There is nothing in the case to sustain this theory.

But it is contended by plaintiffs that Esther Torrence is estopped from making any claim to the property because she did not, during the negotiations for the sale of it, distinctly inform them of the nature and extent of her interest. The argument is that a grant to a wife expressing a valuable consideration creates a presumption that the granted premises are community property; that an intending purchaser has a right to rely on this presumption, and, in the absence of express notice from the wife that she claims some definite interest, he is at liberty to infer, and act upon the inference, that she has no interest; that this is especially so when she is informed that her husband is negotiating a sale or other disposition of the property; and that if under such circumstances she keeps silence, she must not afterwards be allowed to assert her claims, however well founded. We think that, even in the strongest case that can be supposed, this is a dangerous and unnecessary doctrine. The intending purchaser of land which has been conveyed to a married woman is under no compulsion to take it and pay for it without getting her deed, properly acknowledged. He knows her husband has no title to it except through the deed purporting to convey it to her, and that he can get no clear and perfect title himself without a deed from her. If she is willing, deliberately, and with full knowledge of her rights, and of the effects and consequences of her acts, to disclaim all interest in the property, she will be willing to sign and acknowledge a deed. If she is not willing to sign and acknowledge a deed, no other sort of admission should be held to bind her. The clearly expressed purpose and policy of the law is to permit no alienation of a married woman's real property except by deed acknowledged by her on examination, separate and apart from her husband, and after its contents have been fully explained to her by the officer whose sworn duty it is to see that she not only understands what she is doing, but does it without any constraint due to the presence of her husband. In place of all these safeguards for her independence and freedom of volition, the doctrine contended for would substitute the testimony of witnesses that when her husband had asserted a right to dispose of her property she had failed to contradict him. How dangerous a breach upon the policy of the law designed for the protection of married women from marital influence would be made by the establishment of such a doctrine is too obvious to require comment. And, in addition to its danger, how utterly inexpedient it

would be! Its only effect would be to encourage honest purchasers to rely upon uncertain and doubtful admissions in place of the certain, authentic, and secure admission of an acknowledged deed, and to encourage dishonest husbands to enter into fraudulent combinations with simulated purchasers in order to defraud their wives. In other words, the establishment of the doctrine contended for would merely tend to the multiplication of unnecessary litigation, in which fraud and perjury would often carry the day. We had better hold strictly to a law with which compliance in all cases is not only possible, but easy, and which, being observed, leaves no room for litigation in which the most easily manufactured testimony may overwhelm the right. If a purchaser cannot get a married woman's acknowledged deed for property the title of which stands in her name, let him keep his money, and wash his hands of the business.

But, aside from this view of the legal branch of this proposition of the plaintiffs, it is to be observed that in this case it rests upon no basis of fact. There is not a particle of evidence that M. H. Torrence ever did in fact represent himself to be the sole owner, or to have the sole right of disposition, of this property, to plaintiffs or to any other person; and there was, consequently, never an occasion when his wife was called upon to contradict such an assertion. The authorization to Coward to make the sale was signed by both husband and wife. The oral negotiations that ensued with the plaintiffs were conducted by both husband and wife. The written contract prepared by plaintiffs, in terms, implied her concurrence. It was left by plaintiffs to be executed by her, and it was signed by her. There is no suggestion, from beginning to end, that M. H. Torrence claimed, or that plaintiffs understood him to claim, a right to dispose of the property without his wife's concurrence. On the contrary, the evidence leaves no room to doubt that plaintiffs all along understood that Mrs. Torrence was claiming an interest in the property, and a voice in its disposition. For that reason, they sought to bind her by a written contract to convey; and no doubt they then thought, as their counsel still contend, that she was bound by the contract though she had not acknowledged it. Considering themselves secure of getting her deed, they did not care to inquire what her interest was, and they never did inquire. They did not intend to pay for the property without a deed from her and her husband, which they knew would operate a transfer of the whole of it, whatever the respective interests of the grantors might be. What they relied on was not an admission by her that her husband had power to convey, but the promise of her conveyance; and they simply made the mistake of not getting her promise executed in a form to bind her. We conclude that there was no estoppel against Esther Torrence to assert her rights,

not only because the law would not raise an estoppel on the facts assumed, but because the facts assumed had no existence.

We ought not, perhaps, to leave this branch of the case without noticing the argument of counsel, repeated so often, and with such variation of statement, by which they seek to found an estoppel on a legal fiction. Every one, they say, is conclusively presumed to know the law; and, if it be the law, which they deny, that a married woman's executory contract to convey land does not bind her unless it is acknowledged, why then we must impute to Esther Torrence knowledge that the contract signed by her husband was his sole contract, and therefore she knew that it was not what its terms imported, but was an assertion by him of a right to dispose of the whole of the property without her consent,—an assertion which she indorsed, or, at least, failed to deny when she ought to have denied it. We think this is putting the legal maxim relied on to a use never intended, and to which it is wholly inadequate. All that it means is that no one can screen himself from the legal consequences of his acts or omissions by pleading ignorance of the law; and it has no sort of application to a case of this kind, where the question relates to actual knowledge, motives, and intentions.

The last proposition made by plaintiffs on their appeal is that the contract bound Mrs. Torrence to convey, notwithstanding it was not acknowledged; and in support of this proposition they make a long and very ingenious argument. They cite the provisions of the Code, which confer upon married women the power to make contracts of all kinds, and call attention to the fact that there is no provision making an acknowledgment essential to the validity of an executory contract of a married woman to convey. But we think they give to the statute too narrow and literal a construction. The following sections of the Civil Code are referred to: "1093. No estate in the real property of a married woman passes by any grant purporting to be executed or acknowledged by her, unless the grant or instrument is acknowledged by her in the manner prescribed by sections 1186 and 1191." "1186. The acknowledgment of a married woman to an instrument purporting to be executed by her must not be taken unless she is made acquainted by the officer with the contents of the instrument on an examination without the hearing of her husband, nor certified unless she thereupon acknowledges to the officer that she executed the instrument, and that she does not wish to retract such execution." An executory contract to convey, if not within the precise letter of section 1093, as being a technical grant, is within its meaning, and also within the policy of the law. Such a contract, if enforceable, has the effect of vesting the equitable estate in the vendee, leaving in the vendor the dry legal title. It is, in effect, a grant of the whole beneficial interest in the land; and, unless

we are to hold that the law deals with the shadow and not the substance of things, we must conclude that such instruments are embraced by the section referred to. Besides, the specific enforcement of contracts is allowed as a matter of grace, and not of right, and a court of equity will never lend its aid to accomplish by indirect means what the law, or its clearly-defined policy, forbids to be done directly. Of the California decisions cited by plaintiffs on this point, we think *Bodley v. Ferguson*, 30 Cal. 516, and *Racouillat v. Sansevain*, 32 Cal. 377, are not in point; and *Love v. Watkins*, 40 Cal. 562, is opposed to their contention. We hold that specific performance of the unacknowledged executory contract of a married woman to convey her real property cannot be compelled, and that there is no error in the decree of the superior court prejudicial to the plaintiffs.

We come next to consider the appeal of the defendant M. H. Torrence. He contends that the superior court erred in compelling him to convey his interest in the property on receipt of its proportion of the agreed price. He says that in so decreeing the court compelled him to perform a contract which he never made, or intended to make; and in this position, we think, he is sustained by the facts above stated. The case is peculiar. A husband and wife own separate, undivided interests in a house and lot, where they live and carry on a business. They agree together that they will sell the whole property for a fixed sum. Necessarily, they intend, among other things, to take up their abode in some other place, and transfer their business, if they continue in business, to some other establishment. They do not intend to separate themselves,—one to go, and the other to stay. Neither intends to sell out his interest, and leave the other a tenant in common with strangers, especially when the property, as here, consists of both realty and personalty, together with the good-will of an hotel and saloon business. That the sale shall be complete as to both must in all such cases be a highly material consideration; and certainly it cannot be inferred from the fact that the husband is willing to unite with the wife in making a complete disposition of their common property and business that he is also willing to dispose of his share of the property and business for a share of the price, leaving his wife a co-tenant with the purchasers. The effect of this decree, however, in just such a case, is to compel the husband to do what he never agreed to do, and what it cannot be supposed he would ever have been willing to consent to do. The only contract he executed, or intended to execute, was a contract, in which his wife was to join, for the conveyance of the whole property for a round sum. Until this contract was completed by the accession of his wife, there was no contract of which there could be any breach or failure to perform. As we have seen, the wife never did execute, and it never became binding upon the husband, because it

never bound her. *Barber v. Burrows*, 51 Cal. 404. His delivery of the contract to the purchasers, if he did deliver it, can make no difference in this conclusion. He probably did not know that it was defectively executed on the part of his wife; but, if he did know that her acknowledgment was necessary, he also knew that it was the business of the purchasers to procure her acknowledgment to be taken without his presence and hearing, and he had a right to rely upon their doing what was necessary to be done for their own protection. It was not his fault that she was not bound; and, as his agreement was dependent on her concurrence, he cannot be compelled to convey without first making a contract for him, and then enforcing compliance. As against the appeal of the plaintiffs, the judgment of the superior court is affirmed; but on the appeal of M. H. Torrence the judgment and order appealed from are reversed, and the cause remanded.

We concur: SHARPSTEIN, J.; McFARLAND, J.; PATERSON, J.; THORNTON, J.; FOX, J.

Rehearing denied.

(83 Cal. 507)

MONTEREY COUNTY v. CUSHING. (No. 12-535.)

(Supreme Court of California. March 31, 1890.)

APPEAL—EMINENT DOMAIN.

1. A statement on appeal from an order granting a new trial showed that the notice of intention to move for a new trial set forth as ground therefor that the evidence was insufficient to justify the decision as to value. The notice of intention, which is not required by the Code of California to be presented on appeal, was by stipulation made part of the record, and did not set forth such ground. Held, that this did not overcome the presumption that the statement was correct, as an amended notice of intention corresponding to the one shown in the statement may have been given.

2. As Code Civil Proc. Cal. § 1244, providing what the complaint in proceedings in eminent domain shall contain, does not mention value or damages, the burden of proving value is on defendant, and, where there is no direct evidence of value, a finding for defendant is ground for a new trial.

3. The term "private road" as used in Pol. Code Cal. § 2692, providing for "private or by-roads" designates a particular kind of public road. Following *Sherman v. Buick*, 32 Cal. 241.

4. Proceedings in eminent domain to procure a right of way, which Pol. Code, § 2690, authorizes the supervisors of the county within which the road is to be located to institute, are properly brought in the name of the county, rather than in the name of the people.

5. Proceedings in eminent domain for a right of way over land of a decedent's estate are properly brought against the executrix within Code Civil Proc. § 1582, providing that actions for the recovery of any property, or the possession thereof, may be maintained by or against executors where the same might have been maintained by or against their testators, as the word "recovery" does not here imply previous possession.

6. Proceedings in eminent domain may, on the death of the owner of the land be continued against the executrix from the stage at which they then stood.

7. Under Pol. Code, § 2690, providing that, in proceedings to acquire a right of way, the board of supervisors shall, by order, direct proceedings in eminent domain against all the land-owners

who shall not accept the award of damages, an order merely stating, in general terms, that suit be brought against the non-consenting land-owners, is sufficient; and the fact that the order directed suit against a decedent who, before his death, had been before the board, and had refused to accept the award of damages, will not render the suit against his executrix void.

8. Pol. Code, § 2688, provides that, in proceedings to acquire a right of way, the report of the viewers to the supervisors shall contain "the estimate of damages to the owner." It says nothing of the items of damage. *Held* that, as the report was not binding on the owner as to damage, it was sufficient to report a lump sum as the proper amount to be paid.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Chas. S. Wheeler, for appellant. *Geil & Morehouse*, for respondent.

HAYNE, C. This was a proceeding to condemn land for the purposes of a road. The trial court gave judgment for the defendant, but subsequently made an order granting a new trial; and the defendant appeals from that order.

1. At the trial the plaintiff put in evidence the preliminary proceedings before the board of supervisors, the report of the viewers, and the proceedings confirming such report, but gave no evidence of the value of the property sought to be condemned, or of the damage resulting from the segregation. The findings show that the court, in deciding the case, did not consider that the proceedings mentioned constituted any evidence of value, etc.; and it is to be inferred it was of the opinion that the burden of proof as to value was upon the plaintiff. One of the grounds of the motion for a new trial was the insufficiency of the evidence to justify the decision as to value; and, upon well-settled principles, it must be assumed that this was one of the grounds upon which the motion was granted. The appellant makes a preliminary objection to the consideration of this ground because, as she alleges, it was not set forth in the notice of intention. But the statement shows that the notice did set forth this ground. The appellant contends that this portion of the record is overcome by the copy of the notice of intention, which is printed in the transcript, which copy, she claims, was made a part of the record on appeal by the stipulation at the end of the transcript. But, assuming that the stipulation has the effect claimed, it does not follow that the statement is to be disregarded. It imports absolute verity, and must be reconciled with other portions of the record, if that be possible. Now, it is not at all impossible that within the time allowed by law, perhaps on the same day, the notice may have been amended by consent; or another notice, corresponding to the one shown by the statement, may have been given. Such a notice would not be part of the record on appeal, (*Pico v. Cohn*, 78 Cal. 384, 20 Pac. Rep. 706,) and, therefore, would not have to be brought up, and would not be inconsistent with the

stipulation. The preliminary objection should, therefore, be overruled.

The question, then, is whether the decision of the court in favor of the defendant was justified by the evidence. In examining this question, we shall assume, in the defendant's favor, that the proceedings before the board of supervisors did not constitute evidence of the value of the land, etc. But it does not follow that the decision in favor of the defendant was right. If no direct evidence be introduced upon any issue, the finding should be against the party who had the burden of proof. (*Leviston v. Ryan*, 75 Cal. 294, 17 Pac. Rep. 239; *Speegle v. Leese*, 51 Cal. 415; *Connolly v. Hingley*, ante, 273, (filed January 27, 1890.)) To say that the burden of proof is upon a party is equivalent to saying that the presumption is against him. A presumption is indirect evidence, (Code Civil Proc. § 1957;) and if not controverted, "the jury are bound to find according to the presumption," (Id. § 1961.) A finding against such a presumption is a finding against evidence, and is to be reviewed upon the ground we are considering. Then was the burden of proof upon the defendant in relation to value, etc.? The authorities in relation to the burden of proof as to value in proceedings in eminent domain are conflicting. See *Lewis, Em. Dom.* § 426. In California the burden as to value is on the defendant. Section 1244 of the Code of Civil Procedure provides what the complaint shall contain, and it does not mention value or damage; and if the plaintiff is not required to allege value or damage, he is not required to prove it. This was the view taken in *California S. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 63, 64, 7 Pac. Rep. 123. There it was objected by the defendant that the value found was less than that alleged in the complaint, and that, therefore, the finding was contrary to the pleadings; but the court said: "The plaintiff is not required to state the value in the complaint. Code Civil Proc. § 1244. The allegation of the complaint as to value is an immaterial and impertinent allegation, which the plaintiff was not required to prove." It results that the decision of the court was wrong upon the evidence, and that the order granting a new trial was right, unless there is some other reason which shows that the plaintiff had no case. It is argued for the defendant that there are such reasons, and we proceed to consider the positions taken in this regard.

2. It is said that the road was a private road, under section 2692 of the Political Code, providing for "private or by-roads," and that land cannot be condemned for such a purpose. This point is disposed of by the case of *Sherman v. Buick*, 32 Cal. 241, in which it was held that the term "private road" was used merely to designate a particular kind of public road, and that, notwithstanding the somewhat inaccurate language, the use was public. It is true that the decision of this point was not strictly necessary to the disposition

of the appeal; but it arose in the case, and was the main question discussed by counsel. The decision has stood for over 20 years; and, as the statute has been in force during that time, it is probable that many such roads have been opened under it. Under these circumstances, the decision should be followed, even if its soundness be questionable, which, however, we are not prepared to say is the case.

3. It is contended that the suit was not properly brought in the name of the county, but should have been in the name of the people of the state. Counties, however, are "bodies corporate and politic," (County Government Act, § 1,) and may sue and be sued, (Id. § 40;) and this particular suit was a county matter, it being expressly provided that the suit shall be brought under the direction of the board of supervisors. Pol. Code, § 2690. Compare *Kimball v. Alameda Co.*, 46 Cal. 19. The practice is to bring such suits in the name of the county, (see *Humboldt Co. v. Dinsmore*, 75 Cal. 604, 17 Pac. Rep. 710; *Tehama Co. v. Bryan*, 68 Cal. 57, 8 Pac. Rep. 673; *Butte Co. v. Boydston*, 64 Cal. 110;) and we have no doubt of the correctness of the practice.

4. It is argued that the action was not properly brought against the executrix. But we think that the executrix was the proper party. Section 1582 of the Code of Civil Procedure provides that "actions for the recovery of any property, real or personal, or for the possession thereof, * * * may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates." This provision was considered, and its validity impliedly asserted, in *Bayly v. Muehe*, 65 Cal. 345, 8 Pac. Rep. 467, and 4 Pac. Rep. 486, in relation to the foreclosure of a mortgage; and we think that a proper construction requires that it should be held to apply to cases like the one before us. The word "recovery," as used in the section, does not imply that the plaintiff had at some previous time owned, or been in the possession of, the property. If, for example, the owner conveys to another land which is then in the possession of a trespasser, there can be no doubt that the grantee may maintain ejectment against such trespasser, or that it would be correct to describe such action as for the "recovery" of possession, although the plaintiff never was in possession. So it is usual to speak of an action for the "recovery" of money under a contract when, as a matter of course, the plaintiff was never in possession of the money. Taking the word in this sense, we think that proceedings for the condemnation of land fall within the provision of the section; and this is the construction to which other considerations lead. The money awarded as compensation is to be paid to the defendant in the proceeding. Hence the proceeding should be against the person entitled to receive the money; and, as it is clearly a

part of the estate, and may be required to pay creditors, the executrix is, manifestly, the person entitled to receive it.

5. It is said that "the cause of action does not survive." As the plaintiff is not dead, the expression is, perhaps, not entirely accurate. If it means that the action was not properly brought against the executrix, we have already disposed of the point. If it means that upon the death of the owner the proceedings against his estate had to be commenced all over again, we think that the point is manifestly untenable.

6. It is urged that, inasmuch as the order of the board was that suit should be brought against "V. Cushing," the fact that he had died 20 days before the order was made rendered the whole proceedings void. We do not think, however, that section 2690 of the Political Code makes the board of supervisors the judge of the question as to who are the proper parties to the action, or requires it to determine what persons are to be joined as defendants. All that is essential is that the board should give its sanction to the commencement of the suit; and we think there can be no doubt that an order which merely stated, in general terms, that suit should be brought against the non-consenting land-owners, would be sufficient. The designation of such land-owners by name might be proper, as matter of description. But, as such designation is not essential, we do not think that a mistake in the name is of vital importance, provided it can be gathered from the proceedings what interest was to be acquired. Now, in the present case, Cushing's name appeared throughout the proceedings before the board as the owner in question. The report of the viewers states that the road described takes 4.13 acres of the lands of V. Cushing and specified quantities of the land of three other designated persons; that such other persons consented to the opening of the road, but that Cushing did not consent; and that the amount assessed as compensation to him was \$20.65. Cushing was notified of the hearing of this report, and appeared and contested it; but it was confirmed, and an order was made that, "the sum of \$20.65 as damages be, and is hereby, awarded to Volney Cushing, the non-consenting land-owner, whose land is crossed by said road, and that upon payment to said Cushing of said sum," the road should be opened for travel, etc. The money was tendered to Cushing, but was refused by him, and he subsequently died. Shortly after his death, the order that suit should be commenced against him, was made. This order should be read in connection with the prior proceedings, and when so read, the interest to be acquired sufficiently appears, and we think that, upon any rational construction, the order must be held to authorize the suit against his representative.

7. It is said that the report of the viewers is insufficient, in that it makes no estimate of the amount of damages to be awarded to the owner; and the learned counsel seem to argue

that the damage resulting from the taking is a different thing from the value of the land taken, and that the report of the viewers should state the items separately. It is quite true that the Code of Civil Procedure requires that this distinction should be drawn by the court in its findings. Section 1248. But that provision has nothing to do with the proceedings before the board of supervisors. They are regulated by the Political Code, which provides that the report of the viewers shall contain, among other things, "the estimate of the damage to the owner." Section 2686. It makes no distinction between the items of damage. For example, it says nothing about the value of the land to be taken. But, as this is an important element of the damage, it must be included in the phrase quoted. It seems clear, therefore, that all that was required of the viewers was to report a lump sum, which, in their judgment, was the proper amount to be paid to the owner. If this be the true construction, we think that the report should be held sufficient. We do not think that the report of viewers to lay out a county road, to a body like the board of supervisors, should be construed with any great degree of strictness; and it is to be remembered that such report is not binding upon the owner, who may wait until he is brought into court, where he may prove whatever damage he may have sustained.

There is nothing in the respondent's point that the answer should have been verified. The plaintiff was neither the state, "nor an officer of the state in his official capacity." Compare *City and County of San Francisco v. Atsell*, 80 Cal. 60, 22 Pac. Rep. 74. We therefore advise that the order appealed from be affirmed.

We concur: **BELOHER, C. C.; VANOLIEF, C.**

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

193 Cal. 547)

STONE v. HAMMELL. (No. 18,024.)

(*Supreme Court of California. April 2, 1890.*)

PRINCIPAL AND SURETY—LIMITATIONS.

1. Where a surety gives his note for his contributive share to his co-surety, who has paid the debt of the principal, after the co-surety's right of action against the principal is barred by limitation, he cannot recover the amount of the note from his principal.

2. Although a surety's absence from the state will prevent the running of the statute against the right of his co-surety, who has paid the entire debt, to recover from him his contributive share, the statute will continue to run against his right to recover from the principal from the time the debt was paid by his co-surety.

In bank. On rehearing. Reversing 22 Pac. Rep. 203.

Wells, Guthrie & Lee and *S. W. Bouton*, for appellant. *B. F. Thomas*, for respondent.

McFARLAND, J. After further consideration, upon argument on rehearing, we are satisfied that the judgment in this case should be reversed.

The plaintiff, with three other persons,—Newhall, Hamilton, and Hayman,—were sureties on a promissory note made by defendant, Hammell, to one Byron Stevens for \$3,000, dated July 1, 1877, and payable one year after date. Plaintiff claims that one of said sureties, Newhall, paid on said note something over \$2,000, and that plaintiff paid to Newhall, as his *pro rata* contributive share, \$1,000; and this action was brought to recover said \$1,000 of defendant, the principal on the note. There are a number of interesting questions in the case which, under the views which we take of it, need not be determined. For instance, defendant contends that he gave a mortgage to the sureties to secure them, and that the mortgage should have been foreclosed, and that the mortgaged property was sufficient in value to satisfy the note; that defendant was discharged from the liability sued on by a decree in insolvency; and that the \$1,000 was more than plaintiff's contributive share. We will assume, however, that the property was not held by way of mortgage, and was faithfully applied by Newhall, as far as it would go, to the payment of the note; that the decree in insolvency did not include the liability sued on; and that \$1,000 was the correct amount of plaintiff's contributive share.

It is not averred in the complaint, or found by the court, that the plaintiff, Stone, ever paid to his co-surety Newhall any money, or gave him any property, in satisfaction of Newhall's claim for contribution. The only averment on the subject is as follows: "That on the 1st of March, 1884, this plaintiff, in full satisfaction of the amount of money which he should contribute to said P. N. Newhall for his aforesaid payments on the aforesaid note, made, executed, and delivered to said P. N. Newhall his promissory notes in the sum of \$1,000, whereupon the said P. N. Newhall gave to plaintiff his receipt in full for plaintiff's liability to contribute to him for the aforesaid payments on said promissory note." This is not a very clear averment that Newhall took the notes in absolute payment of his former claim, but we will assume it to be sufficient for that purpose. There is no averment that plaintiff ever paid the notes, or any part of either of them. It appears from the findings that they were payable two years after date, and would not mature until more than a year after this action was commenced. The court below held that the giving of these notes, and their acceptance as payment by Newhall, constituted a cause of action in favor of plaintiff against defendant. In this holding, under the facts in the case at bar, at least, the court, in our opinion, erred. The general rule is, undoubtedly, that a surety can recover of the principal only the amount or value which the surety has actually paid. If

he has paid in depreciated bank-notes taken at par, he can recover only the actual value of the bank-notes so paid and received. If he has paid in property, he can recover only the value of the property. If he has compromised, he can recover only what the compromise cost him. The rule is that he shall not be allowed to "speculate out of his principal." *Brandt*, Sur. § 182, and cases there cited; *Estate of Hill*, 67 Cal. 243, 7 Pac. Rep. 664.

There is authority, however, and perhaps a preponderance of authority, to the point that if a surety, by giving his negotiable promissory note, satisfies the claim of the creditor, and extinguishes the debt of the principal to the creditor, he may recover from the principal the amount of the debt without showing that he has paid his promissory note. *Brandt*, Sur. § 181, and cases cited. But the authorities are not uniform upon the subject. In Indiana and North Carolina, and some other states, it is held that the surety cannot recover of the principal until he has paid the money, and that the giving of a note is not sufficient. *Brisendine v. Martin*, 1 Ired. 286; *Nowland v. Martin*, Id. 307; *Romine v. Romine*, 59 Ind. 351, and cases there cited. Many of the cases hold that, if the surety discharges the debt by a negotiable note, he can maintain an action against the principal, while, if he does so by means of a bond, or any non-negotiable instrument, he cannot, upon the theory that a negotiable note is analogous to money,—a distinction which is founded upon no apparent good reason. *Boulware v. Robinson*, 58 Amer. Dec. 117; *Peters v. Barnhill*, 1 Hill, (S. C.) 237. The rule is founded on the reason that if the surety, by giving his own obligation, discharges the original debt of the principal, the latter is as much benefited as if he had discharged it by actually paying the money. Its weakness lies in the possibility of the surety recovering the whole amount of the principal, and never paying his own note; thus violating the cardinal rule that the surety shall not speculate out of the principal. But, if we assume the rule to be as first above stated, it is not so clearly commendable as to deserve pushing further than adjudicated cases have already carried it; and in all cases to which our attention has been called the rule has been enforced against the principal in favor only of the surety who has extinguished the debt to the original creditor. We have seen no case in which the rule has been applied to a surety who had not satisfied the original debt, but had only given his note to another surety, who had satisfied it. Moreover, the reason of the rule, if it be held to be the rule, is that the principal is benefited to the extent of the original debt or liability which has been extinguished by the new obligation of the surety; and the reason ceases when there is no such benefit. Now, in the case at bar, defendant was in no manner benefited by the notes given by plaintiff to Newell, nor was any debt or liability of defendant thereby

extinguished, because, at the time the notes were given, there was no legal liability from the defendant to Newell, for the reason that any cause of action which the latter might have had against the defendant for moneys which he had paid to Byron Stevens had long been barred by the statute of limitations. The last payment made by Newell on the note to Stevens, as averred and found, was on January 10, 1881; and, as his cause of action for the payments which he had made was not "founded on a written instrument," it was barred in two years,—that is, on January 10, 1883. *Chipman v. Morrill*, 20 Cal. 136. But plaintiff did not give his notes to Newell until March 1, 1884. At that time, defendant was under no legal obligation to any one which plaintiff could discharge by giving said notes. The original note given to Stevens had itself been long since outlawed. Therefore, by giving said notes, plaintiff acquired no cause of action against the defendant herein.

We think, also, that the cause of action averred in the complaint would have been barred by the statute of limitations, which was pleaded by defendant, even though plaintiff, on March 1, 1884, had actually paid Newell the \$1,000 in money. Plaintiff seeks to avoid the running of the statute through the fact that, within a month after the original note to Stevens matured, he left the state, and resided out of the state for several years. His contention is that, as Newell's cause of action against him for contribution would not be barred while he remained out of the state, therefore his cause of action which he had against defendant, or which he proposed at some future time to have, by paying his contributive share to Newell, would not be barred during his absence from the state, though such absence should be for 50 years. He contends that by returning at any time, and subjecting himself to Newell's claim, and paying it, he could recover his part of it against defendant, although in the hands of Newell it had been outlawed for a quarter of a century. We do not think that the law of limitation of actions contemplates any such an anomaly. When a man leaves the state, the statute of limitations does not run during his absence as to any cause of action against him, but his absence does not prevent the statute from running as to any cause of action in his favor. At any time within two years after Newell had paid the original note, plaintiff could have paid his contributive share to Newell, and maintained an action for it against defendant. But he could not wait until the whole of Newell's cause of action against defendant was barred, and then revive one-half of the claim by coming back years afterwards, and making a real or pretended payment of it to Newell. The whole claim was, as to defendant, dead; and the breath of life could not be blown into one-half of it by any such legal hocus-pocus. For the reasons above stated, the judgment and order appealed from are reversed, and

the cause remanded for such further proceedings as respondent may be advised to take.

We concur: FOX, J.; SHARPSTEIN, J.; PATERSON, J.

BEATTY, C. J. I concur. A surety who pays the debt of his principal has an undoubted right to recover the amount paid. But such is not the case here. The liability of the principal had been extinguished by the statute of limitations before any payment by the surety. The absence of the plaintiff from the state had kept the claim alive as to him, though it was extinguished as to the defendant. The plaintiff, therefore, did not pay the defendant's debt. He merely paid his own debt. By so doing, he could not possibly acquire a right of action against the defendant.

(33 Cal. 428)

ORD v. BARTLETT *et al.* (No. 12,419.)

(Supreme Court of California. March 12, 1890.)

MORTGAGE FORECLOSURE — RIGHTS OF ADVERSE CLAIMANTS.

Adverse title to mortgaged premises, asserted by alleged prior grantees of the mortgagor, cannot be determined in the foreclosure suit; the proper course being either to dismiss the suit as to them, or to specify in the decree that it is made without prejudice to their rights.

Commissioners' decision. Department 2. Appeal from superior court, Santa Cruz county; F. J. MCCANN, Judge.

A. S. Kittredge, for appellants. L. N. Goldsby, for respondent.

BELCHER, C. C. On the 24th day of January, 1877, William M. Ord executed to the plaintiff, then Mrs. Anne E. Williams, his promissory note for \$700, and a mortgage to secure payment of the same. Subsequently the plaintiff became the wife of Ord, and there was born to them a child named Anne Victoria Ord. On the 26th of April, 1882, Ord died intestate, leaving him surviving, the plaintiff, his widow, and the child, Anne Victoria, as his only heirs at law. Administration on the estate of the decedent was taken out, and S. A. Bartlett was duly appointed the administrator thereof. The plaintiff commenced this action to foreclose her mortgage, making Bartlett, as administrator of the estate, and other parties, defendants. As to the defendants other than Bartlett, the complaint alleged that they had, or claimed to have, some interest in or claim upon the mortgaged premises, which interests or claims were subsequent and subject to the lien of the plaintiff's mortgage. Bartlett allowed a default to be entered against him. The other defendants answered, and, among other things, denied that their interest in or claim upon the mortgaged premises was subsequent or subject to the lien of the mortgage. They then, "for a separate answer and defense," alleged that, under a deed executed by the decedent, Ord, in April, 1873,

—of which deed the plaintiff had full notice when she took her mortgage,—they became the owners, and "have continuously been, and are now, seised and the owners of all the right, title, interest, and estate of said grantor in and to the whole of said premises; that the said claim, interest, and estate of these defendants, and each of them, is, and always has been, prior to and superior to the lien or any lien of said mortgage, and is not, and never was, subsequent to or subject to the same." To this last defense a general demurrer was interposed and sustained. The case was then tried, and judgment was rendered foreclosing the mortgage as against all of the defendants. A motion for new trial was made and denied, and the appeal is from the judgment and order.

The principal question presented for decision relates to the action of the court in sustaining the demurrer. It is claimed that the ruling in this respect was erroneous because, if the averments were true, the appellants "should have been allowed to show it; for that would have dismissed the action as to them." It is well settled that adverse titles to the mortgaged premises, held by parties claiming by conveyance from the mortgagor prior to the mortgage, are not the proper subjects of determination in a suit for foreclosure. Such titles must be settled in a different action, giving rise, as they generally do, to questions of purely legal cognizance. *San Francisco v. Lawton*, 18 Cal. 474. If one who sets up a claim to the land adverse and paramount to that of the mortgagor is made a co-defendant in an action to foreclose a mortgage, his adverse claim cannot properly be tried, and he may refuse to appear and put it in issue; or, if he does appear and put it in issue, the court may refuse to pass upon it. In either event the decree rendered will in no way affect his rights of priority. *McComb v. Spangler*, 71 Cal. 418, 12 Pac. Rep. 347; *Johnston v. Savings Union*, 75 Cal. 135, 16 Pac. Rep. 753. In such a case the proper course, undoubtedly, would be to dismiss the action as to the adverse claimant, or to specify in the decree that it is made without prejudice to his adverse rights. Here the appellants' rights under the deed set up in their answer were not tried or determined; and they cannot, therefore, be impaired or affected by the decree. This being so, appellants suffered no injury by the ruling upon the demurrer, and they have nothing to complain of.

The other points made by appellants relate to the admission of evidence. They sought to prove that plaintiff's note had been paid in whole or in part. But they set up and claimed no interest in the property except the adverse interest before mentioned; and it was, therefore, a matter of no concern to them whether the note had been paid or not. We find no error in the record prejudicial to the appellants, and therefore advise that the judgment and order be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

ON REHEARING IN BANK.

(April 5, 1890.)

It is ordered that the petition for rehearing herein be, and the same is hereby, denied; but the judgment of the department No. 2 herein is modified by the addition of the following: Provided, that nothing in this judgment, or in the judgment appealed from, shall be construed or held to prejudice or affect any rights of the appellants in or to the mortgaged premises derived from William M. Ord, the mortgagor and common grantor, prior to January 24, 1877, the date of plaintiff's note and mortgage, described in the complaint herein. **BEATTY, C. J.; THORNTON, J.; FOX, J.; MCFARLAND, J.**

(83 Cal. 477)

GLIDE v. DWYER et al. (No. 12,882.)

(Supreme Court of California. March 27, 1890.)

MORTGAGE—FORECLOSURE—TRUSTEE.

1. A complaint to set aside a decree of foreclosure alleged that H. and G. executed a trust mortgage to M. and F. to secure certain notes, (3,200 in number,) in whosever hands they might be. It further alleged on information and belief that "not more than" 1,440 of them were issued. It also alleged that, on the day of filing the complaint, plaintiff was the holder of certain of said notes, which were past due. There was no averment either that any of said notes were ever issued or as to when or from whom he received the notes he was holding. *Held*, that he did not show any interest which would entitle him to attack the foreclosure, as the presumption was that they passed to him from the makers on the day of filing the complaint.

2. Where an action to foreclose a trust mortgage is prosecuted by and in the name of the trustees for the benefit of the beneficiaries, whosoever they may be, as Code Civil Proc. Cal. § 369, provides may be done, the beneficiaries, though not named as parties to the record, are privy, and are estopped by the decree in the absence of fraud.

3. Where a trustee under a mortgage buys in with his own means a first mortgage on part of the premises covered by the trust mortgage, it is within the jurisdiction of a court of equity, on foreclosure of the trust mortgage, to award him the amount so paid out of the proceeds of the entire premises.

4. The mere fact that at a mortgage foreclosure sale the property was sold to a mortgagee for a sum much below its value is no evidence of fraud.

In bank. Appeal from superior court, Yolo county; **C. H. GAROUTTE, Judge.**

A. P. Catlin and Add C. Hinkson, for appellant. **J. H. McKune**, (*Beatty & Denson*, of counsel,) for respondents.

FOX, J. This is a bill in equity, in the nature of a bill of review, brought to set aside a decree of foreclosure and proceedings subsequently had thereunder, on the alleged ground of fraud. Defendants demurred to the complaint that the same did not state facts sufficient to constitute a cause of action, or to entitle the plaintiff to relief, and specified many particulars wherein it was insuffi-

cient; among others, that, as to many of the allegations, the plaintiff was barred by lapse of time, and laches. The demurrer was sustained. The plaintiff declined to amend, and judgment was entered for the defendants, from which plaintiff appeals.

This is a case where the rule that a pleading must be construed most strongly against the pleader, clearly applies; but, coming up, as it does, on demurrer, all the allegations of fact therein not inconsistent with other allegations in the same count must be taken as true. The deductions to be drawn from them are for the court, and it does not follow that such as are drawn by the pleader are admitted to be correct. From the allegations of the complaint, it appears that on the 15th day of April, 1880, the defendants **H. T. Holmes and William Gwynn** made and executed to the defendants **Frank Miller and Daniel Flint**, as trustees, their certain mortgage, covering 2,437.38 acres of land, in Lisbon district, Yolo county, in this state, to hold the same in trust as security for the sum of \$80,000 to the holders of any and all of certain promissory notes in said mortgage described, to-wit, 3,200 in number, for \$25 each, with interest thereon at the rate of 8 per cent. per annum, divided into four series, severally marked and known as "Series A, B, C, and D," with 800 notes in each series. All the notes were to be in the same form, except that those of series A were to be payable on or before the 15th day of April, 1881; those of series B, on or before the 15th day of April, 1882; those of series C, on or before the 15th day of April, 1883, and those of series D, on or before the 15th day of April, 1884. All were, or were to be, signed "**H. T. HOLMES & Co.**," and made payable to "**William Gwynn or bearer.**" The said **H. T. Holmes and William Gwynn** were partners, doing business under the firm name of "**H. T. Holmes & Co.**" There is no averment that all, or in fact any, of the said \$80,000 series of notes were ever issued. There is an averment, upon information and belief, that, "of the said 3,200 promissory notes, not more than 1,440 were issued. That is to say, there were only issued 360 notes of each of said several series, making an aggregate of \$36,000." According to the well-settled rules of construction, we have here an entire failure of allegation that any of the notes were ever issued, with an affirmative allegation putting a limit upon the number, if any, that were issued. This is followed by an averment that "said notes so issued were by * * * said trustees delivered to said **Holmes and Gwynn**, who, before the same matured, used them, in whole or in part, in the payment of their debts and liabilities, and in discharging the claims and demands of their creditors." In another portion of the complaint it is averred that the purpose of the parties to the mortgage was to enable **Holmes and Gwynn** to pay off their debts, etc., "and that said promissory notes were received by said **Holmes and Gwynn**."

and used by them, for said purpose, and other purposes." The complaint must be construed as a whole. So construing it, the averment last quoted must not be held to refer to the whole \$80,000 of said notes, but only to such of them as were actually issued. Without any direct averment showing that any were ever issued, there is a limitation placed upon the amount, if any were so issued; and no averment is made from which the fact could be found that any were issued before their maturity, or before the trust created by the mortgage was closed by operation of law, under the decree of foreclosure hereinafter mentioned, except a few that seem to have been in the hands of the defendant McCarty before such foreclosure, and which will be hereafter referred to. There is an averment in the complaint that on the day of the filing thereof, April 11, 1888, nearly four years after maturity of the last of the series, the plaintiff is the holder of certain of said notes, and of each of the four series thereof, which are due and unpaid, with interest thereon from the 15th day of April, 1880,—the day of their date. There is no averment as to when, or from whom, he received them. Assuming that they were ever executed, all that the complaint shows is that they were in the hands of Holmes & Gwynn, their makers, until they passed to plaintiff. So long as they remained in the hands of their makers, they were unissued, and were not notes secured by this mortgage. Under every rule of construction of pleadings, we are bound to assume that they passed from the hands of the makers to this plaintiff on the day of the filing of this complaint, and not before. On that day, and for at least 15 months before that time, if in the hands of the makers, they were mere waste paper, so far as the security of this mortgage was concerned, for the mortgage had already been foreclosed, and the trust under it had ceased. They could not acquire new life by being transferred to plaintiff; and he could not at that time have acquired any rights under them greater than that held by the person from whom he received them, whoever that might have been. Of the \$36,000, which he declares was the limit of the notes issued, he claims that, at the date of filing his complaint, he is the owner and holder of \$17,825, nearly equally divided between the several series; but he does not claim that he, or the person from whom he received them, held them before maturity, or before the foreclosure of the mortgage by which he alleges that they were secured. It is, therefore, apparent that he has not alleged in this regard facts sufficient to entitle him to attack that foreclosure, or any of the proceedings anterior thereto.

The complaint further shows that 846.26 acres of the land described in the mortgage hereinbefore mentioned was at the time subject to a prior mortgage, made March 28, 1879, by said William Gwynn to William Russell, to secure the payment of a promis-

sory note of even date, made by said Gwynn to said Russell, with interest thereon at the rate of 10 per cent. per annum. This note matured two years after its date. It is averred that one-half the principal and interest of this note had been paid prior to the execution of the \$80,000 mortgage, but it is not stated when or by whom; and, as militating against that averment, and inconsistent with it, it is further shown by the complaint that, at or about the time of the execution of the \$80,000 mortgage, Russell made an assignment of his mortgage to the National Gold Bank of D. O. Mills & Co., of which bank it is alleged said Miller was cashier and manager, which bank agreed to assign the same to the trustees upon payment of \$3,500 and interest; and at the same time the trustees gave to Russell a written agreement to deliver to him \$4,200 of "the proposed" trust mortgage notes, when received, in full satisfaction of the balance of his claim under the mortgage. It will be borne in mind that the Russell mortgage was not yet due, and that these two sums amount to just the principal of said mortgage, with the then accrued interest thereon. The law presumes that when the bank received the assignment it paid a consideration therefor. Code Civil Proc. § 1963, subd. 39. It also presumes that in dealing with that mortgage the ordinary course of business was followed. *Id.* subd. 20. From these two declared presumptions of the law, this additional presumption follows: That no part of the note secured by that mortgage had been paid at that time,—it being before maturity; that, upon surrendering it, Russell demanded and received in money and notes the full amount then accrued in his favor under it, \$7,700. As he accepted the agreement of the trustees for the delivery of the \$4,200 in notes, and the bank only agreed to assign to the trustees upon the payment to it of \$3,500 with interest, and that was the balance represented by the mortgage, presumably that was the amount which the bank paid, and Russell received for it. Stripped of mere invective, this was all consistent with honesty and fair dealing, and with the purpose for which the \$80,000 mortgage was made,—that of facilitating the settlement of the affairs of Holmes & Gwynn. It is further alleged, in this connection, that Miller subsequently acquired control of this mortgage, and had it foreclosed in the name of another person, but in his own interest, and upon the sale thereof, under foreclosure, had the property bid in, and the title taken in the name of his wife, and that all this was in fraud of the holders of the trust mortgage notes. We can conceive it possible, and even quite probable, that upon the maturity of that mortgage, held, as it was, by a national bank of which Miller was cashier and manager, he was compelled to take it up, and, as it does not appear that he ever received a dollar of trust funds with which to do it, that he had to do

it from his own funds. If so, he was entitled to be protected, and to protect himself, for the advances which he was compelled to make to preserve the trust property. The method of doing it may not have been the wisest, under the circumstances, that could have been adopted. But, whether good or bad, the plaintiff has failed to show that he has any ground to complain of it—*First*, because he has failed to show that he or his assignor was the holder of any notes or had any interest under the trust mortgage, or as a creditor of Holmes & Gwynn; *second*, because the entire transaction, including the foreclosure and sale, was a matter of public record, of which he was bound to take notice, and of which he is conclusively presumed to have had knowledge, and was concluded more than three years before the commencement of this action; *third*, if there was any fraud or error in that foreclosure, or in the sale under it, or in the acquiring of the title by Miller's wife, or by Miller in the name of his wife, it was all corrected upon the foreclosure of the trust mortgage, which was concluded 15 months before the commencement of this action, and in which the sale under the former mortgage was set aside, and the property subjected to foreclosure in the latter case,—all of which, the complaint alleges, was done with the consent of Miller, acting as the executor of the will of his wife, then deceased. Whether with his consent or not, he has taken no exception to said last decree, nor any appeal therefrom. It is further alleged that on the 3d of March, 1883, the defendant McCarty commenced a suit against the defendants Gwynn, Holmes, Miller, and Flint, and against one Wilson, the person who is alleged to have held the assignment of the other mortgage for Miller, to recover judgment against Gwynn and Holmes upon 18 of said trust mortgage promissory notes, amounting to \$450, with interest thereon, and for a decree of foreclosure and sale of sufficient of said mortgaged premises to satisfy the same, and that on the 9th day of April, 1885, judgment and decree was entered in accordance with the prayer of said complaint. Further, that on the 5th day of July, 1884, the defendants Flint and Miller commenced an action against Holmes, Gwynn, Wilson, and McCarty to foreclose said \$80,000 mortgage, alleging that McCarty and Wilson had or claimed some interest in the mortgaged premises which was subsequent and subordinate to the lien of said mortgage; that in that action McCarty appeared and answered and filed a cross-complaint in which he claimed to be the holder of 45 of said trust mortgage notes, and set up all the facts about the Russell mortgage, and Miller's connection therewith, the foreclosure thereof and sale thereunder, and claimed that such foreclosure and sale were in fraud of the rights of the holders of the trust mortgage notes; that Wilson did not appear, and was never served with summons; that Sarah E. Miller,

wife of Frank Miller, intervened, setting up her title; that she afterwards died, pending the action, and Frank Miller, as the executor of her will, was substituted as such intervenor in her stead; that afterwards an order was made, with the consent of all the parties, J. H. McKune, Esq., appearing for McCarty, and Beatty and Denson for all the other parties, consolidating the two foreclosure cases; that the parties then, other than Holmes and Gwynn, with fraudulent intent, procured an order to be entered in the McCarty foreclosure suit setting aside the decree which had been entered therein; and that on the same day "all the parties to said suit, [the consolidated foreclosure suit,] in the further prosecution of the fraudulent designs herein stated, procured a final decree in said action to be made and entered, of which the following is a copy;" and then follows a copy of the decree. It does not show upon its face that it was a consent decree, but declares that the case was tried in open court, all the parties thereto appearing by counsel, and was tried and submitted upon the pleadings and proofs adduced. It then proceeds to decree and order the sale of all the land covered by the trust mortgage, thus setting aside or disregarding the foreclosure and sale under the Russell mortgage, and directed the disposition of the fund arising therefrom. It provided that any party to the action might become a purchaser at the sale, and that the funds arising therefrom should be distributed as follows: *First*, to the payment of the costs and expenses of sale; *second*, to the payment of the costs of suit; *third*, to the payment to Frank Miller, executor of the will of Sarah Edna Miller, of the sum of \$6,395.50; *fourth*, to the payment of the sum of \$500 to Flint and Miller for their services and commissions in executing the trust; *fifth* and *sixth*, to the payment of counsel fees to the several counsel of McCarty and the trustees, of sums amounting in the aggregate to \$1,000; *seventh*, to McCarty the sum of \$3,041.50, "in full satisfaction and payment of the notes held by him against said Gwynn and Holmes;" and, *eighth*, that any further sum that might be realized be brought into court, to be distributed to the holders of notes issued under the trust mortgage as they should make their respective rights appear.

The entire decree seems to have been within the equitable jurisdiction of the court. If there was error in it, or in any of the awards made by it, it was open to correction, upon application of any party interested, by motion in the court below, and then by appeal. It does not appear that any motion to correct it was ever made in the court below. No appeal was ever taken, and more than the full time allowed by law for appeal expired before this action was brought. That action was brought and prosecuted, by and in the name of the trustees, for the benefit of the beneficiaries under the trust, whosoever they might be, as the statute expressly provides

may be done. Code Civil Proc. § 369. There is no pretense that the plaintiff or his assignor was without notice of the pendency of that action, or of any of the acts which are alleged to have been fraudulent or collusive. The presumption is that he had such notice. Though not named as a party to the record, he had a right, assuming that he (plaintiff or his assignor) was a party in interest, to have himself made a party to the record, by intervention or motion, at any stage of the proceedings. But he preferred to let the whole matter be conducted by his trustees. Though not a party to the record, he was privy, if he was the holder of any of these trust mortgage notes, and is estopped by that decree, unless there was fraud of which he had no notice, or was not by law charged with notice; and it is not pretended in the complaint that such was the fact. See *Freem. Judgm.* § 181; *Pom. Rem.* § 400; *Robbins v. City of Chicago*, 4 Wall. 657; *Castle v. Noyes*, 14 N. Y. 332.

But the fallacy of this charge of fraud, if the plaintiff was or is in position entitling him to be heard on such a charge, is sharply illustrated by reference to one point made and insisted upon in connection with this part of the case. It is insisted upon as perhaps the strongest and most perfect badge of fraud in this case that the plaintiff Miller caused and procured this decree to be so framed and entered as to give the Intervenor Miller a lien upon the entire mortgaged premises for the amount awarded in his favor, and to be paid out of the proceeds of the sale of the entire premises, instead of upon the part thereof covered by the Russell mortgage only, and to be paid out of the proceeds of the sale of that part. As we have already said, it does not appear from the record that Miller had anything to do with the framing of this decree. Whether he did or not, there was neither error nor fraud in that part of it which is so insisted to have been fraudulent. This award was not made in satisfaction of the Russell mortgage. On the contrary, the lien of the Russell mortgage was ignored. According to the facts set up in the complaint, that mortgage had been satisfied and extinguished. The court evidently found, and the facts set up in this complaint would support such a finding, that the moneys claimed by the intervenor were moneys paid out and expended under the trust, and for the benefit of all the beneficiaries thereunder, to relieve the trust property of this prior incumbrance. For the moneys so expended the party was entitled to a return, with interest and costs necessarily incurred in that behalf, and to have the same returned out of the whole trust fund. It was as much a first lien on that trust property as any other expense legitimately incurred by the trustees, and could not, in law or in equity, be so limited as to be a lien upon a moiety only of the trust property. The amount to be allowed on account of that expenditure was for the court

to determine; and in doing it the court seems to have fixed the amount at only about two-thirds the sum claimed and allowed in the former suit for the foreclosure of the Russell mortgage.

One further fact, insisted upon as one tending to show fraud, remains to be considered. At the sale had under the foreclosure of this trust mortgage, the defendant McCarty bid in the property in one parcel at the sum of \$11,500. This occurred March 5, 1887. He afterwards assigned an interest in it to the defendant Dwyer, and in due course the sheriff issued his deed to McCarty and Dwyer. It is alleged, upon information and belief, that the property was then worth \$35,000, and that the property was allowed by the parties to the action, other than Gwynn and Holmes, to be struck off to McCarty for this smaller sum, for the purpose of defrauding the other holders of the trust mortgage notes; but it is not alleged that either the plaintiff or his assignor was one of the holders of such notes, or was injured thereby. We are aware of no law which compels judgment creditors to bid upon property upon which they have a lien any higher than they please. The sale was at public auction, under a decree of court, and, presumably, conducted according to law. There is no allegation that it was not first offered in separate parcels, or that any of these defendants did any act which prevented, or tended to prevent, any other person from bidding at the sale any sum that he pleased for the whole or any part of the land. Plaintiff says he is now willing to bid for the property a sum sufficient to cover such awards as the court may, upon a new trial, make in favor of the other parties to the action, and the amount due him upon the notes which he claims to hold. He had the opportunity of doing so at that sale; and, if he was then the holder of these notes, or any of them, it was his interest to see that the property brought all that it was worth.

It thus appears to us, upon a careful examination of all the allegations of fact contained in this complaint, as distinguished from mere invective and conclusion, that it fails to show a case of fraud, in which a court of equity would be justified in interposing to set aside this decree of foreclosure, which has been allowed by not only the parties to the record, but by all the parties in interest, to become final. It also fails to show that the plaintiff or his assignor was or is a party who could or can maintain such an action—*First*, because it fails to show that he or his assignor is or was the holder of any note, secured by said mortgage, issued before the mortgage was foreclosed and the trust extinguished; *second*, if it be assumed that the notes now claimed by him were outstanding at the time of the foreclosure, then he was privy to the action, and is estopped by the decree, on the authorities and for the reasons already stated. It follows that the demurrer was prop-

erly sustained, and the judgment must be affirmed. So ordered.

I concur: SHARPSTEIN, J.

PATERSON, J. I concur. It must be presumed, in the absence of objection to the contrary, that plaintiff and his assignors had full notice of the pendency of the action, and of all the facts now relied on to show fraud and collusion. Having such notice, it was their duty to appear in the action to protect their rights. *Freem. Judgm.* § 181; *Poin. Rem.* § 400; *Robbins v. City of Chicago*, 4 Wall. 657; *Castle v. Noyes*, 14 N. Y. 332. Furthermore, under the allegations of the complaint, plaintiff must be deemed to be an assignee without consideration after judgment of foreclosure and sale. He cannot, therefore, avail himself of this remedy. *Thompson v. Maxwell*, 95 U. S. 397; 2 Smith, Ch. Pr. 49. For these reasons I concur in the affirmation of the judgment.

McFARLAND, J. I concur in the judgment for the reasons stated in the opinion of Mr. Justice PATERSON.

(83 Cal. 505)

HERRLICH v. McDONALD. (No. 12,235.)
(*Supreme Court of California*. March 31, 1890.)

APPEAL—REHEARING.

Motion to recall a *remittitur* was properly denied where, within the 30 days after the filing of the opinion in department, no petition or order for a rehearing of the cause in bank was filed, as required by Const. Cal. art. 6, § 2, though within that time a motion to strike out the damages from the judgment was made and denied, but not shown on the record. *PATERSON and Fox, JJ.*, dissenting.

In bank. On rehearing. For former opinion, see 22 Pac. Rep. 298.

W. H. Sears, for appellant. Chas. F. Hanlon, for respondent.

McFARLAND, J. This case is before the court upon a motion of appellant to recall the *remittitur*. The cause was heard in department 1, and the judgment of the court below was affirmed, with 15 per cent. damages, the opinion of the court in department having been filed September 7, 1889. 22 Pac. Rep. 298. At the end of 30 days the *remittitur* issued as usual, no petition for hearing in bank having been filed. The motion to recall the *remittitur* is based on an affidavit of appellant's counsel to the effect that on September 16, 1889, he made a motion in department 1 to modify the judgment by striking off the said 15 per cent. damages, and that said motion had never been decided. The records of the court do not show that any such motion was made. As a matter of fact, however, counsel did make such a motion or request orally, but it is also true that the court (department 1) did consider the motion and decided against granting it, although that decision does not appear on the records. So the record does not show anything about the

matter. But, assuming the facts to be as stated in the affidavit, as there was no order made that the cause be heard by the court in bank, the judgment became final, under the constitution, art. 6, § 2, in 30 days, and the *remittitur* in usual course went down to the lower court. The pendency of appellant's said motion—assuming that it was pending—could not prevent that result; and when a *remittitur* issues in regular course the rule is that the jurisdiction of this court ends. Whether or not the court would have power to recall a *remittitur* issued through its own inadvertence it is not necessary here to determine. There was no such inadvertence in this case. As there was no petition for hearing in bank under rule 30, there was nothing for this court to act upon within the 30 days, and at the expiration of that time the *remittitur* issued regularly, and not inadvertently. See *Adams v. Dohrmann*, 63 Cal. 420. Motion to recall *remittitur* denied.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; THORNTON, J.

PATERSON, J., (*dissenting*.) I am unable to concur in the conclusion of the majority. The 15 per cent. damages were imposed without notice to the appellant, and upon learning the fact her counsel, before the expiration of the 30 days, came in and moved the court to modify the judgment by striking out the damages which it had added without a hearing. The motion was submitted, and I think he had the right to assume that the court would control its *remittitur* until all matters affecting the judgment had been passed on. But it is said the motion was decided, although no record was made of it. This is true, but it was the duty of the court to make a record of its action, which would give the party affected by it notice and an opportunity to be heard. If such record had been made, he could have petitioned for a rehearing before the *remittitur* issued. When a party thus loses a right which but for the mistake of the court would have been preserved to him, it seems to me we ought to say the *remittitur* was issued through inadvertence, and should be recalled. The fact that no petition for a rehearing was filed within the 30 days does not seem to me to be material. The moving party sought only to have the damages (amounting to over \$1,000) stricken out. If the department had granted the motion which was submitted to it, there would have been no necessity for a rehearing.

Fox, J. I concur with PATERSON, J.

(3 Cal. Unrep. 350)

STAPLES v. MAY. (No. 12,167.)
(*Supreme Court of California*. March 31, 1890.)
MORTGAGES—DESCRIPTION—RECEIVERS—TRESPASS.

1. Where a mining company operates its various mines under one system, and the proceeds of the ore extracted from each are used indiscrimi-

nately, for the common benefit of all, a receiver appointed on the foreclosure of mortgages covering a part only of the company's property, with power to take possession of the mortgaged premises and to carry on the mines, who is permitted by the company to take possession of its entire property, and to work all its mines, rendering them more valuable and more capable of paying creditors, cannot be considered a trespasser, and is not personally liable to a general creditor of the company for sums realized by him from a mine not covered by the mortgage.

2. A mortgage of specifically described land, together with all the lands, mines, and minerals of every kind belonging to the mortgagor in a designated county, covers all mineral lands in that county shown by proper evidence *dehors* the mortgage to have belonged to the mortgagor at the time of its execution.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; D. S. BELDEN, Judge.

T. I. Bergin, for appellant. *S. F. Leib*, for respondent.

FOOTE, C. This appeal is taken from a judgment in favor of the plaintiff, and from an order denying the defendant a new trial. From the record, it appears that Henry May was appointed the receiver of the property belonging to the Santa Clara Mining Association of Baltimore, whose lands and property were in the county of Santa Clara in this state; that the lands owned or possessed by this association contained mines of quicksilver; that the association was without means to work the mines, by which alone its then numerous debts could be paid; and that, to that end, May was authorized by the court which appointed him to borrow money, and use and expend it in working the mines, etc. He was originally appointed receiver in an action brought by the executors of the estate of W. S. O'Brien, deceased, to foreclose a mortgage on certain specific lands of the Santa Clara Association, and to foreclose a pledge of certain bonds secured by another and second mortgage or deed in trust. Afterwards, when the beneficiaries under the deed in trust, who were made parties to the action originally, intervened and filed a cross-complaint seeking to foreclose their second mortgage or deed in trust, he was appointed receiver of all the property contained in both instruments, to carry on the quicksilver mines, borrow money, etc. There were other unsecured creditors, among whom was the plaintiff, Mary E. Staples, who could not get any satisfaction for their debts out of their debtor, the Santa Clara Mining Association, by reason of its insolvency, and the existence of the instruments above mentioned. But she brought suit against the association, obtained her judgment, and, by proceedings supplementary to the execution issued on her judgment under section 720, Code Civil Proc., sought the aid of the superior court to force May, the receiver, to pay her what she claimed was due her debtor, the mining association, from May, as a trespasser, in realizing money from a mine of the Santa Clara Mining Association which was not included in either of the mortgages for

which foreclosure had been prayed, and in which action May was, as before stated, appointed receiver. The court below held that May, as receiver, had gone upon the property of the Santa Clara Mining Association which was not included in either mortgage; that he was not authorized to do so as receiver under the appointment of the superior court; that he did so as a trespasser; and that the net profits which he had realized out of the working of the quicksilver mine upon which he had trespassed amounted to the sum of \$38,212, for which and interest he became liable to pay to the Santa Clara Mining Association of Baltimore, the mortgagor in the two mortgages, amounting in the aggregate to the sum of \$46,414.84; and, being liable to that corporation, the plaintiff "is entitled to judgment against defendant for such proportion of the sum of \$46,414.84, as the amount of her said judgment and interest thereon to date, to-wit, \$6,593.19, bears to the said sum of \$55,470.70, to-wit, for the sum of \$5,515, and costs of suit."

The theory of the case on which the court seems to have made its findings and decision, and upon which it refused the motion for a new trial, is that the court never had any jurisdiction over the particular part of the Guadeloupe mine, the mining property of the Santa Clara Mining Association, from whence the quicksilver sold by the defendant was taken; that the receiver never had any authority to enter upon it; and that whatever sum of money resulted over and above the expenses of mining the quicksilver was an indebtedness of May, as a trespasser, to the Santa Clara Mining Association, for which he was individually responsible to them, and which, being an indebtedness accruing to them, was the subject of such proceedings as are here initiated, and he must pay her share over to the plaintiff. This conclusion, it is contended by the appellant, is wrong, if the defendant is not justly indebted to the Santa Clara Mining Association, or if any such state of facts exists, as in equity and good conscience that association should not hold the defendant liable as trespasser; and it is urged that he should be held as one who, in the proper care of the other property of the association legally in his custody, was compelled to preserve that part of which he did have charge by the use of that of which he did not have control; thus benefiting the property of the Santa Clara Mining Association, increasing its value, and rendering it the more capable of paying the mortgage debts, and thus making it the more probable that the unsecured debts should be paid.

We think that the facts shown by the record are that, at the time of the first appointment of the receiver, all the mining property of the Santa Clara Mining Association was a part of the same system of operations; that it was all held as the mining ground, for the one common purpose of extracting quicksilver ore; that whatever quicksilver was extracted from one portion of the ground was

used, indiscriminately, when sold and converted into money, for the common benefit of the whole property; that the association, being a party to these foreclosure proceedings, knew when the receiver was appointed that he would take charge of the whole property; that it was in such a condition as that everything which could be gotten out of it, and every part of it, would be needed to preserve the property, and aid in paying its secured indebtedness; and that the receiver would use the whole of this property for that purpose. And, knowing all this, the mining corporation permitted him to take possession of all the property, to use it indiscriminately, to borrow money under the orders of the court, to carry on the whole mining industry, to work every part of it for the common benefit of the whole, never once protesting or objecting, but, apparently, willingly allowing all the benefit which accrued by virtue of the acts of the receiver to go to the enhancing of the value of its property, and standing by, not only without objection to, but, to all intents and purposes, approving his acts; and, so far as this record shows, the corporation is still satisfied with and acquiesces in the acts of the receiver with reference to its whole property. Those who complain are persons to whom the mining association is indebted, and who cannot get their money unless they can show that, as a trespasser, the defendant did acts which the corporation considered a trespass, and not a benefit. The defendant, as receiver, has yet to repay many thousands of dollars of borrowed money used to develop and care for the property of the mining corporation, and borrowed under the authority of the court; yet the plaintiff claims that the proceeds of the quicksilver which the defendant extracted from one portion of the mine should go to her as the representative of the corporation whose property had been trespassed upon, and that the debts which he contracted under orders of the court, unobjected to by the mining corporation, and used to render more valuable its whole property, shall go unpaid from the proceeds of the corporation's property which this borrowed money assisted to bring into existence. The defendant has benefited the mining corporation by all his acts. That corporation was a party to the proceedings, stood by and allowed him, without any sort of check or sign of disapproval, to develop its property, make it more valuable, more capable of paying its creditors, and yet seems to affirm his acts, and makes no claim against him; but its creditors who are not secured claim that May is a willful trespasser, and should be made to hand over to them money, which they claim he wrongfully has, belonging to the mining corporation. That corporation was interested to have the property included in the McCalmont or first mortgage increased in value so as to go further towards the payment of the mortgage debt, by the preservation of such property by May; and, if he used the ore taken out of station 8 to do this, and bor-

rowed money, and applied it to the working of the whole property, thus benefiting the mining corporation, and it sat by, and did not object to receive such benefit, but took it in silence, we cannot see that it can now hold the acts of May in the premises those of a trespasser. *Wise v. Walker*, 81 Cal. 11-13, 20 Pac. Rep. 81, 22 Pac. Rep. 293, and cases cited.

But, while this is true, there is another reason why May should not be held a trespasser, and responsible to the mining corporation. The second mortgage, or deed in trust, the one given to the Farmers' Loan & Trust Company of New York, which was a party defendant to the suit of foreclosure, and then, by intervention and a cross-complaint, became a voluntary party thereto, was, as we think, a mortgage on all the interest in the disputed mine which the Santa Clara Mining Association had. The specific description of property set out in that conveyance did not carry any interest in the ground called "Station No. 8," from whence the quicksilver in controversy was taken, but that which follows did. It is in this language. After conveying the property described in the first or McCalmont mortgage, it reads: "Together with all and singular the property thereunto attached or belonging, situated in Santa Clara county, in the state of California, or wherever the same may be, and all the lands, tenements, mines, minerals, real and personal property, rights, privileges, and appurtenances, of every kind whatsoever, of or belonging to the said party hereto of the first part, in Santa Clara county aforesaid." "A deed is evidentiary and may be helped out by other evidence." *De Sepulveda v. Baugh*, 74 Cal. 468-472, 16 Pac. Rep. 223. As this deed conveyed all the lands, etc., that belonged in any way to the mining corporation in Santa Clara county, all that would be necessary to make the description certain would be to show *dehors* the deed, by proper evidence, that the mining ground in controversy belonged at that time to the corporation. *Pettigrew v. Dobbelaar*, 63 Cal. 397. This was sufficiently shown; and the court had jurisdiction of the property by reason of the second mortgage or deed in trust, and the mortgagor being a party, as well as the mining corporation, to the action of foreclosure wherein the receiver was appointed. The Santa Clara Mining Association was a party to the whole proceedings. It was competent, therefore, for the court, sitting as an equitable tribunal, to settle all matters of accounting in the foreclosure suit; to adjust the whole matter, even if it involves items accruing after the commencement of the action. Station 8, from which the ore in controversy was taken, belonged to the association at the time the trust-deed was executed and delivered,—as much so as it ever did after that time. If the association had no title at the time the trust-deed was given, it had none at the time the ore was taken out. But

it did have possession and control of the land, under a claim of ownership recognized in the neighborhood; and in whatever way the land belonged to it, or by what right, that right was carried by the deed in trust.

Upon the whole case, we do not think the court warranted in finding that May was a trespasser upon the property of the Santa Clara Mining Association, or that he is indebted to it in any sum whatever. Wherefore, we advise that the order be reversed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is reversed.

BEATTY, C. J. Justice THORNTON is assigned to department 1 for the purpose of considering this case.

(83 Cal. 588)

NUNAN v. VALENTINE *et al.* (No. 12,663.)
(*Supreme Court of California.* April 28, 1890.)

APPEAL—DISMISSAL—SATISFACTION.

A motion by appellants to dismiss their appeal on the ground that the judgment has been satisfied will be granted, though opposed by persons who claim to succeed to the rights of the respondent, and ask to be substituted on the ground that the alleged satisfaction was in fraud of their rights; leaving the question to be settled in the superior court, which is the proper forum.

In bank. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Wm. & Geo. Leviston, for appellants. *Carl T. Graef and George D. Collins*, for respondent.

BEATTY, C. J. In this case the appellants move to dismiss their own appeal upon the ground that the judgment appealed from has been satisfied. The motion is opposed by parties who claim to have succeeded to the rights of the original plaintiff, and who ask to be substituted as respondents, upon the ground that the alleged satisfaction of the judgment was entered in fraud of their rights. A number of affidavits have been filed relating to this controversy, but we do not think this the proper forum for its determination. A dismissal of the appeal will simply have the effect of affirming the judgment and remitting the questions as to the persons entitled to enjoy the fruits of it, and as to whether or not it has been satisfied, to the superior court, where they ought to be tried. We do not decide these questions, but we see no reason to deny the motion. Appeal dismissed, with costs to respondent.

We concur: THORNTON, J.; SHARPSTEIN, J.; MCFARLAND, J.; FOX, J.

(9 Mont. 315)

LEBEHER v. BOARD OF COMMISSIONERS.

(*Supreme Court of Montana.* Feb. 10, 1890.)

CONTRACT FOR SUPPORT OF PAUPERS—COUNTER-CLAIM.

1. Rev. St. Mont. div. 5, § 956 *et seq.*, provides that every poor person "unable to earn a liveli-

hood in consequence of bodily infirmities, idiocy, lunacy, or other cause," if having no relatives, shall receive relief from the county, and authorizes the commissioners to award contracts for the care of "the sick, poor, and infirm," and requires the county physician to examine each week all paupers, and to discharge those who are able to support themselves. *Held*, that a contract by the commissioners for the care of the "poor" of the county is void, as is also a contract for the care of the "sick and infirm," the only contract authorized being for the care of the poor who are sick and infirm.

2. One contracting with county commissioners is charged with knowledge of the limits of their authority.

3. Though the contract sued on is void, the supreme court, on reversing a judgment for plaintiff, cannot order judgment for defendant where it is uncertain whether the jury allowed part of a counter-claim, or reduced plaintiff's demand.

Appeal from district court, Custer county; M. J. LIDDELL, Judge.

Garlock, Strevell & Porter, for appellant.
C. R. Middleton, for respondent.

DE WITT, J. In December, 1882, the board of commissioners of Custer county purported to let to one John Clark a contract for the care of the sick and infirm of the county for the following year at the rate of \$12 per week; and for the care of the poor of the county at the rate of \$1.50 per week if cared for at the poor-house, and \$7 per week if cared for in Miles City. The complaint alleges that, in pursuance to the contract, John Clark cared for such sick and infirm, by reason whereof the county became indebted to him in the sum of \$6,098.87, including also his care for the poor to the extent of \$13.50 at the poor-house, and \$365 at Miles City; that this indebtedness was assigned by John Clark to the plaintiff. This constitutes plaintiff's first cause of action, on which he recovered judgment for nearly the whole amount; it appearing that for some reason the verdict was for \$800 less than the demand. The county appeals from an order denying a new trial, and from the judgment.

The action was upon the alleged contract, the validity whereof was attacked by defendant, and to the admission of which in evidence numerous exceptions were taken and saved. The judgment was obtained on the contract. We will therefore first examine the validity of the contract. If made at all, it was made under authority of the statutes which were at that time found in Rev. St. 5th div. "Sec. 956. Every poor person who shall be unable to earn a livelihood in consequence of bodily infirmities, idiocy, lunacy, or other cause shall be supported by the father, grandfather, etc.: provided that, when any person becomes a pauper from intemperance or other bad conduct, he shall not be entitled to any support, except parent or child." "Sec. 958. When any poor person or persons shall not have relations, * * * then the said pauper shall receive such relief as the case may require, out of the county treasury, as is hereinafter provided, Sec. 959. The county commissioners of their respective counties shall, at their regular ses-

sion in September of each year, make an order directing the clerk of the board to publish a notice in a newspaper inviting sealed proposals for the care, support, and maintenance of the sick, poor, and infirm of the county, *per capita*, by the week, for the succeeding year," etc. "Sec. 960. Said proposals shall be addressed to the clerk of the board of county commissioners, and the said commissioners shall at their December term, * * * open and carefully compare said bids or proposals, and shall award the contract for the care, support, and maintenance of the sick, poor, and infirm of the county, by the week, *per capita*, to the lowest responsible bidder for the ensuing year." Section 962 provides that the county physician shall "examine each week all persons who are or may become a charge upon the county; and if, after such examination, he shall be satisfied that the physical condition of such person or persons is such as to enable such person to support and maintain himself or herself, he shall so notify the contractor or contractors having such person or persons in charge." The statute provides for the form of the notice, and filing a duplicate, and then says: "And after the serving of said notice, and filing the duplicate thereof with the clerk, said person mentioned in said notice shall cease to be a charge upon said county." *Id.*

It appears in evidence, from the records of the board of county commissioners for the December meeting, 1882, that bids were filed by divers persons for the care of the sick, poor, and infirm; that John Clark filed separate bids as follows: "John Clark proposed to care for the sick and infirm for the consideration of \$12.00 per week *per capita*, and for the poor for the consideration of \$1.50 per week *per capita* at the county poor-house, and for the poor for the consideration of \$7.00 per week *per capita* in Miles City." These bids were accepted. As far as it is necessary for us to here consider the matter, these bids and the acceptance, constituted the contract upon which plaintiff sues. For the services alleged to be rendered under this contract, the claim for which services was assigned to plaintiff, plaintiff obtained his judgment on his first cause of action. The defendant, in its answer, alleges fraud, collusion, and connivance between Clark, plaintiff, and the members of the board of commissioners. No evidence of this, however, was introduced except as it may appear on the face of the contract. Defendant also sets up a counter-claim in a large amount, in regard to which there was testimony.

We will first determine whether the contract which, as we have said, was the foundation of plaintiff's first cause of action, was valid. The contract was made with public officers,—with the commissioners of Custer county. An individual may contract as to lawful subjects as he pleases. Municipal corporations or public officers are bound by the law. They are authorized by the law of their creation to make certain contracts.

They are creatures of the law, and not of nature. They have not natural rights, but only rights given by the law. Their contracts obtain validity only by force of the law authorizing their making. It follows that, if they make contracts that the law does not empower them to enter into, there is no authority for such contract,—nothing for it to stand upon,—and it falls of its own weight. It is void. *Parr v. Village of Greenbush*, 72 N. Y. 463; *Head v. Insurance Co.*, 2 Cranch, 127; *Bonesteel v. Mayor*, 22 N. Y. 162; *Foster v. Coleman*, 10 Cal. 279; *Zottinan v. San Francisco*, 20 Cal. 96; *Argenti v. San Francisco*, 16 Cal. 256; *City of Alton v. County of Madison*, 21 Ill. 115; *Dill. Mun. Corp.* § 381; *Thomas v. Richmond*, 12 Wall. 349; *Clark v. Des Moines*, 19 Iowa, 209; *Loker v. Brookline*, 13 Pick. 348; *Philadelphia v. Flanigen*, 47 Pa. St. 27.

Persons contracting with such artificial creations of the law as municipal corporations and public officers are charged with notice of the character and constitution of the entity with which they deal. They know the law, and know what are valid acts of such artificial persons. They contract at their peril. The assignee, as plaintiff herein, of a claim against such municipal corporation or public officer arising out of an alleged contract with the same, has the same notice as the original contractor. He knows the character, powers, and constitution of the contractor. See cases last cited. If the contract in question were void, the plaintiff cannot recover thereon. The only authority that the commissioners of Custer county had to make the contract is found in the statutes above cited. We observe, *in limine*, that the chapter of the Revised Statutes from which the citations supra are made is entitled "Poor," and the original act is entitled "An act to provide for the support, care, and maintenance of the county sick and poor," approved February 11, 1876. In viewing the whole act, we are of opinion that the intent of the law is easily ascertainable. The county is to care for "poor persons who shall be unable to earn a livelihood in consequence of bodily infirmity," etc. The statute does not command the county to care for the "poor" simply. If so, the state would readily become a popular place of residence for the healthy, able-bodied, lazy beggars of the world. If one be poor in purse, but wealthy in brawn or brain, he is not to be a charge upon the county. The statute, section 962, supra, provides that when a person properly in charge of the county ceases to be "sick and infirm," although he still remain "poor," he shall no longer be maintained by the county; and, to guard against fraud and imposition by physically vigorous paupers and dishonest contractors, it is provided that the county physician shall examine such persons, and, if they be able physically to take care of themselves, return them to their own resources. Section 962, supra. This is a plain declaration of the law that the county commissioners shall not sup-

port and care for persons whose only claim on public bounty is their poverty. To give them such a claim, other ills must be present. They must be unable to earn a livelihood by reason of sickness, infirmity, or other cause; and they must have come to their deplorable state by misfortune, and not by vice. Section 956, *supra*. It was never contemplated that the state should care for all the poor, without regard to the condition of such poor as to ability, health, strength, and virtue. The purview of the statute is clearly against such a construction. We are therefore of opinion that the alleged contract between John Clark and the commissioners of Custer county for the care of the poor of the county is void.

Again, the contract to care for the sick and infirm is equally obnoxious to objection. We cannot construe the statute as requiring or authorizing the county commissioners to care for the "sick and infirm," as such alone. The wealthy and the well-to-do "sick and infirm" must care for themselves, from their own opulence or competency, and not live upon the taxes collected from their neighbors. Sickness and infirmity, under the statute, confer no claim upon the state. It is only when they are joined with poverty that the claim arises that is supplied from the store-house of a bountiful state. We come, therefore, to the conclusion that the contract between John Clark and the commissioners of the county for the care of the sick and infirm was wholly unauthorized by the law, and void. *Johnson v. Santa Clara Co.*, 28 Cal. 545; *City of Alton v. County of Madison*, 21 Ill. 115.

We have above noticed that the defendant county alleges fraud and collusion between John Clark, the plaintiff, and the county commissioners, in the matter of these contracts. The face of the record of the proceedings of the board of commissioners is the only evidence under this allegation, and by that the letting of the contract seems to be a cunningly devised fable to avoid the plain intent of the law. This view is not altered when we observe that the poor at the poor-house cost \$13.50, and the sick and infirm nearly \$6,000. The contract that the commissioners were authorized to let was one for the care of such persons as were poor, and therewith sick and infirm. What they did do was an evasion of the plain intent of the law, and their alleged contract is void. No recovery can therefore be had under plaintiff's first cause of action.

It is unnecessary to examine the case further. The judgment and the order denying the new trial must be reversed, and the case remanded; and the same is hereby ordered. This court cannot order judgment entered in the district court, as appellant requests. Appellant pleads and insists upon a counter-claim larger than the plaintiff's demand. The judgment of the court below was for less than the plaintiff's demand. It is impossible for this court to say whether the jury cut down the demand of the plaintiff, or allowed a por-

tion of the counter-claim. To determine this matter, the case must go back to the district court for a new trial.

BLAKE, C. J., and HARWOOD, J., concur.

(9 Mont. 267)

DAVIS v. DAVIS.

(*Supreme Court of Montana*. Feb. 10, 1890.)

ATTORNEY IN FACT—CONVEYANCES TO HIMSELF—EQUITY PLEADING—COUNTER-CLAIM—ESTOPPEL.

1. A conveyance by an attorney in fact of land of his principal to himself, through a third person, is invalid.

2. Where an attorney in fact has conveyed to himself land covered by his power of attorney, an answer, in a suit by his principal to set aside the deeds, that the land was originally bought by him and plaintiff, he furnishing the money for plaintiff's share, though title was taken in plaintiff's name, sets up new matter connected with the subject of the action, within Code Civil Proc. Mont. §§ 89, 90, and is therefore a good defense or counter-claim.

3. Though the prayer of defendant's answer is that he be discharged, relief may be given thereon as a counter-claim.

4. An attorney in fact, by accepting a power of attorney, and attempting to convey thereunder land of his principal to himself, is not estopped from asserting an equitable title thereto previously vested in himself.

Appeal from district court, Lewis and Clarke county; H. N. BLAKE, Judge.

Carpenter, Buck & Hunt and *Massena Bullard*, for appellant. *Sanders, Cullen & Sanders*, for respondent.

DE WITT, J. The complaint alleges that on the 1st day of December, 1882, plaintiff, being about to leave Montana, gave to the defendant, Joseph Davis, a power of attorney, authorizing him to sell and convey the real estate of plaintiff in Lewis and Clarke county, said territory. That plaintiff was then the owner of several described tracts of real estate in said county. The power of attorney was duly recorded February 2, 1885. On February 20, 1885, the defendant, contriving to cheat plaintiff, and without consideration, conveyed said premises by two deeds to defendant Bennet Price. Those deeds were executed, "LEWIS DAVIS, by JOSEPH DAVIS, His Attorney in Fact." They were acknowledged and recorded. That, in furtherance of defendant's purpose to defraud plaintiff, said Price, on February 21, 1885, without consideration, conveyed said premises to Joseph Davis. The deeds are all pleaded in the complaint. That said transactions between Joseph Davis and Price were fraudulent and void. Plaintiff prays that all said deeds be declared void, and that the title to the premises be adjudged to be in the plaintiff. The answer contains some denials, which we need not consider in this decision. It then sets forth a separate defense, separately stated, which may be substantially stated, with the legal effect claimed, as follows: That the premises in controversy, or so much thereof as is necessary to notice in this consideration, were originally purchased by Lewis Davis, Joseph Davis, and another,

That Joseph supplied the money to pay for his share in the same. That the deed was taken in the name of Lewis alone. That consequently, at the time of and prior to the acts complained of in the complaint, the legal title was in Lewis, but that there was a resulting trust created in favor of Joseph, and that Joseph had an equitable title in the premises, when the power of attorney was made to him, and when he made the transfers complained of. It appears that Joseph, by the circumambulation through Bennet Price, as attorney in fact for Lewis, conveyed to himself, Joseph, the premises, in which, as appears by his answer, he claims he had the equitable title by virtue of the resulting trust suggested. There was no replication. Plaintiff moved for judgment on the pleadings, "for the reason that the answer filed by the defendant does not present any sufficient defense to the cause of action set up in the plaintiff's complaint." The motion was granted, and judgment entered accordingly. From that judgment this appeal is taken.

We are to determine whether the new matter in the answer constituted a defense which could be presented in this action. The complaint is in equity. The new matter, if it be a defense, is an equitable one. For the purposes of this decision, we take the new matter as true, and, for convenience of treatment, will hereinafter speak of it as facts, and not merely allegations. Joseph Davis, by the power of attorney, was constituted the agent of Lewis Davis. He was in a fiduciary relation. Before the power of attorney was given, the legal title being in Lewis and the resulting trust existing, and the equitable title being in Joseph, Lewis was in a fiduciary capacity as to Joseph. We will not cite authorities upon the general rule of equity, that an agent shall not unite his personal and representative capacities in the same transaction; that he shall not deal with himself; that an agent to sell for his principal shall not himself become the buyer, directly or indirectly; that an agent to buy for his principal shall not himself be the seller. These general doctrines are as old as the court of chancery.

Respondent urges that the conveyances from Joseph, agent, to Joseph personally, (for the mediation of Bennet Price is not material,) must be set aside under the equitable rules cited. The lower court so held, and on that view gave judgment. The opinion on file bases the decision upon those doctrines. We are of opinion, however, that there is another step in the case, another view of the situation of the parties as being in a court of equity, to which the attention of the district court was not invited, and the opinion of that court does not treat of the subject which we will now discuss. Chapter 4, Code Civil Proc., provides: "Sec. 89. The answer of the defendant shall contain: * * * *Second*. A statement of any new matter constituting a defense or counter-claim. * * * Sec. 90. The counter-claim mentioned in the last

section shall be one existing in favor of the defendant or plaintiff, and against a plaintiff or defendant, between whom a several judgment might be had in the action arising out of one of the following causes of action: *First*, a cause of action arising out of the transaction set forth in the complaint or answer as the foundation of the plaintiff's claim or defendant's defense, or connected with the subject of the action. * * * Sec. 91. If the defendant omit to set up a counter-claim in the cases mentioned in the first subdivision of the last section, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor. * * * The defendant may set forth, by answer, as many defenses and counter-claims as he may have," etc.

Was defendant's new matter a defense or counter-claim, and, if so, under the provisions of the Code of Civil Procedure, supra, and by the rules of equity practice, may it be set up in the answer in the case? If so, judgment should not have been against the defendant on the pleadings, and the case should go back to the district court for a determination of the equities. The subject suggests the following order of discussion:

1. Is the new matter in the answer such that, if it were set forth in an original complaint in an action in equity, it would be entertained as entitling defendant to relief in such court? That is to say, if a plaintiff in a bill in equity allege that he furnished money to defendant to purchase land for him, that defendant purchased the land with the money, and took a deed to himself alone, either with or without plaintiff's consent, do these facts entitle plaintiff to equitable relief? The authorities are uniform that they do. Perry, Trusts, c. 5; Story, Eq. Jur. §§ 1201, 1206; Buck v. Swazey, 95 Me. 41; Wood, St. Frauds, § 456; Edwards v. Edwards, 39 Pa. St. 369. The defendant's new matter is a good original cause of action in his favor against the plaintiff.

2. The defendant, Joseph Davis, having such original cause of action before the power of attorney was given to him by plaintiff, Lewis Davis, does the execution by Lewis Davis of such power of attorney deprive Joseph of his cause of action described? In other words, if such cause of action was put into a complaint by Joseph against Lewis, could Lewis defend by alleging the giving of the said power of attorney? It is *reductio ad absurdum*. The question answers itself in the negative.

3. Again, did the acceptance by Joseph of said power of attorney deprive him of such above-described cause of action? Because he consented to act for Lewis as his agent in the caring for and disposition of the lands of Lewis, and also the lands of which the legal title was in Lewis and the equitable one in Joseph, does this consent, this acceptance of an agency, debar Joseph from demanding in a proper action and court rights which existed and were undisputed before the agency was

created? Joseph Davis having the cause of action set forth in paragraph 1, *supra*, could not be cut out of it by accepting the agency conferred by the power of attorney by any principle of law of which we are aware.

4. Again, after the power of attorney was given by Lewis and accepted by Joseph, did Joseph's act, under the power of attorney complained of in the complaint herein, deprive him of his cause of action above described? Counsel for respondent quote the equity maxims, "He who seeks equity must do equity;" "He who comes into a court of equity must come with clean hands;" and argues that, because Joseph Davis took his own land and kept it, when it came into his own hands, by virtue of the creation of the agency by the power of attorney, he cannot be heard to assert his equitable right thereto at this time. We must distinguish here between the state of facts in the case at bar and another one that might exist. Joseph obtained the power of attorney rightfully. It was the voluntary act of Lewis. The *fiducium* was mutual. Lewis held Joseph's title in trust for him. Joseph took Lewis' power of attorney as a trust. On the other hand, if Joseph had obtained such power of attorney wrongfully,—to illustrate it strongly, by actual violence, or duress *per minas*,—and, after it were so obtained, by the authority thereof had conveyed the land to himself, and then had acquired an equitable title thereto, a court of equity would hesitate to hear him, and might then apply the maxim, "He who comes into a court of equity must come with clean hands." But the only proposition before us is, when Joseph was given by Lewis dominion over the land belonging to Lewis in law, and Joseph in equity, and Joseph undertook, by the advantage of his agency, to procure to himself the legal title, when he already held the equitable one, was that attempt of such a nature that the law visits the penalty of estopping Joseph from afterwards asserting that equitable title? The question is not whether that attempt succeeded from a legal point of view, or whether Joseph obtained the legal title by his maneuvers, but whether he has so conducted himself that he has lost his equity. The result could only occur through the operation of the rules of estoppel. Those rules are too familiar to require recitation. It is clear that their application to the facts under discussion cannot work an estoppel against Joseph Davis. See *Perry, Trusts*, § 416.

5. We therefore arrive at the conclusion that, prior to the time when the obnoxious deeds were made, an affirmative cause of action existed in favor of Joseph and against Lewis as above fully described, and that when the action was commenced Joseph had not lost the right to set up that cause of action, and that the facts constituting the same are pleaded as new matter in the answer.

6. Such new matter would constitute a de-

fense or counter-claim. Sections 89, 90, Code Civil Proc. Defendant alleges it in the form of a defense. The prayer of the answer is that defendant be discharged. But the prayer in an equity action does not conclude the pleader. *Gillett v. Clark*, 6 Mont. 191, 9 Pac. Rep. 823; *Leopold v. Silverman*, 7 Mont. 266, 16 Pac. Rep. 580. The court may grant such relief as the party shows himself entitled to. The allegations in the new matter are sufficient for a counter-claim, on which the court could enter a decree adjudging the title to be in Joseph Davis, if it were deemed that the dismissal of the action, as prayed for in the answer, were not a sufficient confirmation of defendant's title.

7. Such new matter is "connected with the subject of the action." It is inseparably connected with the question of the title to the premises. The title to the premises is the subject of the action.

8. Defendant may set up such new matter in his answer. Sections 89 and 90, Code Civil Proc.

9. *Quare*, must he not set it up, or be afterwards barred from asserting it? Code Civil Proc. § 91.

10. Under the rules of practice in a court of equity, the court will hear an equitable defense or counter-claim, connected with the subject-matter of the petition, without regard to the provisions of the Code of Civil Procedure above cited. 1 Pom. Eq. Jur. § 84 et seq.; *Crary v. Goodman*, 12 N. Y. 266; *Dobson v. Pearce*, Id. 156; *Bruck v. Tucker*, 42 Cal. 346.

11. It is a settled rule of equity practice that when the court has before it all the parties to any difference, and when it has obtained complete jurisdiction of the whole subject-matter, it will finally settle the whole controversy. "The court may, on a view of the whole case, annex equitable conditions to its decree, or order what may be reasonable." *Polk v. Wendal*, 9 Cranch, 87. The court, in the case before us, has, with the new matter in the answer, the ample purview contemplated by the rules of equity. It has the whole controversy and all the parties before it. Final adjudication of all the claims of Lewis Davis and Joseph Davis in the premises may be and should be made in one decree, *ut sit finis litium*. The judgment of district court, so far as it affects the validity of the deeds from Joseph Davis as attorney in fact to Bennet Price, and the deeds from Bennet Price to Joseph Davis, is affirmed; but the cause is remanded, with directions to the district court to entertain the equitable claim of defendant set up in his answer, and to hear and determine the claims of the parties in and to the premises in controversy.

HARWOOD, J., concurs.

BLAKE, C. J., did not sit in the case, having been trial judge in the court below.

(9 Mont. 323)

FIRST NAT. BANK OF HELENA v. ROBERTS
et ux.

(Supreme Court of Montana. Feb. 10, 1890.)

EJECTMENT—PLEADING—ACKNOWLEDGMENT OF DEED.

1. A complaint in ejectment alleging that on a certain day plaintiff was the owner, seised in fee, and entitled to the possession of the premises demanded, and that afterwards, while plaintiff was so seised, defendant, on the — day of March, 1889, without right or title, entered into possession and ousted plaintiff, is not demurrable, or subject to a motion to make more definite.

2. A statement specifying that "the evidence shows" certain facts which are contrary to the findings of the jury does not comply with Code Civil Proc. Mont. § 298, subd. 3, requiring specifications of "the particulars in which the evidence is insufficient to justify the verdict."

3. Acknowledgment of a deed may be taken by a notary who is a nephew and attorney of a person interested in its procurement, though such relationship would disqualify him to act as judge, under Code Civil Proc. Mont. § 547, especially where such interest merely consists in being president of a bank, the real party in interest, and surety on an official bond of the grantor against loss, as to which the bank has agreed to indemnify him.

R. G. Davis, for appellants. *Wade & Wallace*, for respondent.

HARWOOD, J. Appeal from district court in and for Lewis and Clarke county, first district of Montana. This is an action in the nature of ejectment, brought by the First National Bank of Helena, respondent, to obtain a decree for the recovery of possession of lots 1, 2, and 3, and the southerly 19½ feet front of lot No. 4, and lots Nos. 9 and 17, all in block 48, in the town-site of Helena, Lewis and Clarke county, territory of Montana, alleged to be unlawfully withheld from respondent by the appellants. The complaint avers "that on the 27th day of September, 1886, the plaintiff was the owner, seised in fee, and entitled to the possession" of the premises mentioned; that, while the plaintiff was so seised, the defendants, on the — day of March, 1889, without right or title, entered into possession of the demanded premises, ousted and ejected plaintiff therefrom, and unlawfully withholds the possession thereof from plaintiff, to its damage in the sum of \$500; that plaintiff demanded the possession of said premises, which defendant refused to surrender. The defendants appeared, and interposed a motion to require plaintiff to make its complaint more specific, and also demurred thereto; both of which pleadings were by the court properly overruled, and to which ruling defendants excepted. *McCauley v. Gilmer*, 2 Mont. 202; *Billings v. Sanderson*, 8 Mont. 205, 19 Pac. Rep. 307; *Payne v. Treadwell*, 16 Cal. 220.

The defendants then filed their answer, which, in effect, denied all the material allegations of the complaint, and in addition thereto alleged a series of transactions by way of further defense to the plaintiff's complaint. It is necessary, in the consideration of the questions brought here on appeal, to keep

prominently in view such new matter of defense, and the same is here condensed into the following statement: The defendants, further answering, say: That the said property is, and has been since 1867, the home and homestead of defendants and family. That on the 10th day of May, 1886, the defendant W. K. Roberts, and one S. T. Hauser, and Dan. E. Floweree were being sued by the commissioners of the county of Lewis and Clarke on a bond executed by said W. K. Roberts, as treasurer of said county, for an alleged defalcation of said defendant, as such treasurer, for the sum of \$42,000. That said defendant W. K. Roberts was also, at the same time, under indictment for embezzlement of the funds of said county to the amount of \$98,000. That Massena Bullard and Ashburn K. Barbour were the attorneys of said Hauser, and defending the said suit upon said bond for said Hauser, and also representing the plaintiff in regard to its liability to the said bondsmen, whom the said bank, without the knowledge of defendants, or either of them, had agreed to indemnify against all loss, if any, as such sureties on the bond of defendant W. K. Roberts. That the consideration for such promise on the part of said bank to said sureties on said bond was to obtain the deposit of the funds of said county in said bank. That such deposits amounted to about the sum of \$800,000 during the time defendant was such treasurer, which funds were deposited in said bank, and used in the general business thereof. That the defendant W. K. Roberts not knowing of said agreement between the said bank and his sureties on his bond, and fearing that said sureties might be injured, and being pressed by said Hauser to give him security against loss as such surety, and being at the time in feeble health and of unsound mind, and said Mary Roberts, fearing that her husband, W. K. Roberts, would be imprisoned in the penitentiary, they were at length compelled to turn over all the property they possessed to the said Hauser to secure him against loss as such surety, which loss said Hauser led the defendant to believe would fall upon himself and his co-surety, Floweree. That said Hauser and said Bullard & Barbour, his agents and attorneys, conspired together to unlawfully injure defendants in respect to their estate, and prepared a deed for said property in fee-simple absolute, and inserted the name of said Bullard therein as grantee, and had said Barbour attend to the execution thereof as notary public; the object being to obtain said land for the benefit of said bank without the knowledge or consent of defendants, and without any consideration therefor. That said Bullard & Barbour were employed, as a firm, to procure said deed, and for the protection of said bank. That said Bullard drew said deed, and said Barbour took the acknowledgment thereof, secretly concealing the fact from the knowledge of defendants that said deed of conveyance was made to said Bullard as grantee, and that the same was an

absolute conveyance of said land, with warranty of title. That, in fact, the only object of defendants was to give security to said Hauser and Flowerree, so far as said property might extend in value, for reimbursement of any sum they might have to pay as sureties for defendant W. K. Roberts, as aforesaid. The said sureties had a good defense to the action against them on the bond aforesaid. That the commissioners of said county became aware of that fact, and proposed a compromise to said sureties, Hauser and Flowerree, for the sum of \$19,000 in full settlement of defendant W. K. Robert's alleged defalcation. And said Bullard & Barbour, as attorneys for Hauser, paid said sum without the knowledge or consent of defendants, or either of them, and said suit was dismissed. That the said compromise sum of \$19,000 was paid, in fact, by said bank, and not by said Hauser and Flowerree. That thereupon said Bullard, in fraud of defendants' right, conveyed said property, on or about September 26, 1886, to said First National Bank by direction of said Hauser, president of said bank, and without the knowledge or consent of defendants. That at the time the said Barbour took the pretended acknowledgment of defendant Mary J. Roberts to said deed he did not explain the contents thereof to her, and she was never acquainted with the contents of the same, nor knew that said Bullard was grantee therein, until about the time this suit was instituted. That said deed was procured through fraud, duress, coercion, concealments, and fraudulent representations, and without adequate consideration, and under such circumstances that neither of them could withhold their consent. That said W. K. Roberts was not of sufficient mental capacity to execute said deed, and his mental disability was known to said Hauser and the plaintiff. That Hauser represented to said defendant W. K. Roberts, in order to procure said deed, that he would not be disturbed in the possession of said property; which representation was relied on by said defendant W. K. Roberts. That the said bank had no legal capacity to take a deed to said land, by reason of the provisions of the laws of the United States governing national banks. This last allegation, denying the capacity of the plaintiff to take and hold said land, was by the court stricken from the answer, on motion of plaintiff; to which action defendant excepted. The action of the court on this point must be sustained as proper in an action of this nature. *Bank v. Matthews*, 98 U. S. 621; *Bank v. Whitney*, 103 U. S. 99; *Fortier v. Bank*, 112 U. S. 439, 5 Sup. Ct. Rep. 234.

The plaintiff filed its replication, denying all the affirmative allegations of defendants' answer, except that portion stricken out; and, touching the transactions set forth in defendants' answer as new matter, plaintiff alleged: That both defendants had full knowledge of all the terms and conditions of said deed, and that the same was made to Bullard, as grantee, as a conveyance absolute, upon the consideration that said Hauser

would settle said suit upon said bond with the commissioners of said county before the trial of the criminal action pending against defendant W. K. Roberts, and also satisfy a mortgage debt for \$3,000 against said premises owing and due to one Perkins; and that said transaction was made in good faith, and at the request of defendants. That defendant was then in good health, with faculties unimpaired. That Bullard was named in said deed as grantee at the request of defendant W. K. Roberts, and that Barbour took the acknowledgement of said deed at the request of defendants. That the property in question was then of the value of about the sum of \$5,000. That defendants then had other property standing in the name of defendant Mary J. Roberts, which defendants proposed to include in and convey by said deed; but said Hauser declined to receive the same. That said Hauser and Flowerree had no meritorious defense to the action of the said county against them as sureties on said bond. That a personal judgment had then been rendered against said W. K. Roberts, as principal on said bond, before said compromise. That the compromise was made at the solicitation of defendant W. K. Roberts. That said property was conveyed to said Bullard, as trustee, by express understanding with said Roberts, with direction to convey the same to whom Hauser directed, after the satisfaction of said judgment in favor of said county, and against said Roberts, in the sum of \$43,000, and the said mortgage debt of \$3,000 against said property owing to said Perkins.

The action was tried to the court and a jury upon the issues joined by the complaint, answer, and replication. The jury found a general verdict for the plaintiff, and also made special findings upon interrogatories submitted, in effect as follows: (1) That W. K. Roberts was at the time he executed the deed to Bullard of sufficiently sound mind to be responsible. (2) W. K. Roberts did not know, before he executed the deed to the property in controversy, that a settlement could probably be made with the county at 50 cents on the dollar. (3) That W. K. Roberts desired the settlement to be made. (4) That Hauser or the bank agreed, as a partial consideration for said deed, to pay the Perkins mortgage. (5) That the plaintiff bank paid thereon the sum of \$3,176.66 on September 16, 1886. (6) That Hauser or the bank agreed, as a partial consideration for said deed, to settle with the county commissioners, and obtain a full release of defendant Roberts from the said judgment then existing against him. (7) That the defendant W. K. Roberts knew that the deed was made to Bullard, and executed it with that knowledge. (8) That Mrs. Mary J. Roberts knew that the deed was made to Bullard, and executed and acknowledged it with that knowledge. (9) That Barbour, notary public, took the acknowledgment of the defendant Mary J. Roberts to two deeds,—one dated May 11,

and the other May 14, 1886. (10) That Barbour, notary public, explained the nature of the first-mentioned deed—that is, the deed conveying the property in controversy—to Mary J. Roberts, before she acknowledged the same. (11) That the plaintiff bank furnished sureties on Robert's official bond, and he knew this. (12) That on September 11, 1886, the plaintiff bank paid, or caused to be paid, to Lewis and Clarke county the sum of \$19,125.70 in full settlement of the bond suit, and in discharge of the said judgment against defendant Roberts. (13) That the deed for the premises in controversy was intended as a deed absolute. (14) That defendants had not decided, before executing the deed to Bullard, to move onto other property, and make a new home. (15) That, before executing said deed, the defendant W. K. Roberts knew of an agreement by the plaintiff to indemnify said sureties, Hauser and Flowerree. (16) That said deed was not obtained from said Roberts by concealment of its terms, misrepresentation, or fraud. Upon the verdict of the jury, judgment was rendered in favor of plaintiff, and against defendants, for the recovery of the possession of the premises in controversy. The defendants moved the trial court for a new trial, based upon a statement of the case; which motion was by the judge of that court heard and overruled, and the defendants appealed, both from the order overruling the motion for a new trial, and from the judgment. The grounds upon which defendants moved for a new trial are substantially two, included under the causes provided by statute, as follows: (1) Insufficiency of the evidence to justify the verdict, and that it is against law; (2) errors in law occurring at the trial, and excepted to by defendants.

The appellants have set out at great length, and with much repetition, what they allege to be "specifications or particulars in which the evidence is insufficient to justify the verdict, and particulars in which the verdict is against law." It may be said, generally, of the so-called "specifications of particulars in which the evidence is insufficient to justify the verdict," that they are not such specifications as required by the third subdivision of section 298, Code Civil Proc. They are merely statements of the conclusions of appellants that the evidence shows facts contrary to the findings of the jury. For example, the first alleged specification of "insufficiency" of evidence is as follows: "*First*. The evidence shows that the deed from defendants to Massena Bullard, dated May 10, 1886, and on which plaintiff relies, and relied at the trial, as necessary evidence of its title, was intended as a security for the payment of money to S. T. Hauser, and was not an absolute conveyance of the title to the land in controversy, but was a mortgage; and further shows that, at the time when Bullard conveyed the land to plaintiff, the plaintiff had notice of the circumstances under which the deed was made to Bullard, and of the

right of defendants." Here is no specification of any particular in which the evidence is insufficient to sustain the verdict. The language quoted amounts to a declaration of conclusions at variance with the verdict of the jury, and nothing more. The so-called specification quoted is a fair sample of the alleged specifications under the head of "insufficiency of evidence to justify the verdict." Each one declares that "the evidence shows" certain enumerated facts or conclusions. It is true, these conclusions, asserted by the appellants, are contrary to what the jury found; but this is not what the Code contemplates by requiring the party who attacks the verdict of the jury on the ground of insufficiency of evidence "to specify the particulars in which the evidence is insufficient to justify the verdict." No variance between the facts found by the jury and the evidence is pointed out; no specification that any fact found by the jury is not sustained by the evidence, with the particulars in which the evidence is insufficient to justify the finding, is pointed out by these so-called specifications. It is not the requirement of the statute that the statement shall declare that the evidence shows something different from what the jury found, because this would simply put the appellate court upon an inquiry as between the conclusions of the jury and the opinion of the appellant as to what the evidence shows. The statute requires that "the statement shall specify the particulars in which such evidence is alleged to be insufficient." The statute of this state is identical with that of California upon the question of practice under consideration. The point has been considered in many cases in California, and many illustrations of good and bad practice in this particular are found collected from the California Reports, and discussed in the valuable work of Mr. Hayne on New Trial and Appeal, (section 150.) Notwithstanding the infirmity of the specifications of particulars in which the evidence is alleged to be insufficient to justify the verdict, the errors of law complained of by appellants, and especially the errors in giving and withholding certain instructions to the jury, are such that the court has, in this action, carefully examined and considered the evidence as presented by the record, and compared the same with the verdict of the jury. This examination of the evidence leads us to the conclusion that the findings of the jury, both general and special, are sustained by the evidence. It is true the evidence, in some particulars, is conflicting; but, where this is the case, it is the province of the jury to judge both as to credibility of witnesses, and as to the weight of testimony, and find where the preponderance lies.

The errors of law complained of by appellants, and urged upon the consideration of the court, are apparently the only points relied upon by them as shown by the argument and authorities cited. The first error thus presented arises from the refusal by the trial

court to give instructions numbered 7 and 8 to the jury, as requested by defendants. These instructions are as follows: "(7) That if you believe, from the evidence, that the notary, A. K. Barbour, who took the acknowledgment of the deed was the attorney and nephew of S. Hauser, for whose benefit it was made, and that said Barbour was a member of the firm of Bullard & Barbour, attorneys, who had charge of the procurement of the said conveyance, and that they, as such, were personally interested in the said conveyance, you should treat the acknowledgment as void. (8) If you believe, from the evidence, that Bullard and Barbour were employed as attorneys for Hauser to obtain the conveyance from the defendants of the land in controversy, and that, by his direction, they took the deed in the name of Bullard, as grantee, for his benefit, and that Barbour, in pursuance of such employment and as his attorney, took the acknowledgment, you should treat it as void." It appears, from the evidence, that Mr. A. K. Barbour, who, as notary public, took and certified the acknowledgment to the deed from defendants to Bullard, the plaintiff's grantee, was the nephew of S. T. Hauser, mentioned in this action. It also appears, from the evidence, that the same Bullard and Barbour were partners in the practice of law, and at the time attorneys, among others, employed on behalf of Hauser and Flowerree, in said action of the county commissioners against them as sureties on the official bond of W. K. Roberts as treasurer of Lewis and Clarke county. That certain consultations had occurred between Hauser and Roberts, and lastly between Roberts, Hauser, and Bullard, wherein was considered and talked over the circumstances of the suit against Hauser and Flowerree as sureties, and the judgment for \$43,000 against defendant W. K. Roberts, in favor of the county, in which Roberts expressed himself as anxious to have the settlement of said suit against his sureties and the judgment against him made, and proposed certain property, including that in controversy, to be put in, to the extent of its value, to consummate such settlement. That at the last-mentioned consultation Bullard was directed by Hauser and Roberts to draw the deed in question, conveying the property in controversy to Bullard, for the time being, with the understanding that when settlement of said judgment was made, and the same was canceled, and the said Perkins mortgage for \$3,000 on said premises was paid, then Bullard should deliver a conveyance of said property to whom Hauser should direct. That, immediately following this last-mentioned interview of the parties named, said Bullard gave the said Barbour a description of the land in controversy, and requested him to draw a deed conveying the same from defendants to Bullard, and see to the proper execution and acknowledgment of such deed by defendants as grantors.

There may be some contradiction between
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the witnesses of the respective sides of this controversy as to some of these statements. The jury has found upon these facts generally, and upon many of them specially, and we refer to them to place the plaintiff and said Hauser, Bullard, and Barbour, and defendants Roberts and wife in the attitude they respectively occupied to this transaction, for the purpose of considering the relationship of Barbour to Hauser as nephew, and the relationship of Bullard and Barbour to Hauser as his attorneys, in reference to this relationship disqualifying Barbour from acting as notary public in taking the acknowledgment to said deed. The appellants contend that the relationship of Barbour to Hauser, as nephew and attorney, in law disqualified him to act as the officer to take and certify the acknowledgment of the defendants to the deed in question; and that herein the trial court erred in refusing to give the jury said instructions Nos. 7 and 8. The learned counsel for appellants contends that the act of taking and certifying the acknowledgment to the deed in question was judicial in character, and consequently, by reason of Barbour's relationship to Hauser, both by blood and as attorney, disqualified him, under the statute, to take and certify the acknowledgment of defendants to said deed, and the same was void. The counsel for appellants has sought, apparently with much industry and research, to establish the point that the act of a notary public, or other qualified officer so to do, in taking and certifying an acknowledgment of a married woman to a deed, is a judicial act; that is, in making the examination, and certifying the fact required by law to be certified, the officer exercises a judicial function. In an examination of authorities on this question, (of which there are many,) we do not find that courts have held this doctrine without qualification. Looking back to the common law, we find that one method of extinguishing title to land was by what is termed "a fine." This was accomplished anciently by a real action in a court of record, which in process of time became a fictitious action. Nevertheless, it was a proceeding in a court of record; and consequently the proceedings, and record thereof, could properly be termed "judicial." Blackstone describes this proceeding in the following passage: "A fine is sometimes said to be a feoffment of record, though it might with more accuracy be called an acknowledgment of a feoffment on record; by which it is to be understood that it has at least the same force and effect with a feoffment in the conveying and assuring of lands, though it is one of those methods of transferring estates of freehold by the common law in which livery of seisin is not necessary to be actually given; the supposition and acknowledgment thereof in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine may be described to be an amicable composition or agreement of a suit, either actual or fictitious, by leave of

the king or his justices, whereby the lands in question became, or are acknowledged to be, the right of one of the parties. In its original it was founded on an actual suit commenced at law for recovery of the possession of land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual that fictitious actions were, and continued to be, every day commenced for the sake of obtaining the same security." The commentator further remarks that "fines, indeed, are of equal antiquity with the first rudiments of the law itself; are spoken of by Glanvil and Bracton, in the reigns of Henry II. and Henry III., as things then well known and long established." 2 Cooley, Bl. Comm. 348; Co. Litt. 262a. This is readily seen to be the prototype of the more modern method prescribed by statute; but these statutes have changed the common-law form by providing for an acknowledgment of certain facts as to the execution of the conveyance before an officer empowered by law to examine as to the facts, and certify the same officially; and this power is not, in all cases, even confined strictly to judicial functionaries.

The cases in which courts have used language to the effect that the act of the officer in taking and certifying an acknowledgment of a married woman was judicial is found to be where the court was considering whether the certificate by the officer imported absolute verity as to the facts certified, *i. e.*, was conclusive of the facts certified, so far as the law required the certificate to go, or whether the certificate was only *prima facie* evidence of the facts stated therein. It appears that the decisions are not in harmony upon this point. In some cases the language used shows clearly that the court was reasoning by analogy from the common-law form of fine, and its effect on the statutory form of taking and certifying an acknowledgment and its effect. In some such cases the language goes far towards stamping the latter act as judicial in its nature; but in all these cases a close examination will show that the burden upon the judicial mind was not to decide between the mere terms by which the act should be designated as "judicial," "*quasi* judicial," or "ministerial," but to decide as to whether the certificate should be conclusive, or only *prima facie* evidence of the facts stated therein. No such consideration is here involved. This question, as to what weight shall be given to the officer's certificate of acknowledgment, is set at rest by section 265, div. 5, Comp. St., which provides as follows: "Neither the certificate of the acknowledgment nor the proof of any such conveyance or instrument, nor the record, nor the transcript of the record, of such conveyance or instrument, shall be conclusive; but the same may be rebutted." This has been the statute law during the whole period covered by the transactions in controversy.

Counsel for appellants contend that the act of a notary public in taking and certifying

an acknowledgment to a deed is judicial in character, and that the point applies to the case at bar in this: (1) That the deed in question was made for the benefit of Hauser. (2) That the acknowledgment thereto was taken and certified by Barbour, who was nephew of and attorney for Hauser; and hence the acknowledgment was void, under the provisions of section 547 of the Code of Civil Procedure, as follows: "A judge shall not act as such in any of the following cases: In an action or proceeding to which he is a party, or in which he is interested; when he is related to either party by consanguinity or affinity within the third degree; or when he has been attorney or counsel for either party in the action or proceeding." (3) That said instructions Nos. 7 and 8, refused, ought to have been given as applying this statute to the facts in the case at bar. This provision is found in chapter 9, Comp. St., which treats of courts of justice belonging to the judicial system as provided for the territory of Montana by act of congress. To properly construe this statute only requires to look at the context, at its own terms, and at some other provisions of the Code of Civil Procedure. The first section of the Code provides that "there shall be * * * but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be the same at law and in equity." The second section of the Code of Civil Procedure provides that "in such action the party complaining shall be known as the plaintiff, and the adverse party as the defendant." Here the terms "action" and "party" are defined. The term "judge," as used in section 547, c. 9, occurs many times in said chapter. In the next section (548) it is provided as follows: "A judge shall not act as attorney or counsel in a court in which he is a judge, or in an action or proceeding removed therefrom to another court for review, or in any action or proceeding from which an appeal may lie in his own court." The term "judge," in section 547, undoubtedly refers to the judge of a court of justice; and the verb "act," as there used, refers to the exercise of judicial functions in an action or proceeding pending therein. In view of the very plain and expressive terms of the statute, that "a judge shall not act as such in an action or proceeding," etc., we are of opinion that the statute applies to a judge of a court; and that the terms "action or proceeding," used in said section, refers to actions and proceedings in courts of justice, as provided for in the Code of Civil Procedure. Section 1907, Rev. St. U. S.; Custer Co. v. Yellowstone Co., 6 Mont. 39, 9 Pac. Rep. 586. And it seems clear to us that this statute does not include notaries public, nor apply to their actions in taking and certifying an acknowledgment to a deed.

Said instructions Nos. 7 and 8 were properly refused by the trial court, not only for the reasons above expressed, but for the more forcible reason that Hauser was neither

shown to be a party to the deed in question, nor beneficially interested in its execution and delivery. If the deed had been made to Hauser as a party to it, or had even been made for his use and benefit, and the acknowledgment thereto by the grantors had been taken and certified by Hauser's nephew and attorney, then the question raised by counsel for appellants would have been more pertinent. It is shown by the evidence and findings of the jury that the plaintiff bank had, in the first instance, procured the sureties, Hauser and Flowerree, on the official bond for Roberts; and that the bank had indemnified these sureties against loss as such; and that the bank was the party in interest as to the loss by reason of recovery against the sureties on said official bond; and that Roberts, the principal on the bond, knew these facts before the deed was executed. The jury also found that the consideration for the conveyance of said property was the agreement that Hauser or the bank would pay and have canceled said judgment against Roberts for \$43,000, and the Perkins mortgage debt of \$3,000, and that this was done by the plaintiff bank. Then, who was the party beneficially interested in having said conveyance made? If the testimony of witnesses and the findings of the jury be true, then Hauser was neither benefited by the conveyance, nor would he have suffered loss by the withholding thereof, for he was indemnified by the bank against loss as surety. Looking at the position of the parties to the transaction, it seems plain that the parties benefited by the conveyance were the bank and defendant Roberts. It is true, Hauser, being one of the sureties on the bond and the president of the bank, took an interest in arranging a settlement which was finally consummated.

The appellants further insist (1) that the deed in controversy was intended as a mortgage, and should have been so construed; (2) that said deed was an executory contract or bond to convey the land in question; (3) that the deed was a power of attorney to Bullard to convey the land in controversy. All these propositions, as applied to the case at bar, are questions of fact. After a searching trial on the allegations set up in the pleadings, the jury found that the deed was intended as an absolute conveyance. It is therefore adjudged that the order and judgment of the court below be affirmed, with costs.

DE WITT, J., concurs. BLAKE, C. J., did not sit in this case, having been trial judge in the court below.

(9 Mont. 276, 279, 286)

WULFF v. MANUEL.

(Supreme Court of Montana. Feb. 15, 1890.)

NEW TRIAL—STATEMENT—LOCATION OF MINES—ALIEN—NATURALIZATION—FORFEITURE.

1. Under Code Civil Proc. Mont. § 298, subd. 3, providing that the moving party shall prepare a draft of the statement on motion for new trial, and serve the same, or a copy, upon the adverse

party, a service by leaving the original with his attorney, who afterwards returned it, is sufficient.

2. The statement, on motion for new trial, need not be indorsed with an acceptance of service by the adverse party where the moving party shows by affidavit that due service was made.

3. Under Code Civil Proc. Mont. § 293, subd. 3, providing that if no amendments are proposed to the statement on motion for a new trial, within the time designated, it may be presented for settlement without notice to the adverse party, he cannot object that settlement was made without notice to him where he had offered no amendments.

4. A party in whose favor a motion for new trial was decided cannot object that it was heard in his absence.

5. Settlement of a statement on motion for new trial during the pendency of a motion to strike out the same on the ground of want of service, is not error where due service is shown by the uncontradicted affidavit of the moving party.

6. That the amendments are all placed at the end of the statement on appeal is not necessarily a violation of the requirement that matters be stated in chronological order.

7. Defendant, in his verified answer, having stated that a person through whom plaintiff derived title to a mining claim was a citizen of the United States, cannot move for a nonsuit on the ground that plaintiff's title is invalid on account of such person being an alien.

8. Only citizens, and those who have declared their intention to become such, having a right to locate and purchase mining lands from the United States, the naturalization of an alien during trial will not retroact so as to validate his claim.

9. In a contest to determine the right to a patent for mining lands, defendant cannot object that the title under which plaintiff claims was forfeited by a conveyance to an alien from whom plaintiff purchased, where he does not specially plead such forfeiture.

Appeal from district court, Lewis and Clarke county; H. N. BLAKE, Judge.

McConnell & Clayberg, for appellant.
Wade, Foote & Wallace, for respondent.

DE WITT, J. This case is before us upon respondent's motion to strike from the transcript the statement on appeal. The statement on appeal contains, as a portion thereof, a statement on motion for a new trial. It is at the latter statement, as it appears in the former, that the motion is particularly directed. The judgment below was for plaintiff. Defendant made a motion for a new trial. The motion was denied. Defendant appeals.

A statement on motion for a new trial appears to have been settled by the district judge. In the statement, on appeal, appears the respondent's objections to the former statement, which objections he urges as follows:

1. That the statement on motion for a new trial does not bear thereon any evidence of service of any copy of any statement on motion for new trial, nor notice thereof, either upon the plaintiff or his attorney; nor is there indorsed thereon any acceptance of service of the statement, copy, or notice. We hold that this objection is not well founded. The statement was settled by the district judge October 25, 1889. On that day it appears that there was before the judge on file in the case an affidavit of N. W. McConnell, one of appellant's attorneys, dated July 26,

1889, which sets forth in detail that on June 29, 1889, he served upon D. S. Wade, one of respondent's attorneys, the statement by then leaving the original with him; that July 2d one of respondent's attorneys returned the statement to affiant, who then filed it with the clerk of the court. This was a good service. The law provides that the moving party must prepare a draft of the statement, and serve the same, or a copy thereof, upon the adverse party. Subdivision 3, § 298, Code Civil Proc. The proof of such service was equally good. It is naturally made by the evidence of the person serving the paper. Such proof was made by a lengthy affidavit of such person, and was before the judge on making the settlement. An acceptance of service, indorsed upon a paper, relieves the party wishing to prove the fact from so doing. It would be a monstrous practice if the party on whom service was made could refuse or neglect to admit service in writing on the paper, and then claim that no service could be made to appear by evidence.

2. The respondent objects that the statement on motion for a new trial was settled by the court, in the absence of the plaintiff and his attorneys, and without any notice of its settlement to either of them. The statute is clear upon this subject. The respondent was not entitled to any notice of the settlement, for the reason that he had filed no amendments to the proposed statement. "If no amendments are served within the time designated, * * * the proposed statement * * * may be presented to the judge or referee for settlement, without notice to the adverse party." *Id.*

3. Respondent complains that the motion for a new trial was heard and disposed of in the absence of plaintiff and his attorneys, and without notice to them. This seems to be the fact. But the respondent cannot complain. The disposition of the motion was in his favor; that is, it was denied. It does not appear that the respondent was injured by the action of the court in sustaining the judgment heretofore rendered in his favor. If his absence had any effect, it seems to have redounded to his advantage. He cannot complain of this.

4. The respondent further complains that the statement, on motion for a new trial, was settled and allowed, when there was pending and undisposed of, what he calls a motion to strike the statement from the files. On July 22d respondent filed the following: "Now comes the plaintiff and moves the court to strike from the files in the above-entitled action the so-called statement on motion for a new trial, and the paper so designated therein, filed, etc., for that there is no proof of a service of a copy thereof upon the plaintiff or his attorney, and for that there was never any service of a copy thereof upon plaintiff or his attorneys, or any waiver thereof, or acceptance thereof, or any service, or waiver of acceptance of service, by plaintiff or his attorneys, or any notice of filing the same."

Signed by plaintiff's attorneys. Also, on the same day the following: "To Messrs. McConnell, Carter & Clayberg, atty's for deft.: You will please take notice of plaintiff's motion to strike from the files the so-called statement on motion for new trial filed therein on the 2d day of July, 1889." Signed by plaintiff's attorneys. Service admitted by defendant's attorneys. There was filed with the above nothing whatever in support of the recitals therein. It must be presumed that plaintiff relied upon the record. Without passing upon whether the above papers constituted a motion under the provisions of sections 482-484, Code Civil Proc., it is sufficient here to say that the alleged want of proof or service of statement was amply supplied by the McConnell affidavit July 26th, which was on file three months before the settlement of the statement, was before the judge on such settlement, and was uncontroverted by any evidence whatever. This matter we have disposed of, (paragraph 1, *supra.*)

5. Respondent also objects to the form of the statement on appeal, that it is not engrossed, and the matters not in chronological order. The only offense in this respect is that the amendments are placed together at the end of the statement. Such may be the chronological order in which events occurred. The arrangement is inartistic and awkward, but not a transgression of the rule which, we think, justifies us striking out the whole statement. It is our opinion that the motion should be denied, and it is so ordered.

HARWOOD, J., concurs.

BLAKE, C. J., did not sit in the case, having acted as district judge in the trial below.

HEARING ON THE MERITS.

DE WITT, J. This action is in the ordinary form of a contest between two claimants of a quartz lode mining claim upon the lands of the United States to determine the right of defendant to proceed in the United States land-office for patent thereto. On November 18, 1887, the defendant, Moses Manuel, made application in the land-office for patent for the Marshal Ney mining claim. The plaintiff, Ivur Wulff, filed his adverse claim to such application, basing his contest upon his right to the premises by virtue of their location and possession as the Columbia mining claim, whereupon the parties were remanded to the court of competent jurisdiction (section 2326, Rev. St. U. S.) for the determination of their claims. The result was this action. The plaintiff's location of the Columbia claim was made July 1, 1882, by Henry Pflaume, who was a citizen of the United States. November 30, 1885, Pflaume conveyed to Alfred Manuel. On November 30, 1887, Alfred Manuel conveyed to Ivur Wulff, the plaintiff. Such is plaintiff's location and deraignment of title of the Columbia lode. Defendant's title is as follows: His Marshal Ney claim was located March 15,

1885, by said Alfred Manuel, "who," in the language of defendant's answer, "was then, and now is, a citizen of the United States," (see cross-complaint in answer, paragraph 2.) This allegation is undenied, and therefore, for the purposes of this action, will be taken as true. In October, 1885, Alfred Manuel conveyed to Moses Manuel, the defendant. It is conceded by counsel on the argument that Moses Manuel was an alien until the 28th day of May, 1889, when he was made a citizen, during the progress of the trial, being entitled thereto without a preliminary declaration for reasons unnecessary here to recite. The respective claims described are in conflict as to their area. No questions are presented as to due location, or annual representation, or compliance with mining laws, rules, or regulations, or sufficiency of the conveyances. The court below nonsuited the defendant upon his cross-complaint, for the reason that at the time when the Marshal Ney claim was conveyed to defendant, and when he made his application to the United States for patent, and the action was commenced, he was an alien. The court further refused to nonsuit the plaintiff, the defendant moving for such nonsuit on the ground that Alfred Manuel was an alien when he received title from Pfaume, and transferred the same to plaintiff. Judgment was rendered for plaintiff for the possession of the premises. A motion for a new trial was made and denied. The defendant appeals from the order denying the new trial, and from the judgment as well. Appellant relies upon two errors, which we will consider in the inverse order of their presentation.

1. The court erred in refusing to nonsuit the plaintiff. The sole ground of the motion was that Alfred Manuel, who was a link in the chain of plaintiff's title, from November 30, 1885, to November 30, 1887, was during that whole period an alien, and as such not competent to receive and transmit the title. The pleadings deny to this court the discussion of that proposition, although counsel in argument and brief have devoted much time thereto. The party making the motion, the defendant, has stated in his verified answer that said Fred Manuel was a citizen of the United States ever since March 15, 1885. This was admitted by the replication. Defendant could not afterwards be heard to deny and stultify his pleading by moving for a nonsuit, by which motion he was obliged to declare the falsity of his own answer. He was bound by the allegations of his answer, especially when the opposite party had accepted the truth thereof. The court as well had the right to accept such truth. Defendant's said motion for a nonsuit was properly denied. *Mulford v. Estudillo*, 32 Cal. 139; *Herold v. Smith*, 34 Cal. 124.

2. The only other error assigned is the action of the court in nonsuiting the defendant upon his cross-complaint. Moses Manuel, the defendant, obtained his title, if at all, by purchase in October, 1885. He applied to

the United States for patent November 18, 1887. The action was commenced February 1, 1888. Defendant answered June 1, 1888. The cause was tried May 28, 1889. At all of these times the defendant was an alien, as admitted by counsel, and had not declared his intention to become a citizen of the United States. He became a citizen during the trial. This act, defendant claims, retroacted to all the previous events above recited. If this be the law, he should not have been nonsuited. He should have been heard upon his claim, that the right to the possession might have been declared to be in plaintiff or defendant, or neither. 21 U. S. St. at Large, c. 140. "That an alien may take by deed or devise, and hold against any one but the sovereign until office found, is a familiar principle of law, which it requires no citation of authorities to establish." *Cross v. De Valle*, 1 Wall. 13. Appellant then cites us to a line of decisions upon the question of the retroaction of the act of naturalization. These cases treat of land in its ordinary sense, and not of possessory rights to mining claims on the public domain. They all discuss grants between persons, and not the peculiar laws, rules, and regulations by which the sovereign power promises to sell its own lands to certain described persons. These cases proceed upon the settled principle of law that an alien may take and hold land by grant until office found; and then they lay down the further rule that if the alien so holding become a citizen before office found, that the act of naturalization, in the cases before the courts, retroacts to the original acquirement of title. The cases referred to are *Osterman v. Baldwin*, 6 Wall. 122; *Jackson v. Beach*, 1 Johns. Cas. 401; *Craig v. Radford*, 3 Wheat. 594; *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 607; *Gouverneur v. Robertson*, 11 Wheat. 332. But in the case at bar we encounter a class of real estate *sui generis*, viz., possessory rights to mining claims on the public domain of the United States, which rights are endowed with the qualities of real estate to a high degree. The land belongs to the United States. But the government says that it will sell this class of its lands to citizens of the United States, and to those who have declared their intention to become such, and to them only, and only to them when they have complied with certain laws of the United States and local mining rules and regulations as to the location and possession of such claims. No other persons may apply to purchase from the United States. The mineral lands of the government are not open to exploration, occupation, or purchase by aliens. An alien may not even take or hold real estate of this class any more than he may take or hold any real estate by descent. In descent, it is the rule of law, and not the act of the party, that vests title in the heir. As to descent to an alien the law says that it would be an idle thing to vest title in the alien by one act of law and then take it from him by another, viz., office found. See *Fairfax's*

Devisee v. Hunter's Lessee, 7 Cranch, 619. So in conferring title to mining claims, and the possessory rights thereto. Such title and possessory rights are given only to the class of persons designated by the law, and by virtue of that law, and in the manner prescribed thereby. It would therefore be incongruous to hold that an alien could take and hold, until office found, these claims by the provisions of the law which says that its benefits are extended only to citizens, and those who have declared their intention to become such, and, after he had so taken and held them, resort to office found to deprive him of them. The parallel of the alien heir claiming by descent, and the alien miner claiming under the mining laws, seems to be complete as to the principle under consideration. To the alien is given no right to explore, purchase, or occupy mineral lands. This being his situation as an alien, without even the right to take or hold until office found, as he may other real estate, then, when he becomes a citizen, there is nothing, no previous taking or holding, or the right thereto, to which his subsequent naturalization can retroact. We are therefore of opinion that Moses Manuel, as an alien when the action was commenced, and when the title came to him, as he claims, could not be heard in court to assert his claim to the possessory right to the mining claim in controversy, and that his subsequent naturalization could not retroact as he urges. As to the proposition last discussed, see *Tibbitts v. Ah Tong*, 4 Mont. 536, 2 Pac. Rep. 759. Respondent has presented some objections to the record on the appeal. The views above expressed render a consideration of those objections unnecessary. The order of the district court denying the new trial, and also the judgment, are affirmed.

HARWOOD, J., concurs.

BLAKE, C. J., was trial judge in the lower court, and did not sit in the case on appeal.

ON REHEARING.

DE WITT, J. A statement of this case appears fully in the opinion on the original hearing, and will not be repeated. We now learn that we fell into an error of fact, for which the rehearing was granted. In the record appear the names Alfred Manuel, and Fred Manuel. The similarity of the names, and the fact that Fred is an ordinary abbreviation for Alfred, led us to believe that these names represented one person, and that he was called indifferently Alfred and Fred. Our attention is now called to the fact that Alfred was the locator of the Marshal Ney claim, and that Fred was the person who appears as a link in the chain of plaintiff's title. With this new light it becomes necessary to add a word to our former opinion.

Appellant contends that Fred Manuel was an alien during all the time that he purport-

ed to hold the title. He then takes the position, in his notice of motion for new trial, and in his specifications of error on the motion, and on the appeal, that when title was attempted to be conveyed by the deed from Pflaume to Fred Manuel a forfeiture took place, and the land escheated to the United States. We do not give any opinion, whether the said attempted conveyance worked a forfeiture or not; but, we will assume for the sake of the argument that the appellant's view of that conveyance is entirely correct, and that it had the effect that he claimed, that is to say that it worked a forfeiture, and will decide the case on the theory that appellant advances. A party relying upon a forfeiture by his adversary in these contests for the possessory rights to mining claims must specially plead such forfeiture, must set forth the facts constituting the same, and prove them on the trial. The answer in the case denies the plaintiff's ownership, possession, and right of possession of the premises. It does not specially plead the forfeiture now claimed; it does not set forth the facts constituting the same; it does not inform the plaintiff that a forfeiture is to be urged, or the nature of the acts or omissions working such forfeiture. If defendant intended to rely upon a forfeiture by plaintiff, he has not observed the rules of law governing that plea. He was properly not heard upon that plea in the court below, and cannot be so heard now. *Water Co. v. Mooney*, 12 Cal. 534; *Du Prat v. James*, 61 Cal. 361; *Morenhaut v. Wilson*, 52 Cal. 263; *Renshaw v. Switzer*, 6 Mont. 464, 13 Pac. Rep. 127; *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53, 8 Pac. Rep. 153; *Hopkins v. Noyes*, 4 Mont. 556, 2 Pac. Rep. 280. The order and judgment of the district court are affirmed.

HARWOOD, J., concurs.

BLAKE, C. J., did not sit in the case.

(9 Mont. 241)

BARBER v. BRISCOE.

(Supreme Court of Montana. Feb. 12, 1890.)

JUDGMENT—AMENDMENT—INTEREST—SUPPLEMENTARY PROCEEDINGS.

1. The trial court may amend a judgment entered at a former term so as to correct the name of plaintiff, and may enter it as amended *nunc pro tunc*.

2. Comp. St. Mont. div. 5, § 1287, authorizing interest on judgments "from the day of entering up such judgment," allows interest on a judgment entered *nunc pro tunc*, from the day on which the judgment is to be considered as entered.

3. An order refusing to set aside an order of examination of a judgment debtor in proceedings supplementary to execution is appealable.

4. Under Code Civil Proc. Mont. § 351, authorizing an examination of a judgment debtor after execution, on proof that he has property which he unjustly refuses to apply to the satisfaction of the judgment, the court has no jurisdiction, where the judgment and execution on which the proceedings are based are defective, to order an amended judgment to be entered *nunc pro tunc*, and then grant an order of examination.

Appeal from district court, Lewis and Clark county; W. H. HUNT, Judge.

A. A. Lathrop, for appellant. McCutcheon & McIntire, for respondent.

BLAKE, C. J. The complaint in this action contained the name of "Sumner J. Barber" as the plaintiff, but the summons described him as "Samuel J. Barber," and notified the defendant of the amount sought to be recovered "upon a certain promissory note made and executed by said defendant on the 24th day of July, 1885, at Kane Station, Idaho territory." At the trial, upon the 8th day of December, 1887, the jury returned a verdict for the plaintiff, who is styled "Sumner J. Barber." After the record of the verdict, the following entry appears: "Thereupon it is ordered that judgment be entered accordingly. Defendant, by counsel, excepts to the rendition of judgment, and gives notice of intention to appeal." An *alias* execution was issued May 27, 1889, which recited that Samuel J. Barber recovered judgment, December 8, 1887, against John O. Briscoe, and that "the judgment roll in the action in which such judgment was ordered is filed in the clerk's office, * * * and the said judgment was docketed in said clerk's office." The return of the sheriff shows that he has been unable to find any property of Briscoe. Afterwards an affidavit of the attorney of "Samuel J. Barber" was filed in the court below, which stated "that on the 8th day of December, 1887, the plaintiff recovered a judgment in said action in said court against the defendant, John O. Briscoe, * * * which judgment was duly entered and docketed in the office of the clerk of said court; * * * that there now remains unpaid on said judgment the whole amount thereof." Upon these and other recitals, the judge of the court below made an order, November 2, 1889, for the examination of said Briscoe, under the provisions of the Code of Civil Procedure concerning proceedings supplementary to execution. A motion was filed November 13, 1889, by said Briscoe to set aside the foregoing order. Upon the following day the plaintiff moved the court "to amend the judgment and all subsequent proceedings in said cause by inserting plaintiff's true name, 'Sumner J. Barber' in lieu of 'Samuel J. Barber.'" The court overruled the first and sustained the last motion, November 20, 1889. On the succeeding day, on motion of the plaintiff, this order was made in the court below: "It is ordered that judgment be entered herein as of the 8th day of December, A. D. 1887, on the verdict rendered herein on the said 8th day of December, A. D. 1887, for the sum of two thousand one hundred and forty-seven and 60-100 dollars, (\$2,147.60,) and costs of suit; and that said judgment bear interest at the rate of ten per cent. per annum from the said 8th day of December, A. D. 1887." In pursuance of this order, a formal judgment *nunc pro tunc* was entered on the aforesaid

verdict in accordance therewith. Up to this time no other proceedings had been had in the matter excepting those which have been mentioned in this statement of the facts. The action of the court below in authorizing the amendment by inserting the true name of the plaintiff in the papers, and the entry of the judgment *nunc pro tunc*, is upheld by the decisions of this court, and will not be further discussed. *Mining Co. v. Rumley*, 1 Mont. 201; *Territory v. Clayton*, 8 Mont. 1, 19 Pac. Rep. 293; *Keene v. Welsh*, 8 Mont. 305, 21 Pac. Rep. 25.

The contention of the appellant is that the court erred in its order that the judgment should bear interest from the 8th day of December, 1887. The statute provides that "creditors shall be allowed to collect and receive interest * * * on any judgment rendered before any court or magistrate authorized to enter up the same, within the territory, from the day of entering up such judgment until satisfaction of the same, be made." Comp. St. div. 5, § 1237. It is admitted that judgments at common law did not bear interest, and that this statute must be construed strictly. What was the effect of the entry of the judgment *nunc pro tunc* upon the day from which interest can be collected by the respondent? In *Tapley v. Goodsell*, 122 Mass. 183, Chief Justice GRAY says: "The technical difficulty of holding the judgment to be binding as of a date before it actually existed is no greater than has always attended every judgment rendered *nunc pro tunc*, and every judgment which took effect by legal relation at an earlier day than that at which it was actually entered. As Lord MANSFIELD was accustomed to observe, fictions of law can never be contradicted so as to defeat the ends and purposes for which they were invented. * * * In the case at bar, the judgment, having been legally rendered as of the former term, has the same operation, for all purposes necessary to make it effectual, as if it had been then actually entered." Mr. Freeman states the law in the following terms: "The entry of judgments or decrees *nunc pro tunc* is intended to be in furtherance of justice. It will not be ordered, so as to affect third persons, who have acquired rights, without notice of the rendition of any judgment." *Wells v. Gieseke*, 27 Minn. 478, 8 N. W. Rep. 380; *Auerbach v. Gieseke*, 40 Minn. 262, 41 N. W. Rep. 946. No question of this kind arises in this case. Mr. Freeman proceeds: "With the exception pointed out in the above section, a judgment entered *nunc pro tunc* must be everywhere received and enforced, in the same manner and to the same extent as though entered at the proper time." *Freem. Judgm.* §§ 66, 67. The case of *Fugua v. Carriel, Minor*, (Ala.) 170, which was decided in 1823 by the supreme court of Alabama, seems to be in point. The facts are not fully reported, and we use this qualified language. It appears that this was an action upon a promissory note; that a default was taken at

one term, and that at the next a judgment *nunc pro tunc* was entered, which included interest. A writ of error was prosecuted, and the question under consideration was not presented, but the opinion treats the right to recover the interest as a matter of course, although the mode of computation, according to the tenor of the note, was adjudged erroneous. The application of these principles requires us to determine that the "day of entering up" the judgment, which is specified in the statute regulating the rates of interest in Montana, is the time which is finally fixed by the courts. When it was ordered that judgment should be entered for the principal sum upon the 8th day of December, 1887, the statutory interest followed as a legal consequence.

It is insisted that the court erred in denying the motion to set aside the order for the examination of the appellant in the proceedings which have been detailed. The respondent, suggests that no appeal can be taken in this matter, if the appellant is correct in his position that no judgment was in force when these proceedings were instituted. We are obliged to review the case as it appears in the record, and the respondent invoked the action of the court, and stated in his affidavit the facts which conferred jurisdiction, and caused the order to be made. He has obtained a ruling in his favor, and cannot complain of its legitimate results, and the order before us is appealable. *McCullough v. Clark*, 41 Cal. 298; *Hagerman v. Tong Lee*, 12 Nev. 334. See, also, *Sperling v. Calfee*, 7 Mont. 514, 19 Pac. Rep. 204. The chapter of the Code of Civil Procedure relating to "proceedings supplementary to execution" provides that "after issuing an execution against property, and upon proof by affidavit by a party or otherwise, to the satisfaction of the court, or a judge thereof, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by an order, require the judgment debtor to appear at a specified time and place, before such judge or referee appointed by him, to answer concerning the same." Section 351. Under this statute, and the circumstances which have been narrated, the above order was made. When the appellant filed his motion, no judgment had been entered in the action, no valid execution had been issued and returned, and *Briscoe* was not a judgment debtor. Before passing upon this motion, the court, upon the application of the respondent, ordered that the judgment should be entered *nunc pro tunc*. Did this action render the proceedings legal and regular? The general principles of law, which are given by the authorities, do not contain any exceptions, and it is claimed that the judgment which was actually entered, cured all the defects which have been

pointed out. The court below was convinced by this argument, and acted accordingly. We think that a different doctrine is applicable and decisive of this question. In *Earl v. Skiles*, 93 Ind. 178, the court says: "To reach the funds of the judgment debtor in the hands of third parties, the affidavit and proof must conform substantially to the requirements of the statute. This proceeding is a remedy extraordinary in character. * * * Hence the statute, among other things, requires the affidavit to show that the judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment. * * * In this regard the affidavit and proof are wholly wanting. * * * For these reasons, we are of the opinion that appellants failed to make a case, either by their affidavit or proof." In *Wegman v. Childs*, 44 Barb. 403, the court says: "In order to sustain this action, the plaintiff is bound to show, not only the judgment, but also an execution from a court having the right to issue it, and that the same was delivered to the sheriff of the proper county, and by him returned unsatisfied. Without each and all of these being proved, the judge had no jurisdiction to entertain proceedings supplementary to execution." See, also, *Flint v. Webb*, 25 Minn. 263; *Lynch v. Johnson*, 48 N. Y. 93; *Adams v. Hackett*, 7 Cal. 201; *Byrd v. Badger*, 1 McAll. 443; *Bank v. Robinson*, 57 Cal. 522; *Sperling v. Calfee*, supra. The cases show that these 'proceedings were intended as a substitute for the creditors' bill as formerly used in chancery. The court says in *Bank v. Robinson*, supra: "After a judgment creditor had exhausted his remedy at law, by the issuance of a *fiery facias*, which was returned *nulla bona*, he had the right to invoke the jurisdiction of a court of equity to aid him, upon the principle of compelling a discovery of assets, tangible or intangible, and applying them to satisfying his execution." The matters in which the informality or irregularity of process is involved cannot be cured by the entry of a judgment *nunc pro tunc*, but the question to be decided is of the gravest importance,—the jurisdiction of the court. We have seen that the practice, both in chancery and under the statute, required the existence of certain facts to obtain similar relief. The jurisdiction of the court below to make this order depended upon the circumstances which could then be proved, and could not be controlled by a judgment given subsequently. The motion to set aside the order should have been sustained. It is therefore adjudged that the cause be remanded, with directions to set aside the order made upon the 2d day of November, 1889, and that the judgment entered *nunc pro tunc*, upon the 8th day of December, 1887, be affirmed, with costs.

HARWOOD and DE WITT, JJ., concur.

(9 Mont. 354)

CHADWICK *et al.* v. TATEM *et al.*

(Supreme Court of Montana. Feb. 13, 1890.)

WILLS—REVOCATION—SALE OF PROPERTY—DOWER
—REPEAL OF STATUTES.

1. Testator devised to his wife all his personalty, and a certain portion of his realty and mining lands. After the execution of the will, he contracted for the sale of certain mining lands; part of the price being paid down, and the deed placed in escrow, to be delivered on payment of the balance before a certain date, otherwise to be returned to the grantor. After the death of the testator, the payment was made, and the deed delivered. Held that, under Prob. Prac. Act Mont. §§ 461, 463, which provide that an agreement for the sale of property disposed of by a will previously made does not revoke such disposal, but it passes by the will, subject to a right of specific performance, and that a conveyance or other act by which testator's interest in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation, the mining lands passed as realty under the will, and the second delivery of the deed will not be allowed to take effect, by relation, from the time of the delivery in escrow.

2. Laws 9th Assem. Mont. p. 63, entitled an "Act concerning dower," was not repealed by implication from its entire omission from Rev. St. Mont. 1879, nor was it expressly repealed thereby; the repealing clause of that compilation (chapter 70, § B) repealing only acts, "any portion of which is embraced in any section in said codification," and providing that all acts, "no part of which is embraced in said codification, shall not be affected or changed by its enactment."

3. As Laws 9th Assem. Mont. p. 63, §§ 6, 7, provide that a devise of land shall be in lieu of dower, unless the widow elect within a year to take her dower instead, the widow cannot obtain dower where she has not so elected.

4. A widow to whom the husband devised over one-half of his realty is not entitled to a further share thereof on the ground that it was community property, under Prob. Prac. Act Mont. § 551, providing that on death of the husband one-half of the community property goes to the widow, and the other half is subject to disposition by will of the husband, or goes to his descendants.

Appeal from district court, Lewis and Clarke county; N. W. McCONNELL, Judge.

J. C. Robinson and Massena Bullard, for appellants. *Carpenter, Buck & Hunt*, for respondents.

HARWOOD, J. In this action there is no controversy as to the facts. The questions involved which demand our consideration relate to the construction of a will, and the proper distribution to the devisees thereunder, according to the terms of the will and the law governing. In September, 1885, Walter F. Chadwick died at the city of Helena, in Montana territory, where he had long been a resident. The deceased left a last will and testament, bearing date April 6, 1882, whereby he appointed the appellants Benjamin H. Tatem, John C. Curtin, and William C. Bailey executors thereof. This will was duly admitted to probate, and the executors entered upon the duties of its execution. By the terms of his will the testator devised to his wife, Norma D. Chadwick, all of the personal estate of the testator after paying his debts, and an undivided two-thirds of all real estate of which the testator died seised, excepting therefrom "all mining property, either quartz leads or lodes, or placer ground, or fire-clay lands, with water-rights and mill-

sites." Of the said mining property, quartz leads or lodes, placer ground, fire-clay lands, together with water-rights and mill-sites, the testator devised to his said wife one undivided half, and the other half thereof he devised to the respondents, to be distributed to them share and share alike. After the execution of said will, and on the 20th day of January, A. D. 1885, the testator, and his wife, Norma D., joining with him, made and executed a deed of conveyance of certain mining property described therein, then, and at the time of making said will, owned by the testator, to one Charles A. Broadwater, grantee. The consideration named in said deed was \$37,500. At the time of executing said deed a certain contract or memoranda referring to the same was made and signed and acknowledged by said Walter F. Chadwick and his wife, Norma D., and said Charles A. Broadwater, which provides as follows: "The inclosed deed of the following described property, viz., [here follows a description of the property set forth in the deed;] also a contract for the conveyance of the 69th lode, and another contract for the conveyance of the Little Sampson lode,—all of said property being more particularly described in said deed,—is hereby placed in escrow in the Montana National Bank. If Charles A. Broadwater shall place to the credit of Walter F. Chadwick, to the credit of his heirs, administrators, or assigns, the full sum of thirty-three thousand seven hundred and fifty dollars on or before the first day of September, A. D. 1885, then and in that case the Montana National Bank is authorized to deliver the inclosed deed to Charles A. Broadwater or his order. In case the said Charles A. Broadwater shall not place, or cause to be placed, to the credit of said Walter F. Chadwick, his heirs, administrators, or assigns, the sum of thirty-three thousand seven hundred and fifty dollars in said Montana National Bank on or before the first day of September, A. D. 1885, the bank is hereby authorized to deliver the said deed to Walter F. Chadwick or his order, his heirs or assigns. It is further agreed that no ore excavated by said Broadwater on or from said premises between the date hereof and the said first day of September, or until the payment of the sum above specified, shall be removed from the dump of said property; and that, in case of failure to pay said sum at the time specified, the same, and all moneys paid by the said Broadwater to said Chadwick, shall become forfeited, and said Chadwick may retain the same as liquidated damages; and said second party shall not create any liens on said property. It is further agreed that said Chadwick will clear the said premises of and from any and all incumbrance, if any there be, now existing and of record, done, caused, or suffered by him."

Another contract was made at the same time, and in reference to the same transaction, signed by the testator, Walter F. Chadwick, and said Charles A. Broadwater, which provides as follows: "That said parties of

the first part, [Chadwick and wife,] for and in consideration of the sum of \$33,750.00 to them in hand paid by the second party, the receipt whereof is hereby acknowledged, and for certain other considerations mentioned and expressed in an escrow agreement deposited, with a certain deed of conveyance, in the Montana National Bank of Helena, of the following described property, situate in Ten-Mile unorganized mining district, in the county and territory aforesaid, viz., [here follows a description of the property described in the deed:] all of which property and premises are particularly described in said deed, which bears even date herewith, the same having been, as aforesaid, executed by said first parties to said Broadwater, and which said deed is to become effective on the compliance with the conditions expressed in said escrow agreement by said second party. Now, therefore, the said first parties hereby agree to and with said second party that, upon compliance with and the fulfillment of the conditions named and expressed in said escrow agreement to be done and performed by said second party, the said deed so deposited shall be delivered to said second party, and the title to said property and the premises therein described shall be and become absolute in said second party, his heirs, etc., according to the covenants and provisions in said deed contained."

The said deed and contracts were placed by the parties thereto in the custody of the said Montana National Bank, to be disposed of according to the conditions set forth in said contracts. The transaction and the papers remained in this condition until near the time for the fulfillment or forfeiture on the part of Broadwater, when, the 18th of August, 1885, said Walter F. Chadwick and Broadwater entered into a third agreement in writing respecting the transaction. The effect of this third agreement was to reduce the sum to be paid on the final taking up of said deed by Broadwater from the sum of \$33,750 to the sum of \$22,500, and to extend the time within which Broadwater might pay said last-mentioned sum from the 1st day of September, 1885, to the 1st day of January, 1886. While the transaction remained in this state, and on the 28th day of September, 1885, the said Walter F. Chadwick died, leaving his last will and testament, with the provisions aforesaid; and thereafter, on the 31st day of December, A. D. 1885, the said Broadwater deposited in the said Montana National Bank, and paid to said executors, the said sum of \$22,500, in fulfillment of the conditions of said transaction on his part; and thereupon said bank delivered to said Broadwater said deed. Now a contention has arisen between the executors and Norma D. Chadwick, the appellants, on the one side, and the other devisees, respondents, on the other, as to the proper distribution of said sum of money arising from said sale of mining property, under said will. The appellants claim that this entire fund should go

to the widow, Norma D., under the provisions of the will giving her the personal property; while the respondents contend that this fund should be distributed as provided under the will for the division and distribution of said mining property, of which they claim the testator died the owner; that is, one-half thereof to the widow, Norma D., and the other half thereof to the other devisees in equal shares.

In the absence of statutory provisions, the solution of this question would be attended with much difficulty. There are, however, statutory provisions which have a bearing upon this contention, and these provisions command the first consideration by the court. The statute of this state in reference to the execution and revocation of wills, at sections 461 and 463, (Probate Practice Act,) provides as follows: "Sec. 461. An agreement made by a testator for the sale or transfer of property disposed of by a will previously made does not revoke such disposal, but the property passes by the will, subject to the same remedies on the testator's agreement for a specific performance, or otherwise, against the devisees or legatees, as might be had against the testator's successors, if the same had passed by succession." "Sec. 463. A conveyance, settlement, or other act of a testator by which his interest in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation, but the will passes the property which would otherwise devolve by succession." If the transaction between the testator and Broadwater only amounted to an agreement for the sale or transfer of the said mining property, then the position taken by appellants cannot be sustained. Again, if the transaction in question amounted, in the language of the statute, to "a conveyance, settlement, or other act of the testator by which his interest in the thing previously disposed of by his will is altered, but not wholly divested," the position taken cannot be sustained.

The question is, did the transaction amount to a complete divestiture of the title by the testator? We think not. Where was the title to this property while Broadwater had the option to purchase? Can it be said it was vested in Broadwater? The deed lay as a dormant instrument in the custody of the bank, without efficacy as a conveyance, until a certain condition was performed by Broadwater, and a delivery of the deed was made to him by the bank. The conditions were such that, if Broadwater did nothing, the title remained in the testator, and passed by his will to the devisees; but, if he performed the conditions,—that is, paid the sum of \$22,500 within a certain time, and obtained from the bank a delivery of the deed,—then the title thereby passed to him. It is frequently asserted by the decisions of courts, and by eminent authorities, going back as far as Lord Coke, that the general rule is that an instrument delivered in escrow takes effect only on the performance of the conditions and the sec-

ond delivery, and is not operative until the conditions are performed and the second delivery is made. This doctrine is decisive of the question under consideration. If the deed is inoperative until the performance of the conditions, it follows that the estate is "not wholly divested," and passes by the terms of the will.

In answer to this line of reasoning, counsel for appellants invoke the aid of authorities where it is held that to prevent injustice, or to prevent the defeat of the plain intention of the parties, courts of equity will allow the second delivery of the escrow to take effect by relation from the time of the first delivery. Let this be granted, and does not the proposition carry with it the conclusion that the act which consummates the divestiture is the performance of the condition and the second delivery? And this second delivery may be given so great a force as to be allowed to relate back in its effect to the first. But this doctrine of relation, which in some of the decisions is called a "fiction," is the exception to the rule applying to escrow instruments, and not the general rule.

It is contended, also, by appellants, that if the title remained in the testator until the conditions were performed and the second delivery was made, the testator having died some months before the second delivery, the effect is that the title remained in the deceased until the condition was performed, and then passed from him to Broadwater, which is not consonant with reason, or with the rules of law; that if the testator died seised of said mining property, September 28, 1885, and the title did not pass to Broadwater until the second delivery, December 31, 1885, the title passed from the deceased on the latter date, which could not be, as the title could not remain in the deceased during the period from September 28 to December 31, 1885, and then pass from him to Broadwater. Hence the title had to pass, if at all, from the first delivery. This position will not stand the test of legal rules and reason. When the testator died, his will became operative, and by virtue of the will and the law the title passed to the devisees, subject to such conditions as the testator had placed upon it in his transaction with Broadwater. Comp. St. (Prob. Prac. Act,) §§ 461, 463. The testator had not only made a will touching the property in question, but he had placed other conditions upon it, by virtue of which it might or might not pass away from him or his devisees. The law joins these two provisions together, and provides that both shall have effect upon the property. The will passes the property to the devisees, subject to the conditions. The conditions being fulfilled, the act of the testator carries the title away from the devisees to another. This conforms to the statute quoted supra. These provisions were evidently enacted to change a rule of long standing by which, if real property be devised, and, after the execution of the will, the testator makes a contract to sell the

same, this was construed as a revocation of the will as to such property; and the further rule that such a transaction wrought a conversion of such property from real to personal estate. We are of opinion that the case at bar is controlled by the statute. Chancellor WALWORTH, in the case of Knight v. Weatherwax, 7 Paige, 182, places this construction upon a similar statute existing in New York. He had to view the same question here under consideration, and he says: "Whether the two lots were to be considered real or personal estate, after the making of the agreement to sell the same the interest of the testatrix therein passes to the objects of her bounty, as specified in the first clause of her will, in the same manner as if the agreement had not been made, subject to the complainant's right to a specific performance of the contract upon payment of the purchase money and interest, according to the terms of the agreement."

We will now consider the two remaining questions brought up for our determination by this appeal. *First.* The appellants claim that said "Norma D. Chadwick is entitled, in addition to the legacies and bequests in her behalf contained in said will, to a dower interest in and to all lands and real property of which the said Walter F. Chadwick died seised, which dower interest should first be carved out of said real estate, prior to the distribution thereof to the devisees in said will." *Second.* That all property mentioned in the said will was at the death of the testator "community property," and by reason thereof said wife, Norma D., was entitled to one-half of all of said property, in addition to the property devised to her by said will. Here are two claims put forth, predicated upon the proposition that, under the law as it then existed, the widow is entitled to dower, and in addition thereto is entitled to one-half of what is termed "community property."

Proceeding in the order stated, first as to dower. In 1876 (Laws 9th Sess. p. 63) the legislative assembly of Montana passed an "Act concerning dower," which provided what interest in the lands of the husband the wife should be endowed of; when dower should attach; the manner by which it could be claimed and enforced, or relinquished, or superseded by other benefits; and, in general, the act covered and controlled the subject of dower. While it is not directly disputed that this act has continued in force since its adoption, still this point is brought to the attention of the court, and should be determined. It does not appear that said act concerning dower has ever been expressly repealed; but the question arises as to whether it has been repealed by implication; and this arises from the fact that two general compilations of the statutes of Montana have been made since the passage of said act, in neither of which it has appeared. The first compilation of 1879, known as the "Revised Statutes of Montana," does not incorporate said "Act concerning dower." We

must now examine and determine whether the repealing clause embodied in section B, c. 70, Rev. St., repealed the "Dower Act." Section B is as follows: "All acts of the legislative assembly passed prior to said 21st day of February, 1879, or on said day, any portion of which is embraced in any section of said codification, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such codification having been repealed or superseded by subsequent acts, or not being general and permanent in their nature: provided, that the incorporation into said codification of any general and permanent provision taken from an act making appropriations, or from an act containing other provisions of a private, local, or temporary character, shall not repeal, or in any way affect, any appropriation, or any provision of a private, local, or temporary character, contained in any of said acts, but the same shall remain in force; and all acts of the legislative assembly passed prior to or on said last-named day, no part of which are embraced in said codification, shall not be affected or changed by its enactment." Proceeding to the Compiled Statutes of 1888, we find the repealing section (2072, c. 124) is *verbatim* with that of the Revised Statutes of 1879, except the change in date. It is unnecessary, however, to consider the latter compilation, except by way of illustration of this subject, for two reasons: *First*. All the facts involved in this consideration arose prior to 1887. *Secondly*. In 1887 congress passed an act providing for dower to the widow in this and other territories; thereby placing the question beyond repeal by our legislative assembly while we remained in a territorial condition. Act of congress entitled "An act to amend an act entitled 'An act to amend section 5352 of the Revised Statutes of the United States, in reference to bigamy, and for other purposes,' approved March 22nd, 1882." 24 St. at Large, 635.

The question, then, is, did the repealing clause in the Revised Statutes of Montana of 1879 repeal the "act concerning dower," approved February 11, 1876, *supra*? The terms of such repealing clause, when carefully considered, are very clear, and show exactly what was intended to be repealed. "All acts of the legislative assembly passed prior to the twenty-first day of February, 1879, or on said day, any portion of which is embraced in any section of said codification, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof." So far, the repealing clause has not touched the "Act concerning dower." The subsequent portion of that clause, down to the proviso, is explanatory of what went before, in these words: "All parts of such acts not contained in such codification having been repealed or superseded by subsequent acts, or not being general and permanent in their nature." A proviso is here inserted in the section, which does not affect said "Act concerning dower;"

and the section closes as follows: "And all acts of the legislative assembly passed prior to or on said last-named day, no part of which are embraced in said codification, shall not be affected or changed by its enactment." It is clear that no part of the "Act concerning dower" is embraced in said codification; and therefore we think it follows, without doubt, that said act is not repealed, but has stood in full force, although, from some cause it was not incorporated in said codification. We have nothing on which to base even an inference that it was the intention of the legislature to repeal this "Act concerning dower." It was the law in full force when said codification was made, and the subject of dower is entirely wanting in the compilation of 1879. Repeals by implication are not favored by the law, and the strong leaning of the courts is against the doctrine. Potter's Dwar. St. 154-160, and cases there cited.

Sections 6 and 7 of said "Act concerning dower" are decisive against the position that said Norma D. is entitled to dower in addition to the devise and bequests under the will. Said sections provide as follows: "Sec. 6. Every devise of land, or any estate therein, by will, shall bar her dower in lands, or of her share in personal estate, unless otherwise expressed in the will; but she may elect whether she will take such devise or bequest, or whether she will renounce the benefit of such devise or bequest, and take her dower in the lands, and her share in the personal estate. Sec. 7. When a woman shall be entitled to an election under this act, she shall be deemed to have taken such devise, unless within one year after the authentication or probate of the will she shall deliver or transmit to the court of probate of the proper county a written renunciation, which may be in the following form, to-wit: 'I, A. B., widow of C. D., late of the county of _____, territory of Montana, do hereby renounce and quit all claims to the benefit of any bequest or devise made to me by the late will and testament of my said deceased husband, which has been exhibited and proved according to law, (or otherwise, as the case may be;) and I do elect to take, in lieu thereof, my dower or legal share of the estate of my said husband;' which said letter of renunciation shall be filed in the office of the probate judge, and shall operate as a complete bar against any claim which such widow may afterwards set up to any provision which may have been thus made for her in the will of any testator, in lieu of dower; and by thus renouncing all claims, as aforesaid, such widow shall thereupon be entitled to dower in the lands, or share in the personal estate, of her husband." It appearing by the record that the widow, Norma D., has not renounced her rights under the will, but, on the contrary, has taken thereunder, she is barred from now claiming dower.

Upon the question of "community property," we find no difficulty in determining the rights of the appellant Norma D. Chadwick.

under the facts presented in this case. The provision relied upon by the appellants is found in section 551, Prob. Prac. Act, as follows: "Upon the death of the husband one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and, in the absence of such disposition, goes to his descendants equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation." It is claimed by appellants that the whole estate which the testator devised and bequeathed was "community property." While we do not here decide or imply that the appellants' position as to what is "community property" is correct, it would appear that, if appellants' position is conceded for the purpose of this discussion, it would not change the rights of the widow, Norma D., as she has, by virtue of the will, more than one-half of the whole estate. We nowhere find provisions that would entitle the widow to one-half by virtue of the statute, and any part of the other half, which is otherwise disposed of by will. The statute implies the contrary by declaring that the "other half is subject to the testamentary disposition of the husband," supra. We are clearly of the opinion that the few, vague, and indefinite allusions of the probate practice act in reference to community property do not apply to the case at bar in such a way as to change the rights of the devisees under the will in question. We therefore do not feel called upon, in this action, to trace the question further, to determine what application these few statutory references to community property might have to other cases. This species of property right, called "community property," is certainly not indigenous to this jurisdiction; and, as an exotic, it has not been transplanted with sufficient root to develop a form having definite attributes or symmetrical proportions. The judgment of the court below is affirmed, with costs.

BLAKE, C. J., and DE WITT, J., concur.

(9 Mont. 223)

STATE *ex rel.* THOMPSON v. KENNEY, State Auditor.

(Supreme Court of Montana. Jan. 28, 1890.)

CONSTITUTIONAL LAW—STATE LEGISLATURE—ELECTION OF MEMBERS—COMPENSATION—MANDAMUS TO STATE AUDITOR.

1. On application by a member of the legislature for a writ of mandate to compel the state auditor to audit and settle his account for mileage and attendance, an allegation merely that a controversy has arisen as to his election is immaterial.

2. The power to determine as to the election of its members being by Const. Mont. art. 5, § 9, given to the legislature, the courts, in the absence of such determination, will regard as a member the person having a certificate of election from the legally constituted canvassing board.

3. Act Cong. Feb. 22, 1889, provides for the admission of certain territories into the Union, and enacts (section 24) that all laws in force made by the territories shall be in force in the states, "ex-

cept as modified or changed by this act or by the constitutions of the states." Ordinance No. 2, promulgated by the constitutional convention of Montana, and adopted by the people, together with the constitution, provides (paragraph 8) that the votes for members of the legislature shall be canvassed by the same board as the vote on the constitution, which board (paragraph 5) consists of the secretary of the territory with the governor and chief justice, or any two of them. *Held*, that Comp. St. Mont. § 1083, which provides for a canvass by the county commissioners, was superseded.

4. As the above act of congress (section 24) authorizes the constitutional convention to make provision "by ordinance" for the election of state officers, and as Const. § 17, "Schedule," refers to the state officers to be duly elected and qualified as provided by ordinance, the ordinance appointing a canvassing board has the force and effect of a constitutional provision.

5. Under Comp. St. Mont. div. 5, § 121, providing that the state auditor "shall audit all claims against the treasury, and when the law recognizes a claim, but no appropriation has been made therefor, shall settle the claim, and give the claimant a certificate thereof," it is his duty to audit and settle a claim by a member of the legislature for mileage and attendance; and he may be compelled to do so by *mandamus*, under section 566, authorizing that writ to compel the performance of an act which the law specially enjoins as a duty resulting from an office.

On application for writ of *mandamus*.

E. D. Weed, McCutcheon & McIntire, and S. A. Balliet, for relator. Henri J. Haskell, Atty. Gen., for respondent.

HARWOOD, J. This action was commenced in this court on the 17th day of January, A. D. 1890, by filing the relator's affidavit, upon which he prayed for the issuance of a writ of mandate directed to Edwin A. Kenney, auditor of the state of Montana, commanding him to forthwith audit and settle and issue relator a certificate for a certain alleged claim in favor of relator against the state of Montana in the sum of \$339 for mileage and *per diem* for attendance as a member of the house of representatives of the legislative assembly of the state of Montana.

The affidavit of the relator recites the following facts: "That affiant, William Thompson, is over 25 years of age, now is, and has been for more than twenty-five years last past, a resident of the territory and state of Montana, and for three years last past has been a resident of the county of Silver Bow; the said county being one of the representative districts of the state of Montana. That at the election held in the territory of Montana on the first Tuesday of October, A. D. 1889, under the provisions of an act of congress entitled 'An act to provide for the division of Dakota into two states, and to enable the people of North Dakota and South Dakota, Montana, and Washington to form state constitutions and state governments, and be admitted into the Union on an equal footing with the original states, and to make donations of public lands to such states,' approved February 22, 1889, and as further provided for by the constitution, ordinances, and schedule framed by the constitutional convention for the state of Montana, and adopted by the people thereof, the relator,

William Thompson, was a candidate for election to the office of representative in the legislative assembly of the state of Montana from said representative district, composed of the county of Silver Bow. That relator was voted for at said election, and was elected to the office of representative from said district. That the returns of said election were made by the various judges of election in said district to the clerk of said Silver Bow county, and that fifteen days thereafter the chairman of the board of county commissioners of said Silver Bow county, taking to his assistance two officers of said county, canvassed the returns of said election, and declared the result thereof, so far as county officers were concerned; and that, so far as the members of the legislative assembly were concerned, the returns of said election were made to the secretary of the territory of Montana. That, thirty days after said election, all votes for the members of the legislative assembly were canvassed by the governor, chief justice, and secretary of the territory of Montana, who then and there found, ascertained, declared, and certified that the affiant, William Thompson, was duly elected to the house of representatives of the legislative assembly of Montana as a member thereof; and that the said governor and secretary of the territory of Montana delivered to affiant a certificate, over their hands and seal of said territory, certifying and declaring that at such election aforesaid affiant had been elected a member of the house of representatives of the said legislative assembly. That on the 23d day of November, A. D. 1889, at 12 o'clock noon, pursuant to the proclamation of the governor of Montana, the legislative assembly of the said state was convened, and affiant appeared at the capital of the state at that time, and in conjunction with twenty-nine other persons, who had, as aforesaid, been ascertained, declared, and certified by the aforesaid canvassing board, composed of the governor, secretary, and chief justice of the territory of Montana, to have been elected from the various representative districts in said state, did meet as the house of representatives of the state of Montana, at the capital of said state, and in the place by them and the auditor of said state agreed upon, of which place of meeting previous public notice had been given. That then and there, in a room provided for that purpose, the relator and said twenty-nine other persons convened, and were called to order by the auditor of the state of Montana, and thereupon the thirty members proceeded to qualify and organize the house of representatives of the legislative assembly of the state of Montana, by the election of Aaron C. Witter, one of said members, as speaker of the house of representatives, and Benjamin Webster as chief clerk thereof. That such proceedings were then and there had by the members of said house as that a committee thereof was appointed on credentials, to which committee the said thirty members presented severally a certificate

signed by the governor and secretary of Montana, and over the seal of the territory of Montana, certifying and declaring that each of them had been duly elected members of the house of representatives of the legislative assembly of the state of Montana. That said committee on credentials then and there reported to the said house that the said thirty members aforesaid, including affiant, were duly elected members of the house of representatives of the legislative assembly of the state of Montana, and entitled to seats therein, which said report was approved and adopted by the said house. That thereafter the said house continued to sit from day to day, from that date, to-wit, November 23, A. D. 1889, to the date of the signing of affiant's affidavit, to-wit, January 16, A. D. 1890; and that affiant has attended said sessions, from that time until the date of making this affidavit, as a member of said house of representatives, except on the 13th day of January, A. D. 1890. That affiant traveled the distance of seventy-five miles in going by the nearest usually traveled route from his residence to the capital of said state to attend said legislative assembly. That on the said 23d day of November, A. D. 1889, the affiant and all of the said twenty-nine members took the oath prescribed by the constitution of the state of Montana as members of the legislative assembly of the state of Montana, and that the said thirty members have attended upon the various sessions of the said house. That on the 16th day of January, A. D. 1890, affiant presented to Edwin A. Kenney, who was then the auditor of the state of Montana, at his office, an account against the state for his services and attendance as a member of the house aforesaid, at the rate of \$6 per day, and for mileage at the rate of 20 cents per mile for the distance traveled as aforesaid, as provided by law, and requested the said auditor to audit and settle the said claim, and give affiant a certificate thereof; but to audit and settle said claim, or give affiant a certificate thereof, or any part thereof, the said auditor did then and there refuse, nor would the said auditor approve said claim, or any part thereof." To which affidavit affiant attaches an account as "Exhibit A," which he verifies as a copy of the said account presented to said auditor, and referred to in his affidavit.

Upon this showing an alternative writ of mandate was issued out of this court requiring the said Edwin A. Kenney, auditor of the state of Montana, to forthwith audit and settle said claim against the treasury of the state of Montana, and give to said William Thompson a certificate thereof, or to show cause before this court at 10 o'clock A. M., January 20, A. D. 1890, why he had not done so. To this process the respondent made his verified answer, wherein he expressly admitted in detail all the affirmative allegations set forth in the relator's affidavit; but in addition to such express admissions the respondent alleged other matters, as follows: "De-

fendant further says, that in the county of Silver Bow, which is a representative district, ten persons were apportioned to be elected members of the house of representatives. That as to the election of five of said persons no controversy has arisen; but as to the said relator, and four of his colleagues sitting with him in the house aforesaid, a controversy as to their election has arisen; and unless they are *prima facie* members of such house, and entitled to act therein, no quorum has been present in said house, and the organization thereof has been without legislative validity. That the said house is composed of thirty members, whose muniment of title is the ascertainment, declaration, and certificate of the canvassing board, consisting of the governor, chief justice, and secretary of the territory of Montana, as provided in ordinance number two, passed by the constitutional convention of the state of Montana. That on the 23d day of November, A. D. 1889, twenty-four persons, from various representative districts in the state of Montana, who had been ascertained and declared to have been elected members of said house of representatives by the governor, chief justice, and secretary aforesaid, under said ordinance of the constitution, did meet at another place in the capital of said state, and five members from the county of Silver Bow, one of whom assumed to have been elected in lieu of relator, met with said members last aforesaid, and having been declared not elected by the said canvassing board, provided for in said ordinance, did nevertheless assume to be members of the house of representatives, and did then and there present, as their muniment of title to said office, each a certificate signed by the county clerk and recorder of Silver Bow county, over his seal, certifying and declaring that such person was elected one of the representatives of the district of Silver Bow county, as representative in said house." To the foregoing new matter, set forth by respondent, the relator filed his replication, as follows: *First*, the relator "denies that any controversy has arisen as to his election and the election of four of his colleagues from the county of Silver Bow, as set forth in said answer; *second*, avers that at the time the said house was organized, and when said house passed upon the report of the committee on credentials, as set forth in relator's application, a quorum of said house was present, and acted therein." The parties rested their case upon the allegations, admissions, and denials in the pleadings above set forth, and upon the questions raised therein the case was argued, and submitted to the court for decision.

At the commencement of the consideration of the questions involved herein it is proper to notice the scope and effect of the relator's replication. He denies therein "that any controversy has arisen as to his election, and the election of four of his colleagues;" but he does not deny the further facts set out in respondent's answer. Those specific facts al-

leged stand unchallenged, and were urged upon the consideration of the court as ground for the refusal, on the part of the respondent, to audit and settle relator's claim, and to grant him a certificate thereof, as provided by law. The relator relied upon the facts alleged in his affidavit, expressly admitted by respondent's answer, as grounds for the relief which he prayed for. The effect of these pleadings raised questions of law only. No issues of fact were made upon which evidence could properly be introduced. The denial made by the relator's replication was nothing more than a denial of an immaterial allegation. Comp. St. Mont. Section 575 of the Code of Civil Procedure, relating to writs of mandate, provides as follows: "If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear, or fix a day for hearing, the argument of the case."

This court is given original jurisdiction to hear and determine actions of this character by section 3, art. 8, of the constitution of Montana, as follows: "The appellate jurisdiction of the supreme court shall extend to all cases at law and in equity, subject, however, to such limitations and regulations as may be prescribed by law. Said court shall have power, in its discretion, to issue and hear and determine writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, prohibition, and injunction, and such other original and remedial writs as may be necessary and proper to the complete exercise of its appellate jurisdiction." In reference to the office of the writ of *mandamus*, the Compiled Statutes of Montana, (sections 566 and 567 of the Code of Civil Procedure) provide as follows: Sec. 566. It may be issued by any court in this state, "except a justice's, probate, or mayor's court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person. Sec. 567. The writ shall be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It shall be issued upon affidavit on the application of the party beneficially interested."

It must now be determined whether or not the act, the performance of which is here sought to be compelled, is one which the law especially enjoins upon the respondent as a duty resulting from his office as auditor of this state. This involves two propositions: *First*. Is the relator entitled, upon the facts shown, to have his said claim audited and settled, and to receive a certificate thereof? *Secondly*. Does the law enjoin upon the state

auditor the duty of auditing and settling said claim, and issuing to relator a certificate thereof? These propositions will be considered in the order stated.

To the high office of legislator, and to persons occupying that office, the law guaranties certain rights, privileges, and emoluments, which courts of justice will regard and enforce in proper cases and upon proper showing. Const. Mont. art. 5, §§ 5, 15; 1 Bl. Comm. 164, and notes and cases cited; Cush. Law & Pr. Leg. Ass. §§ 546-597, inclusive; Cooley, Const. Lim. 162, 163; Jeff. Man.; Rob. Man.; 1 Kent, Comm. 235. But in passing upon a question of this character, relating to a person claiming to be a member of the legislative assembly of the state, this court is mindful of the constitutional provision which places the power to try the ultimate right to the office in another forum, *i. e.*, in the legislative house wherein the person claims a seat. Const. Mont. art. 5, § 9. That body, and that alone, having the plenary jurisdiction to try the ultimate right to the office, it must be determined in the case at bar on what character of *prima facie* evidence will courts of justice enforce collateral or incidental rights and privileges belonging to the members of the legislative assembly; in other words, as applicable to this case at bar, what constitutes in the view of courts of justice sufficient *prima facie* evidence of his membership in the house of representatives of this state to entitle the relator to the relief which he asks; that is, to have his claim to the emoluments of the office of representative from Silver Bow county audited, settled, and certified. Under our republican form of government, election to this office is made by the votes of the legally qualified electors of the district in the manner prescribed by law, and the result of such election is ascertained in a manner prescribed by law, through the returns and canvass of such votes by legally constituted canvassing boards. The courts have uniformly given credit to the result of an election as ascertained and declared or certified by the legally constituted canvassing board, to whom the law has committed the duty of canvassing the returns of the election, and declaring the result, until this evidence of the election has been overborne by the trial and determination of the ultimate right to such office by the tribunal having jurisdiction to try and determine the same. *Crowell v. Lambert*, 10 Minn. 369, (Gil. 295;); *State v. Churchill*, 15 Minn. 455, (Gil. 369;); *State v. Sherwood*, 15 Minn. 221, (Gil. 172;); *People v. Miller*, 16 Mich. 56; *Swinburn v. Smith*, 15 W. Va. 483; *Hulseman v. Rems*, 41 Pa. St. 396; *Kerr v. Trego*, 47 Pa. St. 292; *Com. v. Baxter*, 35 Pa. St. 263; *De Armond v. State*, 40 Ind. 469; *Hadley v. City of Albany*, 33 N. Y. 608. This is not only the rule governing the action of courts, but it is the practice adopted in the organization of legislative bodies, and admitting members thereto, until the *prima facie* evidence contained in the certificate of election issued by

the legally constituted canvassing board is set aside by the proper authority in the determination of a contested election. *Cush. Law & Pr. Leg. Ass.* §§ 141, 142, and 229-241, inclusive. The authorities reviewed and cited by this eminent author amply show the practice upon this question. *McCrary, Elect.* §§ 270-285, inclusive, and cases cited; *Jeff. Man.* (12th Ed.) 390.

In the case at bar it is asserted, and not denied, that another person holds a certificate of election to the same office which the relator claims to be occupying, issued by the county clerk of Silver Bow county. It therefore becomes necessary, in the determination of this case, to ascertain what board or person is by law authorized to canvass the returns of the election in question, and ascertain and certify the result, so as to entitle the person holding that muniment of title to the office, *prima facie*, to maintain his case in an action of this character. If the right of relator to the certificate of election which he holds is challenged, let the question be raised and determined in the proper forum; but if the legislative body of which the relator claims to be a member, vested, as it is, with the powers which the constitution of this state has committed to it, and in view of the long line of precedents which have guided the action of such bodies in like cases, does not determine a controversy as to the election of the relator, then, in the nature of the case, there exists no better evidence of his right to relief than the finding or certificate of the legally constituted canvassing board, charged with the duty of ascertaining the result of the election in question. The title to an elective office, in a majority of cases, rests on this *prima facie* evidence, because in the great majority of cases there is no adjudication of the right to the office which inquires back of the returns of the proper canvassing board. It is proper to observe here that under well-established rules of law, if it was shown that a contest of the election of the relator was pending in the house of which he claims to be a member, and to which he holds a certificate of election, then this court would withhold judgment until the case was determined; but no such fact appears. The relator's certificate of election emanates from a canvassing board composed of the governor, chief justice, and secretary. The other certificate, which is set up in opposition to this, is held by another person, emanates from the county clerk of Silver Bow county, accredited under the hand and official seal of that officer, and this is not denied by the relator. In the absence of any mention of this latter certificate, the consideration of this case necessarily involves the question as to whether the relator's certificate of election issues from the legally constituted canvassing board, charged with the duty of ascertaining, from the returns, the election of members of the house of representatives. The *prima facie* right to relief rests upon the credentials, with the facts of service.

The act of congress above mentioned, en-

abling the people of Montana and other territories to form and adopt constitutions and set up state governments, provides, in section 8, as follows: "At the elections provided for in this section, the qualified voters of said proposed states shall vote directly for or against the proposed constitutions, and for or against any articles or propositions separately submitted. The returns of said elections shall be made to the secretary of each of said territories, who, with the governor and chief justice thereof, or any two of them, shall canvass the same." Section 9 of the same act provides as follows: "That until the next general census, or until otherwise provided by law, said states shall be entitled to one representative in the house of representatives of the United States, except South Dakota, which shall be entitled to two; and the representatives to the fifty-first congress, together with the governors and other officers provided for in said constitutions, may be elected on the same day of the election for the ratification or rejection of the constitutions; and until said state officers are elected and qualified under the provisions of each constitution, and the states respectively are admitted into the Union, the territorial officers shall continue to discharge the duties of their respective offices in each of said territories." Section 24 of the same act provides as follows: "That the constitutional conventions may, by ordinance, provide for the election of officers for full state governments, including members of the legislatures, and representatives in the fifty-first congress; but said state governments shall remain in abeyance until the states shall be admitted into the Union, respectively, as provided in this act. In case the constitutions of any of said proposed states shall be ratified by the people, but not otherwise, the legislature thereof may assemble, organize, and elect two senators of the United States; and the governor and secretary of state of such proposed states shall certify the election of the senators and representatives in the manner required by law; and when such state is admitted into the Union the senators and representatives shall be entitled to be admitted to seats in congress, and to all the rights and privileges of senators and representatives of other states in the congress of the United States; and the officers of the state governments, formed in pursuance of said constitutions, as provided by the constitutional conventions, shall proceed to exercise all the functions of such state officers; and all laws in force made by said territories at the time of their admission into the Union shall be in force in said states, except as modified or changed by this act, or by the constitutions of the states, respectively." Section 25 of the same act provides as follows: "That all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislatures of said territories or by congress, are hereby repealed."

Having reviewed these provisions of the

enabling act of congress, we will proceed to the constitution of Montana, and consider its provisions upon this subject. Section 20, "Schedule," § 1, provides as follows: "All laws enacted by the legislative assembly of the territory of Montana, and in force at the time the state shall be admitted into the Union, and not inconsistent with this constitution, or the constitution or laws of the United States of America, shall be and remain in full force as the laws of the state until altered or repealed, or until they expire by their own limitations." Section 17 of the schedule in the state constitution provides as follows: "All territorial, county, and township officers now occupying their respective positions under the laws of the territory of Montana or of the United States of America, shall continue and remain in their respective official positions, and perform the duties thereof, as now provided by law, after the state is admitted into the Union, and shall be considered state officers until their successors in office shall be duly elected and qualified, as provided by ordinance, notwithstanding any inconsistent provisions in this constitution, and shall be entitled to the same compensation for their services as is now established by law: provided, that the compensation for justices of the supreme court, governor, and secretary of the territory shall be paid by the state of Montana." Passing to ordinance No. 2, referred to in the last above-quoted section, ordained and promulgated by the constitutional convention, with the constitution of the state, and adopted by the people, we find provisions as follows: "*First.* That an election shall be held throughout the territory of Montana on the first Tuesday of October, A. D. 1889, for the ratification or rejection of the constitution framed and adopted by this convention." "*Fifth.* The votes cast at said election for the adoption or rejection of said constitution shall be canvassed by the canvassing boards of the respective counties not later than fifteen days after said election, or sooner, if the returns from all the precincts shall have been received, and in the manner prescribed by the laws of the territory of Montana for canvassing the votes at the general elections in said territory; and the returns of said election shall be made to the secretary of the territory, who, with the governor and the chief justice of the territory, or any two of them, shall constitute a board of canvassers, who shall meet at the office of the secretary of the territory on or before the thirtieth day after the election, and canvass the votes so cast, and declare the result. *Sixth.* That on the first Tuesday in October, A. D. 1889, there shall be elected by the qualified electors of Montana, a governor, a lieutenant governor, a secretary of state, an attorney general, a state auditor, a superintendent of public instruction, one chief justice and two associate justices of the supreme court, a judge for each judicial district established by this constitution, a clerk of the supreme court, and a clerk of the

district court in and for each county of the state, and the members of the legislative assembly provided for in this constitution. The terms of the officers so elected shall begin when the state shall be admitted into the Union, and shall end on the first Monday in January, A. D. 1893, except as otherwise provided. *Seventh.* There shall be elected at the same time one representative in the fifty-first congress of the United States. *Eighth.* The votes for the above officers shall be returned and canvassed as is provided by law, and returns shall be made to the secretary of the territory and canvassed in the same manner, and by the same board, as is the vote upon the constitution, except as to clerk of the district court."

It is clear that said act of congress, legislating for the people of the territory of Montana, supplemented and carried out by the constitution and ordinances framed and promulgated by the constitutional convention, and ratified by the people of the territory, covered the whole question as to what board should canvass the votes cast at the late election, both for and against the constitution, and for members of the legislative assembly, and state and district officers, and declare the result. The fifth paragraph of ordinance 2, above quoted, requires that the returns of said election for the adoption or rejection of the constitution "shall be made to the secretary of the territory, who, with the governor and the chief justice of the territory, or any two of them, shall constitute a board of canvassers, who shall meet at the office of the secretary of the territory on or before the thirtieth day after election, and canvass the votes so cast, and declare the result." The eighth paragraph of the same ordinance provides "that the votes for all the state officers, members of the legislative assembly, and district judges shall be returned and canvassed in the same manner, and by the same board, as is the vote upon the constitution."

It is contended by the respondent that a statute of the territory of Montana, existing prior to the said act of congress, and prior to the adoption of the constitution, provided contrary to the act of congress and the constitution and ordinances above quoted, in that this statute provides that the canvass of the votes cast for members of the legislative assembly shall be made by the boards of county commissioners of the respective counties in the territory, and certificates of election shall be issued by the clerk of the board of county commissioners. Comp. St. § 1033, p. 930. This position is untenable. There are no statutes of the territory of Montana brought over and adopted by the people of this state contrary or in conflict with the constitution thereof, for this plain reason: It is provided by the act of congress above quoted, enabling the people of said territory to form a constitution and state government, that "all laws in force, made by said territories at the time of their admission into the Union, shall be in force in said states, except as modified or

changed by this act, or by the constitutions of the states respectively." Section 24, "An act," etc., supra. This provision was further amplified by section 1 of section 20, "Schedule," of the constitution of Montana, in these terms: "All laws enacted by the legislative assembly of the territory of Montana, and in force at the time the state shall be admitted into the Union, and not inconsistent with this constitution, or the constitution or laws of the United States of America, shall be and remain in full force as the laws of the state until altered or repealed, or until they expire by their own limitation." By these provisions the statute law of Montana territory is remoulded at once to join in harmony with the state constitution. An example of this modification or remoulding of the statute law to harmonize with the constitution is found in reference to the formation of the grand jury. The express letter of the statute as in force up to the time the state was admitted into the Union provided that this body should consist of 16 persons in number, of whom 12 could find an indictment. The state constitution provides that the grand jury shall consist of 7 persons, of whom 5 are competent to find an indictment. It has been abundantly provided, by the act of congress and the state constitution, that the statute is in force as modified by the constitution; and it cannot be maintained, either as a logical or reasonable conclusion, that there is a conflict, where the latter and paramount organic law has expressly adopted the former statute law as modified by the constitution. *State v. Ah Jim*, 9 Mont. — ante, 76.

Counsel for respondent, in this connection, contends that the ordinances framed by the constitutional convention, and appended to the constitution, were not a part of that instrument, and did not have the force and effect of constitutional provisions. For this reason the provisions of the ordinance declaring that the governor, chief justice, and secretary of Montana should constitute a canvassing board to canvass the votes and declare the result of the election of members of the legislative assembly was impotent to work a change or modification of the statute providing that the certificates of election of such members shall be issued by the county clerk. Hence that statute stands in full force, and the county clerk's certificate is the best *prima facie* evidence of a party's right to a seat in the legislative assembly. No authorities have been brought to the attention of the court to sustain the respondent's position in respect to ordinances framed and promulgated by constitutional conventions. It appears this question was raised in the case of *Stewart v. Crosby*, 15 Tex. 546, wherein Justice WHEELER, in passing upon this point, says: "We think it free from doubt that the ordinance appended to the constitution is a part of the fundamental law of the land. Having been framed by the convention that framed the constitution of the state, and adopted by the

convention and the people, along with the constitution, it is of equal authority and binding force upon the executive, legislative, and judicial departments of the government of the state as if it had been incorporated in the constitution, forming a component part of it." The case cited appears to have involved questions of great importance, as shown by the remarks of the judge at the commencement of the opinion, as follows: "In the argument of this case, questions of great moment to the parties, involving an inquiry respecting the constitutionality of the legislative enactments which they have invoked, and on which they rely to maintain their claims, have been discussed." Mr. Paine, in his work on Elections, (section 294,) announces the same doctrine, as does the case of *Stewart v. Crosby*, supra, in the following terms: "To launch a new constitution, certain machinery and arrangements are always necessary, which, having subserved this single purpose, are of no further use. These might, of course, be provided in the constitution itself, but to incorporate temporary provisions into the body of a permanent constitution would be to incur the instrument with matter which might more properly be excluded from the text of the constitution, and placed in such a form as to be dropped when all the uses for which it was provided have been fully subserved. Accordingly, these provisions for inaugurating new state constitutions usually take the form of detached ordinances or schedules. The validity and effect of these provisions are precisely the same, whether they are placed in the ordinance or schedule, to be thrown aside when no longer needed, or imbedded in the text of the constitution, to remain a permanent blemish after the accomplishment of all the purposes for which they were required. It is clearly competent for a constitutional convention, by an ordinance or schedule, to change the time for holding the general election of the state. * * * The people of the state, in their constitutional conventions, are always their own masters. There is nothing to restrain them from giving whatever form they prefer to its organic law, except the constitution of the United States, and treaties made and laws enacted by the United States in pursuance thereof."

To declare that the county clerk's certificate of election to the office in question is the highest *prima facie* evidence of title to the office, as against the certificate of the canvassing board constituted by the act of congress, and the ordinance framed by the constitutional convention, and adopted by the people, would be, in effect, to declare that the provisions of the statute in this respect stand without modification by the act of congress and constitution and ordinances, and prevail over them. If the ordinance did not work a change in the statute in this particular, how can it be maintained that the same ordinance worked such important changes in other respects? The effect of ordinance No. 2 was to

terminate the terms of all the elective officers of the territory of Montana, while under the literal statutory provisions their terms of office would have continued for more than a year. And under that theory the officers elected at the late election, under this ordinance, who have taken possession of these offices, are there without authority. The logical analogies of this theory need not be further traced. It destroys itself by its inherent fallacy, without the force of the authorities above quoted to the contrary. The constitutional convention was authorized, by act of congress, to make provision, "by ordinance," for the election of officers for full state government. In the body of the constitution, at section 17, "Schedule," the state officers to be "duly elected and qualified, as provided by ordinance," are referred to. The ordinance was framed and adopted by the convention, promulgated to the people, and by them ratified. The provisions of the constitution and ordinance relating to carrying out the election, to set in motion the state government, was intended for execution within a short time after the constitution was framed. The plain intent of the convention when framing ordinance No. 2 is shown in the provision dividing the state, legislative, and district officers into one class, and directing that the returns of the election of these officers should be made to the secretary of the territory, and canvassed in the same manner and by the same board as the vote upon the constitution; and in the ninth paragraph of that ordinance the election of the county and township officers was provided for; and the tenth paragraph provides that the votes for the above county and township officers, and for clerk of the district court, shall be returned and canvassed as is now provided by law. The effect of the ordinances upon the statute is to change and modify its provisions so far as is necessary to give the provisions of the ordinance full scope and effect. It follows that the relator's certificate of election emanates from the legally constituted canvassing board, and will be admitted in this action as *prima facie* evidence of his election to the office in question.

The facts of attendance upon the sessions of the house, and as to distance traveled, are asserted by the affidavit of the relator, and admitted by the verified answer of respondent. No question has been raised upon these matters set forth in relator's affidavit. The constitution of the state fixes the amount of compensation at \$6 for each day's attendance, and 20 cents per mile for each mile necessarily traveled, by the nearest usually traveled route, in going to the seat of government from the member's residence, and returning thereto; and the relator's claim conforms to these prescribed rates.

It remains to be determined whether the law enjoins upon the state auditor the duty of auditing and settling said claim, and issuing to the relator a certificate thereof. Section 121, fifth div. Comp. St., provides as

follows: "He shall audit all claims against the treasury, and when the law recognizes a claim, but no appropriation has been made therefor, shall settle the claim, and give the claimant a certificate thereof, and report the same to the legislative assembly." This provision of the statutes should be considered in connection with section 20 of article 7 of the state constitution, which section provides as follows: "Sec. 20. The governor, secretary of state, and attorney general shall constitute a board of state-prison commissioners, which board shall have such supervision of all matters connected with the state prisoners as may be prescribed by law. They shall constitute a board of examiners, with power to examine all claims against the state, except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law. And no claim against the state, except for salaries and compensation of officers fixed by law, shall be passed upon by the legislative assembly without first having been considered and acted upon by said board." The section of the statute above quoted provides that the auditor "shall audit all claims against the treasury; and when the law recognizes a claim, but no appropriation has been made therefor, shall settle the claim, and give the claimant a certificate thereof, and report the same to the legislative assembly." The constitution has created a board of examiners, with power to examine all claims against the state, except salaries or compensation of officers fixed by law; and provides that "no claims against the state, except for salaries and compensation of officers fixed by law, shall be passed upon by the legislative assembly without first having been considered and acted upon by said board." The salaries or compensation of officers fixed by law being expressly, in all cases, excepted by the provisions of the constitution from the action of said board of examiners, the duty of the state auditor, under the statute, is clear as to the relator's claims. No other class of claims against the state is presented in this action than the compensation of an officer fixed by law. However, it is deemed proper to consider the statutory and constitutional provision together, so that no misapprehension will arise as to the decision herein. The relator asks that his claim against the state for compensation for service as a member of the house of representatives of the legislative assembly of this state, for the 54 days' attendance at the sessions of that body, together with mileage for 75 miles traveled, by the nearest usually traveled route, from his residence to that assembly, at the rate fixed by law, amounting to \$339, be audited and settled, and that a certificate thereof be given him by the respondent, Edwin A. Kenney, auditor of the state of Montana. Under the provisions of law and the showing in this action, it is held by this court that the relator is entitled to the relief prayed for; that the relief prayed for is a duty specially enjoined upon the state auditor, as resulting

from his office; that the writ of *mandamus* is the proper remedy herein. Wherefore it is ordered that a peremptory writ of mandate be issued in the form provided by law, as prayed for in relator's affidavit.

Chief Justice BLAKE, having been a member of the canvassing board mentioned in the above opinion, did not sit in the hearing and the determination of this action.

(9 Mont. 370)

STATE *ex rel.* ROTWITT v. HICKMAN, State Treasurer.

(Supreme Court of Montana. Feb. 15, 1890.)

STATE OFFICERS—COMPENSATION—APPROPRIATIONS—CONSTITUTIONAL LAW.

Under Const. Mont. art. 7, § 4, declaring that certain state officers shall receive a certain sum as compensation; and article 5, § 81, declaring that no law shall increase or diminish the salary of a public officer after his election; and article 5, § 84, declaring that "no money shall be paid out of the treasury except upon appropriations made by law,"—the salaries of the officers enumerated are required to be paid, though the legislature has made no appropriation therefor, as the appropriation is made by the constitution itself.

Application for writ of *mandamus*.

McCutcheon & McIntire, for relator. *Henri J. Haskell*, Atty. Gen., for respondent.

BLAKE, C. J. This is an application to the court for a writ of mandate to be issued to Richard O. Hickman, as the state treasurer of the state of Montana, commanding him to pay forthwith, out of such moneys as may be in the treasury of the state, and not otherwise appropriated, a certain warrant hereinafter described. It appears from the affidavit on the application of Louis Rotwitt, the party beneficially interested, and is admitted by the respondent, that Rotwitt is the duly elected, qualified, and acting secretary of state of Montana. That he entered upon the discharge of his duties upon the 11th day of November, 1889, and has ever since that date continued to perform the same. That upon the 10th day of February, 1890, he presented his account in the sum \$416.67 against the state for his compensation or salary as such secretary of state for the quarter ending on the 31st day of December, 1889, to Edwin A. Kenney, who was then and is now the duly elected, qualified, and acting auditor of the state of Montana, for settlement, audit, and allowance. That thereupon the said Kenney, as such state auditor, settled, audited, and allowed said account for the said sum, and then drew his warrant therefor on the said state treasurer, as follows: "No. 9,264. State of Montana, County of Lewis and Clarke, Helena, M. T., Feb. 10th, 1890. Territorial warrant. Original. The treasurer will pay to L. Rotwitt or order four hundred and sixteen and 67-100 dollars, for salary as secretary of state for quarter ending Dec. 31st, 1889, out of any moneys in the treasury not otherwise appropriated. \$416.67-100. E. A. KENNEY, State Auditor." Indorsement: "Feby. 10th, 1890. Presented, but not paid

for want of an appropriation. R. O. HICKMAN, State Treasurer." That he presented the said warrant to the said Hickman, as such state treasurer, and demanded payment thereof, and that payment thereof was refused, and the same is wholly unpaid; and that there is now in the treasury of the state, and in the possession of the said Hickman, as such state treasurer, the sum of \$40,000. The alternative writ was issued, and on the return thereof said Hickman made the following answer, to-wit: "That no provision has been made by law for the payment of this or any other warrant issued to the state officers of Montana for their services rendered as such officers." The relator then demurred to this answer upon the ground that it does not state facts sufficient to constitute a defense.

There is no statute which makes an appropriation or otherwise provides for the payment of this warrant, and the sole question for decision depends upon the interpretation of the following clauses of the constitution: "Until otherwise provided by law, the governor, secretary of state, state auditor, treasurer, attorney general, and superintendent of public instruction, shall quarterly, as due, during their continuance in office, receive for their services compensation, which is fixed as follows: * * * Secretary of state, three thousand dollars per annum. * * * The compensation enumerated shall be in full for all services by said officers respectively rendered in any official capacity or employment whatever during their respective terms of office, and the salary of no official shall be increased during his term of office. No officer named in this section, shall receive for the performance of any official duty, any fee for his own use. * * * Article 7, § 4. "Except as otherwise provided in this constitution, no law shall extend the term of any public officer, or increase or diminish his salary or emolument after his election. * * * Article 5, § 31. "No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof, except interest on the public debt." Id. § 34. "The state auditor and state treasurer shall perform such duties as are prescribed in this constitution and by the laws of the state." Article 7, § 1.

This court, in the cases of *State v. Ah Jim*, ante, 76, and *Thompson v. Kenney*, ante, 733, inquired into the effect of the provisions of the constitution upon the statutes of the territory and state, and a repetition of the citations and conclusions therein will be avoided. We content ourselves with the observation that the foregoing language of the constitution and the laws concerning the territorial treasurer are applicable to this proceeding. What, then, are "appropriations made by law?" A majority of the states of the American Union have not adopted constitutions which specify the salaries that should be paid to their officers. Numerous cases can be found in their courts which de-

termine the necessity of an appropriation by the law-making department before the payment of money can be authorized by the custodian of the public funds. But the fundamental law of this state constitutes an exception in this important feature, and the decisions of such courts do not enlighten us. All the adjudications which construe constitutional phrases similar to those of Montana concur in their declaration of principles.

The leading case is that of *Thomas v. Owens*, 4 Md. 189, which was decided in 1853 by the court of appeals, and the opinion was delivered by the profound jurist, Chief Justice LE GRAND, after a thorough examination. Thomas was the comptroller of the state, and applied for a writ of *mandamus* to be directed to Owens, the state treasurer, commanding him to pay the amount of a draft drawn in payment of his salary. Owens refused payment on several grounds, including the following: "That no sufficient appropriation has been made by law specifying a sum applicable to the payment of the amount claimed by the petitioner." The gravity of the investigation, and the lucid reasoning of the court, induce us to be liberal in the use of excerpts. "The inquiry, then, is, is there an appropriation for the period intervening between the 10th of December, 1851,—the time from which we think he is entitled to pay,—and the 1st day of January, 1852? We are of opinion the constitution, *proprio vigore*, makes such appropriation. Under our system of government, its powers are wisely distributed to different departments. Each and all are subordinate to the constitution, which creates and defines their limits. Whatever it commands is the supreme and uncontrollable law of the land. This is not denied directly, although it is inferentially, substantially, and practically. It is said that, inasmuch as the 20th section of the 3d article of the constitution declares, 'No money shall be drawn from the treasury of the state except in accordance with an appropriation made by law,' that an act of assembly must precede the withdrawal; and inasmuch as none such has been passed covering the period antecedent to the 1st of January, 1852, there is therefore no appropriation by law for that time. To this reasoning we cannot yield our consent. In the construction of any instrument, the whole paper ought to be considered, that the will of its framers may be truly and accurately ascertained. The objects contemplated, and the purposes to be subserved, should be constantly kept in view, and the language used interpreted in reference to the manifest intent. Now, what could have been the purpose of the clause in the constitution to which we have referred? It was obviously inserted to prevent the expenditure of the people's treasure without their consent, either as expressed by themselves in the organic law, or by their representatives in constitutional acts of legislation." After citing *Story, Const.* (3d Ed.) § 1348, and 1 Tuck. Bl. Comm. 362, the opin-

ion continues: "These being the purposes and objects of the clause, the question is, have the people given their consent to the payment of the salary of the comptroller? That they have done so is palpably manifest. They have said he 'shall receive an annual salary of two thousand five hundred dollars.' They have not merely said he may claim such a sum, but, emphatically, that he 'shall receive' it. It is impossible for human language to be less ambiguous or more positive. The people, in their organic law, which is paramount to all other law, have not only given their consent, but they have imperatively issued their commands that the particular officer 'shall receive' it. How is their will obeyed if it be within the power of the treasurer, or any one else, to withhold it from caprice, unfaithfulness to duty, or from mistaken judgment? To allow of such a power in that officer would be to put him above the constitution, whose creature he is. It would be to invest him with authority to annul the sovereign will; in fact, to stop the wheels of government, and reduce things into the wildest confusion. The constitution has said the officer 'shall receive' his salary; and this fiat of the supreme will is not to be nullified by the mere *ipse dixit* of a mere ministerial officer; for such, and none other, is the treasurer. In assigning the powers of government to three different departments, the constitution intended to secure to each its independency of action; and, the more certainly and effectually to ensure this, it has ascertained and appropriated the salary they are severally to receive, and it has inhibited the legislature from diminishing it. Were it not for such a provision, the whole government would exist only by permission of the legislature. It can only be carried on through the instrumentality of individuals, and their services can only be obtained by being paid for. The framers of the constitution, and the people who adopted it, aware of this, determined not to submit the durability of their work to the caprice, passion, or prejudice which possibly might, at times of great excitement, triumphantly rule the action of the legislature; and, therefore, wisely did the work themselves, by ingrafting in the organic law a provision for the protection of those who should be charged with its execution. In other words, they made the appropriation. An opposite interpretation would countenance this paradox: that a co-ordinate branch of the government could stop its whole machinery, by refusing to pay the salaries of those upon whom is devolved the discharge of the duties of the other branches; and this, too, when the constitution expressly declares that these officers 'shall receive' their salaries, and that they 'shall not be diminished!' 'It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.' Marbury

v. Madison, 1 Cranch, 178. Now, it is presumed it would not be contended by any one, however hazardous, that if the legislature were to pass an act diminishing the salary of the governor, or of any other officer whose salary is fixed by the constitution, that such an exercise of power would be rightful and constitutional. If it be not competent to the legislature to take away a part, by what process of reasoning can it be maintained that they can take away the whole? And yet this is the extent to which the argument addressed to us goes. It seems to us to be but necessary to state the proposition to cause its instantaneous rejection. We hold, for the reasons we have assigned, the people have given their consent to the payment of the salaries fixed in the constitution, by declaring the amount 'shall' be 'received' by the particular officer; and that this is an appropriation by law,—by the supreme law of the state." The case of *Thomas v. Owens*, supra, is commented on in *Green v. Purnell*, 12 Md. 333, and the court said: "There, the petition asked for a *mandamus* requiring the treasurer of the state to pay the comptroller, upon his warrant, the amount of his salary, which is regulated by the constitution, and, of course, duly appropriated by law."

In *State v. Weston*, 4 Neb. 216, the "case raises the question of the authority of the state auditor to draw warrants upon the state treasurer for the payment of the salaries of the state officers when no appropriation therefor has been made by the legislature." The constitution of that state provides that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." If this clause, says Chief Justice LAKE, "had limited the appropriation which it requires to an act of the legislature, there might be some force in the objection urged. But it only requires a specific appropriation 'made by law;' and we are clearly of the opinion that this may be accomplished just as effectually by the constitution as by legislative enactment." The court further says: "In the case of *Reynolds v. Taylor*, 43 Ala. 420, it was held that if the salary of a public officer is fixed, and the times of payment prescribed, by law, no special annual appropriation is necessary to authorize the auditor to draw his warrant for its payment. But the case of *Thomas v. Owens*, 4 Md. 189, seems to be more directly in point. It was there held that when the constitution declared the amount to be paid an officer, that it was an appropriation made by law, and no legislative act was necessary." In *State v. Weston*, 6 Neb. 16, the court explains the decision in *State v. Weston*, supra, and asserts that "it reaches only those officers who hold by virtue of the constitution itself, and not to those who hold their offices at the will of the legislature;" and the "appropriation made by law * * * may be done either by direction of the constitution itself—that being the supreme law in the state—or by the legislature." We do not know of any rule to the con-

trary where the same constitutional provisions exist which are embodied in the supreme law of this state. An illustration of the principles which are applied where salaries of the officers are not prescribed by the constitution, and the case of *Thomas v. Owens*, supra, is not followed, may be found in *Myers v. English*, 9 Cal. 348. This was an application for a writ of *mandamus* to compel the state treasurer to pay certain warrants drawn by the comptroller on account of the salary of a district judge. The constitution provided that the judges of the district court shall severally, at stated times during their continuation in office, receive for their services a compensation, to be paid out of the treasury, which shall not be increased or diminished during the term for which they shall have been elected. Article 6, § 15. Another clause is the following: "No money shall be drawn from the treasury but in consequence of appropriations made by law." Article 4, § 23. It was correctly held by the court that it was necessary for the legislature to define the amount of the salary, and make an appropriation for the payment thereof, before this remedy could be enforced. This view of the constitution of a state has been adopted by the supreme court of the United States, in construing the clause of the federal constitution which declares that no state shall pass any "law impairing the obligation of contracts." Mr. Justice SWAYNE, in *Railroad Co. v. McClure*, 10 Wall. 515, asserts that "the constitution of a state is undoubtedly a law, within the meaning of this prohibition." In *White v. Hart*, 13 Wall. 652, the court holds "that a state can no more impair the obligation of a contract by adopting a constitution than by passing a law. In the eye of the constitutional inhibition, they are substantially the same thing." *Gunn v. Barry*, 15 Wall. 623; *Town of Concord v. Bank*, 92 U. S. 630; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 672, 6 Sup. Ct. Rep. 252.

We cannot add anything to the discussion of this vital proposition. The doctrines which were announced in *Thomas v. Owens*, supra, have been accepted for years without a question, and have remained inflexible under every test. The framers of the constitution of this state numbered upon their roll most eminent jurists and lawyers. They studied with wisdom and ability the charters which the people had granted to the states of the Union, in their efforts to obtain the best articles from all. They knew the precedents which have been enumerated, and the canons of interpretation which had been formulated by the courts, and deliberately created the sections of the constitution which fix the salaries of many state officers. In their action upon this subject they did not incorporate the provisions which are frequently in force in the instruments of this solemn character, and did not permit the legislature to have this great power. In order that there should be no erroneous construction of the clauses un-

der examination, the following section was adopted: "The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." Article 3, § 29. When, therefore, it is plainly declared that the secretary of state, or any other officer, shall receive a certain sum as compensation for his services, an appropriation is "made by law," and the proper officer is empowered to draw his warrant on the state treasurer in pursuance thereof; and the respondent is required to pay the above-described warrant to the relator. The demurrer (the respondent abiding by his answer and return) is sustained, and it is therefore ordered that a peremptory writ of mandate be issued forthwith according to the prayer of the application herein.

HARWOOD and DE WITT, JJ., concur.

(3 Wyo. 356)

FIRST NAT. BANK v. SWAN *et al.*

(Supreme Court of Wyoming. Feb. 5, 1890.)

ATTACHMENT — AFFIDAVIT — MOTION TO VACATE — FRAUD.

1. Rev. St. Wyo. § 2870, provides for an order of attachment in certain cases when there is filed an affidavit of plaintiff showing—"First, the nature of his claim; second, that it is just; third, the amount which the affiant believes he ought to recover; and, fourth, the existence of any one of the grounds for an attachment enumerated in the preceding section, or that the affiant has good reason to believe, and does believe, that some one or more of said grounds (stating which one) exists." Held that, where the ground for the attachment was that defendant had assigned part of his property with "intent" to defraud creditors, it was sufficient for the affidavit to recite that "affiant has good reason to believe, and does believe," this; but, where the ground was that defendant fraudulently contracted the debt or incurred the obligation sued on, the above recital is not sufficient, and the affidavit must allege the facts "showing" that affiant has good reason to believe that defendant fraudulently contracted the debt, *i. e.*, that is, the facts constituting the fraud.

2. Section 2910 provides that defendant may, at any time before judgment, move to discharge the attachment. Held, that a motion to discharge on the ground of insufficiency of plaintiff's affidavit raises, among other questions, the sufficiency of the statement of the ground of attachment.

3. Section 2911 provides that when the motion is made on affidavit, or papers and evidence in the case, but not otherwise, plaintiff may oppose the same by affidavits or other evidence in addition to the evidence (the affidavit) on which the order of attachment is made. Defendant filed an affidavit embodying a motion to discharge the attachment because of the insufficiency of plaintiff's affidavit. On the hearing, no ruling was asked for or made thereon, but the sufficiency of the grounds themselves were considered on affidavits and other evidence. Held, that defendant had waived the form of statement of the grounds in the affidavit.

4. Under sections 2514 and 2515, which define a trial as a judicial examination of issues arising on pleadings, the action of a court in hearing and determining a motion to discharge an attachment is not a trial, and may be reviewed in error on the entire record, without a motion for a new trial.

5. Conceding that the obligation of a debtor is incurred at the time he makes a renewal note for a past debt, it cannot be said that the obligation is fraudulently incurred because at the time of such renewal the maker's agent told the payee that the maker was worth a certain amount "in good property, stocks, and other property figured at a fair valuation," as this was but an expression of opin-

ion based on calculation; especially where the payee's reason for granting the renewal was based not solely on this representation, but on the maker's prior promise to pay him certain money, which he was expecting, as soon as he received it.

6. A voluntary conveyance of property raises a presumption of intent to defraud existing creditors of the grantor, and when attacked by such creditors the grantor must rebut this presumption by such a showing of his affairs at the time as would warrant the conveyance, and, failing in this, the conveyance will be held fraudulent.

Error to district court, Laramie county;
W. L. MAGINNIS, Judge.

Corlett, Lacy & Riner and *C. N. Potter*, for plaintiff in error. *Bryan, Seevers & Stewart* and *Hugo Donzelmann*, for defendants in error.

SAUFLEY, J. The First National Bank of Cheyenne, plaintiff below and in error, sued the defendants, Alexander H. Swan, Thomas Swan, and F. W. Lafrentz, on a promissory note for \$25,000, executed on the 28th day of April, 1887, and payable 30 days after date. Contemporaneously with the institution of the suit, an affidavit for an attachment of the property of each defendant was made and filed. In the court below, a motion to discharge the attachment was made, which was based upon an alleged insufficiency of the affidavit, and also upon affidavits intended to controvert the grounds of attachment. Upon hearing, it was adjudged that each allegation on which the writ was issued was untrue, and a conformable judgment was entered. It will be conducive to a clear understanding of the reasons upon which this opinion is based to quote those grounds of attachment which are relied upon to sustain the order: "This affiant has good reason to believe, and does believe, that the said defendants have assigned, removed, and disposed of a part of their property with intent to defraud creditors;" and similar averments as to each defendant. "This affiant has good reason to believe, and does believe, that the said defendants fraudulently contracted the debt to recover the payment of which the above-entitled action has been brought." This affiant has good reason to believe, and does believe, that the said defendants fraudulently incurred the obligation, to recover the payment of which the above-entitled action has been brought."

It will be perceived that these several charges are in verbal conformity to the statutes. Section 2870 reads: "An order of attachment shall be made by the clerk of the court in which the action is brought in any case mentioned in the preceding section, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing—*First*, the nature of the plaintiff's claim; *second*, that it is just; *third*, the amount which the affiant believes the plaintiff ought to recover; and, *fourth*, the existence of any one of the grounds for an attachment enumerated in the preceding section, or that the affiant has good reason to believe,

and does believe, that some one or more of said grounds (stating which one) exists."

In this case the attaching creditor adopted the more cautious method of imputing fraud to the defendants. The charge is simply one of belief and its reasonableness. Nevertheless, the language of the statute is followed. The initial inquiry presented by the motion to discharge is, is this sufficient? The question has been discussed and decided in several jurisdictions, but I have found no opinion based upon attachment statutes similar in all respects to our own. In the ninth and twelfth Ohio State Reports, (*Coston v. Paige*, 9 Ohio St. 397; *Harrison v. King*, Id. 388; *Emmitt v. Yeigh*, 12 Ohio St. 335,) the state after whose remedial jurisprudence ours was fashioned, it is held that the language of the statute may be followed. In Kentucky, California, and in other states the same opinion is held. But, without an opportunity for an examination of the entire line of precedents, it is believed that the opinions of courts so holding are based upon statutes differing in one essential respect from the Wyoming statute, unless it be proper to except a portion of the Wisconsin statutes, which are construed by the supreme court of that state in *Davidson v. Hackett*, 49 Wis. 186, 5 N. W. Rep. 459, and which will be subsequently considered. Sections 2869 and 2870 are exact transcripts of sections 5521 and 5522, Ohio Code, with the exception that the latter do not contain the concluding provision of subdivision 4, § 2870, Code Wyo., which allows the affiant to state his belief of the existence of a cause of attachment, and that he has good reason for the belief.

It cannot be questioned that, when the ground of attachment is a single and complete fact, substantive in its nature, and not dependent on associate facts or circumstances to establish its existence, it will be sufficient to state that ground in the words of the statute. Non-residency and foreign corporate existence may be said to be of this type. Further, when the ground of attachment consists of both an act and an intent, and is of such nature that the approved rules of pleading in civil actions would allow an averment that the act was done, or about to be done, with such intent, without formally setting forth the facts illustrative of that intent, in such case the language of the statute may be followed. Of this type are concealment to avoid the service of process, absconding with intent to defraud, and disposal of property with intent to defraud. In this last-mentioned type the substantive ground of complaint consists of two things—(1) The act done, which can be charged in direct language; (2) the purpose with which it is done, which is equally susceptible of direct averment. The evidence which may support the charge of intent need not, should not, be pleaded. The distinction between pleading the evidence which sustains the charge of a fact and pleading the facts

which constitute a cause of complaint should be kept in mind. An intent—that is, a purpose, an aim, a design—is, in jurisprudence, whatever may be said of it in metaphysics, as much a fact as is a physical act performed. The one is the exertion of the power of the mind; the other, the exertion of the power of the body. The concurrence of the two, in the instances given, constitute the ground of attachment. But when the ground consists of an act done in a manner or for a purpose which makes the act obnoxious to good morals, and that act, thus united to the purpose, is described in the statute only by words of legal import implying conclusions of law from stated facts, then, notwithstanding some *dicta* to the contrary, I think it may be seriously doubted whether a bare recital of the words of the statute is sufficient. Of this type is the ninth statutory ground of attachment, that the defendant has fraudulently or criminally contracted the debt or incurred the obligation. In a purely technical or confined sense, an affidavit for an attachment is not a pleading. In a broader and more rational view, it is a pleading, and is so denominated by the codes of procedure of some states. No reason can be assigned why the rules which tend to the production of a material, certain, and single issue in the altercations between the parties, commonly styled “pleading,” should not prevail with equal force in the procedure for obtaining an attachment. Indeed, if a difference should exist there is not wanting some reason to hold that greater strictness of allegations should be required when the extraordinary remedies of the law are invoked than when the ordinary remedies are sought. The rule of justice which forbids the taking of property, except according to the “law of the land,” means, as is well understood by the profession, that there shall be no taking, no condemnation, before hearing. While a seizure under attachment is not a “taking,” in the sense referred to, it is nevertheless a divestiture of possession,—one of the elements of a complete title. If by the policy of our laws the courts will not so much as inquire whether a citizen’s property shall be taken unless the accusation or complaint which is to authorize the taking is set forth in the way experience hath demonstrated to be wise, may it not, upon fair analogy, be held that, when a seizure—a degree of taking—is to be made before hearing, the accusation or complaint should at least conform to the approved rules of pleading.

Be this as it may, it is obvious that if a petition, setting forth a cause of action against a defendant, for fraudulently contracting a debt or criminally incurring an obligation, should merely charge, in the language of the statute, that the defendant fraudulently contracted the debt, or criminally incurred the obligation, it would be held bad on demurrer. No citation of authority or process of elaborate reasoning is needed to show that, in such case, the charge

of fraud or criminality is but the conclusion of the pleader. The court would require of him to state the facts which are supposed to constitute the fraud or crime. If this be a reasonable requirement, and it is exacted before the court will even hear the evidence upon which the plaintiff proposes to take the property of the defendant, or, indeed, before the court will compel the defendant to answer the accusation, why is it not the law that the plaintiff in attachment shall conform to the same rule before he seizes the property of the defendant? Upon what principle of jurisprudence is a ministerial officer authorized to issue a writ for the seizure of property upon an allegation in an affidavit which, if embodied in an action proper, a judicial officer would not require a defendant to answer?

It is one of the elemental rules that there shall be a correspondence between the *allegata* and the *probata*. If the naked charge that a defendant criminally contracted a debt be an allegation of fact, as distinguished from a conclusion of law and of fact, then it would logically follow that, if the defendant were allowed by statute to file a traverse of the affidavit, and did so file it, the plaintiff, to maintain his side of the issue, need only introduce a witness who would testify, *in hæc verba*, “the defendant did criminally contract the debt.” In opposition, the defendant would introduce a witness who would testify, *in hæc verba*, “the defendant did not criminally contract the debt.” Is it not apparent that there would then thus be, not simply the anomaly, but the absurdity, of a trial before the court without a single fact having been put in issue, or a single fact stated by a witness? Would it be anything more than an investigation by a judicial tribunal of the private opinions of a number of citizens?

Without meaning to decide these questions conformably to the line of reasoning presented, (since it is not necessary that a decision be made,) it does nevertheless seem imperative that there should, in the affidavit, be an averment of the facts conducing to show the fraud or crime, when, as in the case at bar, the affiant charges only that he believes, and has good reason to believe, that the defendant has perpetrated this wrong. Let us subject the statute to a brief analysis. The clerk shall issue the order of attachment when an affidavit is filed showing, among other things, that some one of the grounds for attachment exists, or that affiant has good reason to believe, and does believe, that one of them exists. If the affiant chooses to avail himself of only the latter part of the statute, there must be in the showing these two things: (1) the belief; (2) a good reason for the belief. With respect to the first, it may be said that affiant’s statement of it is sufficient. He is entitled to speak of the impressions upon or the state of his own mind. It is but a declaration of his own thought. But, with respect to the second, a different

rule prevails. His affidavit must show a good reason to believe that the ground exists; that is, that the fraud was perpetrated. Is this good reason shown by affiant's declaration that he has a good reason? It would be a unique process of reasoning which would force the conclusion that a good reason for a belief is shown to exist because it is said to exist. In what way must an affiant show that he has good reason to believe that an act has been committed in a manner which makes it criminal? Upon a plain dictate of common reason it can be shown in but one way,—to state the circumstances and manner of doing.

Presenting the substance and meaning of the statute, as applied to the case at bar, it is this: The plaintiff may have its order of attachment issued if it will file with the clerk an affidavit which will show that it has a good reason to believe that the defendants fraudulently contracted the debt on which they are sued. It will be observed that the language of the statute is not that the affidavit shall state or allege, but that it shall "show." The two words are not synonymous. Webster defines "show" in its transitive sense,—the sense in which it is used in the statute,—thus: to exhibit or present to view; to cause to see; to make apparent or clear, by evidence, testimony, or reasoning; to prove; to give the reason and explanation of; to manifest; to evince. So it is that the statute might read, without change of meaning, "the plaintiff shall exhibit a good reason for his belief, or he shall make apparent or clear by affidavit that he has a good reason to believe the defendant has fraudulently contracted the debt."

Now, an affidavit is one form of presenting testimony. Section 2609 declares: "Testimony of witnesses may be taken—*First*, by affidavit; *second*, by deposition; *third*, by oral examination." Section 2610 defines each thus: "An affidavit is a written declaration under oath, made without notice to the adverse party; a deposition is a written declaration under oath, made upon notice to the adverse party; and oral testimony is that delivered from the lips of the witness." It will be noticed that the only difference between an affidavit and a deposition is that one is made without and the other with notice. Now, suppose the statute, instead of conferring power upon the clerk to issue the writ when an affidavit is filed, should confer that power when a deposition is filed, showing good reason for deponent's belief that the defendant in attachment had fraudulently contracted the debt; and suppose, further, that the deponent should testify only that he did believe, and had good reason to believe, such fact existed. Could a rational doubt be entertained that such testimony would be incompetent? The difference between the two forms of testimony rests wholly on the question of notice. Why should a particular form of statement be held competent when made in an affidavit, and at the same time held grossly incompetent when embraced in

a deposition? It is no response to this to say that the question of the relevancy or competency of testimony cannot arise in such case. It does arise. The statute expressly declares that the attachment can issue only upon an affidavit. Another statute declares that an affidavit is one of the forms of taking or presenting testimony, and so it results that, where the law declares that a fact shall be shown by affidavit, it means that it shall be shown by testimony. It would seem idle to enlarge further, by affirming what is universally conceded, that when a fact is to be shown by testimony, competent testimony, and no other sort, can be lawfully considered or acted upon.

If the law had made it a ground of attachment that a debtor had violated the revenue law or the stock law, or any other general law, with permission to a creditor to have his writ upon filing an affidavit showing that he had good reason to believe that his debtor was guilty of one or the other, and pursuant to this the creditor should make his affidavit stating that the debtor had violated the stock law, would any judicial tribunal hold such testimony competent for any purpose? I perceive no difference in principle between this and the case under consideration. We cannot afford to indulge the presumption that the legislature intended to alter the established rules of evidence in favorism towards extraordinary remedies. We have no warrant to say that the legislature designed to authorize the issuance of an attachment upon a character of testimony which would receive judicial condemnation in any other procedure wherever the common law has taken root.

The proposition here advanced may be summarized thus: The affidavit of an attaching creditor is obviously something more than a piece of paper, and must be classified. It is, in its nature and intentment, either a pleading or it is testimony. In assigning it according to its legal relations, it must fall under the one head or the other, if, indeed, it may not properly fall under both. If the former, then its sufficiency must be tested by the rules of pleading; if the latter, then by the rules of evidence. It is needless to repeat that the application of either test reveals the defect.

The Ohio cases cited *supra* are not in conflict with these views, excepting the *dicta* contained in the reasoning of the court. In *Coston v. Paige*, 9 Ohio St. 397, the ground of attachment was a disposition of property with intent to defraud. In *Harrison v. King*, Id. 388, the plaintiff alleged that one of the defendants was about to remove his property, which would have the effect to delay the collection of the debt. In *Emmitt v. Yeigh*, 12 Ohio St. 335, the plaintiff charged that the defendant had conveyed his property to his son with the intent to defraud his creditors. In each case the supreme court held that a statement of a cause for an order of attachment, made in the language of the statute, is sufficient. This general principle

must, however, be confined to the particular facts of the cases decided. There is nothing to show that it was intended to be of universal application, and, if so intended, it would possibly be regarded as a *dictum*, even by the Ohio courts, except as to those cases where the same grounds of attachment existed, or other grounds bearing towards them a strong legal analogy. In none of these cases was the charge made that the defendant fraudulently contracted the debt, nor did the affiant rest his allegation upon a belief, and its reasonableness, that the cause existed.

In *Wheeler v. Farmer*, 38 Cal. 203, the supreme court holds that it is not necessary for the affiant to state the probative facts requisite to establish the ultimate facts. But it does not appear from the opinion what ground of attachment was relied on, nor does it appear that there is any statute in that state allowing the affiant to simply charge that he has good reason to believe that the cause exists. The court bases its opinion seemingly on the phraseology of the statute, without quoting it, and uses this language: "Under our statute, it is the duty of the clerk of the court in which the suit is commenced to issue the writ upon the filing by the plaintiff of an affidavit stating the ultimate facts in the language of the statute." By the words "ultimate facts" it is understood is meant the ground of attachment in manner and form as expressed by the statute. And so this case decides nothing more than that the statute expressly and imperatively requires the clerk to issue the writ when the words of the statute are employed. His duty to do so is by virtue of an unequivocal mandate imposing that obligation.

The case of *Davidson v. Hackett*, 49 Wis. 186, 5 N. W. Rep. 459, is more pertinent to the issue here involved than the other cases cited, and tends quite forcibly to sustain the contention of counsel for plaintiff. In that case the attaching creditor, following the language of the Wisconsin statute, made affidavit that he had good reason to believe that the defendant has assigned, disposed of, and concealed his property with intent to defraud his creditors. The defendant filed a traverse denying that he had assigned, or disposed of, or concealed his property with such intent. On proof heard as to the issue thus joined, the court below discharged the attachment, and the creditors appealed. The supreme court affirmed the judgment of the circuit court. In the former court counsel for appellants contended that the issue was not whether the defendant had in fact disposed of his property with fraudulent intent, but whether the creditors had good reason to believe that he had; arguing that if the creditors had sufficient reason to induce this belief, no matter how radically they were mistaken in fact, then the court should have sustained the attachment. In combatting this argument, the supreme court used this language: "If we make the proper distinction between the grounds upon which the law authorizes

the attachment to issue, and what proof must be made of the existence of such grounds before the attachment can issue, there is no difficulty in giving the statute its proper construction. The existence of certain facts justifies the creditor in attaching his debtor's property before he obtains judgment upon his claim against him, and before it has been judicially determined that he has in fact any just claim against his alleged debtor. * * * It is clear that the legislature makes the existence of some one of the facts above stated necessary in order to justify the issuing of the writ of attachment; but as the delay which would necessarily follow if the existence of such facts, or any one of them, were required to be established by judicial inquiry before the attachment issued, might defeat the very object sought to be obtained by the writ, the legislature have said that the writ may issue in the first instance, without plenary proof of their existence; that, for the purpose of issuing the writ and seizing the property of defendant thereon, it should be sufficient proof of the existence of such fact or facts, if the plaintiff, or some one in his behalf, shall make an *ex parte* affidavit of their existence, or that he has good reason to believe that they do exist, without stating any facts or grounds upon which his knowledge or belief is founded."

With the greatest possible respect for this opinion, and conceding to it much weight of authority, it seems to me that, in that line of reasoning by which it characterizes the delay following a judicial inquiry as to the existence of facts as possibly destructive of the end sought to be obtained by the writ, the court confuses the doctrine of pleading the facts with the practice, always reprehensible, of pleading the evidence by which the facts are to be sustained. It is not held by any one that there should be "plenary proof" of the existence of the fact alleged before the writ issues. No authority, or even *dictum*, can be found advancing the doctrine that, to authorize the issuance of an attachment under statutes similar to those of Wisconsin and Wyoming, there should first be a judicial inquiry into the sufficiency of the evidence relied upon to sustain the writ. In assailing this position, it is more probable that the court combats without an adversary. But I do hold that in every proceeding by which property is to be taken or seized, whether that proceeding be by action or in that form known as "special," the spirit of the law, and a fair interpretation of its letter, require that some fact—not an inference or conclusion from a supposed state of facts, predicated upon an affiant's statement that he has good reason to believe his inference is correct, but that some fact—be alleged in direct, unequivocal language, which, if it be found to exist, will render the defendant amenable to the process of the law. A fact charged is one thing; the evidence which will support the charge is another. The first is a thing to be averred; the second, a thing to be omitted

from averment. To a certain extent, I am in accord with the Wisconsin court, but am unable to perceive that its line of argument applies to the issue in this case. Proceeding further, the court says: "There is every reason, therefore, why the issue upon the traverse should put in issue the fact of the fraud or other cause, and not the belief, or good reason for the belief, of the plaintiff as to its existence. The language of the statute itself would seem to leave little doubt as to what is put in issue." The statute is then quoted, and the court, interpreting the statute, continues: "These facts [put in issue by the traverse] are * * * that the defendant is a non-resident of the state, or that he has committed some one or more of the fraudulent acts enumerated in the statute. It clearly is not a material fact, within the meaning of that section, whether the person making the affidavit knows, or has good reason to believe, that such facts exist."

Under the Wisconsin statute, which allows a traverse to be filed by the defendant, and which limits the traverse to the negation of the ground of attachment, as distinguished from the affidavit made to procure the issuance of the writ, the opinion of the court that the issue is upon the cause, and not upon the statement of that cause, seems to be faultless. But how far that opinion may be accepted as a general authority upon cognate questions depends chiefly, if not wholly, upon the measure of conformity of the statutes of other jurisdictions to the Wisconsin statute. Suppose the Wisconsin statute had read, as do the statutes of some other states: "The defendant may file his affidavit denying all or any of the statements of the affidavit on which the attachment is issued, and thereupon the attachment shall be considered controverted, and the affidavits of plaintiff and defendant shall be regarded as the pleadings concerning the attachment, and have no other effect." In such case, would not the issue necessarily be that which is made by the traverse? They are the pleadings on the attachment branch of the case, and the object of all pleading is the production of an issue. If the issue be one which the court cannot try, or which is not determinate of the rights of one party or the other, then the pleadings are defective. If the plaintiff tenders a false issue, and it is accepted, or, in other words, if he makes his charge in such form as that the charge does not conform to the statutory ground of attachment, and the defendant elects to meet the charge as made, by filing his traverse, then must the plaintiff suffer the consequences of his own mistake.

Now, the Wyoming Code contains no statute expressly allowing the defendant to file a traverse either of the ground of attachment, or of the statements of the plaintiff made in his affidavit for the writ of attachment. The only provisions tending in this direction are found in sections 2910, 2911. The first reads: "The defendants may at any time before judgment, upon reasonable notice to plaintiff,

move to discharge the attachment as to the whole or any of the property attached." Second: "When the motion is made upon affidavits on the part of the defendant, or papers and evidence in the case, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to the evidence on which the order of attachment is made."

From these provisions, it appears that the defendant is required to proceed by motion, and that any affidavit used by him is to be taken, not as a "traverse," in the technical sense of that word, but as an instrument of evidence. But the motion to discharge which is allowed is, in its functions and office, similar to a demurrer, if based upon defects apparent on the record. If the plaintiff should omit an averment of the justice or amount of his claim, this motion would reach the defect; otherwise the action of the clerk in issuing the writ would be conclusive, and the defendant would be remediless. In the case at bar, the defendants did file an affidavit attempting to deny the grounds of attachment, but, as we have seen, this was not permissible, as such. Some of the denials were too broad, and put nothing in issue. They were fatally defective, in this: that the denials of the grounds of attachment were conjunctive, instead of disjunctive. But, besides this, the defendants availed themselves of the privilege of making a motion to discharge upon the ground of insufficiency of plaintiff's affidavit. What question is therefore raised by such motion? By fair analogy, it seems that every question arising out of the record is raised upon which depended the plaintiff's right to have an attachment issued. Upon what does that right depend? Clearly, as much upon plaintiff's obligation to make an affidavit in proper form, as upon the independent fact that the defendants have committed some act obnoxious to the law. In this view of the matter, the principles of *Davidson v. Hackett*, supra, are without application. There a formal traverse was allowed and filed. The issue was made up, and, according to statute, it was confined to the alleged existence of the ground of attachment, and did not, and could not, reach the manner and form in which that ground was charged in the affidavit. While the form of procedure under the Wyoming statute may not be quite so systematic, and the statute itself may not be expressed with that accuracy of language necessary to convey unmistakable meaning, by giving to it a fair and reasonable interpretation, it is broader in its scope than the Wisconsin statute, and will enable the defendant to avail himself of every defect in the proceeding of the attaching creditor.

The foregoing views relate to the opinion I entertain as to the sufficiency of the affidavit filed by the plaintiff, and would constrain me to the conclusion that the judgment of the district court should be affirmed, except for one thing. In the court below the de-

fendant filed his counter-affidavit, embodying in it a motion to discharge the attachment because of insufficiency of the affidavit of the plaintiff. As the record sufficiently discloses, the court was not at any time asked by defendant to adjudicate this question, and it did not pass upon it, either at the beginning of the trial of the grounds of attachment nor in the rendition of final judgment. Both parties proceeded at once to try the questions of fact which were raised, and no attention seems to have been given by any one to the motion to discharge upon the ground that the affidavit of plaintiff was insufficient. I think that this omission to request the action of the court, and consenting to proceed to an investigation of the facts, may be likened to the failure, for instance, of a defendant who has filed a demurrer to a pleading supposed to be bad for merely formal defects, and fails or omits to ask the court to rule upon it, but files his answer, and voluntarily proceeds to trial. In such case the defendant is deemed to have waived his demurrer, and cannot, after verdict and judgment, be heard upon the grounds alleged in his demurrer. The rule would be different if it went to the jurisdiction of the court or to the cause of action. Here the question raised by the motion was one relating to form. It was not relied on below, a ruling was not asked, and none was made. I must therefore conclude that it was waived, and that this cause must be considered and decided independently of it.

Counsel for defendant in error contend that the judgment should be affirmed because the plaintiff did not make a motion for a new trial. This was not necessary. The issue tried by the court was not one of fact or of law arising out of the pleadings. Section 2652 defines a new trial as a "re-examination in the same court of an issue of fact after a verdict by a jury, a report of a referee or master, or a decision by the court;" and the sixth subdivision of the same section provides that a new trial may be granted upon the ground that "the verdict, report, or decision is not sustained by sufficient evidence, or is contrary to law." Bearing in mind that a new trial is as thus defined,—that is, that it is a re-examination of the same issues previously tried,—it becomes important to know what is meant by a trial and by an issue, in the legal acceptance of those words. Section 2514: "A trial is a judicial examination of the issues, whether of law or of fact, in an action or proceeding." Section 2515: "Issues arise on the pleadings where a fact or conclusion of law is maintained by one party, and controverted by the other. They are of two kinds: *First*, of law; *second*, of fact." From these provisions, and from the sections which follow those quoted, it seems clear that the action of a court in hearing and determining a motion to discharge an attachment is not, in a strictly legal sense, a trial, and therefore the action of the court may be reviewed in error, if the entire record, including the final judgment in the cause, is brought up, although

a motion for a new trial was not made below.

Of the grounds of attachment alleged, the first about which there seems to be serious controversy is that the defendants fraudulently incurred the obligation to recover the payment of which the action is brought. The note is dated April 28, 1887. From the testimony it appears to be the renewal of a note, or several notes, which the plaintiff had held against the defendants for perhaps one or more years prior to that date. In the renewal of the note, Lafrentz acted as the agent of the defendants Alexander and Thomas Swan, who were absent at the time, and he affixed their signatures to the note. It is satisfactorily shown that his agency for this purpose was full and complete. The only testimony offered on this head was that of the president of the bank. On direct examination, the following questions and answers appear in the bill of exceptions, which is all of the testimony elicited by the plaintiff on the subject of fraudulent representations: "Question. While the negotiations were in progress in relation to the renewal of this paper, state what, if anything, was said by you to Mr. Lafrentz in relation to the financial standing of Swan Bros., and what, if any, reply was made. Answer. I asked Mr. Lafrentz the direct question, what kind of condition they were in. He replied that he had recently taken off a balance sheet of Swan Bros., and that they were worth \$800,000, over and above their liabilities. Q. What further did you ask him? A. I asked him what it consisted of. He said: 'Good property; stocks and other property, figured at a fair valuation.' Q. Now you may state what, if anything, induced you to renew the paper. A. The representations made by Mr. Lafrentz." On cross-examination, the witness stated that the renewal was not made entirely on the strength of this representation, but partly on a representation Alexander Swan had previously made, that in a few days money would come to him from England, with which he would pay a considerable portion of his indebtedness to the bank.

On this testimony a question may be made. When did the Swan Bros. incur the obligation to pay this debt? Was it at the time of the renewal of the note, or at the time the debt, of which the renewal note is but an evidence, was created? It may be argued with some force that it was when the debt was first created. It was then that the consideration was received. The obligation to pay the debt was concurrent with the obtaining of the money. The note first executed was but the contemporaneous evidence of the obligation, and the note renewed only a substituted memorial of the original transaction. When this note was renewed, the consideration had actually passed, and with the receipt of that consideration the resulting obligation, continuing in undiminished force and perpetuated in the renewal, instantaneously arose. It would therefore follow, if this view be correct, that fraudulent representations, made

at the time of or pending the negotiations for renewal, would fail to establish the proposition that the obligation to pay the debt was fraudulently incurred. But, waiving further consideration of this particular topic, and assuming that the obligation was incurred when the note was renewed, does the evidence show the fraud charged?

To constitute a fraud through the practice of which another is induced to transfer value, there must be something more than false representation. The representation may be false, it may be made to induce action, and it may be acted on; it may be as to a matter exclusively within the speaker's knowledge,—and yet it may not amount to actual fraud in law. The materiality of representation is a factor not to be eliminated. The representation must be as to a material fact, which is acted on by the complainant to his damage, and reasonably believed by him to be true. A statement which is but an expression of an opinion has never, unless in exceptional and peculiar cases, been held to be the representation of a fact. Judicial decisions throughout the country, to the effect that representations of value, or expressions involving deduction and calculation, though false, do not imply legal fraud, are so numerous that they need not be cited. The representation made by Lafrentz that the Swan Bros. were worth \$800,000, over and above their liabilities, and that this worth consisted of property and stocks figured at a fair value, is, in its most pronounced form, an expression of opinion as to values,—an opinion, too, which is based on paper calculation, and the estimated price of stocks. Nor does it appear from the testimony that the bank officer made any inquiry of Lafrentz as to the location of the property, or the habitat of the corporations in which the stock was held, nor as to the income or dividends of either of them. A party about to consummate a contract by which he parts from property cannot, when the opportunity is before him, and there is nothing in the situation of the parties to prevent investigation, decline to prosecute a reasonably diligent inquiry, refuse to exercise his own judgment, and then be heard to complain of an imposition or fraud practiced on him. Besides, as it appears from this officer's testimony, he did not rely entirely on Lafrentz's representations. They may have been persuasive, but they were not convincing nor controlling. His reliance in part was on a previously made promise of Alexander Swan that, when some money should come from England, he would pay \$30,000 on his general indebtedness to the bank. It is sufficient to remark concerning this statement of Swan's, even if it had been made at the time of the renewal, that it was not a representation, but a promise. "No equitable estoppel arises from a mere promise." 2 Pom. Eq. Jur. § 877, and note. A representation which is promissory in its nature, which relates to the future, or which depends upon contingencies which may or may not

happen, furnishes no foundation for a claim of fraud or deceit. *Thorwegan v. King*, 111 U. S. 549, 4 Sup. Ct. Rep. 529. Moreover, from anything to the contrary which appears in the record, Swan may have kept this promise. He may have paid this particular sum on his general indebtedness, and, while it is wholly immaterial whether he did or not, it may be presumed that he did, since nothing in the record shows to the contrary.

The next inquiry is, did Alexander and Thomas Swan, or either of them, dispose of property with intent to defraud creditors? On the 14th day of May, 1887, acknowledging their insolvency, they executed an assignment of their property for the equal benefit of their creditors. It is shown by the evidence that the larger per cent. of this indebtedness was in existence some years anterior to the date of assignment, and that it amounted to hundreds of thousands of dollars. On the 18th day of August, 1886, Thomas Swan purchased, for the sum of \$6,000, two improved lots in the city of Cheyenne. Subsequently, at a date not disclosed, he conveyed this property to Kelly, who reconveyed to Swan's wife. The scheme was for the purpose of putting the title to the property in Mrs. Swan, and it must therefore be regarded as a voluntary conveyance to the wife. On the 10th day of November, 1886, Alexander Swan, for the consideration, as recited in the deed, of \$30,000, purchased and caused to be conveyed to his daughter a highly improved piece of real property in Cheyenne. This must also be regarded as a voluntary conveyance. There can be no reasonable doubt that each of the Swans was, at the date of these conveyances, largely in debt, and trembling on the verge of bankruptcy. Conveyances made upon a valuable consideration are not presumptively fraudulent, although the grantor's indebtedness exceeds the value of all his property. The transaction, in the absence of proof to the contrary, is held to be only a change of assets. The rule is different as to voluntary conveyances. These create a presumption of intent to defraud existing creditors, but this presumption is disputable, not conclusive. When a voluntary conveyance is attacked as fraudulent by an existing creditor, the burden is on the opposite party to show by proof the condition of grantor's affairs at the time, the amount of his indebtedness, and such other facts and circumstances as will tend to rebut the presumption. If this is not done, the presumption of law must govern, and the conveyance held fraudulent. In *Dunlap v. Hawkins*, 59 N. Y. 347, the court most excellently summarizes the law on this subject: "By proving the pecuniary circumstances and condition of the grantor, * * * his business, and its risks and contingencies, his liabilities and obligations, absolute and contingent, and his resources and means of meeting and solving his obligations, and showing that he was neither insolvent nor contemplating insolvency, and that an inability to meet his obligations was not and

could not reasonably be supposed to have been in the mind of the party, is the only way in which the presumption of fraud, arising from the fact that the conveyance is without a valuable consideration, can be repelled or overcome." In harmony with this opinion are *Sexton v. Wheaton*, 8 Wheat. 229; *Keir v. Smith*, 20 Wall. 31; *Jones v. Clifton*, 101 U. S. 225, and many other authorities.

On the trial below the defendants made no attempt to rebut the presumption of fraud. Indeed, it cannot be considered a remark unfortified by the record, that it was not possible for them, or either of them, to repel the presumption. Their entire testimony on the subject of their business was confused, unsatisfactory, and characterized by a strange lack of knowledge of their own affairs. The conclusion is irresistible that they are both shown to have conveyed property to their relatives which their creditors had a right to look to as security for their debt. No satisfactory explanation of this is given, or attempted to be given. Such conduct the law denounces as fraud, and it furnishes ground for attachment. It is unnecessary to discuss other questions which are relied upon by plaintiff in error, as the judgment of the lower court must be reversed on its ruling as to these voluntary conveyances. The chief justice, having been of counsel in the court below, does not sit in the hearing or participate in the decision of the case. Justice COHN does not commit himself as to the sufficiency of the affidavit of plaintiff, but concurs in the residue of the opinion. Therefore the judgment of the district court discharging the attachment is reversed, and the cause remanded, with directions to vacate the order of discharge, and to enter an order sustaining the ground of attachment, as herein indicated, and for such further proceedings as may be proper, either in the subsequent prosecution or administration of the cause.

(6 Utah, 319)

SELEY v. SOUTHERN PAC. RY. CO.

(Supreme Court of Utah. March 4, 1890.)

MASTER AND SERVANT — DANGEROUS PREMISES — RISKS OF EMPLOYMENT — CONTRIBUTORY NEGLIGENCE.

1. It is negligence to use, at a station where there are several tracks, and where couplings are required to be made promptly, open instead of blocked frogs, whereby the feet of employes making couplings are liable to be caught.

2. Risks of employment do not include risks arising from neglect to use safety blocks in frogs, on the employer's railroad track; that being a reasonable means to prevent injury to employes making couplings.

3. The duties of a conductor of a freight train being somewhat general, one who has been conductor seven years, and brakeman for several years previously, is authorized, when his train is late, and the brakemen have made unsuccessful attempts to couple a car, to try to couple it himself.

4. It was not necessary that a freight conductor, killed by catching his foot in an open frog while making a coupling, should have given the company notice of the danger from open frogs, nor did he assume the risk of danger therefrom by continuing in his employment after knowing that a safety block would remove its perils.

5. His train being late, a freight conductor, after three unsuccessful attempts by his brakemen to couple on a car, tried it himself. He failed the first time, and a brakeman testified that he then had his foot in the frog, and he told him to take it out. On going in again, he caught his foot in a frog, and was killed. From the testimony of the fireman, it appeared that the cars were moved each time, making it doubtful whether there was a frog at the place of the first attempt. Held, that a verdict for plaintiff would not be set aside on the ground of contributory negligence, though all the frogs were open ones, and known to be so by deceased.

Appeal from district court; H. P. HENDERSON, Judge.

Marshall & Royle, for appellant. *E. M. Allison, Jr.*, and *Kimball & White*, for respondent.

ZANE, C. J. This action was instituted by the administratrix of the estate of the late William H. Seley, to recover damages to his widow and children in consequence of his death, occasioned, as alleged, by the negligence of the appellant. The deceased was employed by the appellant as a conductor on its freight train, and while endeavoring to make a coupling at Wells, a station in Nevada, one of his feet became fastened in an open frog, and he was run over by a car and killed.

It appears from the evidence that blocked or cast-iron frogs are used in many tracks. In these the point of the space between the rails is filled with wood or other material, so that the foot will not be held. This block is a simple device, practicable and inexpensive, and prevents the danger. It is called a "safety block." There were six or seven tracks at Wells, and three frogs, and at such a place couplings are required to be made promptly, at all times of the day and night, and the exclusive attention is necessarily directed to the coupling. The individual, at such times, cannot act with deliberation, and his eye, as well as his attention, is necessarily drawn to the coupling. Open frogs, in which the foot is liable to be caught, and from which a release is difficult without more time than a man has when making a coupling, necessarily add to his hazards. The safety block has been in use for years past. It is a simple device for the protection of employes engaged in a very hazardous employment. It is no longer an experiment. It is said that the employer is not bound to employ the latest improvements in machinery; that he is only required to see that the instrumentalities he does use are safe and suitable. An old machine or device may have been considered safe and suitable, as compared with old machines or devices, but, as compared with newer and more perfect ones, it may not be considered safe or suitable; for the human mind is ever engaged with new inventions, and human ingenuity, with wider experience, additional skill, and with ceaseless energy, removes old impediments and dangers in perfecting the old, as well as by inventing the new. While a railway company is not required to experiment with novel inventions alleged to be

safer and more suitable, yet, when experience has demonstrated that their use does remove hazards, and preserves the lives of their employees engaged in dangerous employments, prudence, as well as humanity, demands that such new agencies shall be used. Such companies have no right to continue to employ such dangerous and destructive agencies as wound and kill their employees, when safer and better ones are in use. We are of the opinion that the appellant was guilty of negligence in using the open frog.

It is said that the defendant did not insure the deceased against injury from the dangerous agencies which it necessarily employed, and that he assumed the ordinary risks incident to his employment. While this is so, the deceased did not assume the risks from defendant's negligence. Ordinary risks are such as remain after the employer has used all reasonable means to prevent them. The ordinary risks of an employment differ from the risks from the employer's negligence. The injuries resulting to the employee from the ordinary risks of his employment he must bear, but those that come to him alone from the employer's negligence the latter must bear. In not using the safety block, the appellant neglected a reasonable means to prevent injury to its employees in making couplings, and if the deceased, without his fault, lost his life from that neglect, the defendant must pay his wife and children their loss; the defendant must bear it.

It is claimed that the deceased, as conductor, was not authorized to couple cars, and that, therefore, the defendant is not liable. It appears from the evidence that the conductor of a freight train is expected to use all reasonable diligence to get his train through on time, and that in so doing he assists in switching and making couplings, if he deems it necessary. His duties are somewhat general. It appears from the evidence that Seley's train had come into the station late, and that one of the brakemen had made two attempts to couple a car on, and had failed, and that the other brakeman had failed once; that five or ten minutes had been lost in these attempts; and that the deceased, who had been conductor about seven years, and brakeman a number of years before that, then said he believed he could make it, and then made the effort. Under these circumstances, as a diligent and faithful freight conductor, we think he was authorized by the terms of his employment to make the effort. To have stood by under such circumstances, without bringing to bear his experience and skill, might have been regarded as an indication of indifference, and a lack of zeal in his employer's business.

It is also said that the deceased ought to have informed his employer of the open frogs in use in its track, and that they were dangerous, and to have exacted a promise to repair in a reasonable time; and without such a promise, or in case of a failure to comply with it if made, he should have left the ap-

pellant's employ. No notice was necessary, because the deceased had no right to assume that his employer was ignorant of the open frogs in its track. He must have known that the company had failed to employ the safety block for 15 or 20 years. He had been brakeman and conductor on its road for the greater part of that time. Nor do we think that the deceased assumed the risk from the open frog by entering the defendant's employ with it in use, or by continuing in such employ after he knew the use of the safety block would remove its perils. Imminent danger from a defect in a machine or other instrumentalities, which could be remedied or removed by reasonable and practicable means, is not like those dangers that are less threatening, and which a reasonable man might think he could avoid injury from by a high degree of care. Ordinarily, the duties of a conductor do not expose him to the perils from open frogs. In the discharge of the duties of his employment he does not usually feel called upon to assist in switching or coupling cars, and, if his attention should be directed to the dangers from the open frog, he might reasonably conclude that he would not very often, if ever, be exposed to its hazards in making a coupling over it. In the case of *Patterson v. Railroad Co.*, 76 Pa. St. 389, the court said: "If the instrumentality by which he is required to perform his service is so obviously and immediately dangerous that a man of common prudence would refuse to use it, the master cannot be held liable for the resulting damage. * * * But where the servant, in obedience to the requirement of the master, incurs the risk of machinery which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary caution or skill, the rule is different. In such case the master is liable for a resulting accident."

It is also claimed that the negligence of the deceased caused or contributed to his death, and that, therefore, the defendant is not liable. One of the brakemen testified that they came into Wells behind time, and that he made two attempts to couple the car onto the train, and the other brakeman made one; that the deceased then said that he believed he could make it, and went in, and failed; that the link was too short; that he said to the deceased that his foot was in the frog; the deceased then took it out, and stepped out beside the track; that witness then got a longer link, and the deceased again went in to make the coupling, and the toe of his shoe caught in a frog, and the deceased was run over and killed. Witness further said there were about five minutes between the time the deceased came out and the time he went in again and was killed. The fireman who was managing the engine at the time testified that, when the train backed down to couple onto the cars, one of the brakemen tried to make the coupling, but failed; then the other brakeman stepped in, and he failed, but

still signaled to back up, and went in a second time, and as he came out the conductor come up, and the signal was given again to back up, and he stepped in between the cars, and then stepped out, and walked down in the same direction the train was moving, giving signals all the time to come back. He walked 15 feet probably, and stepped in again, and the witness saw no more of him till after he was run over. It would seem from the brakeman's testimony that the deceased made his second attempt at the same place he made the first, and that the toe of his shoe caught in the same frog that the brakeman told him to take his foot out of. He says about five minutes intervened between the two attempts, and it appears that the cars to be coupled were moved at each attempt, and the inference from the fireman's testimony is that the place of the second attempt of the deceased was about 15 feet from the place of the first. If so, the statement of the brakeman that the deceased placed his foot in a frog when making his first attempt may not be correct.

The evidence shows but three frogs,—two at one place, and one at another,—and their distance apart does not correspond with the distance between the places where the two attempts were made. This evidence presented a conflict for the jurors to consider, and reconcile if they could, and, in case they could not, to determine whom they would believe. The deceased had been conductor seven years, and before that he was a brakeman. He had experience, and probably possessed skill, as a car-coupler, and it was his duty to get his train through, and he was behind time, and was still delayed with the coupling. Under these circumstances, he made his last effort. At the time, his attention must have been directed to the link he was endeavoring to manipulate, and to the movement of the cars, not to where he was stepping. In moving his feet, under these circumstances, he did not raise one of them high enough, and the toe of the shoe caught in the frog. The jury must have found that he used due care, and that his negligence did not contribute to the fatal injury. The jury were not required to test the conduct of the deceased by some imaginary standard requiring unusual care. He was only required to exercise ordinary care, such as might be reasonably expected of experienced brakemen under similar circumstances. The court below overruled the defendant's motion for a new trial, and entered judgment on the verdict.

It was within the province of the jury to reconcile the statements of the witnesses, so far as they could on any reasonable hypothesis, and to judge of their credibility, to draw all reasonable inferences from the facts in evidence, and to determine what the conduct of the deceased was, and the circumstances surrounding him, and how his mind was occupied at the time of the fatal injury. When there is any evidence in support of a

verdict, it will not be set aside because it is against the weight of the evidence, unless it is so clearly wrong as to authorize the court to believe it was the result of a mistake, or that the jurors acted from passion or prejudice, or some other improper motive. *Kane v. Railway Co.*, 128 U. S. 91, 9 Sup. Ct. Rep. 16, was an action to recover damages in consequence of an injury to a brakeman from a missing step which he knew was gone, but failed to think of at the time of the injury. The court said, in the conclusion of its opinion: "We are of opinion that the court erred in not submitting to the jury to determine whether the plaintiff in forgetting or not recalling, at the precise moment, the fact that the car from which he attempted to let himself down was the one from which a step was missing, was in the exercise of the degree of care and caution which was incumbent upon a man of ordinary prudence in the same calling, and under the circumstances in which he was placed. If he was, then he was not guilty of contributory negligence that would defeat his right of recovery." The following cases we regard as analogous in principle to the case in hand, and support this decision. *Snow v. Railroad Co.*, 8 Allen, 441; *Plank v. Railroad Co.*, 60 N. Y. 607; *Devlin v. Railway Co.*, 87 Mo. 545; *Railway Co. v. Bayfield*, 37 Mich. 205; *Fernandes v. Railway Co.*, 52 Cal. 45.

The case of *Snow v. Railroad Co.*, supra, was instituted to recover damages for an injury in consequence of stepping into a hole in a plank between the rails of the track. This language appears in the opinion: "Nor do we think it was any the less a question of fact to be decided by the jury because it appeared that the plaintiff had previous knowledge of the defect in the road which caused the accident. This certainly was a circumstance to be taken into consideration, but by no means a decisive one. If the service to be performed by the plaintiff was of a character to require that his exclusive attention should be fixed upon it, and that he should act with rapidity and promptness, it could hardly be expected that he should always bear in mind the existence of the defect, or be prepared at all times to avoid it." The danger causing the injury complained of in the cases cited was the only one shown of the same character, while in this case the frogs in the defendant's track were all open and dangerous. And this is urged as a material distinction. But we incline to the opinion that a careful man, informed of a number of open frogs, would be as likely to overlook one happening in his way, when making a coupling, as he would with knowledge of but the one causing the injury. Whether the failure to recall the danger at the time of injury in either case could be consistent with common prudence would be a question for the jury to determine. The judgment of the district court is affirmed.

ANDERSON and BLACKBURN, JJ., concur.

(6 Utah, 327)

MAXFIELD v. WEST et al.

(Supreme Court of Utah. March 1, 1890.)

PAROL CONTRACT TO SELL LAND.

A parol sale of land without delivery of possession is void, though part of the price was paid; and it is immaterial that the contract was a renewal of one under which possession had been delivered to the purchaser, the former contract having been mutually abandoned.

Appeal from district court, first district; H. P. HENDERSON, Judge.

Action by John W. Maxfield against Joseph A. West, Sarah Kershaw, A. J. Kershaw, A. C. McKinney, R. C. Landy, and Fred. J. Kiesel to enforce a contract for the sale of land. Decree was rendered for defendants, and plaintiff appeals.

Sutherland & Judd, for appellant. *A. R. Heywood*, for respondents.

BLACKBURN, J. Heber J. Grant, for himself et al., loaned to Straub \$2,000, and took a trust-deed to secure the same. The money was not paid, and the property in controversy was sold to pay the same. The respondent West was a part owner of the money loaned. At the sale the property was bid off for \$2,000 by West for the appellant, in pursuance of a previous arrangement between appellant and Grant, which was that appellant was to take the property at that sum, and pay for the same in installments. West took the deed in his own name, and requested Straub in writing to deliver the possession of the property to appellant, as he had bid it off for him. Appellant took possession of the property, and left it with West to rent for him. The property was in the city of Ogden. West lived in Ogden, and appellant and Grant lived in Salt Lake City. Afterwards appellant paid to Grant \$600 on the property, and gave a note and mortgage to secure the balance. West leased the property for six months, the title still remaining in him, and executed a deed, subject to the lease, and tendered the same to appellant, and appellant refused to accept it with the clause subject to the lease, and thereupon he complained to Grant, and he and Grant mutually agreed, that the trade should be declared off, and Grant paid him back his \$600, with interest, and the note given was canceled. It seems the property did not sell for enough to pay off the whole debt to Grant and the parties interested, and West testifies appellant agreed, in order to make up some of the loss they had suffered, that he (West) might have the rent on the property for six months. This appellant denied, and on account of this disagreement the trade was declared off. The sale was in May, 1887. Afterwards, in August, Grant and West having failed to sell the property, West informed Grant that he was willing to allow appellant to have the six months rent if he would now take property on the original agreement, and Grant and appellant met in Salt Lake City, and renewed the old agreement, and appellant gave his note to Grant for \$2,000, dated of the same date as the one that was canceled, so

as to fit the description in the mortgage which had not been receipted on the record, and paid Grant \$400, which was credited on the same. In the mean time, before he had any notice of the sale to appellant, West bargained the property to the respondent Fred J. Kiesel, but both he and Kiesel had notice of the sale to the appellant before this trade was consummated; but West had gone from home, and had left a deed duly executed by himself and wife, to be delivered to Kiesel on payment of the purchase money. When West learned the facts, he refused to carry out either trade, and did not deliver the deed to Kiesel, and take the purchase money, although tendered to him. Appellant then commenced this suit against West alone, alleging he had paid for the property, and was entitled to a deed therefor. A few minutes afterwards Kiesel commenced a suit claiming substantially the same thing. Kiesel's suit went to judgment, and a decree was made giving him the property.

It is not necessary to go into the details of the suit of Kiesel, as we think that suit in no way determines the rights of the parties to this suit, as appellant was not a party to it. When his suit was commenced appellant had paid on the purchase money of the property to Grant something over \$1,000. As to whether the agreement about the rent for six months, as stated by West, was true or not, we will not decide, for it was a controverted fact, and about it there was conflicting evidence, and the court below found the fact to be with West. There was evidence enough to support that finding, if not a preponderance in its favor, and the rule is the same as in reference to the finding of a jury that the appellate court will not disturb it unless it is clearly wrong. But we think that fact wholly immaterial, for the parties disagreed about it, and mutually agreed the trade was off, and the appellant took back the money that was paid and his note, and that ended the whole matter up to that time, and neither party could claim anything on account of the canceled agreement. We have nothing to do with the question whether the decree against West in favor of Kiesel was correct or not; for, if the appellant could enforce his claim against West, he could also against Kiesel, as Kiesel had notice of appellant's rights before he paid for the property, or tendered payment, and was made a party to this suit, by an amended complaint. The question then is, can the appellant enforce his agreement with Grant of the date of August 19th, against the respondent West and his grantees? We think not. The property had been left on West's hands as the owner, and the appellant had no more claim upon it than a stranger, assuming that Grant had had authority to sell it to the appellant, and that he did bargain it to him, the new contract would require the same solemnity and the same requisites to make it valid under the statute of frauds as if made with a stranger under the statute. 2 Comp. Laws Utah, 153, 154. A person acquires no equity

in law that can be enforced in a court of equity by a parol purchase, with a part payment of the purchase money. This is a parol transfer of land, with a part payment of the purchase money, no possession passing under the contract; for, if the appellant had possession under the first contract, he had completely abandoned it by a cancellation of that contract. The fact that a part of the purchase money had been paid was not of itself sufficient in equity to take the parol contract out of the statute. 3 Poin. Eq. Jur. § 1409. Much is said in the briefs of counsel about the findings of fact and conclusions of law made by the court below. It makes no difference how erroneous these may be, if the decree is right. The decree is affirmed.

ZANE, C. J., and ANDERSON, J., concur.

(6 Utah, 332)

GARNER v. A. FISHER BREWING CO.

(Supreme Court of Utah. Jan. 21, 1890.)

PRINCIPAL AND AGENT.

Where there is evidence that a saloon was conducted by plaintiff's employer, as manager, in the name of defendant, with the latter's knowledge and without objection, a verdict for plaintiff for his wages as bar-tender will not be set aside, though the evidence as to the representations of defendant to him is conflicting.

H. M. Allison, Jr., for appellant. *James N. Kimball*, for respondent.

ZANE, C. J. This is an appeal from a judgment of the district court of the first judicial district against the A. Fisher Brewing Company, for the sum of \$190.20. It appears from the evidence in the record that about April 1, 1885, one J. W. Browning negotiated the purchase of a saloon owned by Livingston & Co., in Ogden City, Utah, for the sum of \$750; that the appellant advanced \$300 of that amount, and, to secure the same, took the bill of sale from that company to itself; that this bill of sale was to be transferred to Browning when he should pay the sum secured; that immediately thereafter Browning took actual possession, and placed a sign on the saloon as follows: "Depot of the A. Fisher Brewing Co., J. W. Browning, Manager,"—and under that name continued the business until June 23, 1886, when A. Fisher, on behalf of the appellant, took possession of the saloon and charge of the business, and dismissed Browning, and put one Whetstone in as manager; that, immediately after Browning commenced business, he employed the plaintiff as a bar-tender at \$50 per month; that the latter continued as such bar-tender until June 23, 1886; that during the time of his employment the respondent's wages were paid from time to time out of the proceeds of the business, but that there was a balance due when Browning was turned out, for which the judgment appealed from was rendered. It also appears that Browning, during the time he was nominal manager for ap-

pellant, had letter-heads printed as follows, "Depot of A. Fisher Brewing Company, Ogden," and used them in his correspondence with the appellant and others; that the brewery was at Salt Lake, where Fisher resided, but that he visited the saloon in Ogden two or three times per month, and saw the sign at such times, and that he knew that the United States and city licenses were taken out in the name of A. Fisher Brewing Company. The respondent testified that, "The first time Fisher came to the saloon after Browning became manager, he said: 'Well, Fred, I see you are working for me, selling Fisher beer.' I said: 'Yes.' He then said: 'If you do as well for me as you did for old George Bruesch, I will be satisfied.'" Fisher testified that he said, "Hello, Fred! now you are selling Fisher beer," and that he did not say, "I see you are at work for me, and I hope you will do as well for me as you did for Bruesch," or that in substance. At the time Whetstone was made manager, respondent testified that he asked Fisher about the balance due him, and that Fisher then said: "I will see you paid. I want you to keep right on as you have done. I will raise your wages to \$2 per day." J. W. Browning testified that the business was conducted in the name of the A. Fisher Brewing Company. The respondent also testified that he did not know on what terms Browning was conducting the business until after he was put out.

There is evidence supporting the view that Browning conducted the business, with the knowledge of the appellant and without objection, so as to indicate to the world that he was simply the manager and agent of the appellant, and that the appellant was the actual proprietor of the saloon, and responsible for the indebtedness incurred in carrying it on, and also tending to prove that respondent was led to believe that such was the fact. If a person, in conducting a business, represents that he is the agent of another, with the other's knowledge and acquiescence, the latter will be liable for indebtedness incurred in such business to third parties dealing with the agent in good faith upon such representations. Such representations may be made by signs on the business house, or by advertisements or correspondence, or other representations, verbal or written. Nevertheless, the person giving the credit must exercise reasonable diligence to prevent imposition. As to what the representations of Fisher were to the respondent, the evidence is conflicting, and it was the province of the jury to draw inferences from the evidentiary facts. The jury found the issue for the plaintiff, and the court overruled the defendant's motion for a new trial. The court will not set aside the verdict, when the evidence is conflicting, unless it is clearly against the weight of the evidence. The court must believe the verdict to be palpably wrong.

We have examined the charge of the court, and find no substantial error in it. We find no error in this record sufficient to authorize

a reversal. The judgment of the court below is affirmed.

ANDERSON and BLACKBURN, JJ., concur.

(6 Utah, 335)

SALT LAKE CITY v. REDWINE.

(Supreme Court of Utah. March 1, 1890.)

LEGISLATIVE POWER—RULES OF PRACTICE.

1. 2 Comp. Laws Utah 1888, § 5380, providing that appeals from justices of the peace shall not be effectual unless appellant cause the papers to be filed in the district court within 30 days, and section 3027, giving courts of record power to make rules, and section 5459, authorizing the collection from appellant of a jury fee, in jury cases, before his papers are filed, are valid, and within the legislative power of the territory.

2. Under 2 Comp. Laws Utah 1888, § 3027, authorizing courts of record to make rules not inconsistent with the laws, and not imposing "any tax or charge upon any legal proceeding," the court may by rule require the clerk's fees for filing and docketing the papers in a case appealed from a justice to be paid before the case is entered, and, if not paid within 30 days, authorize the opposite party to pay them, docket the case, and have the appeal dismissed.

Appeal from district court, third district;
I. J. ANDERSON, Judge.

S. H. Lewis, for appellant. *Richards & Moyle*, for respondent.

ZANE, C. J. The appellant was convicted by the judgment of a justice of the peace of keeping a house of ill fame contrary to an ordinance of Salt Lake City; and within 30 days thereafter she filed with the magistrate the necessary affidavit and undertaking for an appeal to the district court, and delivered the papers in the case to its clerk, but failed to pay the costs of filing the papers and docketing the case, or the jury fee, and for that reason the clerk refused to file the papers and docket the appeal. The respondent, after more than 30 days from the time the papers were left with the clerk, advanced the necessary fees, and had the papers filed and the case placed on the docket, and then, on motion of respondent's attorney, the court dismissed the appeal. Afterwards the appellant moved the court to reinstate the appeal, and filed an affidavit in which she alleged that she was innocent of the offense of which she was found guilty, and that she intrusted the appeal to one Chester How, her attorney, and that he neglected to have the papers filed and the cause docketed, but the court overruled the motion; and the appellant insists that each of these orders was erroneous.

Section 5380, 2 Comp. Laws Utah 1888, provides that appeals from justices of the peace of criminal cases "shall not be effectual for any purpose whatever unless the party taking the appeal shall cause the papers in the case to be filed in the district court within thirty days after the appeal is perfected. In case the party taking the appeal neglects to have the papers filed in the district court, within thirty days next after the appeal is perfected, then the other party to the suit may have the papers filed, and shall be entitled

to an order dismissing the appeal, and may at once proceed to obtain execution of the judgment of the justice's court." And section 3027 of the same volume declares that "Every court of record may make rules not inconsistent with the laws of this territory for its own government and the government of its officers, but such rules must neither impose any tax or charge upon any legal proceeding, nor give any allowance to any officer for service." And section 5459 of the same volume is as follows: "The plaintiff in each civil action, except equity cases where a jury is not required, and the appellant in each civil case appealed to the district court, shall respectively, before his complaint or appeal papers are filed, deposit with the clerk of said court the sum of three dollars, which shall be known and designated as the 'jury fund;' provided that the term 'civil action' in this section shall apply to and include all actions where a municipal corporation is a party beneficially interested; provided, further, that in case judgment is rendered in favor of such plaintiff, or appellant, said amount may be taxed as costs, and collected as other costs in the action." There is also a rule of the district court of the third judicial district applicable to appeals from justices' courts of civil cases as follows: "In all cases hereafter appealed from county justices' courts to the district court of the third judicial district the appellant, within thirty days after the receipt by the clerk of the papers in the case, shall pay to the clerk the lawful fees for filing and docketing the same, and also the jury fee provided by law; and, if the appellant fail to so pay said fees and docket his appeal, the respondent may advance fees, and have such appeal docketed and dismissed." And there is a similar rule of the same district court in criminal cases with this additional provision in case the appellant is unable to pay such fees: "Such appellant shall, within thirty days after receipt of papers on appeal by the clerk, file a sufficient affidavit stating that he is unable to pay the lawful fees for filing said papers and docketing said cause, and upon the receipt of such papers and affidavit the clerk shall file the same and docket the cause."

Section 5380 above quoted does not prevent appeals. Its purpose is to secure promptness on the part of litigants, and to facilitate business. The end sought is a rightful subject of legislation. And section 3027 above quoted authorizes the court to adopt reasonable rules of practice. The authority to adopt such rules is among the usual subjects of legislation. Section 5459 authorizes the collection of a jury fee and its taxation as cost. It requires its payment at the time of instituting the suit, or the filing of papers on appeal. This is clearly a rightful subject of legislation. The rules of court quoted are authorized by the provisions of law above referred to, and were designed and adapted to prevent unnecessary delays in the administration of justice. The law makes it the duty of the party taking the appeal, before filing his papers, to deposit

with the clerk the jury fees, and the fees for filing the papers and placing the case on the docket are also due at the same time, and the clerk has a right to demand them before rendering the service. Before the adoption of the rule quoted above, parties would often take appeals and leave the papers with the clerk without paying them, and without having the case docketed so as to bring it to the attention of the court, and in that way they would secure delay, and sometimes defeat the collection of just debts. The provisions of law above quoted are not in conflict with "an act of congress" in relation to the courts and judicial officers in the Territory of Utah, in force June 23, 1874. We hold that their scope is within the legislative competency of the legislature of this territory. The case of *Wescott v. Eccles*, 3 Utah, 258, 2 Pac. Rep. 525, cited by appellant's counsel, was decided before the enactments of the legislature above mentioned took effect, or the rule above quoted was made; and that decision is overruled so far as it conflicts with this opinion.

HENDERSON and BLACKBURN, JJ., concur.

(6 Utah, 339)

MARKS et al. v. CULMER et al.

(*Supreme Court of Utah*. Jan. 21, 1890.)

RECORD ON APPEAL.

Where it appears from the record that a statement on motion for new trial was complete, except that it was not authenticated by the judge, which omission was not noticed by judge or counsel, it will not be stricken out on appeal, though the clerk, in the absence of both counsel, obtained an authentication a few days after the overruling of the motion, but failed to attach it to the statement for some months, the parties having suffered no prejudice.

Appeal from district court, first district; J. W. JUDD, Judge.

Action by Wolf Marks and Anna Marks against William H. Culmer, Jabez G. Sutherland, John T. Sullivan, Daniel S. Dana, Delos Lombard, Harvey K. Tompkins, and Belle Tompkins. Defendants appeal.

J. G. Sutherland and Arthur Brown, for appellants. D. Evans, Geo. Sutherland, S. R. Thurman, and C. S. Varian, for respondents.

PER CURIAM. This is a motion by respondents to strike from the transcript, on appeal, the papers purporting to be a statement on motion for a new trial, because the same is not, and was not, authenticated as required by statute. It appears from the record that the amendments to the statement were allowed, and the motion for a new trial overruled and denied at the same time on the 17th day of June, 1889. At that time there was no authentication attached to said statement by the judge. On the 21st day of June, the clerk, at the request of one of the attorneys in the case, went to Salt Lake City to procure such authentication, and the judge, on a separate piece of paper, gave the same in the following words: "The foregoing

statement is correct, and the same is hereby allowed and settled. J. W. JUDD, Judge First District Court of Utah. Dated June 22, 1889." That this authentication was signed by the judge, to be attached to the statement. That the clerk took said authentication, and placed it with the files and papers in the case, but did not attach the same to the statement until January 15, 1890, when, upon his attention being called to the matter, he, upon his own motion, attached the same to the statement. None of the attorneys on either side were present when the judge signed the authentication. We think it sufficiently appears from the record that the statement, at the time the motion for a new trial was overruled, was complete in all respects, except that it was not authenticated by the judge before whom the case was tried. This omission does not appear to have been noticed by the court or counsel at the time the motion was passed upon, and the statement was treated as being sufficient and complete. While the manner of the authentication was certainly irregular, we think no prejudice has resulted to respondents, and the motion to strike the statement from the transcript is overruled.

(6 Utah, 341)

STEVENS v. HIGGINBOTHAM et al.

(*Supreme Court of Utah*. March 4, 1890.)

APPEAL—DECISION—DISMISSAL.

1. A second motion to dismiss an appeal, based on a cause existing at the time the first was made, cannot be heard.

2. Questions arising on findings of fact and conclusions of law having been decided on a first appeal, such findings and conclusions will be stricken from the statement on appeal from the decree entered, on a *remittitur*, in accordance with the opinion on the former appeal.

Appeal from district court, first district. For former report, see 21 Pac. Rep. 946.

Thomas Maloney, for appellant. Kimball & White, for respondents.

BLACKBURN, J. A motion was made, argued, and submitted to dismiss the appeal in this case, which motion was denied, and thereupon the respondent submitted this motion to dismiss the appeal, assigning a new reason, but one that existed at the time the first motion was made. This last motion cannot be entertained for a cause that existed when the first motion was made. The question of dismissal was heard on the first motion, and decided; practice allowing a second motion to be made for the same purpose would lead to interminable delay, and should not be permitted. The motion will be stricken from the files.

This case was formerly in this court. It was tried in the court below by the court. Findings of fact and conclusions of law were made and filed, and a judgment entered thereon. An appeal was taken to this court, and the judgment was reversed, and the cause remanded, with the direction to enter a decree in accordance with the opinion of this court.

A *remittitur* was filed in the court below, and a decree entered, and this appeal is from that decree. The motion we are called upon to decide now, is to strike from the statement in this case the findings of facts and conclusions of law made on the first trial in the court below. We think the motion ought to be sustained. The questions arising on these findings of fact and conclusions of law were all disposed of in the former decision of this case by this court, and they can have no bearing in determining the rights of the parties on this appeal. The motion is sustained.

ZANE, C. J., and ANDERSON, J., concur.

(6 Utah, 342)

UTAH LOAN & TRUST CO. v. GARBUTT.

(Supreme Court of Utah. March 1, 1890.)

STATUTE OF FRAUDS—LEASE BY AGENT—EXECUTORS.

1. Under 2 Comp. Laws Utah 1888, § 3916, requiring a lease for more than one year to be in writing, and, if made by an agent, requiring the agent's authority to be in writing, one of six executors, having no written authority from any of the others, cannot make a lease for more than one year, a majority being required for any valid act by section 4030.

2. The acceptance of rent under a lease void under the statute of frauds creates only a tenancy from month to month, the rent being payable monthly.

Appeal from district court, first district; H. P. HENDERSON, Judge.

Richards & Rolapp, for appellant. *Kimball & Allison*, for respondent.

ZANE, C. J. This action was instituted before a justice of the peace. The complaint alleges that the defendant was guilty of the unlawful detention of the premises described in it. The case is here by appeal from a judgment of the district court against the plaintiff, rendered upon the trial of the appeal from the justice. The rights of the parties to the possession of the property, so far as involved by this case, depends upon the legal effect of the following letter: "Salt Lake City, Utah, May 2d, 1887. Mr. Robert Garbutt, Jennings Building, Ogden—Dear Sir: I have placed check to your credit for rent to May 1st, 1887, and gave our lawyer memorandum to draw up your lease long ago, which he has not done yet; so I write the following for your protection until it is done: I hereby certify that Mr. Robert Garbutt has rented from the Jennings estate, in Ogden, the store in the Jennings building now in use as his barber-shop, until January 1, 1891, at \$22.50 per month rent. THOMAS W. JENNINGS, Agent Jennings Estate."

This letter contains the names of the parties, identifies the premises, specifies the amount of the rent, and fixes the term, and would have been a valid lease for the time mentioned, if Thomas W. Jennings had been duly authorized in writing to execute it. It was signed by Thomas W. Jennings, as agent of the Jennings estate, of which the premises in dispute was a part, and it appears from the

evidence that he was one of six duly-qualified executors of that estate. The statute provides that "no estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering the same, or by his lawful agent thereunto authorized by writing." 2 Comp. Laws Utah 1888, § 3916. And subdivision 5, § 3918, Id., is as follows: "An agreement for the leasing for a longer period than one year, or for the sale of real property or of an interest therein," to be valid, must be in writing; "and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged." When the lease is for a longer term than one year, and it is to be made by an agent, the statute requires the lease, and the agent's authority to make it, to be in writing. While the letter purports to be signed by Jennings as agent of the estate, he was also one of six executors; and, when there are two or more executors, the following statute governs their action: "Sec. 4030. When all the executors named are not appointed by the court, those appointed have the same authority to perform all acts and discharge the trust required by the will as effectually for every purpose as if all were appointed, and should act together, where there are two executors or administrators. The act of one alone shall be effectual if the other is absent from the territory, or laboring under any legal disability from serving, or if he has given his co-executor or co-administrator authority in writing to act for both; and, where there are more than two executors or administrators, the act of a majority is valid." 2 Comp. Laws Utah 1888. The evidence shows that all the executors were within the territory, and free from any legal disability, and that the executor signing had no written authority from the others, or any of them.

Notwithstanding the statute of frauds rendered the letter invalid as a lease, the defendant was permitted to remain in possession of the premises until the 25th day of May, 1889, when N. C. Flygare, the grantee of the Jennings estate, and the grantor of the plaintiff, gave him notice to quit on the 1st day of the following July. It also appears from the evidence that rent was received on the 1st day of each month, until the last-named day. And the question now arises, what effect did this acceptance of rent have upon the rights of the parties? The defendant was simply a tenant at will until the acceptance of rent by the lessor, and that converted the holding into a tenancy from month to month, and one month's notice to quit prior to July the 1st was sufficient to terminate the tenancy at that time. In the case

of *Anderson v. Prindle*, 23 Wend. 616, the court said: "It appears by the affidavit that Prindle went into possession under an agreement for a written lease for the term of one year and eight months from the 1st of September, 1835, and that a few days after he entered into possession he violated the agreement by refusing to accept the lease, and execute the counterpart thereof. By that act he became a mere tenant at will or by sufferance, and liable to be ejected immediately. *Hegan v. Johnson*, 2 Taunt. 149. And he would have continued so, if Anderson had not changed the character of that tortious holding by receiving rent from him subsequent to that time, from month to month, at the rate specified in the verbal agreement for a lease. * * * The legal construction of the acts of the parties, in accepting and paying rent monthly, was to create a tenancy from month to month, commencing on the 1st of September, 1835. The tenant was therefore entitled to a month's notice to quit at the end of some month from the commencement of the tenancy." To the same effect is *Tayl. Landl. & Ten.* §§ 57, 60, 61, and 4 Kent, Comm. (12th Ed.) 114. The landlord, by permitting the tenant to take and retain possession of the property, and by accepting rent, does not bind himself to perform so much of the lease as remains executory. *Brown*, in his work on *Statute of Frauds*, (section 448,) states the law: "It is obvious that the mere circumstance that a verbal agreement has been in part performed can afford no reason, such as to control the action of any court, whether of law or equity, for holding the parties bound to perform what remains executory. The doctrine of equity in such cases is that, where an agreement has been so far executed by one party, with tacit encouragement of the other, and relying upon his fulfillment of it, that for the latter to repudiate it, and shelter himself under the provisions of the statute, would amount to a fraud upon the former, that fraud will be defeated by compelling him to carry out the agreement." And in section 451, same book, the author says: "It is settled by a long series of authorities that a part execution of a verbal contract within the statute of frauds has no effect at law to take the case out of its provisions." This is an action at law. We are of the opinion that the court below erred in its seventh finding of fact, and in its statement of its conclusion of law, and also in its judgment thereon. It follows that the judgment of the court below must be reversed, and the cause remanded. It is accordingly so ordered.

ANDERSON and BLACKBURN, JJ., concur.

(6 Utah, 347)

PEOPLE v. BLACKBURN, District Judge.

(*Supreme Court of Utah*. Jan. 21, 1890.)

CRIMINAL LAW—SENTENCE—MANDAMUS.

By Comp. Laws Utah 1888, § 4457, the maximum punishment for voluntary manslaughter is

imprisonment for five years, no minimum being designated. Sentence was suspended by the judge during good behavior, he reciting that good reason was shown therefor. *Held*, that mandamus would not be granted to compel the passing of sentence, especially when it would run to a judge other than the one suspending sentence, as it would be presumed that the judge decided that the case deserved only nominal punishment, making the passing of sentence a mere technicality.

Petition for writ of mandate.

C. S. Varian, Dist. Atty., for the People.
W. H. Dickson and Thurman, Sutherland & King, for defendant.

HENDERSON, J. This is an application for a writ of mandate directing the defendant to proceed to sentence one Pardon Dodds for the crime of voluntary manslaughter, of which he stands convicted in the first district court. The case is brought to hearing upon a return made by the defendant to an alternative writ heretofore issued, from which it appears that in February, 1889, the said Pardon Dodds was indicted for the crime of murder; that he was arraigned, and pleaded not guilty; that in September following he was put upon trial in the first district court at Provo, before a jury and the Honorable JOHN W. JUDD, the then presiding judge; that on the 26th day of September the jury rendered a verdict of guilty of voluntary manslaughter, and thereupon the court, by an order duly entered, appointed October 10, 1889, as the time for passing judgment upon such conviction. On the 10th day of October, the prisoner being present, and Judge JUDD presiding, the district attorney moved for judgment and sentence, and the prisoner, by his counsel, moved the court that the sentence and judgment be indefinitely suspended during good behavior; and thereupon the court, by an order entered in its minutes, reciting that good and sufficient reasons were made to appear therefor, granted the defendant's motion, and suspended sentence during good behavior. On the 15th day of October, Judge JUDD having resigned, he was succeeded by Judge BLACKBURN, the defendant. On the 21st day of October, at a session of court then being held, and Judge BLACKBURN presiding, the district attorney moved the court for an order appointing a time for pronouncing judgment, which the court refused, and still refuses to proceed to sentence. Upon this record we are asked to issue a mandate to the defendant to proceed to judgment and sentence.

Ample authority is vested in the court by the statutes of the territory and rules of practice to set aside verdicts for errors or want of proof to support them; but this power was not invoked in this case, and Dodds stood convicted before the court of the crime of voluntary manslaughter by a verdict which was in full force and effect. After conviction the trial court may, undoubtedly, suspend judgment temporarily, for stated periods, from time to time. It may be proper to do so to allow the defendant time to move for a new trial, to perfect an appeal, to pre-

sent a petition for pardon, and to allow the court time to consider and determine the sentence to be imposed. *People v. Reilly*, 53 Mich. 260, 18 N. W. Rep. 849; *Whart. Crim. Pl.* § 913; *Com. v. Dowdican*, 115 Mass. 133; *State v. Addy*, 43 N. J. Law, 113. But when a defendant stands convicted, and all the remedies provided by law for testing the correctness of the conviction have been exhausted or waived, we have no doubt it is the duty of the court to keep control of the case, and within a reasonable time to proceed to give judgment, and in doing so to exercise such discretion as the statute governing the particular offense commits to the court. The authority to wholly relieve parties from a conviction for crime is not given to the courts, but belongs to the pardoning power. *People v. Morrisette*, 20 How. Pr. 118; *People v. Reilly*, 53 Mich. 260, 18 N. W. Rep. 849; *People v. Brown*, (Mich.) 19 N. W. Rep. 571. It is apparent from this record that it was not intended by the court to temporarily suspend judgment, but, on the contrary, to entertain the prosecution no further, and to discharge the defendant therefrom without sentence. The statute (Comp. Laws 1888, § 4457) which prescribes the punishment for voluntary manslaughter, the crime for which Dodds stood convicted, is as follows: "Voluntary manslaughter is punishable by imprisonment in the penitentiary not exceeding five years." It will be seen that by this statute the largest discretion is vested in the court. It extends from a maximum imprisonment in the penitentiary down to the least appreciable space of time; no minimum being designated. No doubt the legislature, in committing this discretion to the court, recognized the fact that there might be extreme cases where a party might legally be guilty of the crime, and yet the circumstances be such that the penalty should be purely nominal. Of course, such a case would be an extreme one, but it can readily be imagined. On the other hand, the case may be such as to require the extreme penalty provided for by the statute. Within these limits, then, the court, in this case, was authorized to exercise its discretion. It might have designated a term of imprisonment so brief that the prisoner could not have reached the penitentiary before it expired, or, if he did, that would have only required him to be received and discharged. We think it is to be presumed from this record that the learned judge who presided at the trial, and heard all the testimony, in his discretion determined that this was a case in which the lightest penalty which by law he was authorized to inflict should be imposed; and, that being purely nominal and requiring of the officers to execute it a merely perfunctory duty and useless expense, he refused to pass sentence at all. This, we think, is the reasonable presumption. From this record we are to presume official integrity and propriety, rather than the contrary. No case is presented in this record for reviewing the discretion of

the court below. If that could be done, the facts upon which the discretion was exercised are not before us. The question presented to us is whether we shall issue a peremptory mandate requiring the court to proceed to inflict this penalty. We think not, especially in view of the fact that the writ would require another judge than the one that heard the evidence and presided at the trial to pass the sentence. While we have no doubt, as before stated, that it is the duty of the court in which a conviction is had to proceed to judgment within the limits prescribed by law for the exercise of its discretion, and that it cannot rightfully exercise the pardoning power by refusing judgment, but that, where the statute prescribing the punishment for a crime only fixes a maximum punishment, thereby expressly authorizing the court, in its discretion, to fix any degree of punishment from such maximum down to a purely nominal punishment, and it is apparent from the record that the court, in the exercise of such discretion, has determined that the lowest possible punishment should be inflicted, the failure of the court to pass judgment is more a matter of form than of substance. The mandate of this court would only require the performance of a technical duty. For this reason we do not think we are called upon to interfere by issuing the writ asked for. The writ should be denied.

ZANE, C. J., and ANDERSON, J., concur.

(6 Utah, 351)

SALT LAKE FOUNDRY & MACHINE CO. v. MAMMOTH MIN. CO. *et al.*

(*Supreme Court of Utah*. March 1, 1890.)

CORPORATIONS—CONTRACTS—EVIDENCE—EQUITY.

1. The work and materials sued for were furnished at the request of the general manager and a director, who was also secretary, of defendant company. Mining operations were conducted in its name, its office was at the place, its president was sometimes there, and some of its directors lived there. There was evidence that defendant had a contract with its secretary to do the work. *Held* that, in the absence of evidence that plaintiff knew of such contract, defendant was liable.

2. Errors in admitting evidence are not available in equity, as the chancellor is supposed to act only on proper evidence.

Appeal from district court.

Bennett & Bradley and *J. G. Sutherland*, for appellants. *Arthur Brown* and *E. B. Critchlaw*, for respondent.

BLACKBURN, J. This action was originally brought by George W. Taylor *et al.*, as plaintiffs, to foreclose a statutory lien against the defendant company. The respondent was a defendant, as holder of another lien. The case of the original plaintiffs having been disposed of, the respondent is, in effect, plaintiff. It filed a cross-complaint for its lien, the appellant put in an answer, and the cause was heard by the court below without a jury, and judgment rendered for the respondent, from which judgment this appeal is taken. The cross-complaint alleges that the respondent, a corporation, delivered to the appellant, a corporation, castings, and

did work and labor in constructing refineries, furnaces, etc., at the request of the appellant, on its mining and milling property. That the materials were furnished, and the work and labor done, on the property of the appellant, and the amount and value thereof is not denied, but it is denied that this was done at the request of the appellant. The evidence tends to prove that the materials and work were furnished at the request of one Bowers, who was a director and secretary of the appellant company, and one Johnstone, represented to be the general manager of the company; that the mining operations and the work, when this labor was done and their materials were furnished, were carried in the name of the appellant company, the pay-rolls of the men, and the regulations for the conduct of the work, were in its name, and the proceeds of the mine were transferred to its credit, and the material furnished and labor done by the respondent were charged to it, and the whole proceedings in working the mine and making the improvements were carried on, to all appearances, in the name and by the authority of the appellant company. Its president was sometimes there. Its secretary and office were there, and one or two of its directors resided there. We think there was, if not a preponderance of evidence, enough to justify the court below in finding that these materials were furnished and this labor performed at the request of the appellant. But the contention of the appellant is that it is not liable for the labor done and material furnished by the respondent, because it had a contract with another party to have this work done and these materials furnished, and pay for the same, and this contract was with Bowers, a director, stockholder, and secretary of the appellant company, and that the contract was between him and certain stockholders of the appellant company, and consented to by it. If this was a private agreement between certain stockholders of appellant as to who should pay for improvements made in its property, made in its name and for its benefit, it will not avail to defeat the claim of the respondent, unless notice of this agreement was given to the respondent, before the materials were furnished and labor done, that it would not be liable for these materials and labor, although done in its name. On this point the evidence is conflicting, and the court below found for the respondent, or it could not have given judgment in its favor. We think the evidence fully justifies his finding.

The errors assigned in reference to the admission of testimony are not available in a case in equity, for the chancellor is supposed to act only on proper evidence. There is no question of law involved,—only questions of fact; and, if the proper evidence justifies the decree, the judgment ought to be affirmed, and we think it does. Decree affirmed.

ZANE, C. J., and HENDERSON and ANDERSON, JJ., concur.

PEOPLE *ex rel.* BYNON v. PAGE, Registration Officer.

(Supreme Court of Utah. Jan. 21, 1890.)

MUNICIPAL CORPORATIONS — CHARTER — JUDICIAL NOTICE.

1. Laws Utah 1888, c. 48, divides cities into classes, and provides the way, but not an exclusive one, by which cities should determine to which class they belong. *Held*, that the court will take judicial notice of the class to which a city belongs, and the city becomes a member of its proper class without anything done on its part.

2. Laws Utah 1888, c. 48, art. 20, § 5, providing that the sections thereof, specifying the number of wards, and the officers to be elected, in cities of certain classes, shall apply to cities already organized, effects an amendment of the charters of such cities, though the act contains no repealing clause.

Application for writ of mandate.

W. H. Dickinson and *P. L. Williams*, for relator. *O. W. Powers* and *C. W. Benedict*, for respondent.

BLACKBURN, J. This is a petition by the plaintiff for a peremptory writ of mandate to require the defendant, who is the proper officer, to give election notices for the coming municipal election in Salt Lake City; to put up notices of said election, stating, among other things, that there will be chosen by the qualified voters at said election fifteen councilmen, one mayor, one recorder, one treasurer, one marshal, and one assessor and collector, and one justice of the peace for each of the five precincts of said city.

This involves a construction of a portion of the act of the last territorial legislature (Laws 1888, c. 48) entitled "An act for the incorporation of cities." The purpose of that act seems threefold: (1) To incorporate new cities; (2) to provide a mode by which cities already organized can reincorporate under this act; (3) to apply to cities already incorporated, certain portions of the act as amendments to their charters, without reincorporation. The question raised by this petition is, does this act require that the officers provided for in it shall be elected at the coming municipal election in Salt Lake City, or shall the officers provided for in the charter of said city be chosen? I think the officers provided for in this act are hereafter the proper ones to govern the city. Section 14, art. 1, by express words applies to cities now organized, and provides that they shall be divided into three classes. All cities having a population of 20,000 and over shall belong to the first class, etc. Other portions of the act point out the way any city may determine the class it belongs to, but the mode mentioned in the act is not exclusive. If Salt Lake City has in fact a population of 20,000 or over, and the court can judicially know that fact, it is a city of the first class, whether it takes any steps to ascertain that fact or not. Courts take judicial notice of all the political acts of the government. The census of 1880 shows this city to have a population of over 20,000, and that is a political act of which the courts take judicial notice. Therefore I think Salt Lake City, under this act,

is a city of the first class, without anything done on its part. Again, section 5, art. 20, expressly provides that section 1, art. 6, among other provisions of this act, shall apply to all cities already incorporated. Although there is no repealing clause in this act, yet section 5, art. 20, has the effect to make these several provisions amendments to the charters of all the cities to which they are applicable. Section 1, art. 6, provides that officers of the cities of the first class to be elected by the people shall be three councilmen from each municipal ward, a mayor, a recorder, a treasurer, an assessor and collector, and a marshal. Another provision of the act provides that cities of the first class shall be divided into five wards, and that one justice of the peace shall be elected from each ward. Both parties having appeared, and this application having been argued at the hearing, there is no need of an alternative writ. Therefore the peremptory writ will issue as prayed for.

ZANE, C. J., and ANDERSON, J., concur.

HENDERSON, J., was absent at the hearing of this case, and took no part in the decision.

(6 Utah, 357)

DANIELS v. UNION PAC. RY. CO.

(Supreme Court of Utah. March 1, 1890.)

MASTER AND SERVANT—DEFECTIVE APPLIANCES—FELLOW-SERVANTS—EXCESSIVE DAMAGES.

1. A verdict for plaintiff, a brakeman, who was injured in a wreck caused by a broken car-wheel, will not be disturbed where the evidence shows that there was an old crack in the wheel, which could have been seen by proper inspection.

2. A brakeman is not a fellow-servant of a car-inspector, as they are not associated together in their labor, and are under different managers.

3. Where plaintiff is permanently disabled in one leg and shoulder, and wholly unable to perform manual labor, and was rendered helpless by the wreck, and left for more than two days with his wounds undressed, and thus made to suffer unnecessarily, a verdict for \$10,000 will not be set aside as excessive.

Appeal from district court, third district; ZANE, Judge.

Action by William Daniels against the Union Pacific Railway Company. Judgment was entered on a verdict for plaintiff for \$10,000, and defendant appeals.

P. L. Williams, for appellant. Arthur Brown, for respondent.

BLACKBURN, J. This is a suit by a brakeman, an employe of the defendant company, for an injury to him while in the line of his duty on a train that was wrecked. He was severely injured, and permanently in one leg and one of his shoulders, so as to be unable to perform manual labor. The evidence tends to show that the train on which the plaintiff was at work as brakeman was wrecked by a broken wheel; that there was an old crack in the wheel, which could have been seen by proper inspection; and the question was fairly submitted to the jury, and

they found that this was negligence in the defendant company. We think the evidence abundantly supports this finding. It was the duty of the company to furnish reasonably safe cars for the running trains, and to have them inspected with reasonable care at proper intervals; and, if an employe was injured by a neglect to perform this duty, the company is liable to him for the damage he sustained. On this branch of the subject we see no error.

The instructions, as we think, state well and fairly the law of the case, and no point is made on them in the brief of appellant's counsel; but the contention of the defendant company is that, if there was negligence, it was the negligence of the car-inspector, and he was the fellow-servant of the respondent. If this contention is true, the respondent cannot recover, and this case should be reversed. As to who are fellow-servants there have been a great many and great variety of decisions, and it would serve no useful purpose to review them. However various, the decisions agree that the weight of authority is that, in order to constitute servants of one master fellow-servants, within the rule *respondet superior*, they must be engaged in the same line of work, be under the control of the same foreman, be employed and discharged by the same head of the department in which they work; that they labor together in such personal relations that they can exercise an influence upon each other promotive of proper caution in respect of their mutual safety; that they shall be at the time of the injury directly co-operating with each other in the particular business in hand, or that their mutual duties shall bring them into habitual conassociation, as that they may exercise an influence upon each other promotive of proper caution, and to be so situated in their labor, to some extent, to supervise and watch the conduct of each other as to skill, diligence, and carefulness. *Railroad Co. v. Kelly*, 127 Ill. 637, 21 N. E. Rep. 203. The evidence in this case clearly shows that the inspector of cars is not in the same line of work with the brakeman. He has nothing to do with the running of trains; is not under the control of the conductor, but reports to, is appointed by, and may be discharged by, and is under the direction of, the foreman of the repair shops; has no conassociation with, and is rarely seen by, the brakeman on the train, unless casually noticed by him when the train is stopped. They have no work in common; are not so associated in their labor as to be able to act together in a way promotive of their mutual safety. We cannot say, therefore, as a matter of law, that the car-inspector, in this case, was a fellow-servant of the respondent when the accident occurred.

It is contended, also, by appellant that the damages are excessive. On that point the jury were properly instructed. It is peculiarly the province of the jury to estimate the damages in this class of cases; and they doubtless took into consideration, what they

were legally authorized to do, that the respondent was lamed and deformed in one leg for life, and permanently disabled in one shoulder, so that he was wholly rendered unable to perform manual labor; that he was rendered entirely helpless by the accident; that he was neglected for more than two days before his wounds were dressed; and that he suffered unnecessarily in mind and body from his injury. The damages are seemingly heavy, but, in view of the facts of the case, we do not think are so excessive as to justify a renewal. Therefore, we cannot say that the jury were influenced by passion or prejudice in assessing the damages at the amount they did. We think, therefore, the judgment should affirmed. Judgment affirmed.

HENDERSON and ANDERSON, JJ., concur.

(6 Utah, 360)

PRESHAW v. DEE *et al.*

(Supreme Court of Utah. March 4, 1890.)

QUO WARRANTO—MISJOINDER OF PARTIES.

1. The joinder as defendants, in a single *quo warranto* proceeding of several persons who claim title by distinct appointments to the office of justice of the peace, each in a separate precinct created out of a larger precinct, of which plaintiff had previously been elected justice, is error, and is not authorized by Comp. Laws Utah, § 3534, which provides that "when several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons in order to try their respective rights to such office or franchise."

2. Where the complaint merely avers that defendants have usurped plaintiff's office, the misjoinder may be taken advantage of by answer under Comp. Laws Utah, § 3224, which is not apparent on the face of the complaint.

Appeal from first district court; T. J. ANDERSON, Justice.

A. R. Heywood and Boreman & Rogers, for appellant. Sutherland & Judd and H. H. Rolapp, for respondents.

HENDERSON, J. This action was brought in the first district court for usurpation of office (*quo warranto*.) The complaint avers that the plaintiff was on the 5th day of August, 1889, duly elected to the office of justice of the peace of Ogden precinct, setting out the boundaries and extent of the precinct; that he afterwards qualified, and is entitled to said office and its emoluments; "that on September 3, 1889, the defendants, and each of them, usurped said office, and have ever since continued so to do." The facts are that the county court of Weber county, on the 7th day of August, 1883, created Ogden precinct, the same as set out in the complaint. On the 5th day of August, 1889, the plaintiff was duly elected justice of the peace of said precinct, and on September 2, following, he qualified as such. On the 20th day of August, 1889, the county court of Weber county, by an order, abolished said Ogden precinct, and out of the territory embraced there-

in created four separate and distinct precincts, defining particularly their boundaries, and designating them, respectively, as "Ogden Precinct, No. 1, 2, 3, and 4." The county court thereupon, by an order entered at the same time for the purpose of filling the vacancies in the office of justice of the peace in each of the said four precincts thus created, appointed the plaintiff herein justice of the peace in and for Ogden precinct No. 1; the defendant N. Tanner, Jr., for Ogden precinct No. 2; the defendant Joseph Stanford for precinct No. 3; and defendant Thomas D. Dee for precinct No. 4. Defendant Tanner never qualified under his appointment, and has filed his answer disclaiming any right to the office. Defendants Stanford and Dee at once qualified. Commissions were duly issued to them by the governor, and they entered upon the duties of said offices within and for their respective precincts. The plaintiff claims, under his election, to be justice of the peace for the entire Ogden precinct, as it formerly existed, and denies the validity of the proceedings of the county court above set forth. Defendants Stanford and Dee filed their answers, setting up the foregoing facts, and denying the right of the plaintiff to justly implead them. Judgment was entered for defendants in the district court, and the plaintiff appeals.

The first question for our determination is as to whether there is a misjoinder of parties defendant. It will be seen from the foregoing statement that each of the defendants is claiming under separate and distinct appointments and commissions, and are acting as officers and exercising jurisdiction over separate and distinct portions of the territory over which the plaintiff claims his right. They are not claiming a joint jurisdiction or the same jurisdiction. It is a well-established principle of law, as well as in equity, that courts will not take cognizance of distinct and separate claims or liabilities of different persons in one suit, though standing in the same relative situation. 1 Chit. Pl. (14th Amer. Ed.) 44; Bliss, Code Pl. § 83; Pom. Rem. § 308. There must be some community in the wrong-doing among the parties who are united as co-defendants. The injury complained of must be, in some sense, their joint work. *La France v. Krayner*, 42 Iowa, 145; *Lull v. Improvement Co.*, 19 Wis. 100. Applying these principles, we think there is a misjoinder of defendants, and do not think the statute cited by plaintiff (2 Comp. Laws 1888, p. 338, § 3534)¹ is authority for the joinder of these defendants in one action.

The misjoinder not being apparent upon the face of the complaint, it was proper to take advantage of it in the answer. Comp. Laws 1888, p. 245, § 3224.

We deem it unnecessary to discuss the

¹This section provides that, "when several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise."

other questions involved. The judgment of the district court should be affirmed.

ZANE, C. J., and BLACKBURN, J., concur.

(6 Utah, 363)

TEAHEN v. NELSON.

(Supreme Court of Utah. March 1, 1890.)

MECHANICS' LIENS—PLEADING.

Comp. Laws Utah, § 3806, gives every person performing labor or furnishing materials for a building, whether at the instance of the owner or his agent, a lien, but provides that "the aggregate amount of such liens must not exceed the amount which the owner would be otherwise liable to pay." Section 3807 provides that any subcontractor performing labor or furnishing materials for the contractor may, within 30 days after commencing to perform the labor or furnish the materials, serve on the owner or his agent written notice of the amount due him, or contracted to become due him, and have a lien for such amount. *Held*, that the subcontractor's lien attaches from the time he begins to labor or furnish materials, provided he gives notice within 30 days, but the amount of all liens cannot exceed the amount of the contract with the owner, and a complaint to foreclose a subcontractor's lien should allege the amount due the contractor, less any payment made for labor or materials furnished before plaintiff's lien attached. BLACKBURN, J., dissenting.

Appeal from district court, third district; H. P. HENDERSON, Judge.

Miller & Muginnis, for appellant. A. H. Nelson, for respondent.

ZANE, C. J. The appellant filed his complaint in the district court, in which he alleged, in substance, that the respondent was the owner of the lot described; that he made a contract with one V. H. Harding to erect a building thereon; that, in pursuance of a contract with the latter, appellant performed labor on the building to the amount of \$207, no part of which had been paid; that he served on respondent notice of the amount due him as such subcontractor, and also filed for record his claim, as required by the statute. The usual prayer was added, and the action was commenced within 90 days after the claim was filed for record. The court sustained a demurrer to the complaint, because it did not contain an averment of any amount due on the contract with the owner at the time the alleged lien of the plaintiff attached. This ruling the appellant assigns as error.

To decide the question raised, it is necessary to construe certain provisions of chapter 1 of the Compiled Laws of Utah of 1888 defining mechanics' liens, and providing for their enforcement. Section 3806 of that chapter is as follows: "Every person performing labor upon or furnishing materials to be used in the construction * * * of any * * * building * * * has a lien upon the same for the work or labor done or materials furnished, * * * whether done or furnished at the instance of the owner of the building * * * or his agent, but the aggregate amount of such liens must not exceed the amount which the owner would be otherwise liable to pay." The provisions of this section, giving the person performing the labor

or furnishing the materials a lien, whether the same is done or performed at the instance of the owner or his agent, manifests an intention to confine the lien to such persons as have express or implied contracts with the owner; or, in other words, an intention not to include in its provisions a lien in favor of subcontractor or in favor of persons performing labor or furnishing materials at the instance of such subcontractor. The language of the last clause of the section, viz., "but the aggregate amount of such liens must not exceed the amount which the owner would be otherwise liable to pay," indicates an intention to include the liens of subcontractors, and the liens of persons furnishing materials or performing labor at his instance, provided for in section 3807 of the chapter, as well as the lien of the contractor with the owner given in the section above quoted. The aggregate amount of all liens for work done or materials furnished under contracts with the owner or his agent would be limited by those contracts, and the clause would be of no effect if intended to refer to those; but the amount of the liens for labor performed or materials furnished under subcontracts, or under contracts between other persons and the subcontractor, would not be limited by the contracts with the owner by what he would otherwise be liable to pay. Hence the necessity for the clause. When a provision of an act is susceptible of two meanings, one of which gives effect to it, and the other does not, the rule of construction is that the one giving to it effect shall be adopted. The application of this rule to the limiting provision authorizes the inference that the legislature intended it to embrace the three classes of liens. Section 3807 is as follows: "Any subcontractor, material-man, laborer, or other person performing labor or furnishing materials for the contractor, who is entitled to a lien under the provisions of the last section, may, * * * within thirty days commencing to perform the labor or furnish the materials, serve upon the owner or his agent * * * written notice of the amount due him, or contracted to become due him, for such labor or materials; and such subcontractor, material-man, laborer, or other person may have a lien for such amount; and any person furnishing materials, or performing labor for the contractor, may, by like notice to the contractor, be subrogated to the rights of such subcontractor; and, by filing notice with the county recorder, shall likewise have a lien for the amount due him, although the building may not be finished: provided, that he file notice of such lien within the time mentioned in section 1062 of this act." This section gives the subcontractor a lien, and it also gives a lien to the person who performs labor on the building, or furnishes material under a contract with such subcontractor. The subcontractor is required to serve upon the owner, within 30 days after the performance of labor or the delivery of materials by him commenced, written notice of the amount due

him, or contracted to become due him; and that amount is the entire compensation for such labor and materials,—not the whole amount, less such payment as the owner may have made to the contractor with him, after the work commenced or the delivery of materials begun, and before the service of notice. The lien is given to secure the entire compensation for the labor and the materials from the beginning.

If the owner may pay the contractor in advance the full amount of the contract, he may in that way defeat the subcontractor's lien, because, as we have seen, the owner cannot be compelled to pay more than that amount. While the owner may pay the contractor for labor when performed and materials when delivered, as payment therefor becomes due before the subcontractor or other person at his instance commenced work or the delivery of materials, he cannot by payment in advance, or by payment of any kind to the contractor after the subcontractor commences work or the delivery of materials, defeat or diminish the amount of the subcontractor's lien, or the amount of the lien of any person performing labor or furnishing materials at his instance. When the contractor has performed the labor or delivered the materials, and is entitled to his pay therefor, the owner ought to pay him, if the right of the subcontractor has not intervened. The owner of premises, contracting with a builder for the erection of a house thereon, is required to anticipate the rights of subcontractors, and persons performing labor and furnishing materials at their instance, before paying the contractor in advance. The owner is presumed to observe the presence of subcontractors and other persons performing labor upon his building, or delivering materials therefor; and the law requires him to know that he cannot defeat or diminish any lien in their favor by any payment to the contractor in advance, or by any payment he may make to him after the subcontractor or other person doing work or furnishing materials at his instance has commenced work or the delivery of materials. As labor is performed and materials are furnished upon the owner's contract with the builder, he may pay for it as the pay becomes due, but after the subcontractor commences the execution of his contract his lien commences to run, and it is beyond the power of the owner to defeat or affect it, except by payment of the amount to the subcontractor. The latter may lose it by failing to serve the requisite notice within 30 days after the execution of his contract begins, or by not filing the required claim with the recorder within 30 days after the building is completed, or by not commencing suit to foreclose within 90 days after filing that claim. When the performance of the labor or the delivery of materials begins, the lien attaches and increases in proportion as the labor performed and materials delivered increases. If the legislature had understood that the lien

would not attach until notice given, it should have required its service when the performance of labor or the delivery of materials commenced. The law, in effect, says that, in order to secure the amount due for the labor and materials, it is sufficient to serve the notice at any time within 30 days after the work or delivery of materials begins; but if the owner may defeat the security by payment to the contractor at any time before notice, then there is no security against the action of the owner and the contractor.

The lien is maintained by the service of notice within 30 days after the work or the delivery of materials commences, but the work may be done and the materials delivered before that time; and if the owner may make payment to the contractor during that time, and in that way the subcontractor may be deprived of his lien, the service would be an idle performance. The legislature could not have intended a construction that would probably be attended with such consequences. Section 3810 of the same chapter prefers the lien given in the chapter to any other that may have attached or been created subsequent to the time when the building, improvement, or structure was commenced; also to any such lien of which the lienholder, had no notice, and which was unrecorded at the time the building was commenced. This section requires other lienholders, by mortgage or otherwise, to take notice of the commencement of work on the building. And section 3815 declares that all persons entitled to liens on the structure or improvement, except those who contract with the owner, are subcontractors, and requires the court, in its judgment, to direct the amount due subcontractors to be paid out of the proceeds of sales before any part thereof is paid to the contractor. And section 3816 of the chapter limits the recovery of the contractor upon a lien filed by him to such amount as may be due him according to his contract, after deducting all claims of subcontractors, and other parties under them, for work done and materials furnished. And section 3817 of the chapter declares the order in which the liens shall take precedence when there is more than one class, viz.: *First*, all persons other than the original contractor and subcontractor; *second*, the subcontractor; *third*, the original contractors.

We are of the opinion that the aggregate amount of liens of the contractor, subcontractor, and of the persons performing labor and furnishing materials at the latter's request, cannot exceed the amount of the contract with the owner; that the owner may continue to pay the contractor for labor done and materials furnished, as payment therefor becomes due, until the subcontractor commences work, or the delivery of materials; and that the owner can make no other payments that will affect the amount of the subcontractor's lien, or the lien of other persons performing labor on the building, or delivering materials therefor, at his request;

and that the amount of the subcontractor's lien, and the lien of those performing labor and delivering materials at his request, cannot exceed the amount of the contract with the owner, after deducting from that the amount paid by the latter upon such contract, for labor performed and materials furnished, as before stated. We hold that the complaint should contain an allegation of the amount of the contract with the owner, less any payment for labor performed and materials furnished under the same, made before the plaintiff commenced work or the delivery of materials on his subcontract. For the reasons stated, the judgment of the court below is affirmed.

ANDERSON, J., concurs.

BLACKBURN, J. I concur in the affirmation of the judgment of this case. But I do not concur in the construction of the lien law of this territory, as stated in the opinion of the chief justice; for I think that the subcontractor is entitled to claim a lien for the work and labor and material furnished by him for the amount due the contractor at the time he commenced furnishing the materials or doing the work, or that should subsequently become due, and for no more, and this right to a lien is waived if the subcontractor does not give the notice required by the statute.

(5 N. M. 458)

GARCIA Y PEREA v. BARELA et al.

(Supreme Court of New Mexico. Feb. 12, 1890.)

WILLS—ATTESTATION—WITNESSES—EXECUTORS—SETTLEMENT—COURTS.

1. Comp. Laws N. M. 1884, § 562, so far as it attempts to invest the probate courts with exclusive original jurisdiction to hear and determine all suits and proceedings instituted against executors or administrators upon any demand against the estate of the testator or intestate, is void, being in contravention of section 1868 of the organic act of New Mexico, which provides that "the supreme court and the district courts, respectively, of every territory, shall possess chancery as well as common-law jurisdiction."

2. Under a clause in a will giving to the wife of the testator the homestead and "all articles of goods in my house, personal furniture, household furniture, and all that therein exists," money contained in an iron box in the house passes to the wife.

3. Where there is no ambiguity in the language of a clause of a will, parol testimony is not admissible to ascertain the testator's intention.

4. The final settlement of an executor is void, where he took no account of money found in a box, in his inventory of the property belonging to the estate.

5. A receipt given to the executor by the wife, releasing all claims against the estate, is not binding on her where there is a suspicion of fraud in the procurement of the receipt, and the wife was ignorant of her rights in the estate.

6. Under Comp. Laws N. M. 1884, § 1880, requiring that a will shall be attested by three or more witnesses, a valid attestation of a codicil to a will requires no less number.

Appeal from district court, Dona Ana county; HENDERSON, Judge.

Bill in equity to have declared null and void codicils to a will, and the proceedings

in reference to admitting said codicils to probate, and in granting the discharge of the executor, and for discovery. There was a decree for complainant, and defendants appeals.

Wade & Ryneron and Catson, Knaebel & Clancy, for appellants. *S. B. Newcomb*, for appellee.

WHITEMAN, J. This is a suit in equity, commenced in the district court of Dona Ana county, by Guadalupe S. de Garcia y Perea, widow of Pedro Garcia y Perea, who died February 25, 1887. The decedent left a will written in the Spanish language, of which the following, it is admitted in the record, is a correct translation:

"Last will of Pedro Garcia y Perea. Know all men by these presents, that I, Pedro Garcia y Perea, on this 29th day of January, A. D. one thousand eight hundred and eighty-six, write my last will as my voluntary act under the following rules. (1) I declare that my nephew, Mariano Barela, is the administrator of all my estate, of real estate and personal property. (2) I declare that the house, and now my residence, composed of all the square bounded on the east with the second public street, and on the west bounded with Water street, I grant to my wife, Guadalupe Perea. (3) I also grant to my wife, Guadalupe y Perea, the land and property near the railroad depot, and generally known as 'Juan Bautista Armijo and Manuel Lopez,' as it appears in the deed. (4) I also grant to my wife, already referred to, all articles of goods in my house, personal furniture, household furniture, and all therein exists. (5) I also grant her ten cows picked from my property. (6) I grant in favor of the Las Cruces Church, five hundred ewes. (7) My administrator is instructed to pay \$50.00 in money for masses for my deceased wife, Romaldita, in case of her death. (8) All notes that may be due me, accounts, claims of whatever nature they may be, my administrator is authorized to collect; and whatever he does shall be sustained. (9) I grant to Cruz Garcia one house, formerly Mariano Molinar's, situated near the Protestants', as it appears by the deeds. I also grant to Cruz Garcia one bay mare that Concepcion Martinez has, and ten cows, two asses, *burros o burras*, (male or female,) as they may be. (10) I grant to Adilaida Flore one hundred ewes. (11) I grant to Gandelaria Garcia one hundred ewes. (12) I grant to Clemente Garcia one hundred and fifty ewes. (13) I grant to Martin Garcia five cows. (14) I grant to Julian Albillar one hundred ewes. (15) I leave to Guadalupe, my wife, one small wagon and two mules. (16) To Jose Angel Sisneros, I leave one hundred ewes. (17) To Clemente Garcia, I leave two asses. (18) \$200.00 in money that Jose Maria Padilla owes me, I grant to my niece, Juanita Barela. (19) To Teresa Chave, I leave fifty ewes. (20) All the other property that is not here specified, I grant to my sister, Rafaela Barela, and to

my nephew, Mariano Barela. In witness whereof, I sign this myself, in the presence of witnesses, in the town of Las Cruces, this 29th day of January, A. D. 188--.

[Signed] "PEDRO GARCIA ^{his} X ^{mark} Y PEREA.

"In presence of JACINTO ARMIJO, NESTOR ARMIJO, GEORGE BUTSCHOFKY, PEDRO LASSAIGNE."

"At the reading of the will, the testator directs that his administrator do sell five hundred ewes, and that they be distributed amongst honest and needy persons, at the will of the administrator. [Signed] PEDRO GARCIA Y PEREA. In presence of the same witnesses: JACINTO ARMIJO, NESTOR ARMIJO, GEORGE BUTSCHOFKY, PEDRO LASSAIGNE."

"Territory of New Mexico, county of Dona Ana. On this 29th day of January, A. D. 1886, personally appeared before me the undersigned, having been duly commissioned, qualified, and acting notary public. Pedro Garcia y Perea, whom I personally know to be the same person who signed the foregoing testament and last will in the presence of the witnesses mentioned, and that he signed it in my presence, and declared that he did it voluntarily for the uses and purposes therein stated. In witness whereof, I sign this in the town of Las Cruces, the month and year aforesaid. JACINTO ARMIJO, [seal] Notary Public within and for Dona Ana County, N. M.

"Instructions to the administrator, Mariano Barela: I further declare that my sister, Rafaelita Barela, and my nephew, Mariano Barela, are heirs; and I grant them the following properties: Certain real estate situated in La Mesilla, called a Terreno; the property bought from the Perez, as it appears by the deeds; the properties known as my ranch, as it appears by the deed of purchase, and in the U. S. office; the balance of the stock and animals after paying the donations this day made; all the notes and properties, as it appears by the deeds and my books, except the donations made. I declare that the following witnesses be subpoenaed in the United States office; Mauricio Gamboa, Jose A. Sisneros, Jose Ma Domingues, and Manuel Trujillo,—to prove the right in the U. S. office in the application made by Julian Albillar. PEDRO GARCIA Y PEREA. In presence of JACINTO ARMIJO, GEORGE BUTSCHOFKY.

"I declare that there is due me:

S. B. Newcomb.....	\$500 00
Eugenio Moreno paid part.....	20 00
Padre Tenorio.....	75 00
Barbaro Lucero.....	250 00
(The debts of Jacinto Armijo, J. J. Preciado, J. N. Montes, are forgiven.)	
D. Woods.....	80 00

"PEDRO GARCIA Y PEREA. Jan. 29th, 1886. In presence of JACINTO ARMIJO, GEORGE BUTSCHOFKY."

The will, after providing for a number of legacies, made Rafaela Barela and Mariano

Barela, sister and nephew of the testator, respectively, residuary legatees. The complainant's claims, involved in this case, all arise under the second, third, and fourth paragraphs of the will. On the 28th of February, 1887, the will was probated, and defendant Mariano Barela appointed executor. On the 21st of September, 1887, while the administration of the estate was still pending in the probate court, the complainant filed her original bill of complaint against Mariano Barela as executor and individually, Rafaela Barela, William H. H. Llewellyn, and Thomas Brannigan. Subsequently the case was dismissed as to Llewellyn and Brannigan, and an amended bill was filed on October 12, 1887, against the other defendants. A reamended bill was filed November 2, 1887, which also made Demetrio Chavez, the probate judge, a defendant. At the time of the filing of the reamended bill the administration of the estate had been closed up, and an order made by the probate court discharging the executor from any further liability as such, and also discharging the sureties upon the bond of the executor.

The reamended bill sets up complainant's marriage with the decedent, his death, the execution of the will aforesaid, its admission to probate, and the appointment of Mariano Barela as executor. It also avers that two codicils to the will were approved at the same time as the will, which, she avers, were never executed by the decedent, and are void because not properly executed; that she had no knowledge of the existence of such codicils, and no notice of the attempt to have the same probated until long after the time when she might or could have availed herself of the right and benefit of an appeal from the action of the probate court in the premises; that at the time of the death of the testator, he was entirely free from debt, and that the estate came into the hands of Mariano Barela, executor, unincumbered; and that the said executor failed and refused to file in the probate court any schedule or inventory of the property coming into his hands as such executor. She further avers that by the terms of said will the testator devised to her a certain house and lot situated in the town of Las Cruces, and particularly described in the will, together with everything contained in said house and upon said premises, and also certain other real estate situated in Dona Ana county, near the Las Cruces depot of the Atchison, Topeka & Santa Fe Railroad, known as the "Juan Bautista Armijo and Manuel Lopez Properties," as described in the deeds to said property, and also ten cows, two mules, and a wagon; that the real estate mentioned in the first codicil to said will as the real estate bought of Perez is a part of the Juan Bautista Armijo tract, which was devised to her by the decedent, and that under the said first codicil the said Mariano Barela claims said land; and that Demetrio Chavez is the probate judge of Dona Ana county, who admitted the said codicil to probate.

She further avers that, at the date of the death of her husband, there were, among other things, in the house and lot devised and bequeathed to her, an iron box and an iron safe which belonged to the testator, and which, together with their contents, became her property under the terms of said will, and also that there were on and contained in said premises so devised to her a buggy and two horses, which became her property by the terms of said will; that shortly after the death of her husband, and while she was still suffering and prostrated by reason of his death, and ignorant of her rights under the will, the defendant Mariano Barela came to her house, and, under pretext of obtaining documents and papers belonging to the testator, opened said iron box and said iron safe, and without her consent took therefrom and carried away a large sum of money which belonged to her, the amount of which she could not state, but believed it amounted to the sum of \$25,000; that the defendant Mariano Barela counted said money, and gave to complainant \$500 of her money taken as aforesaid, and presented each of three servant girls in the house with \$10, and took and carried away the balance of said money, and also took and carried away the horses and buggy aforesaid; that, at the time of the occurrence last mentioned, she was totally ignorant of her rights under the will; that she is uneducated, and unable to read or write, easily deceived, and that she at that time reposed implicit confidence in the good faith and integrity of the defendant Mariano Barela, and therefore did not remonstrate against his said actions, but permitted him to take away the said horses and buggy and said money without giving a receipt for the same, and without her knowing the amount of money so taken; that, after she became informed of her rights under the will, she requested the defendant Mariano Barela to inform her of the amount of money so taken from her, and also requested him to pay and return the same to her, together with the two horses and buggy; that the said defendant refused to comply with her request, and sent his agents, Nestor Armijo, Jacinto Armijo, and Pedro Lassaigne, the parish priest and spiritual adviser of complainant, to dissuade and discourage her from asserting and demanding her rights in the premises, and to represent to her that she was not entitled to the money or to anything else which the said Mariano Barela had taken away from said house and lot, and to represent to her that the title to said house and lot was defective, and that, unless she would accept the two horses and buggy, and a deed which the said Mariano Barela represented to her conveyed to her all the lands formerly known as the "Juan Bautista Armijo and Manuel Lopez Properties," and said house and lot, in full satisfaction of all demands against him as such executor, he would cause the title to said house and lot to be investigated, and the complainant to lose, and be turned out of,

said house; that she, being deceived by the false and fraudulent representations of Barela, and being intimidated and coerced by his threats and menaces, and being ignorant of her rights, agreed to accept said proposition and accede to said demand, and thereupon the said Mariano Barela executed and delivered to her a deed which he represented conveyed to her all the lands known as the "Juan Bautista Armijo and Manuel Lopez Properties," and also the house and lot in Las Cruces, and returned to her the said two horses and buggy which he had wrongfully taken away, and thereupon she executed and delivered to the said Mariano Barela the receipt which he demanded of her; that said release and receipt so executed and delivered by her was wholly without consideration, and gave to her only a part of what she was entitled to under the will, and is a fraud upon her rights, and would, if permitted to remain in force and effect, deprive her of property of great value, viz., the value of \$25,000, without any recompense or consideration. The bill also avers that said Mariano Barela and Rafaela Barela are the residuary legatees under the will, and as such claim the money and property wrongfully taken from complainant by the said Mariano Barela, executor, etc., and that on the 24th day of October, 1887, while complainant had pending in the district court a bill of complaint against Mariano Barela, executor, and Rafaela Barela, which bill, among other things, prayed for the cancellation of the said receipt and release, the said Mariano Barela, in order to make a final statement of his accounts as executor, went before the defendant Demetrio Chavez, probate judge, and proffered and used said false and fraudulent receipt and release for the purpose of obtaining a final release and discharge from his liabilities as such executor, notwithstanding the fact that there never had been filed in the probate court any schedule showing the kind and value of the property and assets which had gone into the hands of the executor, and that the complainant had no notice of such settlement and discharge until some five or six days after the same had been made and granted.

The prayer of the bill is that the said codicils to the will, and the alleged and pretended discharge of the said Mariano Barela as executor, and the proceedings in reference to admitting said codicils to probate, and in granting the discharge of the executor, be declared null and void, and for a full and perfect discovery of all sums of money, valuable papers, and property of every description and kind obtained by him, received, or taken from the house and lot, and everything contained therein, devised to complainant; that the will of the late Pedro Garcia y Perea, so far as the same relates to the rights of complainant, be construed, and her rights thereunder be enforced, by a decree of the court; that said pretended receipt or release be surrendered and canceled, and said transaction

be declared null and void; and that an account, etc., be taken, under the direction of the court, of all the dealings and transactions between the defendant Mariano Barela and complainant, etc.

The defendant Mariano Barela, in his answer, admits the will, the probate thereof, and of the codicils, his own appointment as executor, and that the codicils were not properly executed, because signed by only two witnesses, but he says that at no time has there ever been any objection or contest made in the probate court as to those codicils, and that he derives no benefit from the codicils, and renounces all benefit therefrom, but whether they are valid or not in no manner affects complainant's rights under the will; that no objection or exception has ever been made in the probate court to any proceedings therein relative to the estate; that complainant's receipt is only evidence of her having received her distributive share of the estate; and that he disclaims all title to the Armijo and Lopez properties devised to complainant by the will. The answers of the other defendants are unimportant on this appeal, and space will not be taken up in stating their contents. A general replication was filed to the answer of the defendant Mariano Barela by the complainant.

The special master in chancery, to whom the cause was referred, found in favor of the complainant upon all the material allegations of the bill; that the money found in the iron box and iron safe, and carried away by the defendant Mariano Barela, passed to the complainant, under the devise to her of the house and lot in Las Cruces, articles of goods, personal furniture, household furniture, and all that was therein contained; and that the amount of said money was \$6,138; and the report of the master recommended a decree in favor of the complainant for that amount, less the \$500 the defendant paid to her. The defendant filed exceptions of the master's report, which were, on the 8th day of October, 1888, considered by the court and overruled. The court then made a decree confirming the report of the master in all things except as to the time from which the amount found in favor of complainant should bear interest. The decree also held the first codicil to the will, and the action of the probate court in admitting the same to probate, null and void, and directed the executor to execute the will as construed by the master and confirmed by the court. It declared null and void the so-called final settlement made by the executor in the probate court, as to the complainant, and decreed that the complainant have and recover of the defendant Mariano Barela as executor of the said estate, and of the said Mariano Barela in person, the sum of \$5,638, with interest from the date of the decree at the rate of 6 per cent. per annum, and for costs, etc.

The first question presented for the consideration of the court is raised by the appellants' first and third assignments of error,

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viz., "that the court erred in not dismissing the bill for want of jurisdiction, and in overruling defendants' exception numbered eight, as to the jurisdiction of the court." The appellant contends that section 562, Comp. Laws 1884, conferred exclusive original jurisdiction upon the probate court of Dona Ana county to hear and determine all questions relative to the probate of the will, and any controversy respecting the will, involved in the case, the conduct of the administration of the estate, and the settlement of the estate by the executor; that the appellee should have presented the questions arising in this case to the probate court, and, if unsuccessful there, could have then appealed to the district court; and that the district court did not possess original jurisdiction to hear the case, and could only acquire jurisdiction by appeal taken from the probate court. Section 562, Comp. Laws, 1884, is as follows: "The several probate judges shall have exclusive original jurisdiction in all cases relative to the probate of last wills and testaments; the granting letters testamentary and of administration, and the repealing the same; the appointing and displacing guardians of orphans and persons of unsound mind; to binding out apprentices; to settlement and allowance of the accounts of executors, administrators, and guardians; to hear and determine all controversies respecting wills, the right of executorship, administration, or guardianship, respecting the duties or accounts of executors, administrators or guardians, and all controversies between masters and those bound to them; to hear and determine all suits and proceedings instituted against executors or administrators upon any demand against the estate of their testator or intestate: provided that, when any such demand shall exceed one hundred dollars, the claimant may sue either before the probate court or in the district court, in the first place." This section of the statutes is certainly broad in its provisions; and it may be, as contended by the appellant, that it was the intention of the legislature to vest in the probate courts "exclusive original jurisdiction in all cases relative to the probate of last wills and testaments; * * * to hear and determine all controversies respecting wills; * * * to hear and determine all suits and proceedings instituted against executors or administrators upon any demand against the estate of their testator or intestate." But the appellee insists that, if the statute is susceptible of the construction claimed for it by the appellant, the legislature had no power to take from the district court a part of the jurisdiction conferred upon such courts by the organic act of New Mexico, and vest such power in the probate courts; and this question we will proceed to consider first. Section 1868 of the organic act provides: "The supreme court and the district courts, respectively, of every territory, shall possess chancery as well as common-law jurisdiction." The chancery and common-law juris-

diction here conferred upon the district and supreme courts is a jurisdiction very ample and very well understood. It includes almost every matter, whether of civil or criminal cognizance, which can be litigated in a court of justice. It includes, and has always included, a very general jurisdiction over cases of administration, from the fact that common-law courts and probate courts do not have powers adequate to give relief. The jurisdiction is founded upon the principle that it is the duty of the court to enforce the execution of trusts, and the "necessity of taking accounts, and compelling a discovery," etc. 3 Williams, Ex'rs, 2117. The organic act provides that "the jurisdiction of the probate court shall be as limited by law." There can be no doubt that by the organic act a part of the judicial power of the territory was vested in the probate courts; but this power was limited to such subjects as have from an early day, both in this country and in England, pertained to these courts, such as the probating of wills, the appointment of executors and administrators, the allowance of claims against estates, the settlement of accounts of executors and administrators, the appointment of guardians, and the control of infants' estates, etc. Such courts are not, in their mode of proceeding, governed by the rules of the common law. They are without juries, and have no special system of pleading; and hence their powers are inadequate to the complete exercise of original and exclusive chancery jurisdiction. In *Ferris v. Higley*, 20 Wall. 375, the supreme court of the United States, we think, fairly and accurately interpreted the meaning of the phrase "as limited by law," as used in the organic act, with reference to the jurisdiction of the probate courts. In that case the legislature of Utah territory had passed an act as follows: "The several probate courts in their respective counties have power to exercise original jurisdiction, both civil and criminal, and as well in chancery as at common law, when not prohibited by legislative enactment; and they shall be governed in all respects by the same general rules and regulations as regards practice as the district courts." In construing this statute, that court said: "The argument is that the words 'shall be as limited by law' refer to laws to be hereafter made by the territorial legislature, and that, as the power of that body extended to all rightful subjects of legislation, it extended to this of totally changing the jurisdiction of these courts. We are not prepared to say that, in deciding what law is meant in this phrase 'as limited by law,' we are wholly to exclude laws made by the legislature of the territory. There may be cases when that legislature, conferring new rights or new remedies, or establishing anomalous rules of proceeding within their legislative powers, may direct in what court they shall be had. Nor are we called on to deny that the functions and powers of the probate courts may be more specifically defined by territorial statutes within the limit of the

general idea of the nature of probate courts, or that certain duties not strictly of that character may be imposed on them by that legislation. But we hold that the acts of the legislature are not the only law to which we must look for the powers of any of these territorial courts. The general history of our jurisprudence, and the organic act itself, are also to be considered; and any act of the territorial legislature inconsistent with the latter must be held void. We are of opinion that the one which we have been considering is inconsistent with the general scope and spirit of that act in defining the courts of the territory, and in the distribution of judicial power amongst them; inconsistent with the nature and purpose of a probate court as authorized by that act; and inconsistent with the clause which confers upon the supreme court and district courts general jurisdiction in chancery as well as at common law." It is true that the Utah statute is much broader in its scope than our own, but the difference is in degree only. The principle involved is as to the power of the territorial legislature to take from the district courts jurisdiction of matters which have belonged to such courts from time immemorial, and which is specially conferred by the organic act, and to confer upon the probate courts jurisdiction of matters far beyond that granted by the organic act, and which, in the history of our jurisprudence, has never been considered as inherently belonging to such courts. We are of the opinion that section 562, Comp. Laws 1884, so far as it attempts to invest the probate courts with exclusive original jurisdiction in controversies of the character of the case at bar, is void. The case presented by the bill and made out by the evidence involves a trust fraudulently executed, and necessitates a discovery and an accounting. The existence of these is all that is necessary to invoke the equitable jurisdiction of the court.

We now proceed to consider the main point involved in the case, viz., whether, under the fourth clause of the will, the money contained in the iron box and iron safe passed by the devise to complainant, or to the residuary legatees under the last clause. Some discussion has occurred as to whether the translation made of the will from the Spanish to English is correct; but the record discloses an admission of both sides that the copy of the will heretofore set out in this opinion is the sworn translation of the will made by Pinito Plino, and as such was introduced in evidence without objection. We therefore adopt that translation as the proper one.

The fourth clause of the will reads: "I also grant to my wife, already referred to, all articles of goods in my house, personal furniture, household furniture, and all that therein exists." The house contained, among other things, an iron box and an iron safe; and in these were found the money which is the subject of this controversy. The will was evidently written by some person who

was entirely ignorant of legal forms, and of all rules relative to the construction of wills; but, however lacking in legal precision of expression the will may be, the testator had some meaning in the language used to convey his wishes with respect to the disposition of his property, and the meaning must be ascertained from the instrument itself. The clause of the will under consideration contains a devise of certain particular things which are enumerated; and the appellant contends that the words 'all that therein exists,' which follow the enumeration of particular things, did not extend the devise, but limited it to the particular things enumerated. The rule invoked is a familiar one. But little assistance is derived from general rules in the construction of a will. The intent of the testator is to be sought in the instrument itself. In making it, he does not often have in mind any particular rules of construction applied to other wills. He uses those expressions which he supposes convey his own thoughts and wishes. In *Given v. Hilton*, 95 U. S. 598, it is held that in the construction of wills, as well as of statutes where certain things are enumerated, and a more general description is coupled with the enumeration, that description is commonly understood to cover only things *ejusdem generis* with the particular things mentioned. This is because it is presumed the testator had only things of that class in mind; but this rule of construction rests on a mere presumption, easily rebutted by anything that shows the larger subject was in fact in the testator's view. The language used in the fourth clause was certainly sufficient to make a good devise to complainant of all the things that were enumerated, without the use of the words "and all that therein exists." Why were these words added, unless the testator had in mind something besides the particular things mentioned? The second clause of the will devised to the wife the testator's residence, which is described. The fourth clause devised to her the articles of goods, personal furniture, household furniture in the house, "and all that therein exists." Exists where? Not in the house, but in the personal and household furniture. We think there can be no doubt but the iron box and iron safe passed to the wife under the enumeration of "articles of goods, personal furniture, and household furniture." But there was something more in the articles enumerated to be disposed of. Therefore the testator adds: "And all that therein exists." These words had a meaning to the testator, because he alone knew that the money was there. Taking the language used in the will in connection with the testator's esoteric knowledge of the existence of a large sum of money in the iron box and iron safe, we hardly see how a man ignorant of the rules of the construction of wills could have expressed his thoughts and intentions more clearly than the same were expressed in this will. - The purpose of the testator was to dispose of all his property; and, if the

contention of appellant be correct, the will gave to the wife the residence of the testator, and a piece of land near the depot in Las Cruces, known as the "Juan Bautista Armijo and Lopez" land, the household furniture in the residence, 10 cows, 1 small wagon, and 2 mules. It made specific bequests to various other persons of 1,600 head of sheep, a house, cows, asses, money, etc., and the remainder of the property to the defendants, and although possessed of a large amount of money, the wife was left without a dollar, except as she might raise it by a sale of the property devised to her. The complainant was the wife of the testator. They had no children. There is nothing in the record to suggest that the testator did not entertain for his wife that complete affection that all good men should have for good wives. No reason existed to indicate that the testator had any cause to deprive his wife of that maintenance and support from his property to which she was entitled. It is held in *Smith v. Bell*, 6 Pet. 74, that "in the construction of ambiguous expressions the situation of the parties may very properly be taken into view. The ties which connect the testator with his legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him, and to influence him in the disposition of his property, are all entitled to consideration in expounding doubtful words and ascertaining the meaning in which the testator used them." The residuary legatees were, respectively, the sister and nephew of the testator. But the testator was under no legal or moral obligation to make provision in his will for their support. Had he ignored them entirely, no one could question his right to do so. But to the wife he was bound by legal and moral ties that could not be disregarded. We must presume that the testator had in his mind these obligations when he made his will, and that his intentions in respect thereto were in accordance the dictates of humanity and morality. From these considerations, we think it was the intention of the testator to leave the money to the complainant, and that such intention is clearly expressed in the will.

The court below set aside the receipt executed by complainant to the defendant Mariano Barela of all claims against the estate of her deceased husband, and this is assigned by the appellant as error. It appears from the record that, a few days after the death of Pedro Garcia y Perea, the defendant Mariano Barela, in company with one Nestor Armijo and others, went to the residence of the deceased, and opened and read the will, and obtained from the wife the combination of the safe and the key to the iron box, and took therefrom money which was then and there counted, and which amounted to \$6,138. The defendant gave to the complainant the sum of \$500, and other small sums to household servants, and carried the remainder away with him. At the same time he took away

a carriage and two horses, which were found in a corral on the same premises. The wife at the time made no objection. She was advised at the time by Nestor Armijo that, in his opinion, the money belonged to the defendant Barela. Afterwards a controversy arose on account of the executor having taken away the horses and carriage, and the deeds to the property devised to the wife. Up to this time there seems to have been no dispute as to the ownership of the money. The complainant is an ignorant woman, and seems to have accepted implicitly the statements of others that the money belonged to defendant. Nestor Armijo, who had so advised her, had been requested by her husband, before his death, in her presence, to look after her interests after his death; and therefore his advice, naturally, had great weight with her. Armijo and one Pedro Lassaigue, parish priest and spiritual adviser of complainant, undertook to settle the dispute. They went to the house of complainant, and persuaded her to give the defendant a receipt in full of all claims against the estate in consideration of his returning the horses and carriage and the deeds to her property. The complainant at first refused to give a receipt in full, but Armijo insisted on having a receipt to cover all her demands against the estate. During the conversation, Armijo told the complainant that defendant had written a letter to certain relatives of the deceased to come on and contest complainant's right to the property. In this way they preyed upon her fears, and prevailed upon her to settle with defendant, in order that she might get a perfect title to the property that had been left to her; the defendant promising, at his own expense, to defend any suits that might be brought against her. Under these circumstances, complainant signed and delivered to the defendant a receipt in the following words: "Territory of New Mexico, county of Dona Ana—ss.: Guadalupe Sisneros Garcia, widow of the late Pedro Garcia y Perea, late of the said above county and territory, hereby receipts in full of all claims against said estate of said Pedro Garcia y Perea, in consideration of two horses and one buggy, and in full of all moneys, notes, debts, credits, choses in action, and all claims whatsoever due said estate, and does hereby relinquish all claims against said estate, and does hereby release Mariano Barela, executor of the last will and testament of the said late Pedro Garcia y Perea, from all claims of the undersigned widow of the said Pedro Garcia y Perea, deceased. GUADALUPE S. Y GARCIA. NESTOR ARMILJO. PEDRO LASSAIGNE." We think the court did not err in sustaining the master's finding that the receipt given by complainant was obtained by improper influences, by working upon her fears, and imposing upon her confidence and ignorance, and that the procuring of it was a fraud upon her. It does not matter whether the motives of the priest and Nestor Armijo in persuading complainant to execute the receipt were honest

or sinister,—whether they acted as the agents of defendant or as the mutual friends of both parties. They held such relations to her as to give them the utmost influence over her conduct. She was ignorant of her rights, and they took no pains to inform her. Professedly her friends, they, whether purposely or not, insinuated in her mind the belief that only by acting on their advice could she preserve the property which she understood had been left to her by the will. At this time no thought of the money found in the safe was in her mind; but evidently the defendant's purpose, by obtaining the receipt, was to estop her thereafter setting up any claim to the money. *Wheeler v. Smith*, 9 How. 82. The law imposes upon an executor the utmost good faith in the discharge of his duties to the estate and to the legatees. He will not be permitted to derive a benefit from the administration of such trust.

The order of the court below setting aside the final settlement made by the executor in the probate court, we think, was entirely proper. At the time the settlement was made the executor had in his hands a large amount of money that belonged to complainant under the will. He took no account of this money in his inventory of the property belonging to the estate. He accounted for it in no manner whatever. And a final settlement of his accounts as executor, under such circumstances, was a fraud upon the rights of the complainant, and was very properly held to be null and void.

The appellant contends that there was error in sustaining the finding of the master that the testimony showed that the testator in the fourth clause of the will, intended to give to his wife the money in question. The record shows that parol testimony to prove the intentions of the testator with respect to the money was first offered by the appellant, and was permitted to be given over the objection of the appellee, not because the master regarded the evidence as competent, but, as he says in his report, "he could find no rule of law authorizing a master to exclude testimony of any kind, which counsel might deem proper to offer." The report shows, further, that the master did not consider the parol evidence competent, and did not consider it in making up his findings.

The master says in his report: "I am of the opinion that there is no ambiguity in the language of the fourth clause of the will such as will relax the rule, and admit the parol testimony to ascertain testator's intention." This conclusion of the master was sustained by the court below, and we can see no error in that ruling. On the contrary, we think the court below declared a correct principle of law upon the subject, and applicable to this cause.

The second codicil of the will was attested by but two witnesses. Section 1380, Comp. Laws N. M. requires that a will shall be attested by three or more witnesses. To constitute a valid attestation of the codicil would

require no less number. Jarm. Wills, § 93. The court below committed no error in setting aside the action of the probate court approving said codicil.

A number of errors have been assigned by the appellants besides those already noticed, but they all depend more or less upon the questions already noticed in this opinion. We do not think it necessary to enter into a discussion of them. The case was properly decided below upon the merits. We see no substantial errors in the record, and the judgment will be affirmed.

LONG, C. J., and LEE, J., concur.

(5 N. M. 373)

LAMY *et al.* v. CATRON *et al.*

(Supreme Court of New Mexico. Jan. 31, 1890.)

DIVORCE—ALIMONY—ATTORNEY'S FEES—MARRIED WOMEN.

1. A court of equity, as an incident to the power to decree divorces, may grant to the wife, *pendente lite*, on a proper showing, temporary maintenance and allowance for solicitor's fees, and enforce payment of the same against the husband, or his property, in the absence of a sufficient separate estate belonging to the wife, or, under such circumstances, charge such maintenance and allowance for solicitor's fees against any common property belonging to both husband and wife, whether such property is in the control of the husband or wife.

2. Where the wife has an ample estate of her own, she may charge such estate with necessary solicitor's fees to enable her to prosecute or defend a divorce action to which she is a party, and the court has power, as an incident to the divorce proceeding, to decree such necessary fees against her separate estate.

3. The compromise of the husband and wife, to which the solicitor is not a party, cannot take away his established right to his fees.

Error to district court, Santa Fe county; REEVES, Judge.

Gildersleeve & Preston, for plaintiffs in error. *Catron, Knaebel & Clancy*, for defendants in error.

LONG, C. J. John B. Lamy and Mercedes Chaves de Lamy, plaintiffs in error in this court, filed in the district court of Santa Fe county their bill of complaint to review and set aside a decree rendered in said court on the 1st day of August, 1885, in a cause wherein Mercedes Chaves de Lamy was complainant, seeking a divorce, and John B. Lamy was defendant. Upon hearing the bill filed below by the plaintiffs in error here, who were complainants in the bill of review, the court dismissed the same. The plaintiffs in error contend that the court below should have sustained the bill of review, and bring this cause here to correct the error which it is alleged the court below committed in dismissing the bill of review.

It will be necessary to a proper understanding of the objections urged here to state with some detail the various steps taken in the original proceeding for divorce of Mercedes Chaves de Lamy v. John B. Lamy. The bill of complaint in that case was filed in the district court, and in December, 1879, an amended bill was filed, Thomas B. Catron

appearing therein, by appointment of the court, as next friend. It was charged in the bill of complaint, among other things, that at the time of the marriage of the complainant Mercedes Chaves de Lamy with John B. Lamy she was possessed of the sum of \$16,800 in money and property, which she inherited from her father, and that after her marriage she also inherited and received from her mother the sum of \$27,000 in money and property, including a large amount of valuable real estate in Santa Fe. She further averred that, against her will, and over her remonstrance and objection, the defendant in said action, her husband, had reduced to his possession, and taken and converted, the whole of the said property, and the rents, profits, and issues of said real estate; that he had changed the form of much of the property, and was then claiming the whole of it absolutely as his own, and denying that she had any interest in the same; that he refused to give her possession or control of the whole or any part of the property, and had so managed the same as to materially lessen it in value; that at that time of his marriage, and at the time of bringing the action, he had no property of his own whatever, and that he had incumbered by liens a part of her property. For relief she asked to be decreed an absolute divorce; that the property be decreed free from said liens; that she be decreed to be the owner of the whole of the property; and that the same be restored to her. She also prayed that John B. Lamy should be required by decree to pay into court a sufficient sum of money to pay her solicitors, Messrs. Catron & Thornton, for their services, as such, in instituting and conducting the divorce suit, and to pay costs. John B. Lamy appeared to the action, and on the 20th day of April, by his solicitors, Messrs. R. H. Tompkins and C. H. Gildersleeve, filed answer, to which a replication was filed by complainants, and thus issue was joined. July 26, 1880, the cause was referred by the court to a master, with directions to take evidence and report. February 9, 1882, the master filed his report, showing therein that neither party had presented any witnesses for examination, and that he had not taken any evidence. Two days before this report by the master, John B. Lamy, then appearing by C. H. Gildersleeve, his solicitor, moved to dismiss the action for want of prosecution. It may be observed that at this state of the record the cause was pending in court on the bill, answer, and replication, with the motion of John B. Lamy to dismiss not yet acted upon, with Catron and Thornton yet appearing for the complainant, and C. H. Gildersleeve for the defendant. On the 21st day of February, 1882, the record recites: Catron & Thornton, solicitors for said complainant, filed their petition of interpleader. In it they allege their employment by Mrs. Lamy as her solicitors; they show the services rendered for her; charged that she agreed to pay them the sum of \$5,000 out of her separate property,

at the time in the control of her husband, in trust for her benefit; that such property was worth \$40,000; that Mrs. Lamy and her husband settled their controversy, and that it was agreed that her husband should hold her property as her trustee on such settlement, and pay out of the same the said \$5,000; that the services were of that value to her, and not paid. They ask that the cause be continued on the docket, a master be appointed to take proofs, and that their fees be decreed in the action. No further action was taken for nearly five months, when, on July 10th, the court ruled Mercedes Chaves de Lamy and John B. Lamy "to plead, answer, or demur to the petition of interpleader of said Catron and Thornton, on file herein, at or before the incoming of court on next Monday morning." For designation only, as a matter of brevity in statement, the paper filed by Catron & Thornton will hereafter, in this opinion, be referred to as an interpleader, following in that respect, for designation, the name given by the court below to that paper. Two days after this rule was entered of record, July 12th, Catron & Thornton served C. H. Gildersleeve, as solicitor for defendant, with a copy of the interpleader. July 26th, neither John B. Lamy nor his wife appearing to the interpleader, and failing to respond to the rule "to plead, answer, or demur" thereto, it was decreed that the same be taken as confessed. On the 31st day of July, for the first time after the filing of the interpleader, John B. Lamy appeared, and then, by C. H. Gildersleeve, his solicitor, moved to set aside the decree *pro confesso*, the order of reference to a master made thereon, and to strike from the files the interpleader. Thus the cause remained, without any action whatever, either by the court or parties, until the 28th day of July, 1884, a period of over two years. The interpleader was filed during a term of court, and presumably in open court; yet John B. Lamy, with full opportunity to examine the record and files, permitted 140 days—nearly five months—to elapse without taking a single step to defend against the claim for solicitor's fees. He permitted 19 days to pass after the actual delivery of a copy of the interpleader to his solicitor, and court in session, before he took any step with respect to the interpleader. He did not then make to the court any complaint that he was not aware that the interpleader had been filed, or that he was ignorant of the fact that a rule to plead had been entered against him, or for want of service of a copy of the interpleader in time. The record does not disclose that any objection on the ground of irregularities of that character was made. Had objection on that ground been made at that time in the court below, the ruling there might have been different; but, as no such objection was presented for the consideration of the court below, it cannot be considered for the first time here, but must be held to be waived.

The ground of the motion to set aside the decree *pro confesso*, filed by John B. Lamy,

is because "the court has no jurisdiction to entertain the consideration of the matters contained in said interpleader, nor grant any decree, order, or relief on the matters and facts therein stated and contained." He did not object on the ground of irregularity, but attacked the power and jurisdiction of the court, as an incident to and a part of the cause, to ascertain and decree solicitors' fees for services rendered the wife in a divorce proceeding. The discussion of this point will appear more appropriately later on in this opinion. Two years passed after the motion by John B. Lamy to set aside the decree *pro confesso* was made, when, on the 28th day of July, 1884, the complainant in the divorce action filed in court her own affidavit as follows: "Affidavit of Complainant. Mercedes Chaves de Lamy v. John B. Lamy. Chancery. In the district court, Santa Fe county, territory of New Mexico. Mercedes Chaves de Lamy, being duly sworn, on her oath states that she is the complainant in the above-entitled cause, and at present residing in the city of Santa Fe, territory of New Mexico. That all matters of difference existing between herself and defendant, her husband, at the time of filing said bill of complaint, have been for the past three years fully settled and adjusted. That a reconciliation between herself and her husband has taken place, and she is now living with him again. That over two years ago she directed her attorneys in the above cause to dismiss said bill of complaint, and is greatly surprised to learn that her directions in the premises have been disregarded by them. Affiant states that she employed T. B. Catron as one of her counsel at the time said suit was brought, but made no arrangements with him then nor since whereby she was to pay or promised him any compensation for services rendered, or to be rendered, or that he was to receive from her any greater compensation than her other counsel, which was five hundred dollars, which she paid each to Wm. Breeden and T. F. Conway. That she desired Mr. Catron, at the time she retained him, to name the amount of his fee, but that he assured her that it was unnecessary, as his charges would be very reasonable. That in fact Mr. Catron performed for her but very little service, Mr. Conway being the attorney who did most of her business, and with whom she most always consulted. Affiant further states that it is her desire said suit be dismissed, and she respectfully requests the court to so order. MERCEDES CHAVES DE LAMY. Subscribed and sworn to by the said Mercedes Chaves de Lamy this 4th day of February, 1884, before me, GEORGE CUYLER PRESTON, Notary Public, Santa Fe County, N. M." On the same date, John B. Lamy filed a denial under oath that he had ever promised, obligated himself, or undertaken to pay the solicitors' fees of Catron & Thornton. There was pending at that date in the court below the motion of John B. Lamy, before mentioned, and the application of Mrs.

Lamy to dismiss her action for divorce. The motion of John B. Lamy was denied, and C. M. Phillips appointed master to take testimony as to the allowance of solicitors' fees, and to report to the court.

The face of the affidavit and application to dismiss filed by Mrs. Lamy proves that she had personal knowledge as early as February 4, 1884, of the pendency of the interpleader, and of the claim by Catron & Thornton to have, in the divorce proceeding, a decree for their solicitors' fees. This was six months before the court ruled upon the motion of her husband. During this time they had become reconciled. She never asked the court to set aside the decree *pro confesso* as to her, or for any relief whatever, except to dismiss the action. There is absolutely not a line of the record to indicate that she objected to the action of the court in proceeding to ascertain and fix solicitors' fees, except what may appear in her application to dismiss the case. In that application there is no intimation that she denies the power of the court to decree solicitors' fees against her. She objects to the amount, concedes that she agreed to pay \$500 to Catron, and is silent as to the action of the court taken before that time. The prayer of her bill of complaint is "that the defendant [John B. Lamy] be required to pay into court a sufficient sum of money to pay the solicitors of your oratrix for their services in instituting and conducting the suit." While she does not designate the fund or estate out of which her husband is to pay into court such fees, she does show in her bill that the only property John B. Lamy held belonged to her, and the order of court could only be effective in the first instance by payment out of her property. That she expected at the commencement of the cause to charge that property with solicitors' fees is apparent from the averments of the bill. Mrs. Lamy was in court as a complainant, praying the allowance of solicitors' fees. She was in court with her sworn affidavit, asking to dismiss the bill, and also in court with her sworn affidavit with allegations relating to solicitors' fees. The record is silent as to whether she filed this application in person or by solicitor. It is immaterial which way she did that act. In three days after she filed her application to dismiss the cause, Mr. Gildersleeve appeared as her solicitor before the master. He was, from July 31, 1882, forward, also the solicitor for her husband. At the time she filed the application to dismiss, and for six months prior thereto, she was living with him. It is impossible to resist the conclusion from the record that Mr. Gildersleeve, or some other solicitor adverse to Catron & Thornton, represented her in court in the application to dismiss. While the motion of John B. Lamy to set aside the decree was denied, no action is disclosed by the record on his wife's application to dismiss the cause. The matter of solicitors' fees was referred to the master, and, although denying the motion to set aside the decree *pro confesso*, the court

seems to have accorded both to Mr. and Mrs. Lamy as full right and opportunity to make defense as if the motion had been sustained. On the 31st day of July the evidence of T. B. Catron was taken before the master, and the record recites: "Present, C. H. Gildersleeve, attorney for complainant." On behalf of Mrs. Lamy, Mr. Gildersleeve, as her solicitor, cross-examined Mr. Catron. Six months more intervened, and neither party moved in the action. Then, January 18, 1885, Louis Sulzbacher was examined as a witness, and again the record recites: "Present, Charles H. Gildersleeve, solicitor for complainant." Mr. Barnes at the same time testified as a witness, and the solicitor of Mrs. Lamy cross-examined both witnesses. Again, on the 24th of January, Mrs. Lamy, by her solicitor, Mr. Gildersleeve, again appeared before the master during the taking of evidence, and examined the witness. February 28, 1885, she appeared before the master, and was herself sworn, and testified in her own behalf as a witness, and introduced other evidence for herself, all on the question of solicitors' fees, Mr. Gildersleeve appearing at the time as her solicitor. It was nearly seven months from the date of the reference to the master till the conclusion of the evidence. During this time she was represented by an able solicitor. She had the benefit of her husband's aid and advice, and the most ample opportunity to disclose to the court every fact in existence relating to solicitors' fees, or likely to reduce the amount of allowance. No evidence was offered and refused; no witness presented who was not examined. What better opportunity could have been given her, if the court had set aside the decree, and permitted a formal appearance? In her affidavit she swears Mr. Catron should have received \$500. In good conscience, she could not expect, if the court had jurisdiction to decree at all, that it would fix the amount at less than that sum. The question of the value of the services is not before this court.

It is also apparent from the face of the record that both Mr. and Mrs. Lamy had ample opportunity given them by the court to prove before the master every fact within their power relating to the fees claimed. Neither can complain if such opportunity was neglected. What prevented either party from examining other witnesses? Nothing. The examination was not hastened. The door was not closed against investigation. If full opportunity was offered to make defense, and such opportunity was neglected or refused, such neglect or refusal should estop the party from complaining. This case is not one where the party complaining shows that he was denied the right to defend. Suppose the record does show some irregularity in the mode of procedure, is it such as to invade any substantial right of plaintiffs in error? If the court had refused to allow them altogether to be heard on the question of solicitors' fees, the case would be different. The record discloses that they were allowed to be,

and in fact were, heard, and did produce evidence,—all they desired. Under such circumstances, even if it should appear that such hearing was by reason of the interpleader, rather than under the averments of the bill, how could that affect substantial rights? It is to be remembered this is one of the errors complained of. The interpleader, as it is called, only gave Mr. and Mrs. Lamy fuller notice of the exact character of the claim for solicitors' fees, and thus the better enabled them to meet the claim by evidence. If the court, as an incident to the divorce proceeding then pending, had jurisdiction and power to refer to the master the matter of solicitors' fees that evidence might be taken to inform the court as to value, what possible difference could it make to Mr. and Mrs. Lamy whether the reference recited that it was upon the interpleader or bill or issues, so long as they were allowed to be heard? The thing to be considered and reported upon by the master was the claim for solicitors' fees. It was that claim upon which he was to take proof. The form of the order which gave the master this power was a mere incident,—a matter of form. To reverse the case on that ground alone would be to sacrifice substantial rights to immaterial form. In this reference, if there was any error at all, it was of form, and not of substance, and in no way deprived the plaintiff in error of any substantial right. "Error in matter of form only, although apparent on the face of a decree, seems not to have been considered as a sufficient ground for reversing the decree." Story, Eq. Pl. § 411; Barb. Ch. Pr. 92. In the case before this court the plaintiffs in error had their day in court, their opportunity to present and examine witnesses, to be heard on the allowance and amount of solicitors' fees, as fully as if the court had set aside the decree *pro confesso* entered as to the interpleader. The irregularity is one that is harmless. "A judgment will not be reversed for an error which does not affect the substantial rights of the party complaining." *Morse v. Morse*, 25 Ind. 156; *Louden v. Dickerson*, 19 Ind. 387; *Bowen v. Pollard*, 71 Ind. 177. In *Holcraft v. King*, 25 Ind. 352, the court say: "Where a correct result is reached in the court below, error in the mode of reaching it is harmless." The authorities to this effect are numerous.

Other questions are pressed upon the attention of the court by the plaintiffs in error. They insist that the court had no right to permit the interpleader to be filed. This objection is substantially the same as that relating to reference. If the court had full power to make the reference without the interpleader, or if the interpleader was treated, or can be properly regarded, in its legal effect, as a motion in the cause, as it well may be, to refer the claim of the solicitors to a master to take proofs, its allowance by the court was harmless. There are three propositions made by the plaintiffs in error, which may be considered together: "*First*. That the husband

is not liable at common law to the legal adviser of his wife, in prosecuting or defending a divorce suit. *Second*. That the wife is not liable on her contracts for counsel fees, made during coverture, even though she joins the suit." If these two propositions are correct, and followed by a third: "That the wife's separate property cannot be charged by her, or by a court of equity, for the fees of her solicitor in prosecuting a just cause for divorce,"—then, indeed, is a married woman in this territory at the mercy of her husband, as all means whereby she may protect herself from unjust accusation in court is cut off. We cannot hold with plaintiffs in error on the first proposition. It is held in many cases, where the wife has no means to prosecute her action, that the husband is liable for her necessary solicitors' fees, and that they may be recovered either in an action at law or allowed and enforced in the divorce proceeding. *Preston v. Johnson*, 21 N. W. Rep. 606; *Porter v. Briggs*, 38 Iowa, 166. Other cases to the same effect are more fully set out later in this opinion. The plaintiffs in error further say: "Before counsel fees can be made a charge upon the separate estate of the wife, it must appear that the service rendered was for the benefit of the estate." The plaintiffs here, imperfectly, at least, admit that in a case where the court finds that the solicitors' fees are for the benefit of the wife's separate property, they may be charged against it. This court elsewhere construes the decree complained of to be a charge against the separate estate of the wife, and against the husband only for so much as cannot be thus made; so, if the court found, as a matter of fact, the services to be beneficial to her estate, it had the legal right to decree the value thereof to be paid out of the same. Assuming, for the present, a point hereafter considered, that the court had jurisdiction, it certainly might lawfully consider the evidence to determine whether such services were or were not beneficial to the wife's separate estate. The court below had the right to draw such conclusion of fact from the evidence as was, in its judgment, proper, and such conclusion could not be reviewed in this proceeding. "A bill of review * * * cannot be sustained upon the ground that the court has decided wrong upon a question of fact. Nor can it be brought for wrong inferences of the court on matters of evidence, nor upon the ground that the former decree was not supported by evidence." Barb. Ch. Pr. 91; *Webb v. Pell*, 3 Paige, 368. In the latter case it is said by the court: "It is well settled that a bill of review for error apparent on the decree must be for an error in point of law, arising out of facts admitted by the pleadings, or recited in the decree itself, as settled, declared, or allowed by the court." As pertinent to this rule, where, it may be asked, is it settled in the record that the property charged in the bill of complaint to be the separate property of Mrs. Lamy was not so? If it was her separate estate, and the service

rendered for her by the solicitors was beneficial thereto, then, according to the admission of the plaintiffs in error, the fees might have been charged against such estate by the court, if it had jurisdiction. Such we believe to be the law. Whether that property was her separate estate, or was her husband's, is not a question of law, but of fact. Whether the solicitors' services were beneficial to the estate, or were not so, was also a question of fact. Both these questions the court had a right to pass upon, without being subject to review upon a bill for that purpose. If the court below, upon the original hearing, found that the property in the hands of John B. Lamy was the separate estate of his wife, Mrs. Lamy, and also found that the services rendered were beneficial to her estate, it would have the right, upon that state of the evidence, to charge the services in a proper proceeding against her estate. The following authorities are to that effect: *Owen v. Cawley*, 36 N. Y. 604; *Yale v. Dederer*, 18 N. Y. 276, 22 N. Y. 451; *Viser v. Bertrand*, 14 Ark. 267; *Cook v. Walton*, 38 Ind. 228; *Putnam v. Tennyson*, 50 Ind. 456. This court cannot presume that the court below did not determine those to be facts. It is nowhere in the record shown, declared, or admitted that the court found to the contrary. In the absence of anything to the contrary, this court will presume the court below found all the facts proven or established necessary to constitute a foundation for the decree. Did the court decree the solicitors' fees to be a charge upon the wife's separate estate? The decree allows Catron & Thornton \$4,000 as solicitors' fees. There is no question before this court as to the amount of the decree. It orders that the defendant John B. Lamy pay over that sum, and recites as follows: "Said respondent [John B. Lamy] is hereby allowed to charge to and against the said property of said complainant, which he may have received into his power, possession, or control, as well as against any acquest property he may have received of said marriage community, and that execution do issue for the same, to be levied of the goods, chattels, property, effects, and real estate of said complainant, and of the acquest property which may be found in the hands, possession, or control of the respondent." The sum is here charged directly against the wife's property in the hands of the husband. Its seizure and sale is provided for to make the debt. To reach this result, the court, no doubt, upon the pleadings and proofs, determined the fact to be that the wife employed and agreed to compensate her solicitors; that under such promise they performed services for her in the divorce proceeding, worth \$4,000; that she had a separate estate of her own, in the hands of her husband; that he held the estate as her trustee, and that the services were beneficial to the estate. The court had the legal right to so find, if, in its judgment, that was the proper conclusion of fact to draw. If it did so find, then it had the right to predi-

cate the decree made on such conclusion of facts. The ruling of the court on the facts cannot be attacked by bill of review. This court cannot hold that it is error of law, if the court below found the facts contrary to the right of the case, or contrary to the evidence. In addition to the averments of the bill, there is much evidence indicating that she intended originally to charge her separate estate with solicitors' fees, and that she promised to do so. This court has nothing to do with the matter of fact, whether the services were or were not beneficial to the estate, or whether the amount allowed was less or greater than the proper amount which should have been allowed. These questions are not before the court.

Plaintiffs in error contend that it is too late to apply for solicitors' fees after the parties have settled their differences, and returned to the connubial state. Authority is cited in support of that proposition. If the solicitor performs services in a divorce cause for a wife, so as to create a present right of allowance, which a court of equity is bound to respect, and decree during the litigation, while the parties are carrying on their controversy, it is difficult to perceive how the compromise of the husband and wife, to which the solicitor is not a party, can take away such established right. The case of *Sprayberry v. Merk*, 30 Ga. 81, declares the correct doctrine on that point, and also is to the effect that the wife may charge the common estate of both in her husband's hands for the fees of her solicitors. In that case *Sprayberry* had performed services as solicitor for the wife in prosecuting an action for divorce against her husband. The husband and wife compromised their suit, and began again to live together. It seems the husband held common property of both in his hands, and the court holds that such property may be charged with her solicitor's fees. The court there says: "As to this one matter of a suit for divorce the wife is *sui juris*, having a clear right to institute and conduct that kind of a suit independently of her husband's consent. But this right is practically denied to her if she can command no means of paying the agents who are necessary to the conduct of the suit; therefore it is that, *quoad hoc*, she may charge the common funds of herself and husband in his hands. But this power on her part is founded on the necessity of the case, so its extent does not exceed the demands of the necessity; and therefore she can charge the common funds, or her husband, which is the same thing in effect, only with the real value of such services as she may procure. * * * It is worthy of remark that her counsel fees are allowed as a part of her necessary maintenance, and are allowed before it is ascertained whether she has valid ground for a divorce or not. They are allowed as a necessary means of testing that question,—a question which every wife has a right to test whenever she pleases." The court continue: "As to the settlement which

took place in this case between the husband and wife after she had got the services of her counsel, it is scarcely necessary to remark that the counsel, after having acquired a right to compensation for his services by rendering them, at the request of the wife, could not be settled out of that right by arrangement to which he was no party." That case is somewhat analogous to the one here, and the principle a wholesome one. The authority is directly in point as to the proposition that attorneys' fees may be allowed after the parties to the divorce suit have become reconciled, and resumed their marital relations. If the husband and wife could not so settle their case as to deprive the solicitor of his right to recover in an action at law his fees, then such settlement could not deprive him of his right to have the same ascertained and decreed in the divorce proceeding while it was pending, even though the husband and wife had resumed their relations: provided, such allowance could properly be made in such case as an incident thereto. In the case of *Weaver v. Weaver*, 33 Ga. 173, the facts are as follows: Virginia Weaver instituted a divorce suit against her husband. During the pendency of the action, upon her motion, and upon a showing, the court ordered that defendant pay into court a certain sum of money to compensate the solicitor of the wife for bringing and prosecuting the action. Subsequently, and before this money had been paid in, but after the solicitor had performed some service, Mrs. Weaver discontinued the suit. A motion was made in the case to rescind the order for the payment in of counsel fees. The court below declined to rescind the order, and the case was taken to the supreme court on that point, among others. The supreme court affirms the action on that point of the court below, and says: "Shall counsel be driven to his action at law to recover his fees, or shall the order already passed by the court for that purpose be enforced? We see no reason for compelling counsel to resort to an independent action, when his fees have been already adjudged by the proper court."

It will be observed that the supreme court of Georgia in this case not only hold that the court wherein the divorce action is pending is the proper court, but also that such a case is one in which it is proper to adjudge counsel fees, and enforce their payment, and also that the compromise between the husband and wife does not operate to divest the attorney of his right to compensation. In *Burgess v. Burgess*, 1 Duv. 288, the supreme court holds: "Although the unfortunate difficulties which existed between the husband and wife, and which had resulted in a divorce suit, had been happily terminated by a reconciliation, after the suit had been prepared for trial, yet it was right to make a proper allowance against the husband * * * to pay the attorneys who conducted the suit for the wife." This case is under a statute which somewhat weakens the same as au-

thority here. A very interesting discussion, highly illustrative of the question here, may be found in *North v. North*, 1 Barb. Ch. 243. The case was decided as early as 1845, and seems to have been considered and decided by the court independently of statutory provision. Chancellor WALWORTH there says: "By referring to the reviser's note, * * * it will be seen that the allowance does not depend wholly upon the statute, but upon the practice of the court, as it previously existed." The chancellor observes: "The counsel for the complainant is under a mistake in supposing that the allowance for *ad interim* alimony, and for the expenses of defending the suit, is confined to cases in which both parties admit the original marriage to have been legal." The question there seems to have been as to the legality of the marriage. Counsel appear there to have admitted, where the marriage was legal, and the divorce was sought for acts occurring subsequently, that counsel fees could be allowed in the divorce action, but contended that such a rule did not apply where the legality of the marriage was denied. In discussing the question thus raised, the learned chancellor establishes that it was the practice to allow solicitors' fees, when asked, in divorce cases generally, both where the marriage was admitted, and in cases where that fact was controverted; and this, independently of statutory enactments. So the case becomes especially pertinent to the contention before this court. After a citation from *Ayliffe and Poynter*, and other authorities, the opinion continues: "The precise question now under consideration came before Sir GEORGE LEE, in the arches court of Canterbury as early as 1753, in the case of *Bird v. Bird*, 1 Lee, Ecc. 209, and was decided in favor of the wife. In that case the husband brought a suit against the wife to annul the marriage, on the ground that she had another husband living at the time of her marriage with the plaintiff. The fact being denied by the wife, she applied for an allowance to enable her to defend the suit. It was granted to her accordingly, although the plaintiff insisted she was not his lawful wife, and that he was not bound to bear the expenses of her defense."

The cases thus cited, and they could be multiplied, certainly must dispose of the contention made by John B. Lamy on his construction of the legal effect of the decree as against him. By the terms of the decree, he can only be reached after the separate property of his wife is exhausted, and the authorities quoted establish beyond doubt the power of the court to charge him in that event, at least. There is one more case on this point so clear and strong in its reasoning, so directly in point and satisfactory, that we cannot omit to cite it. Preliminary to a consideration of that cause, it may be observed that in New Mexico jurisdiction to decree a divorce is conferred by statute. Sections 998, 2282, Comp. Laws. No provision is made by statute, either for alimony or for an allowance

to the wife to prosecute a cause for divorce against her husband, or for allowance to enable her to defend against such an action when prosecuted by him. Unless there is power outside of the statute to charge the husband in such cases with solicitors' fees for the wife, and for necessary expenses connected with such suits, in cases where she has no separate property of her own, then the wife is powerless to protect herself, and is at her husband's mercy. This court should consider carefully before maintaining a rule of law having such effect. If the wife, having a separate estate of her own, may charge it, or the court may do so, with legitimate, necessary, and proper expenses for solicitors' fees to enable her to protect herself in such cases, and in cases where she has no property, if the court may allow against the husband, and compel him to pay, such necessary expenses, then the wife is clothed with a proper power for her own defense. The supreme court of Georgia, as long ago as 1851, was confronted with conditions exactly similar, and in *McGee v. McGee*, 10 Ga. 478, delivered an opinion which, to this court, appears both exhaustive and conclusive. It is unanswerable, and sustains the right of the wife to temporary alimony in a proper case, and allowance for her necessary expense, when she has no estate, out of the property of the husband. The statute of Georgia at that time provided that, in all cases where the court determined in favor of a divorce to the wife, it could make provision out of the property of the husband for alimony. But the statute of Georgia, like our own, was silent as to temporary alimony or expenses preceding such determination. The court in that cause stated the proposition to be considered in this way: "The first proposition denies altogether the right of a wife, pending a libel for divorce, to a temporary allowance out of the estate of the husband for her support and maintenance, and to defray the expenses of the litigation; the counsel insisting that, according to the laws in force in this state, no power is conferred upon the courts, either of law or chancery, to grant any alimony until after a divorce is decreed. * * * The power which he [the judge below] exercised * * * is that of allowing the wife temporary alimony. It is conceded to the plaintiff in error that this power is not expressly conferred by statute, whilst it is also to be claimed against him that it is not prohibited." Such is also the state of the law to-day in New Mexico. The court proceeds: "We look out of the statute book for its source; that is, out of the express provisions of the statute. First, then, I say it is incidental to the power to grant divorces. The superior court being clothed with jurisdiction over divorces, from that jurisdiction springs the authority, pending the cause, to provide, by summary order, for the maintenance of the wife. It is thus that the ecclesiastical courts in England acquired the power to grant alimony. That power is

not an original jurisdiction; it is derivative and incidental. Indeed, it may be stated as a true general proposition that no court has an original authority to decree a separate maintenance while the marriage contract subsists; and, when such power is exercised, it is incidental to some other conceded power. Thus, a court of chancery, as an original power, cannot decree a separate maintenance for the wife; but, having jurisdiction over agreements, when there is a separation, and an agreement for a separate maintenance, it will specifically enforce that agreement. * * * In this way, I apprehend, originated the power in the ecclesiastical courts to provide alimony. Having jurisdiction over divorces, as incidental to that they acquire the power, where the divorce was decreed, to provide permanently for the wife, and the lesser power of providing temporarily for her whilst the litigation is pending. Both powers they have immemorially exercised. In *Ball v. Montgomery*, 2 Ves. Jr. 195, the lord chancellor said: 'I take it to be now established law that no court, not even the ecclesiastical court, has any original jurisdiction to give a wife separate maintenance. It is always incidental to some other matter.' * * * I see no reason why the superior courts of this state have not acquired jurisdiction over temporary alimony incidentally, as the ecclesiastical courts acquired jurisdiction over alimony, both temporary and permanent. It is founded in the most manifest justice and sternest necessity. * * * It is not, therefore, unreasonable to say that the legislature, in clothing a tribunal with power to decree a divorce, intended thereby, as necessarily incident to it, to invest the same tribunal with power to make provision for the wife. This justice and necessity is equally as stern, and the inference therefore equally as clear, in regard to temporary as permanent alimony. * * * *Alimony pendente lite* is a common-law right. It was an established right in England when we adopted the common law. It is no less a common-law right because it grew up under the usages of the ecclesiastical courts. What becomes of that right in Georgia? The common law which guarantees it has not been repealed. It is suited to our condition, and in harmony with our institutions." This court has now quoted extensively from *McGee v. McGee*, because the conditions in Georgia at the time when that opinion was delivered were exactly the same on the question involved with that of New Mexico when the decree sought in this case to be reviewed was entered, and for the further reason that the historical statement of that opinion is correct, and the conclusions deduced therefrom indisputable and convincing. This court is unwilling to hold that in New Mexico the courts in divorce proceedings are powerless to place the wife, as to means for her defense and protection, on an equality with her husband. In *McGee v. McGee* it is further said, (page 487 of the opinion:) "In

a recent case in Pennsylvania, under statutes conferring jurisdiction over divorces very much indeed like ours, but conferring no power to make an allowance to the wife for the expenses of her suit, a motion was made for an order upon the husband for the expenses. The court allowed it, upon the ground that 'it was an incidental authority to the power given to the court to decree divorces.' See *Melizet v. Melizet*, 1 Pars. Eq. Cas. 78. The expenses of the suit and the expenses of maintenance stand upon the same ground. The expenses allowed were not the court costs simply. See, also, the following cases: *Yeo v. Yeo*, 2 Dick. 498; *Wilson v. Wilson*, 2 Hagg. Const. Rep. 208; *D'Aguilar v. D'Aguilar*, 1 Hagg. Ecc. 773; *Soilleux v. Soilleux*, 1 Hagg. Const. Rep. 378; *Poynt. Mar. & Div.* 263; *Monroy v. Monroy*, 1 Edw. Ch. 382; *Wright v. Wright*, Id. 62; *Denton v. Denton*, 1 Johns. Ch. 365; *Mix v. Mix*, Id. 110; *Wood v. Wood*, 8 Wend. 364; *Wood v. Wood*, 2 Paige, 115; *Lawrence v. Lawrence*, 3 Paige, 267; *Germond v. Germond*, 4 Paige, 643."

The reason and authority cited is to the mind of this court satisfactory and conclusive as to the jurisdiction and power of the court below to render the decree sought to be reviewed and set aside. It may be well, also, to refer to a more recent case, decided by the supreme court of Iowa, (*Porter v. Briggs*, 38 Iowa, 170.) In that case the husband brought an action of divorce against the wife, charging her with adultery. Porter & Moir, at her request, rendered legal services as her attorneys in defending her in the action against such charges. The husband contended that he was not liable, and that if he was his liability should have been found and decreed in the action for divorce. The court say: "The ecclesiastical courts in England and the courts of chancery of this country have almost uniformly in a divorce proceeding required the husband to pay the wife's counsel. * * * This right is usually enforced in the courts which take cognizance of the divorce proceeding. It is eminently proper that that court should have jurisdiction of all the incidents of the divorce, and be able to grant complete relief, thus avoiding further litigation. Oftentimes that court can grant more complete relief than a court of law; as by suspending the action of the husband until he advances or secures the sum ordered." The court then further considers the claim being urged before it that an action at law would not lie to recover for such services, and adds: "It is claimed that to sustain this jurisdiction will give rise to a multiplicity of suits, which it is the policy of the law to avoid. We concede this would be a good ground for asking a court of chancery, having once assumed jurisdiction of the case, to determine the entire matter, with all its incidents, and not turn the parties over to an action at law. But it is not, as we conceive, a reason for denying the jurisdiction of a law court, when that of a

court of equity has not been invoked." In the case before us the jurisdiction of the equity court was invoked and exercised, and it is the exercise of such jurisdiction that is complained of. We hold that the district court on the trial of the original cause had jurisdiction and power, as an incident to the power to decree divorces, to grant to the wife, *pendente lite*, upon a proper showing, temporary maintenance and allowance for solicitors' fees, and to enforce payment of the same against the husband, or his property, in the absence of a sufficient separate estate belonging to the wife, or, under such circumstances, to charge such maintenance and allowance for solicitors' fees against any common property belonging to both husband and wife, whether such property was in the control of the husband or wife. We further hold that, where the wife has an ample estate of her own, she may charge such estate with necessary solicitors' fees to enable her either to prosecute or defend a divorce action to which she is a party; and where she has done so, in the employment of her solicitor, that the court has power in the divorce proceeding, as an incident thereto, to decree such necessary fees against her separate estate as an allowance to the solicitor, so far as such fees are actually necessary, and being limited to the fair value of the service rendered. It follows that the court below in the original action did not exceed its jurisdiction, and committed in that respect no error. Inasmuch as the court had power and jurisdiction in the original case to enter the decree complained of, the irregularities of practice shown in the record are harmless, and do not constitute reversible error, and therefore the decree of the court below is approved, and the cause affirmed.

WHITEMAN, McFIE, and LEE, JJ., concur.

(5 N. M. 442)

WOLCOTT *et al.* v. ASHENFELTER *et al.*

(*Supreme Court of New Mexico. Jan. 29, 1890.*)

LANDLORD'S LIEN—FRAUDULENT CONVEYANCES.

1. Under Comp. Laws N. M. § 1537, providing that "landlords shall have a lien on the property of their tenants, which remains in the house rented, for the rent due, and said property may not be removed from said house without the consent of the landlord, until the rent is paid or secured," where there are several rooms in one building, each occupied by a separate tenant, as between the landlord and the several tenants each apartment so occupied is a "house," within the meaning of the statute, and, when the landlord consents to a removal of a tenant's property from a separate room so occupied to another room in the building, his lien for the rent of the first room is lost.

2. A general creditor cannot sue to set aside a mortgage on the ground that it is in fraud of creditors.

Elliott & Pickett, for plaintiffs in error.
Gideon D. Bantz, for defendants in error.

LONG, C. J. This cause is in this court on writ of error to the district court of Grant county. There Singleton M. Ashenfelter and

Nettie A. Ashenfelter, his wife, brought their action to foreclose a chattel mortgage, and made parties thereto Frank J. Wright and Alvah E. Wolcott, who are the plaintiffs in error in this court. As against Wright, it is alleged in the bill of complaint that on the 24th day of February, 1886, Frank J. Wright made and delivered to Nettie A. Ashenfelter, wife of S. M. Ashenfelter, his promissory note in the sum of \$250, and at the same time that he also made, executed, and delivered to her to secure said note a chattel mortgage on a library situated in Silver City, in said county; that the mortgage was duly acknowledged, and also properly recorded in time in the said county of Grant. It is also averred that the debt was, at the commencement of the action, unpaid and past due. It is further alleged that the other defendant in the action, Wolcott, also claimed to hold a lien on the same library for \$1,800, but that his lien, if any existed, was for a much smaller sum, and was subsequent to that claimed by the complainants. Wolcott was made a party, that he might be required to set up and establish his lien, so that the court could ascertain and discover the amount thereof, and decree as to priorities. The complainants made the usual prayer for judgment, decree fixing their priority, and for sale of the mortgaged property. Wolcott filed demurrer to the complaint which was overruled by the court. Both Wolcott and Wright then answered the bill, and upon the answers issue was joined, and the cause referred to a master.

It is assigned here for error that the demurrer should have been sustained, but as no reason for such contention is shown in the oral argument or brief, and as we are unable to perceive any defect in the bill of complaint, we hold that assignment to be not well taken. The master made a very careful and elaborate report. He found, and so reported to the court, that in 1883 Alvah E. Wolcott owned a building in the town of Silver City, and on the 1st day of October made a written lease to his co-defendant, Frank J. Wright, of two certain rooms in said building, said rooms to be used by Wright for a law office, and the lease to run for two years, at \$45 per month, payable monthly; that Wright occupied the two rooms until the 1st of February, 1886, under said lease; and at that date, on account of the non-payment of rent for the two rooms during his occupancy under the written lease, owed Wolcott the sum of \$945, as rent due and unpaid for said rooms to that date. The master further found that Wolcott, at that date, desired to make other arrangements respecting said two rooms, and so he rented them then to another tenant, who took possession of them. Wright, at that date, with Wolcott's consent moved out of the two rooms the library, which, before that date, had been in them, and altogether ceased to occupy them as a tenant. Through the building in which the two rooms are situated is a central hall. The two rooms occupied by

Wright as aforesaid are in the building on the north side of the hall, and entered from it. Wright, when he moved his library out of the two rooms, moved into and occupied a single room on the south side of the central hall, by and with the consent of Wolcott. Possession was taken by Wright, February 1, 1886, of the single room. At that time it was verbally agreed between Wright and Wolcott that the former should pay, as rent for the single room, \$20 per month, nothing being said as to the time of payment. Wright, after he moved into the single room, paid as one month's rent therefor, in February, \$20. He paid no further rent, but continued to occupy the room south of the hall to the rendition of the decree in the court below, and at that date, for rent of the single room, was indebted to Wolcott in the sum of \$420, being the rental for said room to December 1, 1887. The note and mortgage given by Wright to Mrs. Ashenfelter were executed on the 24th day of February, 1886, and the mortgage was duly recorded the next day. At that time the library described in the mortgage was situated in the single room south of the central hall, and had been there at least 23 days. There was then due and unpaid, as rent for the two rooms on the north side of the hall by Wright the sum of \$945. All these facts are found by the master, and reported to the court. The master found and the court decreed the priorities, as between the two lienholders, Wolcott and Mrs. Ashenfelter, to be as follows: That Wolcott held, to the extent of \$420, the prior and first lien over Mrs. Ashenfelter; that Mrs. Ashenfelter, to the amount of her mortgage, held the next and second lien. It seems to have been apparent to the court that, after payment of costs and expenses and the liens thus decreed, there would be nothing left; so nothing is decreed as to any residue. Wright does not assign any separate error on his own behalf separately, but joins in the assignment by Wolcott. These do not relate to any matter affecting Wright separately, but only refer to priorities.

The first question to consider is whether the court erred in refusing to decree the \$945 as a lien on the library prior in time to the mortgage lien. The court held, and in effect so decreed, that this lien was lost on the library when Wright removed, by the landlord's consent, out of the two rooms, and into the single room. If this ruling is correct, then, as to that sum, Wolcott would be only a general creditor, or, as it is sometimes expressed, "a creditor at large," without any specific lien for the rent thus accrued on the library. The two rooms first occupied by the tenant and the single room last occupied are entirely separate and distinct apartments, but plaintiffs in error contend, inasmuch as they are all under one roof, in the same building, that the rent which had accrued for the occupancy of the two rooms, and which had attached as a lien on the li-

brary there situated, followed the library to the other room, and continued there, also, as a lien. The defendants in error contend that the term "house" in the statute applies to the separate apartments in the same building, where these are rented separately; that where there are several rooms in one building, and each room is occupied by a separate tenant, as between the landlord and the several tenants, each apartment so occupied is a "house," within the meaning of the statute; and that when the landlord consents to a removal of a tenant's property from the separate room so occupied it is, in legal contemplation, a removal from the house, and the lien is lost. This question arises on the following section of the Compiled Laws: "Sec. 1537. Landlords shall have a lien on the property of their tenants, which remains in the house rented, for the rent due; and said property may not be removed from said house, without the consent of the landlord, until the rent is paid or secured." The lien is upon the property of the tenant which remains in the house, not upon the property which, with the landlord's consent, is removed from the house. The tenant may not remove the property from the house until the rent is paid. This is a right which the landlord may insist upon, but, if he voluntarily consents to the removal, he waives his lien. This statute is a substitute for the old remedy of distress for rent, a right exercised by the landlord during an early period. Says Mr. Taylor: "The common law of England, and most of her statutory provisions regulating a distress for rent, have been generally adopted in the United States." "In order to sustain a distress, the relation of landlord and tenant must be actually completed and exist between the parties. * * * It will, however, only continue so long as that relation subsists." *Tayl. Landl. & Ten.* §§ 558, 563. The rule of the common law is well stated in *Williams v. Terboss*, 2 Wend. 151, as follows: "At the common law, the landlord could only distrain property which was actually on the demised premises when he came for that purpose. His right to distrain must also have been exercised during the * * * term. * * * If the tenant fraudulently removed his property and effects from the demised premises, either before or after the rent became due, the landlord could not follow and seize them for rent, unless they were removed by the tenant after the landlord had actually come to distrain, and had view of the goods on the premises." Our statute is an outgrowth of this principle of common law of distress for rent, and, if the landlord voluntarily consents to a removal of the goods from the demised house, his lien is lost, because the statute expressly provides the lien attaches against the goods which remain in the house. The right is itself an incident of a particular tenancy, and arises out of it. This statute contemplates there must be, to create the lien, a landlord, a tenant, a house rented, and goods

in that particular house. In case of a building, erected with many rooms, for the purpose of letting separate apartments to different tenants, no occupant is a tenant of the whole building, but only of a particular apartment, which apartment is the tenant's house. Over that he has full control. One entering there without his consent is a trespasser. It is his house. The lien grows out of the tenancy as to a house rented. Wright did not occupy the whole building, and he had no house rented, if the word "house" can apply only to the whole building. This question, however, is settled on authority.

Taylor, in his work on *Landlord and Tenant*, vol. 2, p. 187, quotes from the case of *Winslow v. Henry*, 5 Hill, 481, with approval: "As rent cannot issue out of a mere easement or incorporeal hereditament, upon the demise of a room, with a right of common passage along an entry leading from such room into the public street, it was held that the landlord could not seize goods of the tenant kept in such common passage." *Bukup v. Valentine*, 19 Wend. 554, is exactly in point. The facts of that case are as follows: The defendant, Valentine, demised to the plaintiff, for a term which ended May 1, 1845, the lower part of a house in Mulberry street, New York, consisting of all the lower story, the two front joint bedrooms, the front basement kitchen, with half the cellar and privilege in the yard. Valentine, at the same time, rented to one Merit the upper part of the same house, consisting of certain rooms, and also the back basement kitchen and half the cellar. May 1, 1835, Merit left that part of the house he had previously occupied; and the plaintiff, under a lease from Valentine for one year, removed into those apartments vacated by Merit. At the same time one Marshall became tenant of the apartments which Valentine had at first occupied. The plaintiff had failed to pay his rent for the lower part of the house which he first occupied, and for rent due for those apartments Valentine distrained the plaintiff's goods located in the upper part of the building, in the apartments he last occupied. The plaintiff brought replevin for the goods, and failed in the court below. He appealed to the supreme court, and it was contended there by Valentine that plaintiff had not removed from the demised premises. The court held otherwise; and reversed the case. The court say: "It is now said that the removal to another part of the same building was not a removal from the demised premises. I cannot yield to this argument. Both before and after the rent fell due there were two tenants in the house, each having the exclusive enjoyment of a different part of the building. On the 1st of May, the plaintiff gave up the rooms he had previously occupied, and removed into other apartments. He ceased to be a tenant of the rooms he had occupied in 1834, as fully as though he had removed into an adjoining building owned by the same or another landlord." So this court say with respect to Wright. The case

is exactly in point, correct, as we think, in principle, and we are content to follow it, and therefore hold the rent accrued for the two rooms did not follow as a lien on the library to the single room across the hall. As to the \$945 rent due Wolcott for the two rooms occupied by Wright, the former, having waived his landlord's lien by consenting to the removal of the property, at least as between himself and a subsequent mortgagee, it is a question whether in the court below Wolcott, being only a general creditor, was in a position to attack the mortgage of Mrs. Ashenfelter, on the ground that she had not complied with the statute requiring an affidavit to be filed within 30 days next preceding the expiration of one year from the filing of the chattel mortgage. Mrs. Ashenfelter had filed her affidavit, but not within the 30 days. She filed it several days too early, as at the time of such filing the 30 days specified in the statute had not yet commenced to run. If the affidavit is filed or exhibited too soon, or before the 30 days begin to run, such filing is nugatory, and of no effect. *Jones, Chat. Mortg. § 287; Boone, Mortg. § 250; Bank v. Sprague, 20 N. J. Eq. 13; Newell v. Warner, 44 Barb. 258.*

The chattel mortgage must be regarded as if the affidavit had not been filed. Our statute provides as follows: "Sec. 1589. Every mortgage, so filed, shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year after the filing thereof, unless, within thirty days next preceding the expiration of the term of one year from such filing, and each year thereafter, the mortgagee, his agent or attorney, shall make an affidavit exhibiting the interest of the mortgagee in the property at the time last aforesaid, claimed by virtue of such mortgage, and, if said mortgage is to secure the payment of money, the amount yet due and unpaid; such affidavit shall be attached to and filed with the instrument or copy on file to which it relates." The record in the case before us discloses that Mrs. Ashenfelter had not taken possession of the mortgaged property, so at the commencement of the action, in the absence of the statutory affidavit, and without possession having been taken by the mortgagee, her mortgage under the statute would be of no effect as to such creditors of Wright as were in a situation to assert its invalidity. The authorities before cited give construction to a statute like our own, and under them it is clear, as against creditors who are in a position to raise the question, the chattel mortgage is void. Was Wolcott in that position in the court below? He had not reduced his claim to judgment. He had no specific lien on the library in any form. At best, he had only the right to sue his debtor. In the mean time, Mrs. Ashenfelter had the right, if she could peaceably obtain possession, to do so, or to proceed and foreclose her mortgage. Is there any rule which would require that she should be

restrained of her right to foreclose, and wait the movements of the general creditors, so long as the mortgage remained valid as between her and the debtor? The mortgage contained a provision that, upon default in payment, she might take actual possession of the property wherever she could find it. Default was made, and her rights as against Wright to possession was perfect. If she had taken actual possession, her right under the mortgage would have been as complete as if she had filed the affidavit required by statute. Controversy arose as to possession between Mrs. Ashenfelter and Wolcott, so she procured a receiver to be appointed to hold the property, and the court decreed a sale thereof. As to the \$945, Wolcott had not then procured either a judgment or lien by attachment. In this state of things, if Wright had turned over possession to the mortgagee, notwithstanding her failure to comply with the statute, she would have been preferred to the general debt of Wolcott; not so as to the specific landlord's lien for the single room. That, however, is decreed to be prior to Mrs. Ashenfelter's, and is out of the case. If, then, she could have received possession, and thus have perfected her right, which had become suspended by failure to file the statutory affidavit, we can see no reason why she might not have properly invoked the aid of the court to reduce the property to cash, and apply it to the discharge of her specific lien as against Wright, unless some lienholder, with a right to question the legality of her mortgage, interposed. If Wolcott could attack the chattel mortgage, then any general creditor could do so. It would, to say the least, be illegal to hold that a creditor, without any lien upon a chattel, or right thereto, in the absence of a judgment which might by execution be enforced against such chattels, could call upon a court of equity to remove even a void lien from the property, constituting an apparent cloud upon it. Without a specific lien on the chattel, what benefit could such a creditor derive? He could not sell the chattel without judgment and execution. A consideration of some of the cases will indicate the construction which should be placed upon the words of the statute, "shall be void against creditors." In *Van Heusen v. Radcliff, 17 N. Y. 580*, the court say: "When a conveyance is said to be void against creditors, the reference is to such parties when clothed with their judgments and executions, or such other titles as the law has provided for the collection of debts." Mr. Bump, in his work of *Fraudulent Conveyances, (3d Ed.) p. 460*, gives a clear elucidation of this subject: "It is commonly said that a fraudulent conveyance is void against creditors, but this must be taken in a limited sense. The law provides a mode for determining the rights of all parties, and does not permit even a creditor to act as judge in his own case. * * * A fraudulent conveyance, moreover, does not confer any additional rights upon creditors. They cannot seize the property of their debtor

without any legal process, and appropriate it of their own accord to the satisfaction of their demands. * * * They may cause it to be appropriated to the payment of their debts, but they can do this only in the mode which the law prescribes. * * * Consequently the expression that a fraudulent transfer is void against creditors simply means that the rights of creditors as such are not, with respect to the property, affected by such transfer, but that they may, notwithstanding the transfer, avail themselves of all the remedies for collecting their debts out of the property, or its avails, which the law has provided in favor of creditors, and that in pursuing those remedies they may treat the property as though the transfer had not been made; that is, as the property of the debtor. The transfer is ineffectual to shield the property in the hands of the grantee from the just claims of the creditors of the grantor, when those claims are prosecuted against it in the manner pointed out by the law. His title, however, is good against even creditors, unless they protect themselves against him by pursuing that prescribed course by which alone the property can be made available for the satisfaction of debts. A 'creditor at large,' as it is termed, cannot impeach the conveyance, but only a creditor having some process on which the property may be lawfully seized, and by which it is made liable, either immediately or ultimately, to be appropriated in satisfaction of his debt. * * * Before he can impeach the transfer, he must have an execution, attachment, or some other legal process which authorizes the seizure of the property. This process may be a warrant of distress or an attachment, as well as an execution." Although unable to examine all the cases cited by Mr. Bump in support of this position, one which we believe to be well established, we append them for reference: *Andrews v. Durant*, 18 N. Y. 496; *Rinchey v. Stryker*, 26 How. Pr. 75, *Schlusell v. Willett*, 34 Barb. 615, 12 Abb. Pr. 397, 22 How. Pr. 15; *Tiffany v. Warren*, 37 Barb. 571, 24 How. Pr. 293.

In *Owen v. Dixon*, 17 Conn. 496, a well-considered opinion is given, from which the following quotation is made: "It is a familiar principle that a fraudulent conveyance of property is void as to the creditors of the vendor. By this is meant that the rights of a creditor as such are not, with respect to the property, affected by such conveyance. * * * A 'creditor at large,' as it is termed, cannot impeach the conveyance, but only a creditor having some process on which the property may be lawfully seized, and by which it is made liable" for the debt. We think the same rule of construction established with respect to conveyances fraudulent as to creditors should be applied to the term "void as against creditors," used in our statute. There is authority, however, more directly in point, giving that construction to

statutes to the same effect as the one quoted. In New York the statute on the subject under consideration is much like our own. In *Thompson v. Van Vechten*, 27 N. Y. 582, in considering who might attack a chattel mortgage for want of the statutory affidavit, the court says: "It is true the mortgage cannot be legally questioned until the creditor clothes himself with a judgment and execution, or with some legal process against his [the debtor's] property; for creditors cannot interfere with the property of their debtors without process." It seems to us clear that, until Wolcott had by some legal means procured a lien on the property, being only a general creditor, or, as some books express it, a "creditor at large," he could not appeal to a court of equity to remove by its decree a mortgage good against the debtor. The conclusion reached on this point is much strengthened by the terms of section 1590 of the Compiled Laws. This section and section 1589 must be construed together, as they clearly relate to the same subject. "Sec. 1590. If such affidavit be made and filed before any purchase of such mortgaged property shall be made, or other mortgage deposited, or lien obtained thereon in good faith, it shall be as valid to continue in effect such mortgage as if the same had been made and filed within the period above provided." This must remove all substantial doubt. If the affidavit provided for in section 1589 is not filed within the 30 days required, then the mortgage is void as to creditors; but if such a creditor omits to take such action as to obtain a lien thereon before the affidavit is thereafter filed, and the mortgagee files his affidavit as required by section 1589, it operates to revive the mortgage against all creditors who have not in the mean time obtained liens. Failure to file the affidavit required within the 30 days suspends the operation of the mortgage as against general creditors, and if they reduce their debts to judgment against the mortgagor, and levy on the property of the mortgagor, while the mortgage is suspended for want of the statutory affidavit, they secure priority, or, if they levy attachments, the same result is reached; but, if they omit to take some such action, the mortgage lien may be revived. This latter section gives construction to the term "creditors," as used in the preceding one, and limits that term to such as may, by some legal means, secure a lien on the mortgaged property. As to the §945, Wolcott, being only a general creditor, without specific lien on the property, and being without judgment upon which execution might issue, could not attack the mortgage of Mrs. Ashenfelter, the same being good and valid against the mortgagor. We find no error in the record of the court below, and accordingly the judgment and decree there entered are affirmed.

WHITEMAN, LEE, and MCFIE, JJ., concur.

(5 N. M. 479)

ABRAHAMS v. CALIFORNIA POWDER CO.

(Supreme Court of New Mexico. Feb. 12, 1890.)

NEGLECT—DANGEROUS SUBSTANCES.

Consignors of gunpowder to be sold on commission are not liable for damages resulting from an explosion of the powder while stored by the consignees, the doctrine of *respondet superior* having no application.

Appeal from district court, Grant county; HENDERSON, Judge.

Catron, Knaebel & Clancy, for appellant. Gideon D. Bantz, for appellee.

LEE, J. This is an action of trespass on the case, by the plaintiff, David Abrahams, against the defendant, the California Powder Company, and also the Safety Nitro-Powder Company, corporations organized under the laws of California, to recover damages for an alleged injury to a brick hotel building situated in the town of Silver City, in the county of Grant, from an explosion of a certain lot of powder stored in a powder-house in said town of Silver City, which powder-house, it is alleged, was erected, kept, and maintained, and which powder was stored in said house, by the defendants. The defendants pleaded not guilty. There was a trial by jury, and a verdict for \$800 against the California Powder Company, and, by direction of the court, not guilty as to the Safety Nitro-Powder Company. The California Powder Company brings this case to this court by appeal.

The evidence on the part of the plaintiff tended to show that there were 80 kegs of powder in the house, at the time of the explosion, belonging to defendant the California Powder Company, which was consigned to Neff & Stevens for sale on commission. Evidence was introduced on the part of the defendant tending to show that the powder in question, the 80 kegs, was not a consignment, but an absolute sale, to Neff & Stevens. We will consider the case as if the position of the plaintiff was the correct one, in this respect.

As to the ownership and control of the powder-house, the evidence on the part of the plaintiff is indefinite and uncertain. The witness Neff testifies that Higbee and Cohn told him it belonged to the defendant the California Powder Company, but says he does not know of any connection Cohn had with the defendant company; that his understanding is that Higbee had been an agent of the company, and that he built the house. The nature and character of the agency of Higbee, if one existed, is not shown; nor does it appear what authority either Higbee or Cohn had for giving him the information, or what source of knowledge they possessed on the subject. Neither does it appear that Gould had any authority to make any statement as to ownership. The building of the magazine took place many years before the explosion occurred. There appears to have been several transfers of the business with which it was connected before reaching Neff & Ste-

vens. It does not appear in the evidence that these defendant companies agreed to, or were consulted in regard to, the transfers. No attempt was made to prove that the defendants authorized, or assented to, or had any knowledge of, the storage of any powder in the building in question; but, on the part of defendant the California Powder Company, it was shown that it not only never authorized nor assented to such storage, but that it had no knowledge whatever of the manner in which Neff & Stevens kept the powder; that they never owned the building, or had any interest in it. Taking the facts as shown on the part of the plaintiff to be true, if the defendants are liable for the damages resulting from the explosion of the powder in question, such liability must attach to them from the fact that they were owners of the powder which was consigned to Neff & Stevens, to be sold by them on commission.

The vital question—that upon which the case hinges—is whether, upon such a state of facts, the defendant companies stood in relation to Neff & Stevens, the parties who stored the powder in the house, and appear to have had full control of it, so that the maxim, *respondet superior*, will apply. The rule is adopted by Wharton, in his Law of Negligence, § 176, in which he quotes as follows: "The principle to be extracted from the cases is said to be that a person, natural or artificial, is not liable for the acts or negligence of another, unless the relation of master and servant, or principal and agent, exist between them, and that when an injury is done by a person exercising an independent employment the person employing him is not responsible to the person injured." Again, in section 183, the same author says: "We strike, when pursuing the distinctions which have been taken by the courts in this relation, on the fundamental principle, elsewhere fully discussed, that, wherever there is liberty to act, there, to the party thus free, liability for a tort committed by him is imputable. If the master is at liberty to act in a particular matter, then the tort is imputable to the master. If the servant is at liberty to act, then, if this liberty be one of entire emancipation in the particular relation of the master's control, the tort is imputable, not to the master, but to the servant." In a very able review of this question in the case of *De Forrest v. Wright*, 2 Mich. 368, the court says: "This greatly vexed question, as an eminent judge has pronounced it, has been very much discussed, not only in the English courts, but in our own. The difficulty in deciding cases involving the question presented has been in determining what facts and circumstances legally constitute the relation of master and servant, or under what circumstances one person will be held liable for injuries occasioned by the negligence or unskillfulness of another, employed in his behalf. To hold that every person, under all circumstances, would be responsible for injuries committed by another person while

employed in his behalf, involves an absurdity no one would countenance. It would create a penalty from which few could escape; for every man is, or ought to be, directly or indirectly, nearly or remotely, engaged in the service, or on behalf, of his fellow-men. But, from an examination and comparison of the adjudged cases, the rule now seems very clearly to be this: that where the person employed is in the exercise of an independent and distinct employment, and not under the immediate control, direction, or supervision of the employer, the latter is not responsible for the negligence or misdoings of the former." So, in the case of *Gulzoni v. Tyler*, in 64 Cal. 334, which was a suit for damages against the owners of a steam-boat, it was proven on the trial that the owners did not have control and management of the boat at the time the damages occurred. The court says: "The rule as stated by *Shear. & R. Neg. § 501*, is that if the owner of property lets or lends it, and transfers the entire possession and control of it to another, the owner is not responsible for the wrongful use or mismanagement of it by the transferee. Whoever had the exclusive possession, management, and control of the boat, its officers and men, was alone responsible for its mismanagement; and, whether rightfully or wrongfully in such possession, the liability would rest on them alone. Under the rule, *respondeat superior*, this must be so." The act of the servant is not the act of the master, even in legal intentment or effect, unless the master previously directs or subsequently adopts it. *Parsons v. Winchell*, 5 Cush: 592.

In order to clearly understand the application of the foregoing principle to this case, it may be well to refer more particularly to the evidence as to the relationship as proven. Gould, an agent of the California Powder Company, in 1884 called upon Neff & Stevens, requesting them to take the agency of the company, which they declined, for the reason that they had a large amount of powder of the other company on hand. They desired a certain amount of black powder, which they were short of, which he agreed to have sent them; and it was sent, and billed as follows: "Tucson, Arizona, November 11th, 1884. Messrs. Neff & Stevens, Silver City: Bot. of the California Works, 30 California Street. Consigned, 80 kegs blasting, 4.00, \$320.00." It is contended on the part of the plaintiff that this powder was sent as a consignment, to be sold on commission, as other powder belonging to the defendant that had been turned over to them by Cohn, assignee of Crawford. The defendant claims that these 80 kegs was an absolute sale. There was also a letter from William A. Scott, agent at Tucson, Ariz., dated March 13, 1885, which is as follows: "Messrs. Neff & Stevens, Silver City, N. M.—Gentlemen: Your favor of the 10th inst. is at hand. Please to send account sales at \$4.00 per keg, and send draft on me for 10 per cent. of the amount of the same, as if the draft

was cash, for so I will count it. The account sales must be at \$4.00 per keg, and I need your receipt for the commission of 10 per cent. You are duly credited with account for \$16.-85. Respectfully, Wm. A. Scott, Agent." The above bill and letter, together with the oral evidence introduced on the trial, clearly show that Neff & Stevens were handling this powder as factors, commission merchants, or consignees. There is no evidence in any way limiting their power as such, or directing the manner of handling it. As factors, under the law, they would have full possession of the goods, with a special property therein. *Story, Ag. § 97.*

The court instructed the jury: "If they should find that said black powder was kept and maintained by the defendant or their agents at the time, etc." The word "agent," in the instruction, must be understood in the sense in which it appears from the evidence; and, if instruction No. 6, which was asked by the defendant, and refused by the court, had been given, the issues would have been fairly presented to the jury; which instruction was: "If you believe from the evidence that the defendant corporations each owned a portion of the powder stored in the powder-house at the time of the explosion, but that such powder and powder-house was under exclusive control of Neff & Stevens, as consignees of said corporations, respectively, at the time of the explosion, then, in that case, unless you further believe from the evidence that such explosion was caused by some willful and malicious act of defendant the California Powder Company, you will find the defendant not guilty." The first part of this instruction would have brought the case under the rule laid down by the authorities we have referred to, and which is unquestionably the correct law, as applicable to this case. The evidence does not show anything upon which the doctrine of *respondeat superior* could be based. So far as the evidence shows, the relationship of Neff & Stevens to the defendant was that of an independent employment, free of action. There is a total lack of all the elements of master and servant, which must exist to constitute responsibility on the part of the defendant. We think the court should have given the first part of this instruction, or instructed the jury in accordance with the views herein expressed. The case will be reversed, and remanded for a new trial.

WHITEMAN and McFIE, JJ., concur.

(14 Colo. 297)

McCLURE *et al.* (SCHERRER, Intervenor,)
v. SMITH.

SAME v. CLOUGH.

(*Supreme Court of Colorado. March 23, 1890.*)
FRAUDULENT CONVEYANCES—DEED ABSOLUTE IN
FORM—ATTACHMENT.

1. A deed, absolute in form, intended to operate as a mortgage, if given, in good faith, to secure an actual indebtedness, is not constructively fraudulent as to the grantor's other creditors.

2. When it appears that an attachment notice is correct, it is not error, on application supported by affidavits and notice to opposing counsel, to allow the sheriff to amend his return by correcting a misdescription of the realty attached.

Appeal from district court, Arapahoe county; ELLIOTT, Judge.

Suits were brought by Smith and Clough against Charles B. and H. C. McClure to recover claims for goods sold and delivered. Attachments were issued in these suits, and levied upon certain real estate in the city of Denver. This real estate appears of record in the name of Scherrer, and Scherrer duly filed a plea of intervention in each of the suits, claiming a superior right as against the attaching creditors. He averred in these pleas that, although the deed from the McClures to himself to the premises was absolute in form, yet it was intended, together with a certain defeasance in writing executed at the same time, to constitute a mortgage securing a large existing, and also a contingent, indebtedness. The causes were consolidated and tried to the court upon the pleas of intervention, answers thereto, replications, and evidence offered. The court made specific findings of fact and of law, upon which was predicated a decree in favor of the attaching creditors and against the intervenor. To review this decree the present appeal was taken.

Bennett & Bennett, for appellants. *Perry & Carpenter*, for appellees.

HELM, C. J. The present appeal was taken under the act of 1885. No evidence is embraced in the abstract, and therefore a review upon the evidence could not be had. The findings of fact, however, of the court below are properly before us, and, since they are not in any way questioned, will be accepted as conclusive. By the record as presented, we are advised of the following facts: That McClure Bros., being indebted to Scherrer to a large amount, executed an absolute deed conveying the realty in question to him; that in connection with the giving of this deed, and as a part of the same transaction, Scherrer executed in writing, and delivered to McClure Bros., a defeasance; that the two instruments were designed by the parties to constitute, and did constitute, a mortgage of the premises as security for the indebtedness to Scherrer; that the whole transaction, so far as Scherrer was concerned, was characterized by entire good faith in fact; that, immediately upon the execution of these instruments, Scherrer took, and has since retained, possession of the mortgaged realty; but that, while the absolute deed to Scherrer was duly filed for record with the clerk, and recorded prior to levy of the writs of attachment, McClure Bros. failed to record their defeasance. Notwithstanding the foregoing conclusions of fact, however, the court found that as to Smith and Clough, the attaching creditors of McClure Bros., the transaction constituted a constructive fraud, and the deed to Scherrer was void in law. On this

finding the decree in favor of the attaching creditors was based, and upon its correctness or incorrectness the affirmance or reversal thereof must rest.

It is obvious that the court below adopted the view that a deed absolute in form, but in reality designed to operate as a mortgage only, is constructively fraudulent, and consequently void in law, as to other existing creditors of the mortgagor, even though the transaction contain no element of fraud in fact. This position of the trial judge is supported by well-considered decisions. *Friedley v. Hamilton*, 17 Serg. & R. 70; *Manufacturers', etc., Bank v. Bank of Pennsylvania*, 7 Watts & S. 335; *Smyth v. Carlisle*, 16 N. H. 464; *Bryant v. Young*, 21 Ala. 264; *North v. Belden*, 13 Conn. 376. But in our judgment the weight of authority favors the view heretofore announced by this court. It was held in *Ross v. Duggan*, 5 Colo. 85, that, while this method of creating an incumbrance is a conspicuous badge of fraud as to existing creditors, it is not conclusive, and that the *bona fides* of the transaction may be shown by collateral proofs. It is true that when the mortgagee consents to take an absolute deed, even though, as in the case at bar, he delivers back a defeasance, he makes it possible for the mortgagor to deceive his other creditors. For this reason, such a proceeding is regarded with disfavor, and upheld with reluctance. It would no doubt be wiser, as well as less harmful, if the mortgagee insisted upon having the transaction evidenced by an ordinary mortgage. But, if there be a *bona fide* debt for which the security is given; if there be no understanding with the mortgagee to hold the overplus, or to hold the property after payment of his debt, secretly, for the benefit of the mortgagor; if there be no collusion on the part of the mortgagee with the mortgagor in keeping the defeasance unrecorded, or in keeping secret the exact nature of the transaction, for the purpose of deceiving creditors; in short, if the mortgagee is simply endeavoring, in good faith, to obtain that precedence in the security of his debt which the law permits, the mere isolated fact that he takes an absolute deed, instead of a mortgage, will not, in and of itself alone, render his lien nugatory. The law prescribes no absolute and inflexible form for mortgages upon realty. It certainly assumes that such instruments as the one under consideration will sometimes be employed. Section 261, Civil Code 1887, provides that "the fact of a deed being a mortgage, in effect, may be proved by oral testimony." While this section would not be permitted to affect the title of a *bona fide* purchaser from the mortgagee, for good consideration, without notice, we conceive it to be broad enough to permit the proof mentioned as between the parties, and as against the claims of other creditors. The view that fraud *per se* should not be imputed to such transactions as the one under consideration receives countenance from section

1529 of the General Statutes. This section declares that the question of fraudulent intent, in all cases relating to the conveyance or assignment of any estate or interest in lands, shall be a question of fact, and not of law. *Ross v. Duggan*, supra; *Bump, Fraud. Conv.* 40; *Gaffney's Assignee v. Signalgo*, 1 Dill. 158; *Harrison v. Trustees*, 12 Mass. 455; *Gibson v. Seymour*, 4 Vt. 518; *Stevens v. Hinckley*, 43 Me. 440; *Chickering v. Hatch*, 3 Sum. 474; *Bank v. Jacobs*, 10 Mich. 349. Since neither the case of *Ross v. Duggan*, in 5 Colo., nor the other cases supra, are mentioned by the briefs filed in this court, we are justified in assuming that the attention of the presiding judge was not directed thereto. Had he been advised of these authorities, especially of *Ross v. Duggan*, his decree would, doubtless, have been different.

In view of a retrial of the cause, we deem it important to notice briefly the remaining question argued on the present appeal. The return of the officer who levied the writ of attachment was slightly defective in its description of the realty attached. There is nothing, however, in the record before us to show that the attachment notice filed with the clerk and recorder partook of the same infirmity. The court, prior to the trial, upon application supported by affidavits, notice having been given to opposing counsel, and upon careful consideration, permitted the sheriff to amend his return by correcting therein the misdescription in question. This was not error. Amendments of the officer's return upon process to correspond with the fact are in the interest of justice; and, unless it be shown that the party complaining has been deceived or misled to his prejudice, great liberality in allowing them is always exercised. *Anderson v. Sloan*, 1 Colo. 83; *Loveland v. Sears*, Id. 438; *Paper Co. v. Clark*, 3 Colo. 321; *Crock. Sher.* § 43; *Corby v. Burns*, 36 Mo. 194. The judgment is reversed, and the cause remanded for a new trial.

ELLIOTT, J. I concur in the foregoing opinion. The chief justice is quite right in supposing that the case of *Ross v. Duggan* was not cited at *nisi prius*. I did not have the opinion in that case in mind at the trial, or I should gladly have followed it, instead of the Pennsylvania cases then referred to. This case serves to emphasize what was said in *Crane v. Farmer*, ante, 455, about the importance of giving attention to our own Reports.

(14 Colo. 391)

STATE INS. CO. v. HORNER.

(Supreme Court of Colorado. March 28, 1890.)

INSURANCE—TERMINATION—CONSTRUCTION.

1. In a provision in a policy that the "insurance may be terminated, at the request of the insured, by repaying the company the customary short rates from the date of this policy, together with the expenses of writing the risk," the "customary short rates" do not include "the expenses of writing the risk."

2. In such a policy "the expenses of writing the risk" includes the commission paid by the company to its agent.

Error to circuit court, Arapahoe county.

W. J. Weeber and Rogers & McCord, for plaintiff in error. *John W. Horner, pro se*, and *P. L. Palmer*, for defendant in error.

HELM, C. J. The insurance policy issued by plaintiff in error to defendant in error contained the following provision: "This insurance may be terminated, at the request of the insured, by repaying the company the customary short rates from the date of this policy, together with the expenses of writing the risk." Upon the construction of this provision rests the present decision. Contracts of insurance, like other contracts, are to be interpreted according to the language employed by the parties. Neither the understanding of the insurer or insured, nor custom or usage inconsistent therewith, can be substituted for the provisions of the written policy. *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. Rep. 207; *Sperry v. Insurance Co.*, 26 Fed. Rep. 234; *May, Ins.* § 172; *Wood, Ins.* § 57. It is hardly necessary to add that courts of equity will relieve against such contracts where fraud or deception supervenes, and that substantial ambiguity therein may be explained as in other cases. The clause above quoted clearly provided that, upon the termination of the policy within the period named therein, the company should be repaid two specific amounts, viz.: *First*, the "customary short rates" from the date of the contract; and, *second*, the "expenses of writing the risk." In this respect the provision is too plain to admit of serious controversy. If the expression "the customary short rates" includes the expenses referred to, why are those expenses mentioned? Reference thereto is wholly superfluous, and can only serve to mislead. The two expressions may each possess a peculiar technical significance, and testimony may be necessary to explain their meaning; but that they refer to different things, and that the former does not include the latter, and was not intended to do so, are propositions placed by the contracting parties themselves outside the province of construction. The jury may determine upon the evidence produced what is meant by and included within each of these expressions, but we do not consent to the idea that the question whether one embraces the other is a proper subject for their consideration. It may be true that the "customary short rate" itself includes the expenses of writing a correspondingly short risk, when such risk is taken in the first instance; but, if the assured elects to secure the benefit of a long-time and low-rate policy, and agrees that, in case he invokes the privilege of canceling his contract, he will pay, in addition to the customary short rate, the expenses of writing the long risk, we cannot say that his agreement is so unreasonable or unjust as to warrant his release from performance upon exercising the

option in question. We shall assume, therefore, that the assured, upon cancellation of the policy, was to pay the "expenses of writing the risk," in addition to the "customary short rate." What are "the expenses of writing the risk?" What is the meaning of this expression, as it is generally understood among insurance people? Does it include commissions paid to the agent for procuring the risk? An answer to the third and last of the foregoing interrogatories will be decisive of the present controversy, because it embraces the only item of difference between the parties. It is contended by defendant in error that the phrase "writing the risk" is synonymous in meaning with the phrase "writing the policy;" that the expense of writing a policy is the one-dollar fee paid the agent for his clerical labor in preparing the instrument; and, therefore, that the one-dollar fee constitutes the entire expenses of writing the risk, and the agent's commission is no part thereof. The fee of one dollar for writing the policy is always paid to and retained by the agent. The company never receives it, or has anything whatever to do with it; nor does it in any way appear upon the company's books. It is a small item, hardly deserving this prominence in the contract; and, if considered worthy of such careful mention, it is strange that so much indifference was exhibited in the use of language. Why is the fee of one dollar designated "expenses," and why is the word "risk" substituted for the word "policy?" The word "expenses" usually indicates more than one expense or item, and no one capable of contracting would be excused in law for not knowing that the word "risk" and the word "policy" possess a radically different significance. The company itself could hardly have thought that it was merely providing for the retention of the one-dollar fee paid for writing the policy; a fee of which it took no cognizance, and preserved no record. But the meaning generally assigned among insurance people to the phrase "writing the risk," and the items covered by the expression, "the expenses of writing the risk," are subjects fairly within the domain of oral explanation. Such explanatory testimony was given at the trial by witnesses engaged in the insurance business, and it will now be accepted as controlling. The four insurance agents called by the company agree that the two phrases, "writing the policy" and "writing the risk," do not, in insurance parlance, mean the same thing; and such is the tenor of the same kind of testimony received on behalf of defendant in error. These witnesses, seven in all, unite in declaring that the expense of writing the policy is the fee, usually one dollar, for the clerical labor of preparing the contract; but not one of them squarely and consistently asserts that this is the total expense of writing the risk. There is considerable difference of opinion among them as to what items constitute these expenses; but four of them positively assert, and the remainder fairly admit, that the com-

mission paid by the company to its agent is included. Some of these witnesses stated that they were not familiar with the provision under consideration. It does not seem to be universally incorporated in insurance policies, though its presence is not uncommon. This undoubtedly accounts for some of the discrepancies between the witnesses, and also for some of the seeming inconsistencies in the testimony of the same witness. Upon a retrial of the case, most if not all of these discrepancies and inconsistencies will probably disappear; and, if our conclusion, based upon the testimony now before us, that a repayment to the company of the commission paid its agent was within the purview of the contract, be wrong, such error will doubtless be made to appear.

It may be that, as claimed by defendant in error, the foregoing view will, in individual cases, result in surprise and injury to the assured; but our answer to this assertion, if it rest upon a truthful basis, is that reasonable examination and inquiry before entering into the contract would avoid such surprise and resulting hardship. Besides, courts have no power, under circumstances like those here presented, to reconstruct contracts solemnly and deliberately made. We do not hesitate, however, to hold that the expenses mentioned in the phrase under discussion must be reasonable. The courts will not permit insurance companies to take advantage of this feature of the contract, and collect unreasonable charges or expenses. But in the case at bar no controversy exists concerning the reasonableness of the commission paid to the agent. Therefore, this particular matter requires no further notice. We are not unmindful of the rule that doubtful provisions of insurance policies are to be construed most favorably to the assured, but we do not feel at liberty to give this rule a broader application in the present case than is embraced within the foregoing discussion. The judgment is reversed, and the cause remanded for a new trial.

(14 Colo. 802)

ARMOR et al. v. SPALDING et al.

(*Supreme Court of Colorado. March 28, 1890.*)

MORTGAGE—DEED ABSOLUTE ON ITS FACE—EVIDENCE.

In a suit to recover land conveyed by a deed absolute in form, on the ground that there was a parol agreement that it should operate as a mortgage, it appeared that the conveyance was in trust for the use of the Protestant Episcopal Church, with power to the trustee at will to convey the same, for such price, and upon such terms, as to him may seem fit, "the proceeds of any such sale or conveyance to be held in trust for the same object and purpose above expressed;" that the grantor was indebted to the grantee in a greater amount than the value of the land at the time conveyed; that the debt was evidenced by notes and secured by deeds of trust on the land; that at the execution of the deed in question the notes were delivered to the grantor, but the trust-deeds remained unreleased; that the grantee, before the execution of the deed, wrote the grantors: "Of course, should I ever get out of the property more than the church dues, of which I am simply the trus-

tee, it will be competent to consider your rights and dues in the matter." The attorney who drew the deed testified that he understood that it was agreed that the deed should be held to be a mortgage, but his partner and his clerk testified that the conveyance was intended as a final settlement of the indebtedness. *Held*, that the evidence was not sufficient to prove that the deed was a mortgage.

Error to district court, Arapahoe county.

In 1876 John F. Spalding, as bishop, was the owner of five promissory notes given by John Armor, aggregating \$8,380, besides interest at the rate of 18 and 20 per cent. per annum. These notes were secured by trust-deeds upon the lots in dispute. Subsequently an absolute deed was given by Armor to Spalding, as bishop, covering the incumbered premises. Spalding at once took exclusive possession, and has since paid all taxes, insurance, and other expenses. The promissory notes held by Spalding were delivered to Armor, but at the commencement of this suit no cancellation of the trust-deeds, securing the same, appeared of record. At the time the said absolute deed was given, the property covered thereby was not worth, in the market, the full aggregate amount of the notes, together with interest. At the present time its value is estimated to be from \$75,000 to \$100,000. Plaintiffs in error, as the heirs of said Armor, brought suit in the court below to recover the premises in question, upon the theory that Spalding held them as mortgagee. Prior to the commencement of suit they offered to pay him the aggregate amount of indebtedness, together with interest to that time, and demanded the carrying out of the foregoing alleged mortgage agreement. Their tender and demand were refused. The answer, after specifically denying the allegations of the complaint, in so far as that pleading alleged a trust or mortgage, averred an absolute sale. It also pleaded additional defenses, which, however, need not be stated. A replication was filed, duly traversing the material new matter set up in the answer. The cause was tried to the court, and upon the evidence and pleadings a decree was rendered dismissing the complaint. To reverse that decree the present writ of error was sued out.

Wells, McNeal & Taylor and *Enos Miles*, for plaintiffs in error. *S. C. Hinsdale* and *J. L. Jerome*, for defendants in error.

HELM, C. J. The complaint in the case at bar avers that the absolute deed given by John Armor to Spalding, as bishop, coupled with the alleged parol agreement existing at the time of its execution, constituted a mortgage. But in pleading the conditions of the defeasance it declares that Spalding was not only to take possession of the property under the deed, "hold the same in trust, collect all rents and profits, pay all taxes and expenses," but also that "when it so enhanced in value that it could be sold so as to leave Armor a surplus, Spalding should sell, satisfy his indebtedness, and pay the overplus to Armor, his heirs or assigns, on a reasonable request." There

was no provision that the title should in any event be restored to Armor. It was conveyed to Spalding with authority to sell. This fact is somewhat inconsistent with the theory of a mortgage; for in mortgages the defeasance ordinarily provides that upon payment of the debt title to the premises incumbered shall revert to the mortgagor. *Lance's Appeal*, 112 Pa. St. 456, 4 Atl. Rep. 375; *Hoffman v. Mackall*, 64 Amer. Dec. 637; *Reece v. Allen*, 48 Amer. Dec. 336. The averments under consideration are more analogous to the conditions of an express trust. Thus regarding the transaction, however, it is obvious that the action must fail. The conditions of the alleged trust not being written, its enforcement is inhibited by the statute of frauds. No bad faith is averred on the part of Spalding in procuring the conveyance, and this case is not covered by either of the exceptions to the foregoing statutory requirement.

But counsel for plaintiffs rely, in argument, entirely upon the view that the transaction constituted a mortgage, and that plaintiffs, as the heirs of Armor, since deceased, may assert a right to the reconveyance of the property upon payment of the mortgage debt, with interest. If their major premise be correct, their conclusion correctly follows, unless the remedy is barred by limitation, or for some other reason cannot be enforced. The equitable rule that an absolute deed may be shown by parol to be in effect a mortgage has, in this state, received express legislative recognition. Civil Code, § 261. We shall assume that the mortgage issue is sufficiently presented by the pleadings, and proceed to consider whether the evidence sustains plaintiffs' theory. It should be observed at the outset that only upon clear, unequivocal, and convincing proofs will courts of equity construe an absolute deed to be in effect a mortgage. *Whitsett v. Kershow*, 4 Colo. 419; *Lance's Appeal*, supra; *Gassett v. Bogk*, 7 Mont. 585, 19 Pac. Rep. 281; *Jones, Mortg.* (4th Ed.) § 335, and cases cited. Plaintiffs have engaged in a difficult undertaking. They are to show a parol defeasance agreement made over 12 years prior to the commencement of suit, with an ancestor, who died soon after making the same, and upon them rests the burden of establishing this agreement so clearly that the mind of the chancellor shall be free from substantial doubt. To maintain the foregoing issue, and discharge the resulting burden, plaintiffs rely upon the following proofs:

First. A letter written October 9, 1875, by Spalding to John Armor. Armor was hard pressed for money, and, as the closing paragraph of the letter sympathizingly declares, in "perplexity and distress." He was seeking relief, not through the giving of an absolute deed to Spalding, but by urging the latter to release some part of the premises covered by the five trust-deeds, then securing as many notes of Armor given or assigned to Spalding, as bishop. The letter in question was written in response to this urgent appeal. Spalding therein speaks of

having consulted with Mr. Kountze and other friends regarding the matter, and declines to grant the request. It is true he says incidentally: "Of course, should I ever get out of the property more than the church dues, of which I am simply the trustee, it will be competent to consider your rights and dues in the matter; but I fear that we shall have to wait for some years, and the interest of the money will more than cover any enhancement in value." But while the letter speaks of "closing up the matter," and refers Armor to Sayre for that purpose, no terms of settlement are specified. This letter was written over 14 months prior to the execution of the absolute deed. It is not in any way connected therewith by extrinsic evidence, and there is nothing to show that it was mentioned or thought of when the deed was given. But, even if coupled with the transaction, it affords little aid to plaintiffs' case. The declaration that in the unexpected contingency of a sale and surplus it would be competent to consider Armor's rights and dues in the matter is not an agreement to pay over the surplus, nor does it indicate the existence of such an agreement. It shows, at most, a disposition on the part of Spalding to favor Armor within legal and reasonable bounds.

Second. A conversation between two of the plaintiffs and Spalding in 1888, after demand had been made for a reconveyance of the property. In this conversation, it is claimed that when asked whether a parol agreement was not made with the elder Armor at the time the deed was given, providing for an ultimate sale and repayment to him or his heirs of the overplus after liquidation of the indebtedness, Spalding hesitated and then answered: "Well, the moneys that your father used belonged to eastern trusts, and whatever I might have said would not have made any difference." Spalding, in his testimony, declares that there was not the slightest hesitation in answering. He does not squarely deny having used the foregoing or similar language, but asserts that he at once positively and persistently insisted that the transaction was an absolute sale. So the alleged hesitancy and equivocation are evidenced only by the testimony of two deeply interested witnesses, while their existence is disputed by defendant, who acted throughout the entire proceedings solely as a trustee for others. Besides, in his letter inviting this very interview, Spalding expressly declares that he was compelled, much against his will, to take the property for the debts; also, that Armor begged him not to foreclose, "for in that event he [Armor] might have been held for a large amount over and above the proceeds of sale, and judgment obtained against him." This letter was offered in evidence by plaintiffs, and fairly corroborates Spalding's declarations on the witness stand. If, at the interview, as in the letter, he maintained that the deed represented an absolute sale, a plausible explanation of the statement imputed to him would be that like his other suggestion in the letter, that a suit could only be

settled in the supreme court of the United States, it was legal advice volunteered upon the doubtful hypothesis that even if he had made oral concessions the real parties in interest would not be bound thereby.

Third. The part we have, for convenience, italicized, of the following extract from the absolute deed under consideration: "In trust, however, for the use of the said Protestant Episcopal Church, with power to the said party of the second part, or his successor in office, at will, to convey the same, either with or without warranty, for such sum and price, and upon such terms and conditions, as to him, or any of his successors in office, shall seem fit; the proceeds of any such sale or conveyance to be held in trust for the same object and purpose above expressed." The purpose of expressly providing that Spalding might sell the premises conveyed is explained by the extract itself. It is evident from the language employed that the provision had reference to the position of Spalding, as trustee of church property. He took title in his trust capacity, and caused the deed to be so drawn that no embarrassment would follow in reselling, and reinvesting the proceeds. That, in any event, Armor was not to be the beneficiary, clearly appears by the concluding clause of the quotation, which provides that the proceeds are to be held in trust for the "purpose above expressed," *i. e.*, for the use of the Protestant Episcopal Church.

Fourth. A certain indorsement upon one of the promissory notes. It appears that an item of \$38.05 interest was credited upon one of the Armor notes by Spalding on December 23, 1876. It will be remembered that the deed in question bears date December 13, 1876, and plaintiffs argue that this credit indicates that Armor's interest in the property did not terminate with the giving of the instrument. The complaint avers, and the answer does not deny, that the conveyance was executed and delivered on December 13th. Moreover, it is true that unacknowledged instruments of the kind may nevertheless be effectual in passing title. But counsel for defendant insist that especially since this is a suit in equity, the following circumstances may be considered: The deed itself, which was received in evidence without objection or limitation, shows that it was not acknowledged or filed for record until upwards of three weeks after its date, and more than two weeks after the credit mentioned was given. Counsel urge that from this circumstance the inference may be fairly drawn that the transaction represented by the deed was not finally closed till January 12th, the date of acknowledgment and recording. The matter is not of sufficient importance to warrant a discussion of the question of practice involved, and we shall leave it with the single remark, that if counsel's view be correct, the supposed discrepancy arising from the indorsement of interest entirely disappears.

Fifth. That the trust-deeds originally given to secure the notes have never been re-

leased upon the county records. Spalding, as bishop, was the real owner of these instruments, and Armor's deed in fact merged in him the entire ownership of the property. Though the notes were canceled, it was imprudent, perhaps, to permit this seeming cloud to remain of record. But until an attempt to convey, the importance of a formal release might not occur to any but a legal mind. The circumstance in question, therefore, possesses no great significance.

Sixth and last. The testimony of Alfred Sayre. Mr. Sayre acted as the attorney, advising with Armor and Spalding concerning their matters. He gives his recollection of the conversations that took place in his office between the parties about the time of the execution of the instrument. He does not undertake to relate these conversations; but, after giving the substance, which strongly corroborates plaintiff's theory, he concludes with the declaration, that he "had no moral doubt that an equity of redemption or right to the surplus rested in Armor." This is the most cogent evidence produced by plaintiffs; but in considering it we should remember that Mr. Sayre was an attorney in active practice, carrying in his mind a multitude of transactions; that upwards of 18 years have elapsed since the occurrence, and during that time his attention has never before been directed to the matter; that he now admits his inability to recall specifically the conversations; and that his impressions, which constitute part of his testimony, are not competent. But Mr. Sayre's recollection and impressions on the subject are different from those of Messrs. Wright and Jerome. The former was Mr. Sayre's law partner; the latter was then a clerk in the office. Both were present when the deed was made; both heard conversations between Spalding and Armor in connection therewith. Their recollections and impressions of these conversations are to the effect that the deed was delivered and accepted in final settlement of the notes, and as a full discharge of the indebtedness represented thereby.

Fairly weighing the foregoing proofs alone, in the light of surrounding circumstances, the burden assumed by plaintiffs is not discharged. It cannot be said that the existence of a mortgage is so established as to relieve the mind of a chancellor from substantial doubt. But the testimony of Spalding is strongly corroborated by the following circumstances, as yet unconsidered: The promissory notes were evidently delivered back to Armor when the deed was executed. Plaintiffs themselves produced these notes at the trial. There is nothing in the record showing or tending to show that new ones were given. Had the transaction been in reality a mortgage, Spalding would, in all probability, either have kept the original notes, or have insisted upon the execution in lieu thereof of a new instrument, conditioned according to the terms of the defeasance, and specifying the rate of interest. The defeas-

ance condition of the alleged mortgage is highly unreasonable. Spalding is required thereby to hold the mortgaged property until such time as its enhancement in value will enable him to sell it and leave the surplus for the mortgagor. He cannot sell, apply the proceeds to the discharge *pro tanto* of the indebtedness, and forgive the balance thereof; he cannot even make the sale when there has been sufficient increase of value to wholly liquidate his debt with interest; he must wait until such time as its enhancement will leave a surplus for Armor; how much of a surplus does not appear, the amount thereof being wholly unmentioned. No date is fixed for the payment, or even maturity of the principal debt, though, when the deed was given, the original notes were all past due. There was no certainty that the property would ever so enhance in value as to pay the debt, with accumulating interest, to say nothing of a surplus. According to the complaint, as a matter of fact, there could have been no surplus until more than 10 years had expired. The alleged arrangement is devoid of business characteristics. It is such an arrangement as no man of ordinary prudence would be likely to make in conducting his personal affairs. It is such an arrangement as the law would be extremely loath to sanction when made by a trustee in the management of a trust-estate. In view of the foregoing conclusion, it is unnecessary for us to consider the defenses based upon statutes of limitation. We shall not further prolong this opinion by discussion thereof. The judgment of the district court is affirmed.

(14 Colo. 212)

HURD v. McCLELLAN *et al.*

(Supreme Court of Colorado. Feb. 28, 1890.)

ATTACHMENT—APPEAL-BOND—WRITTEN PROMISE TO PAY MONEY.

An appeal-bond conditioned that if defendant shall duly prosecute his appeal, and pay the judgment in case the same shall be affirmed, then the obligation shall be void, otherwise it shall remain in full force, is not a written instrument for the direct payment of money, within the meaning of Code Civil Proc. Colo. § 23, subd. 14, which provides that, "in all actions brought upon overdue promissory notes, bills of exchange, other written instruments for the direct payment of money, and upon book-accounts, the creditor may have a writ of attachment issued."

Commissioners' decision. Appeal from district court, Arapahoe county.

W. T. Hughes, for appellant. *R. S. Morrison*, for appellees.

PATTISON, C. It appears from the abstract of record and arguments in this case that on April 27, 1885, appellant recovered a judgment against Job C. McClellan, one of the appellees, for the sum of \$4,437 and costs. From this judgment an appeal was taken and an appeal-bond filed, with the other appellees as sureties, which contained the following condition: "Now, if the said Job C. McClellan shall duly prosecute said appeal, and,

moreover, pay the amount of said judgment, costs, interests, and damages, rendered and to be rendered against said Job C. McClellan, in case the said judgment shall be affirmed by the said supreme court, then the above obligation to be null and void, otherwise to remain in full force and virtue." On April 9, 1886, the appeal was dismissed for failure to file transcript, etc. Thereupon this action was brought upon the appeal-bond, and an attachment issued. Motion was made to quash the writ because "(1) no attachment lies upon an appeal-bond; (2) an appeal-bond is not a written instrument requiring the direct payment of money." The court sustained the motion, and dissolved the attachment. From this order this appeal was taken.

The sole question to be determined by this court is whether an appeal-bond containing the condition above recited is a written instrument for the direct payment of money, within the meaning of subdivision 14 of section 92 of the Code of Civil Procedure. Appellant contends that the provision cited was borrowed from California, and the supreme court of that state has decided an attachment will issue in aid of a suit brought upon an appeal-bond. He invokes the principle that whenever a statute is adopted from another state the construction given to that statute by the courts of that state is also adopted. The principle is correct, as a general rule, (*Stebbins v. Anthony*, 5 Colo. 348;) but the premises upon which appellant predicates his proposition are erroneous. The 14th subdivision of section 92 of the Code was enacted in 1881 as an amendment to the original statute. It created a new substantive cause for attachment. It reads as follows: "In all actions brought upon overdue promissory notes, bills of exchange, other written instruments for the direct payment of money, and upon book-accounts, the creditor may have a writ of attachment issued upon complying with the provisions of this section." The provision of the California Code, to which reference is made, reads as follows: "In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this state," etc. Harst. Pr. § 538. The language of the two sections is in no sense similar. The California provision applies to all contracts for the direct payment of money, whether written or unwritten, express or implied. The Colorado provision applies only to written contracts, and specifically mentions such contracts as overdue promissory notes, bills of exchange, other written instruments for the direct payment of money, etc. Clearly, this provision cannot be said to have been adopted from California. The question of construction, therefore, is an original one. The meaning of the words "other written instruments for the direct payment of money" should be construed in connection with the context. Other instruments are specifically mentioned. It is clear that the statute was intended to apply to instruments of the nat-

ure of those specially mentioned. Such instruments are overdue promissory notes and bills of exchange. These are, manifestly, instruments for the direct payment of money. The payment provided for is absolute and unconditional. In other words, it is direct. In this case the obligation assumed by the sureties was not direct, but collateral. They could be charged only upon failure of the principal to pay. If he failed to pay the judgment appealed from, if affirmed by this court, then there would be a breach of the condition of the bond upon which a cause of action might be predicated. Commenting upon this section in the case of *People v. Boylan*, 25 Fed. Rep. 594, HALLETT, J., says: "In respect to the manner of payment, promissory notes and bills of exchange are distinguishable from many other contracts, in that they are for a definite sum of money, payable absolutely at a specified time. Upon the principle *nosctitur a sociis*, the 'other instrument' mentioned in the statute should be of the class of promissory notes and bills of exchange, in respect to the quality of direct payment. Inasmuch as the word 'overdue,' in the statute, is applicable to the other instruments as well as to promissory notes and bills of exchange, such instruments must be of a character to become overdue, and an instrument of that character must be for a fixed sum, payable absolutely at a time specified." That action was brought upon an administrator's bond, and it was expressly held that such bond was not an instrument in writing for the direct payment of money. It is true that the condition of an administrator's bond is not the same as that of an appeal-bond, yet the reasoning of Judge HALLETT in the case cited is clearly applicable to this case.

Appellant relies principally on the case of *Hathaway v. Davis*, 33 Cal. 162. By a divided court it was held that "an undertaking on appeal is an express contract for the direct payment of money, in the sense of the statute in relation to attachments." The opinion of the majority of the court is vague and unsatisfactory. In a dissenting opinion, SAWYER, J., uses the following language: "This appears to me to be an undertaking that another party shall pay, and not that the party himself will pay. There is no promise that the defendants themselves will pay any money at all, and consequently no contract on their part for the direct payment of money. On a failure of the appellants in the suit to pay in accordance with the terms of the undertaking, there is a breach, it is true, and the party to the undertaking is liable for damages for the breach. But the liability is strictly for damages, and not on his own contract that he himself will pay money. For these reasons, I think there was no contract, express or implied, on the part of the defendant, for the direct payment of money, within the meaning of the attachment law, and that an attachment is unauthorized." This reasoning is clear and convincing, and clearly applicable to the case at bar. The order of

the court dissolving the attachment was correct. The order is affirmed.

REED and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

(83 Cal. 533)

In re MOORE'S ESTATE. (No. 13,139.)

(Supreme Court of California. April 26, 1890.)

ADMINISTRATOR—REMOVAL—BURDEN OF PROOF.

1. Code Civil Proc. Cal. §§ 1436-1440, provides that whenever a judge of a superior court has reason to believe, from knowledge or information, that any administrator has long neglected to perform any act as administrator, he must, by an order entered upon the minutes of the court, suspend the powers of such administrator until the matter is investigated, and if, after notice given, he fails to appear, or, if appearing, "the court is satisfied that there exists cause for his removal, his letters must be revoked." *Held*, that an administrator cannot be removed simply because his administration has been continued for 16 years. Such fact, alone, does not overcome the legal presumption of faithful performance of official duty.

2. In such case, it is error to refuse to allow the administrator to show that for 10 years preceding the trial the estate was involved in litigation which was not commenced by him, and which resulted in no injury to the estate.

In bank. Appeal from superior court, Santa Cruz county; PHIL W. KEYSER, Judge.

Petition for the removal of Thomas W. Moore, administrator of William H. Moore. For former reports see 9 Pac. Rep. 164, 315, and 20 Pac. Rep. 558. Code Civil Proc. Cal. §§ 1436-1440, provide that "whenever a judge of a superior court has reason to believe, from his own knowledge or from credible information, that any executor or administrator * * * has long neglected to perform any act as such executor or administrator, he must by an order entered upon the minutes of the court, suspend the powers of such executor or administrator until the matter is investigated;" and if, after notice given, he fails to appear, or, if appearing "the court is satisfied that there exists cause for his removal, his letters must be revoked."

Hall & Rodgers, (Warren Olney, of counsel,) for appellant. *C. B. Younger*, for respondent.

PATERSON, J. The appellant, Thomas W. Moore, was appointed administrator of the estate of William H. Moore, deceased, March 4, 1872. On February 7, 1882, a petition was filed by the widow of deceased, asking the court to remove the administrator from his office on the grounds that he was incompetent to act as administrator of the estate, and that he had neglected to have his accounts settled by the court, and had failed to turn over certain property which had been set apart as exempt from administration. On September 19, 1883, the court denied the petition. The widow thereupon appealed; and on January 27, 1886, this court dismissed the appeal on the ground that an order refusing to remove an administrator was not appealable. 68

Cal. 394, 9 Pac. Rep. 315. On March 16, 1883, the widow asked the court below to appoint her administratrix of the estate, on the ground that Thomas W. had been committed to the insane asylum on April 28, 1881, and that since that time no order had been made appointing any person administrator of the estate. The court denied the request, and the widow again appealed. This court, on appeal, held that the fact that the administrator had been sent to an insane asylum did not create an absolute vacancy in the administration of the estate; and, the application having been made after his incapacity had been removed and he had again entered upon the discharge of his duties as administrator, the court properly refused to appoint another in his place. 68 Cal. 281, 9 Pac. Rep. 164. On July 14, 1887, the petition before us herein was filed in the court below, asking for the removal of the administrator on the following grounds: (1) That he had failed to pay all the family allowance, and refused to deliver to the widow the possession of property set aside for her; (2) that he had failed to file his final account within a reasonable time; (3) that he had wrongfully prolonged the administration of the estate for the purpose of withdrawing from the estate the sum of \$6,000 to pay the widow; (4) that he had used \$6,000 of the fund of the estate to pay off a personal obligation; (5) that he had become mentally and physically incompetent to act as administrator; (6) that, although he knew one of his bondsmen had removed from the state, no additional bond had been given; (7) that he improperly paid out certain sums of money. The appellant filed an answer denying all the charges. The evidence introduced related to only two of the charges, namely, the first and the fifth. The matter having been submitted for decision, the court, on September 7, 1888, filed the following findings and order: "The said Thomas W. Moore has wrongfully and willfully neglected said estate, and has unnecessarily, willfully, and wrongfully prolonged the administration of said estate, to the great detriment thereof. As conclusion of law, I find that the administrator should be removed from the administration of said estate, and his letters of administration revoked. Let an order be entered accordingly." These findings were filed on September 7, 1889; and upon the same day a judgment was entered revoking the letters of administration, and removing the appellant from his office as administrator of the estate.

The judgment is clearly erroneous. If it be conceded that there is an allegation in the petition upon which the finding of the court could be based, there is not a word of evidence in the record to support the finding. The only evidence offered by either party on the question of delay in the settlement of the estate was offered by appellant, and tended to show that the administration of the estate had been prolonged by reason of litigation, for which the administrator was not respon-

sible; but the court, on the objection of respondent, excluded it. If it be assumed that the fact that the administration of the estate was continued for 16 years without a final account, is sufficient, *prima facie*, to justify the finding, it was clearly error to reject evidence offered by appellant tending to excuse the delay in closing the estate. To show unavoidable delay and good faith, the appellant was entitled to introduce in evidence, if he desired to do so, every paper in the case which tended to show the history of the various proceedings had therein, from their commencement to the time of trial. But, as a matter of fact, it is apparent that the issue referred to was abandoned by the petitioner at the trial. He made no attempt to prove his allegation. The burden of proof rested on him, and not upon the administrator; but he offered no evidence of negligence, or of injury by reason of delay. Appellant had the right to rely upon the presumption of fair conduct and faithful performance of official duty until something was offered by the petitioner tending to overcome it, and the mere fact that the proceeding had been pending for 16 years did not throw upon him the duty of disproving the charge of negligence.

The court could not, of its own motion, remove the administrator without giving him an opportunity to be heard. Sections 1436-1440, Code Civil Proc. Nevertheless, this is practically what was done in this case; for not only was there no evidence offered by the petitioner to show unnecessary delay in the settlement of the estate, but, as stated before, the administrator was not allowed to introduce evidence in his own behalf which, if admitted, would have tended to show that for about 10 years the widow had been prosecuting a claim for certain sums of money alleged to be due her as family allowance, and that the litigation had terminated, only a few days before the trial of this action, in a judgment denying her petition. It is true this court had on a former appeal (60 Cal. 528) decided that the administrator was not entitled to have the \$6,000 paid in satisfaction of the bond referred to allowed as a payment on account of family allowance, and to that extent his defense was not supported; but there is nothing to show bad faith on his part. The litigation was not commenced by him, and it resulted in no injury to the estate. In *Deck's Estate v. Gherke*, 6 Cal. 667, it is stated, in the statement of facts, that the order removing the appellant from the administration was made on an order to show cause. That case is authority only for the proposition that the appellate court will interfere with the exercise of the power conferred upon the probate judge in such matters only where there has been gross abuse of discretion. All the cases agree upon that matter. Here, there was no evidence at all introduced in support of the charge of wrongfully prolonging the administration. The only theory upon which the finding can be

supported is that all the papers filed, being matters of record in the proceedings, might be considered by the court as evidence in the case. But, when the appellant applied here for an order for the insertion in the bill of exceptions of some of the papers filed in the proceedings, the application was denied on the ground that they had not been offered in evidence. The fact that they had been commented on at the argument was held not to be sufficient to entitle the party to have them considered as evidence. 78 Cal. 244, 20 Pac. Rep. 558. Respondent again objects to the right of appellant to be heard, and moves to strike out the bill of exceptions and to dismiss the appeal. On August 21, 1889, the motion to dismiss was, after argument, denied in department 2. On September 5th the court in bank granted respondent leave to renew the motion, which was done, and, after argument, was again denied. 20 Pac. Rep. 558. Upon consideration of the points made, we are satisfied that the ruling in this regard was correct. The judgment is reversed, and the cause is remanded for further proceedings.

We concur: BEATTY, C. J.; FOX, J.; THORNTON, J.

(83 Cal. 515)

McDANIEL v. CUMMINGS. (No. 13,173.)

(Supreme Court of California. March 13, 1890.)

EASEMENTS—DISCHARGE OF FLOOD WATER.

1. Civil Code Cal. § 801, providing that the right of receiving water from or discharging it upon land, and the right of having water flow without diminution or disturbance of any kind, may be attached to other lands as easements, merely defines the easements, without prescribing or regulating the mode of acquiring them. Overruling *McDaniel v. Cummings*, 22 Pac. Rep. 216.

2. Plaintiff owns land lying between the Sacramento river and certain lowlands belonging to defendant. The land next to the river is the highest, there being a gradual descent from the river bank to and beyond defendant's land. Held, that plaintiff has no easement at common law to have the flood waters of the river flow over defendant's land. Distinguishing *Ogburn v. Connor*, 46 Cal. 346.

In bank. On rehearing. For former opinion, see 22 Pac. Rep. 216.

H. M. Alberty, for appellant. Edwin Swinford and John T. Harrington, for respondent.

BEATTY, C. J. Defendant owns the west half of a certain section, No. 26, in Colusa county. Plaintiff owns land adjoining on the west. Still further to the west, at a distance of about two miles from plaintiff's land, the Sacramento river flows from north to south. The land next to the river is the highest, there being a gradual descent from the river bank to and beyond the land of defendant. When the river rises above the level of its banks, as it generally does several times during every rainy season, the water flows off to the east or south-east, across the land of plaintiff and other lands similarly situated, to and across the land of defendant

and other lands in the same relative situation. It does not flow in any narrow or defined channel or channels, but in a broad sheet, covering a wide surface. When the river falls below the level of the banks the overflow cannot, of course, find its way directly back into the stream, and consequently the lands near the river are drained by the spread and flow of water towards the east and south-east, across the lower lands, such as those of defendant. Left unobstructed in their natural and accustomed flow, these waters soon pass beyond the plaintiff's lands, leaving them fit for cultivation. But recently the defendant, without intending to injure the plaintiff, and acting upon the *bona fide* belief that he had the right so to do, commenced, and was proceeding to complete, a levee or embankment along his west line, the necessary effect of which will be to prevent the flood water from passing over his land, and to set it back upon the plaintiff's land, causing it to cover a larger area thereof, and to remain thereon for a longer period, than it otherwise would. The plaintiff thereupon commenced this action to enjoin the defendant from erecting or maintaining said levee. A temporary injunction was issued upon the filing of the complaint. Afterwards, on motion of the defendant, and upon affidavits showing the state of facts above set forth, the superior court dissolved the injunction on the ground that the defendant, in erecting and maintaining his levee, was acting within and according to his rights. From this order dissolving the injunction plaintiff appealed, and on September 12, 1889, an opinion was filed by this court reversing the order, upon the authority of *Ogburn v. Connor*, 46 Cal. 346. See 22 Pac. Rep. 216. A rehearing was subsequently granted upon petition filed on the part of the defendant, in which the correctness of the decision in *Ogburn v. Connor* is assailed, as is also the construction which we gave to section 801 of the Civil Code.

I think there can be no doubt that we were in error in holding that section 801 of the Civil Code gives to the owner of higher land an easement for the discharge of surface water upon lower land adjoining. That section merely enumerates the different kinds of burdens or servitudes upon lands that may be attached as incident or appurtenant to the other lands; or, in other words, it is a mere definition of easements appurtenant, and makes no pretense of prescribing or regulating the manner of acquiring them. Among the other easements defined are: "(9) The right of receiving water from or discharging the same upon the land. * * * (11) The right of having water flow without diminution or disturbance of any kind." Undoubtedly these are easements which may exist as appurtenant or incident to the lands of one, and as servitudes or burdens upon the land of another, but the question here is not as to what an easement or a servitude is, but as to how it is created, and when it attaches. In

the solution of this question we derive no assistance from section 801 of the Civil Code. That section is no more authority for saying that the plaintiff has an easement for the discharge of surface water according to its natural flow from his land to that of defendant than it is for saying that he has any other of the 17 kinds of easements enumerated; as, for instance: "(1) The right of pasture. (2) The right of fishing. (3) The right of taking game. * * * (17) The right of burial."

How, then, is the existence of an easement in any particular case to be determined? Ordinarily, an easement is created by contract between the owners of different parcels of land,—that is to say, by grant, either express or implied; but with respect to rights such as that in controversy here, the question of easement or no easement depends upon the law defining the mutual rights and obligations of the owners of land in the relative situations of the tracts belonging to the plaintiff and defendant. What, then, was the law applicable to these lands at the date of their acquisition? It does not appear when either of the parties acquired his land, but it is to be presumed it was subsequent to the 13th of April, 1850, at which date it was enacted that "the common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of the state of California, shall be the rule of decision in all the courts of this state." St. 1850, p. 219. This rule continues in force. Pol. Code, § 4468. As there is nothing in the constitution of the United States, or in the constitution or statute law of this state, to which the common-law rule on this subject—whatever it may be—can be repugnant, it is manifest that the whole question is solved whenever it is determined what the common-law rule is. In the case of *Ogburn v. Connor* this precise question was presented, and it was then determined that "when two parcels of land, belonging to different owners, are adjacent to each other, and one is lower than the other, and the surface water from the higher tract has been accustomed by a natural flow to pass off over the lower tract, the owner of the lower tract cannot obstruct this flow. The owner of the upper tract has an easement to have the water flow over the land below, and the land below is charged with a corresponding servitude." This, of course, was intended as a statement of the common-law rule, for otherwise it could not have been the law of this state. But counsel for respondent contends, and counsel for appellant seems to admit, that it is really a statement of the rule of the Roman civil law, and that it is the exact opposition of the common-law rule. It must be confessed that this proposition seems to be sustained by many of the cases cited in the briefs, and if the question were now to be decided for the first time I should certainly find great difficulty in arriving at the conclusion reached by the court in the case referred to. But that decision was rendered

17 years ago, following a previous case, not reported, entitled *Castro v. Bailey*, and has stood unchallenged ever since. Necessarily, it has become a rule of property and of right respecting interests which have vested during that long interval, and it cannot now be disturbed without manifest injustice to all who have acted upon the faith of it. If it be erroneous, it must nevertheless be upheld upon the principle of *stare decisis*, and, so far as our action is concerned, the rule must continue to obtain as it is there laid down.

But counsel for respondent, although originally conceding that the order appealed from must be reversed unless the decision in *Ogburn v. Connor* was repudiated, now contend that the cases may be distinguished, and that this order should be affirmed on the principle applied in *Lamb v. Reclamation Dist.*, 73 Cal. 125, 14 Pac. Rep. 625. In that case this court adopted and applied to the flood waters of our large rivers the principle laid down in the English case of *Rex v. Commissioners, etc.*, 8 Barn. & C. 355, with respect to the waters of the sea, viz., that they are a common enemy, against which every man has a right to defend himself, regardless of the fact that the barriers he erects for the protection of his land may cause the flood to rise higher, or flow with greater force upon his neighbor. We think this is the true principle to apply to the case of parties in the relative situation of the plaintiff and defendant here, especially in view of the policy of all our state legislation respecting our overflowed lands. If the owner of the land next to the river will not, either by himself or in combination with those behind him, erect a levee on the bank, he ought not to be allowed to prevent them from protecting themselves merely because by so doing they prevent his higher land from being drained of the flood waters as rapidly as it otherwise would be. Because his land may be cultivated without artificial protection, he ought not to be allowed to prevent others from using proper means to make their lands productive; and what is true of the owner of the river bank is true in the same sense of each successive owner back of him. It is the interest of all to combine and share the expense of placing a levee on the bank, by which all will be protected; but if those in front will not co-operate with those behind, and will do nothing for themselves, they must not be allowed to stand in the way of those whose necessities compel them to act. There is no necessary conflict between these views, or the principles they sustain, and the decision in *Ogburn v. Connor*. That decision refers to surface water having its sources in springs, or descending from the clouds in the form of rain or snow waters; waters, that is to say, which the owner of the higher land cannot keep out by any practicable means. It does not apply to flood waters which the owner of the higher land can restrain by the same means employed by his neighbor. In this case it does not appear that defendant's dam will cause

the plaintiff any injury by holding back the rain-water falling on his land, or any water except the overflow of the Sacramento river. As against that, we think the defendant is entitled to protect himself, and that the plaintiff, if he finds it necessary, may do the like.

Order affirmed.

We concur: PATERSON, J.; SHARFSTEIN, J.; FOX, J.; MCFARLAND, J.

(83 Cal. 561)

STEPHENS *et al.* v. PARRISH *et al.* (No. 13,505.)

(Supreme Court of California. April 16, 1890.)

PLEADING—VERIFICATION—ATTORNEY.

The verification of a complaint by plaintiffs' attorney, which states that plaintiffs are absent from the county where the attorney resides, is sufficient, under Code Civil Proc. Cal. § 446, which provides that a pleading may be verified by the attorney when "the parties are absent from the county where the attorney resides," but requires him to "set forth in the affidavit the reasons why it is not made by one of the parties."

In bank. Appeal from superior court, San Diego county; JOHN R. AITKEN, Judge. *Collier & Haines, Shaw & Holland*, and *Parrish, Mossholder & Lewis*, for appellants. *J. B. Mannix* and *Brunson, Wilson & Lamme*, for respondents.

FOX, J. The only point made on this appeal is as to the sufficiency of the verification of the complaint. It reads as follows: "State of California, county of San Diego—ss.: J. B. Mannix, being duly sworn, says that he is the attorney for the plaintiffs in the above-entitled action; that he resides in the said county of San Diego; that the plaintiffs are absent from the said county; that he has read the foregoing complaint, and knows the contents thereof, and that the same is true, of his own knowledge, except as to matters which are therein stated on his information or belief, and as to those matters he believes it to be true. J. B. MANNIX. Subscribed and sworn to before me this 4th day of April, 1889. THOMAS HIGGINS, Notary Public. [Seal.]" Section 446 of the Code of Civil Procedure provides that, "where a pleading is verified, it must be by the affidavit of a party, unless the parties are absent from the county where the attorney resides, or from some cause unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he must set forth in the affidavit the reasons why it is not made by one of the parties." The verification in this case is made by the attorney, and distinctly sets forth the first of the conditions which authorize the making of it by some person other than a party,—that the plaintiffs are absent from the county in which the attorney resides. This is the only one of the conditions under which the law excuses the making of the verification by a party that is given in the affidavit, and

is alone sufficient for the purpose. No additional force could be given to it by adding that it is for that reason that the verification is made by the attorney. The best of the statutory reasons is given. We see no occasion to say more on the subject than is said.

Judgment affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

(83 Cal. 579)

MOYLE *et al.* v. LANDERS *et al.* (No. 11,906.)

(Supreme Court of California. April 26, 1890.)
CORPORATION—STOCKHOLDER'S ACTION—PARTIES.

1. Where an action is brought against the directors of a corporation by some of its stockholders in behalf of themselves and all other stockholders who see fit to join them, to recover moneys alleged to have been fraudulently misappropriated, an objection that one of them has been made a plaintiff since the filing of the original complaint cannot be sustained when the complaint shows that he is a stockholder, and the record does not show when he was made a party. The presumption is that he was made a party by leave of court.

2. A demurrer to a complaint will be overruled where the complaint is not ambiguous nor unintelligible in the particulars specified in the demurrer, though obscure and multifarious.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

L. E. Bulkeley, for appellants. H. G. Sieberst, for respondents.

FOX, J. This is a bill in equity brought by two stockholders of the defendant, the Andes Silver Mining Company, against the directors of said company and certain others, for an accounting, and the recovery, for the benefit of the company, of moneys of the corporation alleged to have been fraudulently misappropriated by the other defendants. The judgment is on demurrer to the fourth amended complaint, from which the plaintiffs appeal. The complaint is a model of obscurity. If it were again amended, and carefully pruned of much of its verbiage in the way of recital and repetition, and reduced to about one-third its present volume, it would be much more intelligible and probably would not then invite demurrer; at least, it would not be as likely to induce a sustaining of the demurrer. A careful analysis of the complaint, however, shows that each of the two counts thereof contains allegations of fact sufficient to constitute a cause of action in favor of the company against the other defendants; that the plaintiffs are, and have been during all the times mentioned in the complaint, stockholders in the corporation; that the facts and circumstances are such as would make it useless to apply to the directors to have the action brought in the name of the corporation, and such as to authorize the plaintiffs to bring and maintain the action in their own names for the benefit of the corporation; that all persons who are not plaintiffs are made defendants, who are

necessary parties to the action, and that none are made defendants who are not proper parties; that, if the facts stated are true, the action is not barred by the statute of limitations; and that the complaint, though multifarious and obscure, is not ambiguous and unintelligible in the particulars specified in that branch of the demurrer. The demurrer, therefore, should have been overruled, with leave to the defendants to answer. A point is made by appellants that the plaintiff Holling has been made such since the filing of the original complaint. The record does not disclose such to be the fact; but, if it is, the presumption is that he was made so by leave of the court, and there is no legal objection to his being joined as plaintiff, as the complaint shows that he was from the beginning, and still is, a stockholder, and the action was brought on behalf of all stockholders who might see fit to join as plaintiffs therein. Judgment reversed, with directions to the court below to overrule the demurrer and allow the defendants to answer.

We concur: BEATTY, C. J.; PATERSON, J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

(83 Cal. 571)

MCCALLION *et al.* v. HIBERNIA S. & L. SOC. *et al.* (No. 12,423.)

(Supreme Court of California. April 24, 1890.)

APPEAL—BOND—JUDGMENT AGAINST SURETIES.

1. Defendants appealed from a judgment and an order denying a motion for a new trial, and gave an undertaking, with sureties, "that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellants will pay to the plaintiffs the amount directed to be paid by the said judgment, * * * and that, if the appellants do not make such payment within thirty (30) days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered, on motion of the respondents, in their favor, against the sureties." Held, that the undertaking related only to the appeal from the judgment itself, and not to the appeal from the order denying a new trial, and did not authorize judgment, on motion, against the sureties, on receiving a remittitur that "the order of the superior court" was affirmed.

2. In such case, it is incumbent on plaintiffs, on making the motion, to show that 30 days had elapsed since the filing of a remittitur on appeal from the judgment; and a certificate of the clerk of the supreme court filed after notice of the motion was given, and only four days before the hearing, cannot help plaintiffs, even though the certificate should be deemed to be a remittitur.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

D. I. Smoot, for appellants. M. C. Hassett and Theodore Bradley, for respondents.

HAYNE, C. This was a motion by plaintiffs for judgment against the sureties on an undertaking on appeal. The motion was denied, and the plaintiffs appeal. The action related to the right to a deposit in the Hibernia Bank. The bank paid the money into

court, and other parties were substituted as defendants. The plaintiffs recovered a judgment; and the substituted defendants appealed from such judgment, and from an order denying their motion for a new trial. In order to effect a stay of execution, the substituted defendants gave, in addition to the \$300 undertaking, an undertaking in double the amount of the judgment, which undertakings were in the same instrument. The promise of the sureties set forth in the stay undertaking was as follows: "That if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellants will pay to the plaintiffs the amount directed to be paid by the said judgment, or the part of said amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellants upon the appeal, and that, if the appellants do not make such payment within thirty (30) days after the filing of the *remittitur* from the supreme court in the court from which the appeal is taken, judgment may be entered, on motion of the respondents, in their favor, against the undersigned sureties," etc.

Under this agreement, we think it clear, in the first place, that the stay undertaking related to the appeal from the judgment, and not to the appeal from the order on motion for new trial. It is not doubted that a stay undertaking can be so drawn as to effect a stay on appeal from an order denying a new trial. See *Fulton v. Hanna*, 40 Cal. 278. But the undertaking here was not so drawn. Its condition was that "if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellants will pay," etc.; and it is therefore, clear that, before the liability of the sureties upon the stay undertaking became fixed, the appeal from the judgment must have been disposed of, either by affirmance or dismissal. A disposition of the appeal from the order alone was not sufficient.

In the next place, the sureties, by the express provision of their contract, were to become liable to a proceeding of this kind upon the stay undertaking only in case of non-payment by the principals "within thirty days after the filing of the *remittitur* from the supreme court;" and this, evidently, refers to the *remittitur* upon the appeal from the judgment, which, as we have seen, is the appeal to which the stay undertaking relates. Consequently the sureties were not in default until 30 days after the filing of the *remittitur* upon the appeal from the judgment; and, this being so, it was necessary for the moving parties to show that 30 days had elapsed since the filing of the *remittitur* on that appeal. The *remittitur* which they introduced in evidence was on appeal from the order only. Its language is that "the order of the superior court * * * be, and the same is hereby, affirmed." It says nothing about the appeal from the judgment; and, if the

certificate of the clerk of the supreme court, introduced in evidence in rebuttal, be deemed to be a *remittitur*, it does not help the plaintiffs, because it was filed after the notice of motion was given, and only four days before the hearing and the order denying the motion. The way this condition of affairs came about was, probably, that the appeal from the judgment was dismissed nearly a year before the appeal from the order denying the motion for new trial was disposed of; and, from inadvertence, the clerk of the court omitted either to send down a separate *remittitur* on the dismissal, or to include it in the *remittitur* on affirmance of the order. But the omission of the clerk cannot take away the right of the sureties to stand upon their contract. They were not in default until 30 days after the filing of the *remittitur* on the appeal from the judgment, and consequently the motion for judgment against them was properly denied.

This disposes of the appeal before us, and, as the order appealed from must be affirmed, no other questions can arise on the return of the case to the court below; and hence it is not necessary or desirable to express an opinion upon the other questions discussed, although they may, possibly, arise in some other proceeding. See *State v. McGlynn*, 20 Cal. 276. We therefore advise that the order appealed from be affirmed.

We concur: GIBSON, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(21 Nev. 13)

STATE v. SADLER *et al.* (No. 1,317.)

(Supreme Court of Nevada. April 14, 1890.)

TAXATION—ASSESSMENT—EVIDENCE.

1. A tax-payer whose property has been assessed at a sum greater than its true value must make application for relief to the board of equalization, according to the provisions of Gen. St. Nev. § 1091, and, if he fails to do so, the overvaluation cannot avail him as a defense in an action by the state to collect the taxes.

2. An allegation that defendant's property is assessed "in an amount greatly in excess of that authorized by law" is insufficient to raise an issue as to the value of the property. It must show what its real value was.

3. Gen. St. Nev. § 1091, provides that "where the person complaining of the assessment has refused to give the assessor his list under oath, as required under this act, no reduction shall be made by the board of equalization in the assessment made by the assessor." *Held*, an allegation that defendant made application to the board to have his assessment reduced, without any averment that the sworn statement was furnished the assessor, or that no demand for it was made, was insufficient as a defense to an action for the taxes.

4. An objection, in an action by the state to recover taxes, to the introduction of the delinquent tax-roll in evidence, on the ground that it is not properly verified by the county treasurer, will not be considered where defendant, after his objection is overruled, introduces the original assessment roll, which gives the true assessment of his property, as the error, if any existed, was cured by the introduction of the original assessment.

5. Where the dollar-mark is placed at the head

of the column of figures showing the amount of taxes assessed against each piece of property, it is not necessary that it should be prefixed to each item.

6. The omissions of officers to perform the duties required of them "between the assessment and commencement of suit" constitute no defense to a suit for taxes, as the statute (Gen. St. Nev. § 1108) provides that "the acts herein required between the assessment and commencement of suit shall be deemed directory merely."

7. The supreme court will not review the evidence on appeal for the purpose of determining its sufficiency to sustain the findings of the lower court unless there has been a motion for a new trial.

Appeal from district court, Eureka county; A. L. FITZGERALD, Judge.

Gen. St. Nev. § 1091, provides that the board of equalization shall have power to determine all complaints made in regard to the assessed value of any property, and may change and correct any valuation, if they deem the assessment either above or below its true value, whether said sum was fixed by the owner or assessor, except that, in case where the person complaining of the assessment has refused to give the assessor his list under oath, no reduction shall be made. Section 1108 provides that the acts required to be performed by the county officers in regard to notices, etc., "between the assessment and commencement of suit, shall be directory merely."

Rives & Beatty, for appellants. *The Attorney General, Peter Breen*, Dist. Atty., and *A. E. Cheney*, for respondent.

HAWLEY, O. J. This is an action to recover delinquent state and county taxes.

1. Appellants claim that the court erred in striking out certain portions of their answer, alleging that the assessment was fraudulently and illegally made, in this: that it was not equal in valuation with that of other property similarly situated and of the same value; that it was assessed "in an amount greatly in excess of that authorized by law, to-wit, its true cash value;" that the assessment was arbitrary, as appellant Sadler neither signed, swore to, or made any return of his property; that he appeared before the board of equalization, and protested against the assessment, and demanded that it should be reduced and "fixed at its true value;" and that said board refused and neglected to equalize the same, or any part thereof. This court decided, in *State v. Eastabrook*, 3 Nev. 180, that it was no defense to a suit for taxes that other property similarly situated was not assessed at all. It is the duty of the assessor to assess all property at its true cash value. If he errs in this respect, the law provides a proper remedy. Gen. St. § 1091. The tax-payer cannot avoid the payment of his taxes on the ground that his property was valued at a higher rate than the property of other persons similarly situated.

The allegation that the property of appellant Sadler was assessed "in an amount greatly in excess of that authorized by law" was not sufficient to raise any issue as to the

true value of the property, even if he was otherwise entitled to make such a defense, because it does not state what the true cash value of the property was. Courts do not deal with trifles. To raise an issue facts must be stated, showing that there are real questions involved. The allegation, treated as an ordinary pleading denying an indebtedness, amounts to an admission that the true value of the property was only one mill less than the amount of the assessment. But he is not in a position to complain that his property was not assessed at its true value. The statute provides that the tax-payer who has any cause of complaint in this respect may make application to the board of equalization to have his assessment reduced, (Gen. St. § 1091;) and if he fails to do so his remedy is lost, (*State v. Wright*, 4 Nev. 251.)

Sadler alleges that he made such an application; but he does not aver that he complied with other provisions of the statute, which it was necessary to do in order to entitle him to any redress before the board of equalization. The statute expressly provides that "where the person complaining of the assessment has refused to give the assessor his list under oath, as required under this act, no reduction shall be made by the board of equalization in the assessment made by the assessor." In construing this provision it has uniformly been held by this court that the board of equalization has no jurisdiction to act unless it is shown that the complaining party furnished a statement to the assessor as provided by law, or that no demand was made for such a statement; that the burden of proof is upon the defendant to show that such statement was furnished, or that no demand therefor was made. *State v. Commissioners*, 5 Nev. 317; *State v. Board*, 7 Nev. 83; *State v. Railroad Co.*, 17 Nev. 260. The allegations did not present any question of fraud in the assessment. The court did not err in striking out the allegations, as they did not constitute any defense to the action.

2. The objections made to the introduction of the delinquent tax-roll in evidence, in so far as the same relate to a want of proper verification by the county treasurer as required by law, will not be considered. It is, of course, the duty of the officers to comply with the law; yet it has never been held that it was absolutely essential, to enable the state to collect its taxes, that a delinquent tax-roll should exist in strict conformity with the law. Any irregularity in this respect is a defense in an action to recover taxes only to the extent that the party has been injured thereby. *State v. Railroad Co.*, 10 Nev. 61; *State v. Mining Co.*, 15 Nev. 386. And in this case it affirmatively appears that there was no injury. It is always an easy method, in making the proofs on the part of the state, to introduce the delinquent roll, as it is made *prima facie* evidence "to prove the assessment, property assessed, the delinquency, the amount of taxes due and unpaid, and that all the forms of law in relation to the assess-

ment and levy of such taxes have been complied with." Gen. St. § 1110. But the facts may be proven in any other manner. The record shows that appellant Sadler, after his objection was overruled, introduced the original assessment roll, which set forth the assessment as made upon his property. This cured the error, if any existed, in the delinquent roll, and obviates the necessity of determining whether or not the court erred in admitting the exhibits taken from the delinquent roll. "The failure of the plaintiff to introduce the delinquent list could certainly do no more than throw on it the necessity of proving a regular assessment. There was no necessity of proving a delinquency. When the assessment is once properly made, it then becomes the duty of the tax-payer to seek the proper officer and pay his taxes." *State v. Telegraph Co.*, 4 Nev. 346.

The objections to the assessment roll, to the effect that it did not show, or purport to show, the amount of taxes in money which had been levied and assessed against the respective pieces or parcels of property, and that the taxes had not been properly extended or carried out according to law, are based principally upon the erroneous theory that it is necessary that the dollar-mark should be affixed to the value of each piece of property, and to the amount of the tax in the respective columns where the amounts are carried out. The fact is that the dollar-mark appeared at the head of each column. This was sufficient to enable the court to determine with certainty the amount of the tax, which is all that the law requires. *State v. Mining Co.*, 8 Nev. 16. If the dollar-mark is prefixed at the head of an item column of figures, or to some, but not all, of the items in the column, or to the totals at the foot of the column, then all the figures standing in the same column must necessarily be construed to be dollars without a repetition of the dollar-mark before each.

All the objections to the delinquent and original assessment roll relate to the acts of officers required to be performed "between the assessment and commencement of suit," which are directory merely, (Gen. St. § 1108,) and an omission of any or all of them will not release the tax-payer from his obligation to the state, (*State v. Telegraph Co.*, supra; *State v. Railroad Co.*, 10 Nev. 78.)

3. It is contended that there is no evidence to sustain the findings of the court that appellant Sadler was the owner of the "Duker Ranch," which was assessed to him. After the findings were filed, appellants moved the court to correct its findings in this respect, which the court refused. No motion for a new trial was made. The question of practice relating to this point is too well settled to require discussion. It has always been held that this court cannot review the facts in order to ascertain whether the findings are supported by the evidence, unless there has been a regular statement on motion for a new trial. *Whitmore v. Shiv-*

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erick, 3 Nev. 303; *James v. Goodenough*, 7 Nev. 324; *Conley v. Chedic*, Id. 336; *Beck v. Truckee Lodge*, 18 Nev. 246, 2 Pac. Rep. 390; *Burbank v. Rivers*, 20 Nev. —, 16 Pac. Rep. 431.

The judgment of the district court is affirmed.

(1 Wash. St. 1)

LILIENTHAL et al. v. WRIGHT.

(*Supreme Court of Washington.* Jan. 15, 1890.)

APPEAL—FINAL ORDER—VACATING JUDGMENT.

An order of the district court vacating a judgment rendered during the term in plaintiff's favor on the pleadings, and permitting defendant to file an amended answer, is not a final order, and therefore not appealable.

Appeal from district court, Pierce county; FRANK ALLYN, Judge.

Action by J. L. and E. R. Lilienthal, co-partners as Lilienthal & Co., against B. F. Wright for the breach of a contract for the sale of hops. There was a judgment for plaintiffs on the pleadings, which was afterwards vacated. Plaintiffs appeal.

Judson, Sharpstein & Sullivan, for appellants. *Branson & Parker* and *Doolittle, Pritchard & Lehman*, for appellee.

ANDERS, C. J. During the progress of the trial of this cause in the court below, judgment was rendered upon the pleadings in favor of appellants. Subsequently, and at the same term of the district court, the judgment was set aside, and defendant permitted to file an amended answer. From the order of the court below vacating said judgment the plaintiffs appeal to this court. Appellee moves to dismiss the appeal mainly on the ground that the order appealed from was not final, and hence not appealable. We are all agreed that the decided weight of authority is in favor of the claim of appellee herein. We think the law applicable to this case is clearly and satisfactorily stated in the case of *Brown v. Edgerton*, 16 N. W. Rep. 474, cited in the brief of appellee. The order complained of was in no sense final, and is therefore not reviewable by this court. The appeal is dismissed, with costs.

HOYT, SCOTT, and STILES, JJ., concur. DUNBAR, J., not sitting.

(1 Wash. St. 6)

DANFORTH v. PAXTON.

(*Supreme Court of Washington.* Jan. 15, 1890.)

Appeal from district court, Pierce county; FRANK ALLYN, Judge.

Action by C. H. Danforth against J. Wilson Paxton to cancel the record of a deed alleged to have been wrongfully procured from the custody of a person holding the same in escrow. Defendant interposed a demurrer, which was overruled, a decree entered in favor of plaintiff, and defendant appealed. Subsequently, plaintiff moved in the district court, that the decree in his favor be set aside and vacated. This motion was denied on the ground that the district court had lost jurisdiction of the cause of defendant's appeal. From the order denying his motion plaintiff appeals.

Lewis Cass Branson, for appellant. *John Arthur*, for appellee.

ANDERS, C. J. For the reasons stated in the opinion of this court in the case of *Lillenthal v. Wright*, ante, 801, (just decided,) the appeal herein is dismissed.

SCOTT, STILES, and HOTT, JJ., concur. DUNBAR, J., not sitting.

(1 Wash. St. 148)

LEVY v. SHEEHAN.

(Supreme Court of Washington. Feb. 27, 1890.)

CHattel Mortgage—ILLEGAL SEIZURE—DAMAGES.

1. A debtor mortgaged his stock of goods to a creditor, and gave him possession thereof, with authority to sell at once, and apply the proceeds on the debt. The sheriff, with knowledge of the mortgage and of the mortgagee's possession, seized the goods on attachments of other creditors of the mortgagor, and sold and scattered them beyond recall. Held that, there being no question of *bona fides*, the mortgagee could recover of the sheriff the amount of the secured debt and interest, not exceeding the value of the goods at the time of their taking.

2. In an action to recover damages for such taking the complaint need not allege the value of the goods; but, in the absence of evidence as to the value, a judgment for the amount of the debt cannot be sustained.

3. The right of a mortgagee in possession of personal property to retain possession and dispose of the property according to the terms of the contract, subject to a strict accounting for the proceeds, cannot be questioned by third persons merely on the ground that the instrument is not in the statutory form, or that the mortgagee is empowered to sell at private sale.

4. It is error to include in the judgment an item of special damage which, although recoverable, was not alleged in the complaint.

5. As rule 8, Sup. Ct. Wash., providing that appellant's brief shall contain the pleadings and an abstract of the case, is purely for the convenience of the court, it is in its discretion to refuse to dismiss an appeal for non-compliance therewith, where appellant was unaware that it had been adopted.

Appeal from district court, Jefferson county.

Smith & Hastings and *C. H. Gest*, for appellant. *Thomas Burke* and *T. N. Haller*, for appellee.

STILES, J. The appellee brought suit against the appellant, the sheriff of Jefferson county, to recover damages for the unlawful taking of certain personal property from his possession under the following circumstances: On the 5th day of November, 1887, one Rostein was the owner of certain goods, the stock in trade of a store kept by him; and on that day, being indebted to appellee in the sum of \$1,118, he executed and delivered to appellee an instrument reciting the indebtedness, and authorizing appellee to take possession of the goods, and sell them as expeditiously as possible without sacrifice, and to apply the proceeds, after deducting the expenses of making sale, to the payment of the debt. As soon as the debt was paid the instrument was to be void. The property was forthwith delivered to the appellee, who commenced to dispose of it in accordance with the terms of the instrument. The sheriff had knowledge of this arrangement; but on the 7th day of November he seized the goods, and took them from the possession of the appel-

lee, under certain attachments issued at the suit of other creditors of Rostein. Subsequently he sold the goods, and they were scattered, and lost to the appellee. This action followed, and resulted in a judgment for appellee for the amount of his debt, interest, and certain expenses. The sheriff appeals.

Appellee moved to dismiss the appeal for the reason that the appellant's brief was not served 20 days before the term, inadvertently failing to note that the legislature had changed the first sitting of this court from January 6th to January 13th. A second motion was made to strike appellant's brief, for the reason that it did not contain the pleadings and an abstract of the case, as required by rule 8. Appellant argued that the rules of the territorial supreme court were not in force as rules of this court, apparently not being aware that at our first session, November 18, 1889, we adopted those rules as the rules of this court. But, inasmuch as the matter omitted was required purely for the convenient reference and information of the court, the motion is directed entirely to its discretion, and we do not deem it best to follow the course suggested. We desire to remark in this connection, however, that appellant's argument that, because the transcript in this case is not voluminous, and the evidence is contained in a commendably terse agreed statement of the facts, there is no substantial reason for printing the pleadings and statement in the brief, is not a good one, even in the absence of a rule.

The complaint alleged "that, for a long time prior to the 5th day of November, 1887, one L. Rostein was indebted to this plaintiff in the sum of \$1,118, and was the owner of a stock of goods, wares, and merchandise, situated in the city of Port Townsend, Wash. T., of the value of \$2,000 and upwards;" and there was no other allegation of the value of the goods. Appellant maintains that for the failure to allege the value at the time of the taking, November 7, it must be held that the complaint was insufficient; but it seems that the nature of the action was misconstrued by counsel for appellant, who assume to treat it as an action for the value of the goods, whereas it is clearly one upon the tort of the officer. In the latter case, although the value of the goods at the time of their taking limits the amount of the mortgagee's recovery, where no elements of special damage are pleaded, it is not necessary to plead the value. The damages are here alleged to have been \$2,000, and we think that sufficient. The defendant denied the damage and the amount thereof, and that was the material issue.

This was not a statutory chattel mortgage, such as is contemplated by chapter 141 of the Code, although the mortgagee caused it to be recorded. Here the possession was forthwith delivered to the mortgagee, and the instrument contained a provision that the mortgagee might sell the goods at private sale. Although the appellant assails this

method of taking security, we can see no objection to it, even under our statute. In the absence of fraud, the parties can make such agreement as they see fit. No fraud is alleged in this case; and the mortgagee was clearly entitled to the undisturbed possession of the goods, for disposal according to the terms of the contract, subject to a strict accounting for the proceeds by the mortgagee. *Marsh v. Wade*, 20 Pac. Rep. 578; *Reynolds v. Smith*, 28 Kan. 810; *Denny v. Van Dusen*, 27 Kan. 437; *Jones, Chat. Mortg.* 775a. We are not here called upon to decide whether or not the interest of the mortgagor could be reached by creditors of the mortgagor until after the mortgage debt was paid. The officer took the goods, and treated them as though the appellee had no rights whatever to the goods or their proceeds, although, as the evidence shows, he had full knowledge of the mortgage and the possession of the appellee. He afterwards sold and scattered them beyond recall; and he now claims that the sum which he derived from their sale is, at most, the measure of appellee's damage. Neither chapter 141 nor the attachment law of 1886, in our judgment, bears any such construction. Chapter 141 contemplates the possession of the mortgaged property by the mortgagor, gives the officer acting at the instance of other creditors the right to take the property from his possession and sell it, subject to the lien of the mortgage, to any purchaser; and this includes the right to deliver the possession to the purchaser. But in doing this he cannot sell so as to render it impossible for the mortgagee to follow the property into the hands of the purchaser. Certainly the mortgagee in possession is in no worse position than the mortgagee who leaves the mortgaged property in the hands of the mortgagor. We hold that in this case, in the absence of any allegation of special damage, the appellee was entitled to recover the amount of his debt and interest thereon, not exceeding the value of the goods at the time of their taking. Certain cases were cited by appellee to the point that he was entitled to his debt and interest without regard to the value of the goods, but they do not maintain the position assumed. In *Norris v. McCanna*, 29 Fed. Rep. 757, the court said "no question was raised but that the value of the goods exceeded plaintiff's debt," from which we presume that there has been a finding as to the value. In *Wood v. Franks*, 56 Cal. 217, the controlling statute (Civil Code, § 2969) provided thus: "Before the property is so taken [by a sheriff taking mortgaged personal property] the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest," etc. And the court held that an officer who took mortgaged property without such tender assumed the payment of the debt. But we have no such statute. Appellee also maintains that if he is not entitled to his debt and interest, without regard to the value of the mortgaged property, the burden is upon the officer to show the

property taken to be of less value than the amount of the debt and interest, and cites *Smith v. Tooke*, 20 Tex. 751; *Pardee v. Robertson*, 6 Hill, 550, and other cases, in support. But an examination of those cases shows that they were actions against officers for their failure to make return of executions wherein the *gravamen* of the controversy was the failure of duty on the part of the officer, which is not in any sense parallel to the case at bar, and we cannot agree to the proposition. In all cases where damage results from neglect of official duty on the part of an officer, there are many presumptions justly indulged against him; but here the defendant is not sued as an officer at all, much less upon any alleged neglect; nor should we know him as an officer but for his answer, wherein he endeavors to excuse his act because he was an officer acting under lawful process.

Thus far the better of this appeal is with the appellee; and we should have been content to affirm, with a slight modification, were it not that the cause comes to us weighted with another objection which we deem so vital as to necessitate a reversal and new trial. The parties, desiring a trial by the court without a jury or the actual presence of witnesses, agreed upon and filed a statement of facts, and submitted the case upon it. From the statement the court found the facts, and both statement and findings are in the record; and one of appellant's assignments of error is that neither in the statement nor in the findings is there any reference whatever to the value of the goods seized by the officer. It is a fact that there is no evidence, and therefore no finding, of this value, which, under our view of the case, as hereinbefore stated, was necessary to support the judgment. Under chapter 17 of the Code, the findings of the court stand as a verdict, and must be equally supported by testimony. Had this case been tried by a jury upon the agreed statement, and a charge that the appellee was entitled to a verdict for his debt and interest, not exceeding the value of the goods, their verdict for any amount would have been set aside, since they would have had no basis at all for their findings. The judgment also included \$46 expenses found to have been incurred by the appellee for rent of the building in which the goods were kept by him. This should not have been so included, as it was an item of special damage which, although recoverable, was not alleged in the complaint. The judgment is reversed and a new trial ordered, with costs to the appellant, not including the expense for his defective brief.

ANDERS, C. J., and HOYT, SOOTT, and DUNBAR, JJ., concur.

(1 Wash. St. 227)

BROTTON v. LANGERT.

(*Supreme Court of Washington*. March 8, 1890.)

EVIDENCE—MEMORANDA—EXCESSIVE VERDICT.

1. Where, in an action for the conversion of mortgaged property, the mortgagee testifies that

payments whose amounts he cannot remember have been made on the mortgage, a memorandum of such payments, made by his clerk, as to the manner of making which the mortgagee is ignorant, is not such a memorandum as he may be allowed to use to refresh his memory.¹

2. Where, in such action, the property covered by the mortgage was of the value of \$1,200, of which defendant converted only \$500, plaintiff can recover only the value of the goods taken, not exceeding the amount unpaid on his mortgage, and a verdict for \$1,000 is not warranted by the evidence.

Appeal from district court, Pierce county.
E. W. Taylor, for appellant. *Judson, Sharpstein & Sullivan*, for appellee.

HOYT, J. Plaintiff in this action sought to recover damages for the conversion of certain articles of personal property, upon which he had a mortgage. Defendant attempted to justify as an officer by virtue of certain executions against the mortgagor. Numerous errors are assigned to the rulings of the court below, but, in view of the unsatisfactory state of the record and of a division of opinion as to what is made to appear therefrom, we shall only notice two of said alleged errors, and leave the questions presented by the others to be determined in some other case. During the progress of the trial plaintiff admitted that he had received certain sums of money from the mortgagor to be applied upon the mortgage debt, and, when asked as to the amount of such payments, stated that he could not tell. He was then shown a certain memorandum, and asked if by the aid thereof he could give such amount. Upon examination it appeared that such memorandum was not made by himself, but by his clerk, and that he (witness) could not say how said clerk made up the same. Upon this appearing, counsel for the defendant objected to the witness' using the memorandum in giving his testimony. The court, however, against such objection, allowed the witness to read from such memorandum as to the items of payment made by the mortgagor. Exception was duly taken to such ruling, and error assigned thereon. The amount still due upon the mortgage was material to the plaintiff's case, and, as he had testified that certain payments had been made, it became material that he should show the amount of such payments. Therefore the evidence elicited from the witness by the aid of the memorandum was material.

Was the memorandum such as the witness was authorized to read from to the jury? If it was not, it was error to allow the witness thus to use it. It is not claimed that the paper used was such as, in itself, could be introduced in evidence; but it is contended that it comes within the rule which al-

lows certain memoranda to be used by a witness to refresh his memory when testifying. If this memorandum was of that class, it is possible that it was not error to allow witness to read therefrom, though the usual course is to allow the witness to read the memorandum, and then to testify to knowledge of the facts as to which he has thus refreshed his memory. In our opinion, however, the memorandum in question was not shown to be such as could be used by the witness even for the purpose of refreshing his memory. It comes within none of the three classes recognized by the writers on evidence, especially in view of the fact that, after reading it, the witness did not pretend to say that he then had any personal knowledge of the statements therein contained. See 1 Greenl. Ev. §§ 436, 437. Plaintiff introduced evidence tending to show that the value of all the property covered by his mortgage was about \$1,200. But the uncontradicted evidence in the case showed that only a portion of such property was converted by the defendant, and that the value of those goods not taken by him was, at least, \$700. Under the pleadings in the case, plaintiff could only recover the value of the goods converted by the defendant, not exceeding in amount the balance unpaid upon his mortgage. See *Levy v. Sheehan*, ante, 802, (decided at this session of this court.) Hence it follows that the verdict of \$1,000 was much larger than the evidence warranted, and that defendant's motion for a new trial on that ground should have been granted. For the errors above stated, the judgment must be reversed, with costs, and a new trial granted.

ANDERS, C. J., and DUNBAR, STILES, and SCOTT, JJ., concurring.

(1 Wash. St. 18)
MAHNOKE et al. v. CITY OF TACOMA et al.
(Supreme Court of Washington. Jan. 24, 1900.)

APPEAL—FINAL ORDER—INJUNCTION.

1. No appeal lies from an order refusing a temporary injunction, as such order is not a final decision, under Rev. St. U. S. § 1869, in regard to appeals from territorial district courts.

2. Where, by an order refusing an injunction, the case is also summarily dismissed, said dismissal is erroneous; but, it appearing from admissions of counsel in argument that said dismissal was made at appellants' request, they are bound thereby, and cannot appeal.

Appeal from district court, Pierce county.
Town & Likens, for appellants. *Thomas Carroll*, for appellees.

SCOTT, J. The appeal in this case is from an order refusing appellants a temporary injunction, and also dismissing the action. Appellees move to dismiss on the ground that no appeal lies from such an order. Under the organic act, (Rev. St. U. S. § 1869,) no appeal could have been taken from an order refusing a temporary injunction, as the same is not a final decision; and, had the order stopped with refusing the injunction, the appeal would not

¹See, on the subject of the use of memoranda by a witness to refresh his memory, *Riordan v. Guggerty*, (Iowa,) 89 N. W. Rep. 107, and note; *Billingslea v. State*, (Ala.) 5 South. Rep. 187, and note; *Johnson v. Culver*, (Ind.) 19 N. E. Rep. 129, and note; *Bank v. Bollong*, (Neb.) 40 N. W. Rep. 413; *Card v. Foot*, (Conn.) 15 Atl. Rep. 871; *Daniels v. Smith*, 8 N. Y. Supp. 123.

lie. This goes further, however, and purports to summarily dismiss the suit. The complaint states a cause of action, and, from the bare record, this part of the order is unaccountable, and manifestly erroneous. Were the record unaided in any way, the case would have to be reversed on that ground. But counsel for appellants advisedly states to the court, in his argument here, that the order dismissing the action was made at appellants' request. This being admitted by appellants, we think they are bound by it in this court, and that we would not be justified in viewing the case in any other light; and, as it was a voluntary dismissal, no appeal could be taken therefrom. The motion to dismiss is therefore granted, with costs.

ANDERS, C. J., and DUNBAR and HOYT, JJ., concur.

(1 Wash. St. 22)

TRIPP v. MAGNUS.

(Supreme Court of Washington. Jan. 23, 1890.)

APPEAL—FINAL ORDER.

No appeal can be taken from a ruling of a district court sustaining a demurrer, as such ruling is not a final decision, in the meaning of Rev. St. U. S. § 1869, in regard to appeals from territorial district courts.

Appeal from district court, Pierce county.

Defendant demurred to the fourth amended complaint, and the demurrer was sustained September 27, 1888. An exception was allowed, and thereupon the plaintiff appealed "from the order, decision, and judgment of" the district court "sustaining said demurrer."

Mitchell, Ashton & Chapman, for appellant. Judson, Sharpstein & Sullivan, for appellee.

DUNBAR, J. In this case the motion of the defendant in error to dismiss this appeal, as shown by his brief, is based on but two grounds: (1) Because no notice of the appeal from the judgment rendered in said cause had ever been given in open court, or filed and served on defendant in error or his counsel; and (2) because no assignment of errors has been filed or served upon defendant in error or his counsel within the time required by rule 5 of this court. And the question whether or not the judgment or order appealed from was not a final decision, as, under the organic act, could be appealed from, was not directly raised in the motion. But from the arguments in the briefs, and the oral arguments of the counsel on both sides, it appears that this was the main question at issue; and from such arguments, and from what the court can gather from the transcript, this is the main question before this court; and, thus considering it, this court, especially in view of the uniform decisions of this court during its territorial existence, will hold that this case does not fall within the provisions of section 1869 of the Revised Statutes of the United States, and that the

order of the court in sustaining the demurrer is not such a final decision as is contemplated by the statute, and from which an appeal can be taken to this court. The motion to dismiss this appeal is sustained, with costs of this court.

ANDERS, C. J., and HOYT, SOQT, and STILES, JJ., concur.

(1 Wash. St. 120)

DANFORTH'S ADM'R v. PAXTON.

(Supreme Court of Washington. Feb. 20, 1890.)

EQUITY—ESCROW—PUBLIC LANDS.

In compromise of a disputed claim to public lands, it was agreed that plaintiff should make a homestead entry on part of it, and after final proof convey 20 acres to defendant. A deed was executed and placed in escrow; but, before final proof, defendant wrongfully secured possession of the deed, and put it on record. Held that, as the land laws of the United States prohibited a conveyance of public land before final proof, plaintiff had such a special interest in having the deed remain in escrow that a bill against defendant for its return was not demurrable for want of equity.

Appeal from district court, Pierce county; FRANK ALLYN, Judge.

Lewis Cass Branson and Doolittle & Pritchard, for appellant. John Arthur, for appellee.

SCOTT, J. The defendant appeals from the judgment of the district court overruling his demurrer to the complaint, and in granting relief to the plaintiff. It appears from the complaint that in February, 1884, plaintiff, Danforth, and defendant were each seeking to obtain title from the United States to the same parcel of land,—plaintiff having a pre-emption filing, and the defendant a homestead filing, thereon. That in March, 1884, said parties agreed to a compromise whereby plaintiff relinquished his claim to a part of said lands, and defendant relinquished his claim to the remaining portion; whereupon each party filed a homestead claim upon the land released by the other. It was further agreed between the parties, in making said compromise, that, as soon as the plaintiff should make final proof and entry of the lands embraced in his homestead claim; he should convey to the defendant, by deed of warranty, 20 acres thereof. In pursuance of said agreement a deed was signed by the plaintiff, duly acknowledged before a proper officer, and placed in escrow in the Tacoma National Bank, there to be held until final proof should be made as aforesaid, when it was to be delivered to the defendant. That soon thereafter the defendant, in violation of the terms of said compromise, conspired with one Daniels to defeat plaintiff's claim to said lands relinquished by defendant, and to prevent the plaintiff from making his final proof. That he induced said Daniels to enter upon and claim said lands, and to undertake to obtain title thereto from the United States under its land laws, and, to further said designs, the defendant wrongfully procured the possession

of said deed from the bank, and caused the same to be recorded in the county auditor's office of Pierce county, before the plaintiff had made his final proof. Whereupon the plaintiff commenced this suit in equity; and, as a part of the relief prayed for, he asked the court to decree that the defendant be required to return the deed to said bank, there to be held in escrow. The grounds of the demurrer were that the complaint does not state a cause of action, and that the court had no jurisdiction of the subject-matter. The demurrer was overruled, and the court ordered the deed returned to the bank, to be held in escrow. It appears to us that this is a case wherein a court of equity has jurisdiction and should grant relief. The plaintiff had a special and peculiar interest in said instrument, in having the same held in escrow, by reason of the uses to which it could be put, and the damage it might do him in causing the loss of his claim, if it should be allowed to remain extant, with the appearance of being a deliberate violation by the plaintiff of the land laws of the United States in attempting or agreeing to convey a part of said lands before making final proof. This interest of the plaintiff was beyond any mere pecuniary value that could be attached to the instrument. Legal damages would be too uncertain to constitute an adequate compensation, and in no way would an action at law afford an adequate remedy. See 3 Pom. Eq. Jur. § 1402, and authorities there cited. It follows, therefore, that the judgment of the court below should be, and the same is hereby, affirmed.

ANDERS, C. J., and STILES, J., concur.
HOYT and DUNBAR, JJ., not sitting.

(19 Or. 81)

BUMP v. COOPER.

(Supreme Court of Oregon. April 7, 1890.)

SALE—BREACH OF WARRANTY—MEASURE OF DAMAGES.

1. Where a contract fixed the price for the sale of a certain quantity of hops to be delivered in a good and merchantable condition, etc., but contained a further provision giving the benefit of the rise in the market to the seller, with the privilege of closing the sale within a time specified, *held*, that the provision was intended for the benefit of the seller, and, if he failed to exercise the privilege and close the sale within the time limited, it became *functus officio*, and the price fixed by the contract became the price agreed to be paid.

2. In the event that the hops were not sound and merchantable as contracted for, the measure of damages would be the difference between the value of the hops as fixed by the contract price at the time and place of their sale and delivery, and their value with the defect complained of.

(Syllabus by the Court.)

Appeal from circuit court, Benton county;
R. S. BEAN, Judge.

John Kelsay, for appellant. W. S. McPadden and J. R. Bryson, for respondent.

LORD, J. This was an action to recover money, founded upon a written contract. The contract, omitting immaterial parts, is as follows: That "the party of the first part

[plaintiff, Bump] does hereby agree to sell, and doth sell, and agree to deliver, or cause to be delivered, to the party of the second part, [defendant, Cooper,] all her crop of hops, the growth of the year 1888, the said hops to be of good first quality, well baled, and put up in good merchantable order and condition, in bales of about one hundred and eighty-four pounds, etc., said hops to be delivered in lots of not less than eight bales, at Independence, between this date and the 1st day of November, 1888; and in consideration thereof the party of the second part agrees to pay the party of the first part, in full payment for said hops, the sum of twelve cents per pound after delivery to and acceptance by said party of the second part. It is further agreed that said E. C. Bump is to have the benefit of rise in market value, with privileges of closing the sale at market price until the 15th day of November, 1888. This is followed by an allegation "that the rise in the market value over and above said twelve cents per pound mentioned in the contract, etc., was four cents additional up to said day of November, 1888," etc. After making certain denials, defendant set up affirmatively in substance that the plaintiff failed to furnish and deliver good first-quality baled hops, put up in good merchantable order or condition, etc.; that plaintiff represented said hops to be of good first quality, and in a merchantable condition, etc.; and that said representations and warranty were untrue, and that by reason of said damaged condition of said hops, etc., the same were worth no more than four cents per pound at Independence, etc. The reply denied specifically each and every allegation set in the defendant's separate defense. Upon trial the jury found a verdict for the plaintiff, upon which the court rendered a judgment, from which the plaintiff has appealed to this court.

The first question is as to the construction of the contract. Under the contract the price of the hops, if they were properly baled, and delivered in a good and merchantable condition, was fixed at 12 cents a pound, unless the plaintiff exercised the privilege of closing the sale for any rise in the market which should occur within the time limited. The provision is that the plaintiff "is to have the benefit of the rise in the market value, with the privilege of closing the sale at market price, until the 15th day of November, 1888. This provision was inserted for the benefit of the plaintiff, and if she neglected to avail herself of it, and close the sale when the rise in hops should happen, within the time prescribed, it became *functus officio*, and the price fixed by the contract at 12 cents became the price agreed to be paid. It is a privilege which she must exercise or act upon by closing the sale, and which she forfeits by failing or refusing to avail herself of it before the expiration of the time specified. If the hop market, instead of rising, should decline, the plaintiff would have no occasion to exercise the privilege, and would be entitled to the

price fixed in the contract. On the other hand, if there was a rise in the hop market, and she failed to act upon it, and close the sale at such increased price, within the time allowed, the privilege was gone, and the price fixed by the contract prevailed. Under the allegation in the complaint, the plaintiff was permitted to prove the rise in the market value of hops to be 4 cents additional over the price fixed in the contract, or 16 cents a pound up to the time specified, without alleging that the privilege was exercised and the sale closed at the increased market price within that time. The plaintiff could not do this, unless it was alleged that the sale was closed, under the provision, by an exercise of the privilege it granted; for otherwise the price was fixed by the contract, and the defendant was not liable beyond it. To permit such testimony was not only misleading, but was unauthorized, for it permitted the jury, as they did do, to find a verdict for a price and an amount not warranted by the contract, unless the plaintiff availed herself of the privilege, and closed a sale with the defendant within the time limited, and the fact was so alleged.

The bill of exceptions discloses that the defendant, Cooper, was called and sworn as a witness in his own behalf, and gave evidence tending to show that the hops delivered to him by the plaintiff were worthless, and that there was no market for said hops at Independence; that he tried repeatedly to sell them, but that he could not find a buyer, on account of their not being merchantable and in a damaged condition. On cross-examination he was asked the following question: "Did you sell hops afterwards, and after the 16th day of November, 1888, and, if so, when, and for how much?" To which question objection was made, and overruled by the court, and the witness then, among other things, proceeded to testify that "in February, 1889, he shipped the remainder of said hops to Cincinnati, Ohio, and sold the same; a part for twelve cents a pound net at Independence, and the remainder for fourteen cents a pound net at Independence, about one-half for twelve cents, and about one-half for fourteen cents." The objection to this testimony is that the plaintiff was bound to make good his contract at the time and place agreed on, and that he cannot discharge that obligation by inquiring into the sale three months afterwards, or at another place. Under the pleadings as the case stands the defendant was treated as the owner of the hops after delivery under the contract, and if the hops were of the quality required, properly baled and in the condition bargained for, the defendant was liable for the amount fixed by the contract, unless the defendant should be able to make his defense good, and show that they were either worthless or not merchantable, or in a damaged condition. In that event the measure of damages would be the difference between the value of the hops as fixed by the contract price at the time and place of

their sale and delivery, considered as sound, and their value with the defect complained of. What this value was, if the hops were in a damaged condition, but had a marketable value, had reference to that time, and in that market, or the nearest market. What the defendant might sell such hops for several months, or, as to that, years, afterwards, was a matter of his own concern; and the price he would receive would depend on the scarcity of the article or condition of the market, and might be greater or less, and in no event could affect the issue involved. As the case must go back, it is not necessary to be more particular as to this matter, as the theory upon which the action was tried was inconsistent with the terms of the contract. The judgment must be reversed, and a new trial ordered.

(18 Or. 460; 19 Or. 468)

RIDDLE v. MILLER.

(*Supreme Court of Oregon.* March 5, 1890.)

ATTACHMENT—LIEN—BONA FIDE PURCHASERS.

1. The intention of the legislature in adopting the several provisions of the statute (Hill's Code, §§ 150, 151, 271) was to give the creditor under an attachment, judgment, or execution the same standing in regard to his right in or to the property affected thereby which he would gain by a purchase of the property from the debtor.

2. A creditor who attaches the land of his debtor, or obtains and docketes a judgment against him, who is at the time informed of an outstanding equity, or of facts sufficient to put him upon inquiry, takes his lien subject and subordinate to such equity.

3. Where the equitable right is superior to the legal right, its establishment in a court of equity becomes paramount to the legal right established in a court of law.

(*Syllabus by the Court.*)

Petition for rehearing.

This was an appeal from the circuit court of Josephine county. Upon the hearing the court announced its decision as follows: "The only question of law arising upon this record we considered and decided in *Wood v. Rayburn*, 18 Or. 1, 22 Pac. Rep. 521. We see no reason to depart from the conclusions there announced. After a careful examination of the evidence, we have reached the same conclusions that the court below did. We do not think a particular examination of the facts disclosed by the evidence is necessary. The decree appealed from must, therefore, be affirmed." Counsel for appellant subsequently filed a petition for a rehearing.

A. H. Tanner, for appellant. *P. P. Prim* and *Davis Brewer*, for respondent.

PER CURIAM. The counsel for the appellant herein, in his petition for a rehearing, has suggested certain propositions which he claims have a bearing upon the merits of his appeal, and which did not appear, from the opinion of the court rendered, to have been considered. The first proposition is as to the effect to be given to sections 150 (supposed to have been intended, 271) and subdivision 4, § 283, Ann. Code Or. Said sec-

tion 150 provides that, "from the date of the attachment until it be discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith, and for a valuable consideration, of the property," etc. Section 271 provides: "A conveyance of real property, or any portion thereof or interest therein, shall be void as against the lien of a judgment unless such conveyance be recorded at the time of docketing such judgment or the transcript thereof, as the case may be, or unless it be recorded within the time after its execution provided by law, as between conveyances for the same real property." Subdivision 4 of said section 283 provides that "property shall be levied on in like manner and with like effect as similar property is attached, as provided in sections 149 * * * and 152, * * * omitting the filing of the certificate provided for in section 151." The intention of the legislature, in adopting these several provisions of the statute, was to give the lien creditor under an attachment, judgment, or execution the same standing in regard to his right in or to the property affected thereby which he would gain by a purchase of the property from the debtor, so that in case the debtor had, prior to the levy of the attachment or execution or the docketing of the judgment, executed a deed of conveyance of it, if real property, and the deed were not recorded, as provided in sections 3023, 3024, Ann. Code, within five days thereafter, it would be void, as provided in section 3027, Ann. Code. Under the said provisions the lien of the creditor may attach to property rights which the debtor has in fact conveyed away by deed good as between him and his grantee, while, under the law as it existed prior to their adoption by the legislature, a creditor would only acquire by virtue of such levy, or of the docketing of the judgment, a lien upon the actual interest which the debtor had in the property at the time the attachment or execution was issued or judgment docketed. The statute has materially enlarged the creditor's right under the proceedings, in the manner indicated; but the legislature did not intend thereby to give to a creditor, by virtue of such levy or the docketing of a judgment, any right as against an outstanding equity known to him at the time his lien attached. Acts of that character have always been construed as giving to a creditor, under such circumstances, such rights only as he would acquire under a voluntary sale of the property to him by the debtor for a valuable consideration. They operate to cut off the equities of third persons in the property, where the proceeding under them is taken and perfected without any knowledge of such equities. In the latter case, the equities between the parties being equal, the law prevails. But where a creditor resorts to such a proceeding who is informed of the outstanding equity, or of facts sufficient to put him on an inquiry by which he could ascertain the existence of

such equity, the lien he secures thereby will be subject to it. This view has been sustained by two decisions of this court. *Stanis v. Nicholson*, 2 Or. 332, and *Baker v. Woodward*, 12 Or. 12, 13, 6 Pac. Rep. 173; also by the circuit court of the United States for the district of Oregon, in *U. S. v. Griswold*, 7 Sawy. 332. Those cases refer more directly to a construction of said section 271, Code, but they apply with equal force to said section 150.

The second proposition presented in the petition, "that respondent has lost his right to equitable relief by his own laches and negligence," is not, in our opinion, maintainable from the facts and circumstances of the case. We think the evidence shows clearly that, at the time the lot in suit was attached at the suit of the appellant, he had at least sufficient notice of the respondent's rights in the lot to put him upon inquiry.

The third proposition, "that the decree of the court below should be so modified as to allow the appellant to recover the costs and disbursements awarded him in the action of ejectment," and the fourth one, "that the said decree should be further modified so as to require the respondent, Riddle, to pay appellant's judgment against Royal as a condition to the relief prayed for," are untenable. The principle which governs in such cases is that the equitable right is superior to the legal right; that the establishment of the latter in a court of law is conclusive of the rights of the parties in that forum, while the establishment of the former in a court of equity becomes paramount thereto. The appellant herein is presumed to have had an unconscionable advantage of the respondent, and to have attempted its enforcement in the legal tribunal, in which the latter was unable to interpose his equity as a defense. He therefore resorted to the equity branch of the court in order to assert it and arrest the proceeding of the appellant. The court, sitting as a court of equity, heard the respondent's complaint, and said to the appellant, in effect: "Desist from further proceeding in the matter, as your course is inequitable and unjust." Now, if the court, after saying this, were to say to the respondent, "but you must pay the appellant the cost of his wrongful proceeding," it would be highly absurd. The petition for a rehearing will be denied.

(20 Or. 34)

CURTIS v. LA GRANDE WATER CO.

(*Supreme Court of Oregon. March 26, 1890.*)

DIVERSION OF STREAM—PRIOR APPROPRIATION—EASEMENTS—LICENSE—REVOCATION—ESTOPPEL—ABANDONMENT.

1. The doctrine of prior appropriation, under the act of congress of 1866, applies to the public lands of the United States.

2. To acquire a right by prescription in the lands of another upon the presumption of a grant, the possession must be adverse, continuous, uninterrupted, and by the acquiescence of the owner of the land over which the easement is claimed. If its inception is permissive, or under a license from the owner, it cannot avail to work an ouster.

3. A license creates no interest in land. It is founded on personal confidence, and is not assignable, and its continuance depends on the will of the party giving it, and is revocable, unless the license is executed under such circumstances as would authorize the interference of equity to prevent fraud.

4. To allow one to revoke a license when it was given to influence the conduct of another, and cause him to make large investments, would operate as a fraud, and warrant the interference of equity to prevent it, under the doctrine of equitable estoppel.

5. By building a dam, laying the pipes, and making a diversion of the water, the licensee, by its acts and the consent of the licensor, fixed the point of diversion and the place on the land where the license was to be exercised; and it cannot be exercised at any other place.

6. In such case, at that point and place, the license is irrevocable so long as the dam and pipes remain for the purpose for which they were constructed, but, if abandoned, there can be no right to divert the water of the stream at any other place without the assent of all the parties in interest.

(Syllabus by the Court.)

Appeal from circuit court, Union county;
L. B. ISON, Judge.

Stayter & Son and C. H. Carly, for appellant. *Williams, Ach & Wood*, for respondent.

LORD, J. This is a suit to restrain the diversion of water from a natural water-course on the land of the plaintiff. The defense is threefold: (1) Prior appropriation; (2) prescription; and (3) estoppel *in pais*. In substance, the facts are that the defendant constructed a dam across Mill creek upon lands owned by Green Arnold, and occupied the same, with his consent and authority, for the purpose of diverting water from said creek, which was effected by means of a pipe of a certain size inserted in the dam, and conveyed to the town of La Grande for the use of its inhabitants; that in June, 1887, the defendant constructed a new dam across said creek, some 1,000 feet above the old dam, upon lands owned by D. Chaplin, and removed the pipe which had been formerly used and laid upon the lands of Arnold as a diverting pipe of the old dam, and inserted it in the new dam, and used and occupied all the lands necessary for that purpose, with the consent and authority of Chaplin and Arnold; that in the year 1871, after such consent was given, and the pipe laid, and the land occupied for the purposes stated, Arnold sold a certain described portion of his land, through which said creek ran, to one McComas, and McComas in 1876 sold the same to the plaintiff; but this portion of the land constituted no part of that upon which said dam had been constructed and pipe laid. It will be seen, then, that, long before the plaintiff acquired any title to a portion of the land through which said creek flowed, she purchased it subject to whatever rights the defendant had acquired in the premises by virtue of the consent and authority of the grantor, Arnold, and the construction of the dam, laying of the pipes, etc., in pursuance thereof, to divert the water for the uses specified. Assuming that the license granted by Arnold, and the

investment made by the defendant for its enjoyment, operated as an estoppel *in pais*, the contention of the plaintiff is that when the defendant removed the dam and pipe from the land of Arnold, and constructed another dam, and laid other or the same pipe on the land of Chaplin, the effect was to revoke such license, and to revive the rights of the plaintiff to have the stream flow through her land without interruption or perceptible diminution; that neither Chaplin nor Arnold, nor both, could authorize the change of location without the consent of the plaintiff, who is a party in interest; and that, when it was so done without her consent, it was an interference with her rights which equity will restrain by injunction. To avoid the effect of this contention, the defendant interposes (1) the defense of prior appropriation of the waters of the creek under the act of congress of July 26, 1866, (14 St. U. S. 253,) that "whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same," etc.

While that act was passed a year later than the facts show the waters of the creek were diverted, yet it applies only to government lands, and streams flowing through it. In these, under the circumstances indicated in the act, the prior appropriation of the water may operate to secure a vested right to divert it, which shall be maintained and protected. But it has no application to the lands of individual owners, and, as against them, can confer no right to divert the waters of streams flowing through their lands. The facts disclosed by this record show that the diversion took place, not from a stream upon and running through government lands, but from a stream at a point upon and running through the lands of Green Arnold, a part of which now belongs to the plaintiff, and through which a portion of that stream naturally runs, and that the permission to construct the dam, and lay the pipes by means whereof the waters of the creek were diverted from flowing, as was their wont, through it, was given by Arnold, and their possession and occupation for the purposes specified taken and used in pursuance of it. In *Kaler v. Campbell*, 13 Or. 596, 11 Pac. Rep. 301, both parties diverted the water at or near the same point, which was off their own lands, and at the time of the diversion and appropriation upon land belonging to the United States; but in the case at bar the diversion was from a stream upon private land, and done with the consent of the owner first obtained. Upon the facts, then, the doctrine of prior appropriation, under the act of congress can have no application.

The next defense urged is that the defendant has acquired the right by prescription to occupy the land, and divert the waters of that

stream. It is true that the plaintiff practically admits that the company took possession and diverted the waters in the year 1865, and conducted it into La Grande by means of pipes, and that it has continued to so divert the waters of that creek, and use the lands for that purpose, ever since. But the facts show the waters were not so diverted, and possession taken of the land to construct the dam and lay pipes, as a matter of right, against Arnold or the plaintiff, but under the license or permission of Arnold in the year 1865, which prevented it being adverse. To acquire a right of prescription in the lands of another upon the presumption of a grant, the possession must be adverse, continuous, uninterrupted, and by the acquiescence of the owner of the land upon which the easement is claimed. If its inception is permissive or under a license from the owner, it cannot avail to work an ouster. To effect that result, the possession taken must be open, hostile, and continuous,—“he must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest.” Under this rule, an adverse possession cannot grow out of a permissive enjoyment; and so speak the decisions without a dissentient voice, including this court. *Springer v. Young*, 14 Or. 285, 12 Pac. Rep. 400.

The next and main defense is that the defendant constructed its dam and laid the pipes on the land, and diverted the waters for the uses specified, at the place designated on the stream, by the permission or under a license from Arnold, who was then the owner of the land through which the stream flowed, and that, in consequence of large investments of money and labor expended in the construction of such a dam and laying such pipes for the purpose of diverting the waters of that stream, the license has become irrevocable, or turned into an agreement which equity will enforce. The principle on which this contention is based is that after one has acted on the faith of a parol license, and made permanent improvements, the owner will be estopped from revoking his license, to prevent injustice. The application of this principle of equitable estoppel after one has acted on the faith of a parol license is strongly resisted by some authorities, holding, in effect, that it operates to overturn the statute of frauds, and, for all practical purposes, to create an interest in land in disregard of the requirements of that statute. A license creates no interest in land. It is founded on personal confidence, and is not assignable, and its continuance depends on the pleasure of the party giving it; and it is revocable, unless executed under such circumstances as would authorize the interference of equity to prevent injustice. At law a license could not have the effect to create an interest in lands upon the theory of becoming irrevocable by estoppel, as courts of law deal with the legal aspect of estates in land, and cannot enforce

equities which grow out of an equitable estoppel against the owner of land. Judge COOLEY seems to regard it as a serious reproach to the law that it should fail to provide some adequate protection against the injustice of a revocation after the licensee, in reliance upon the license, has made large and expensive improvements. *Maxwell v. Bridge Co.*, 41 Mich. 467.¹ But it is unnecessary for us to consider the effect of such a position at law, as it is only the equitable rights of the parties that are now under inquiry. An executed license is treated like a parol agreement in equity. It will not allow the statute to be used as a cover for fraud. It will not permit advantage to be taken of the form of the consent, although not within the statute of frauds, after large expenditures of money or labor have been invested in permanent improvements upon the land, in good faith, upon the reliance reposed in such consent. To allow one to revoke his consent when it was given, or had the effect, to influence the conduct of another, and cause him to make large investments, would operate as a fraud, and warrant the interference of equity to prevent it, under the doctrine of equitable estoppel. The ground of the jurisdiction is to prevent injustice or fraud. “Its effect,” said Chancellor BATES, “when applied, is to restrain a party from exercising his legal right; and this even a court of equity cannot do unless there have been on his part some conduct, declaration, or improper concealment misleading an innocent person to his prejudice, and rendering the assertion of the legal right as against such person an act of bad faith amounting to constructive fraud. Moreover, it may be well added that, to warrant the interference of the court with the legal right or title of a party, the case relied on to work the estoppel must be clear, beyond doubt, upon the facts; and the more stringently do these rules apply in a case * * * where the effect of the estoppel, if allowed, will be to convert what was originally a bare privilege, temporary and revocable, into an easement in the licensor's land, perpetually binding it, and transmissible from the licensee.” *Jackson v. Railroad Co.*, 4 Del. Ch. 180.

The testimony of Green Arnold, a witness for the defendant, shows that he was the owner of the land, and gave the La Grande Water Company permission to take the water and the right of way for the use of his land for the construction of the dam and laying of the pipes. In order to show in what his permission consisted, he testified that he assisted in putting in the dam and starting the water-works; and, so far as he is concerned, he assents to the change of location from the place of diversion, and the removal of the pipes, etc., to the land of Chaplin. In short, it is clear that what was done by the company was done not only with his consent, but he intended it to induce the construction of the works, and the diversion of the water for the

¹ 2 N. W. Rep. 639.

uses specified. Other testimony there is in corroboration of this, but further reference is unnecessary. Upon the undisputed facts, as between him and the defendant, if he were to attempt to revoke his license to use his land and divert the water for the purposes indicated, a court of equity would apply the doctrine of equitable estoppel, and enjoin him. As against him and the plaintiff, then, who subsequently purchased a piece of the land through which the stream flowed, it may be assumed that the license is irrevocable so long as the interest created by it endures.

By building the dam, laying the pipes, and making the diversion of the water, the defendant, by its act and the consent of Arnold, fixed the place on the land where the license was to be exercised and enjoyed; and the inquiry is, can it be exercised at any other place on the land of Arnold, or above it, although with the consent and permission of its owner, without reviving the right of the plaintiff to have the waters of that creek flow without interruption through her land? What was the effect of a change of location which involved the abandonment of the use and enjoyment of the license upon the land of Arnold? The plaintiff purchased subject to the rights acquired by the defendant to divert the water and use the land under the license, which fixed the point of diversion on the stream, and the particular land to be occupied for that purpose, as definitely as if it were described in a deed; and it cannot be exercised at any other place. It is as to that point, and the use of the land for the purposes specified, that the facts created an equitable estoppel, and rendered the license irrevocable, so long as the dam and pipes remained for the purpose for which they were constructed and laid. If these should be allowed to fall into decay and disuse, or be abandoned, the cause of the diversion ceasing, the waters of the stream would resume their accustomed channels, and flow uninterruptedly through the plaintiff's land. Neither Arnold nor Chaplin would give a right of diversion at any other place against the consent of the plaintiff, who was entitled to have the waters of that stream flow through her land subject to the license created by the estoppel. When the license was abandoned at that point and place, the defendant had no right at any other to divert the waters of the creek without the consent of the plaintiff, through whose land it flowed. These parties might give their consent, and so far so good, to divert at some other place on their land; but, as the exercise of such a right or privilege affected her rights in the premises, it could not be used and enjoyed by the defendant without her consent.

It may not be amiss to say that we have omitted a detail of the facts, such as the incorporation of 1880, etc., because they are not essential, in the view taken, to the conclusion reached. It results that the plaintiff is entitled to the injunction prayed for, and \$25 as damages and costs and disbursements; and it is so ordered.

HYLAND v. HYLAND et al.

(Supreme Court of Oregon. March 31, 1890.)

REFORMATION OF DEED—PLEADING—BONA FIDE PURCHASERS—EVIDENCE.

1. A complaint in a suit to reform a written instrument in consequence of a mistake in its execution must allege facts. It must show what the parties to the instrument mutually agreed to do, and wherein the writing fails to express their agreement, and that the mistake did not occur through any carelessness or negligence of the plaintiff; otherwise a demurrer to the complaint should be sustained.

2. Where the plaintiff, a married woman, in a suit against her husband, as defendant, to have reformed a certain deed executed by him to her, alleged in her complaint that, for a valuable consideration, the defendant bargained and sold to her certain real property; that he promised and agreed with her that he would execute and deliver a deed conveying to her the said property during her natural life, and then to her heirs and assigns forever; and that the defendant executed and delivered to plaintiff a deed of conveyance to the property, but by mutual mistake the words "and then to her heirs and assigns forever" were omitted from the deed; that the defendant instructed and directed the person who wrote the deed to insert the said words, but he inadvertently and through mistake omitted to write in the same; that the plaintiff relied upon the word of the defendant, and, being ignorant of business of that kind, did not read the deed, nor find out the mistake until a short time before bringing the suit,—*held*, that the complaint was faulty in not stating the terms of the agreement between the parties which the deed was given to effectuate, but that the fault only constituted a defective statement of cause of suit, and not a defective cause of suit; and that therefore the defendant waived the defect by filing an answer to the complaint.

3. In order to defeat an outstanding equity in real property by a plea that the defendant was the purchaser of the property in good faith, he must set forth in his answer the deed of purchase, the date, parties, and contents briefly; that the vendor was seised in fee, and in possession; he must state the consideration, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed; and he must deny notice previous to and down to the time of paying the money and delivery of the deed; and where it was averred in the answer of a defendant in such a case that, at or about a certain date, his grantor executed and delivered to him a deed of conveyance, conveying unto him the title to the property, and that he did on such date, without knowledge or notice of such equity, purchase the property in good faith and for a valuable consideration, and was absolute owner of it in fee-simple,—*held*, that it was insufficient to give the defendant the benefit of the claim that he was an innocent purchaser of the property without notice. *Held, further*, that evidence showing that the deed was made out in favor of the defendant without his knowledge, but immediately afterwards delivered to him, and after receiving it he promised and agreed that he would take care of the grantor his life-time in consideration of the property, and that he received knowledge of the equity about the time the deed was delivered, or soon afterwards, and the suit to enforce the equity was commenced within the next three months thereafter, did not prove that the defendant was an innocent purchaser of the property.

(Syllabus by the Court.)

Appeal from circuit court, Lane county; R. S. BEAN, Judge.

The respondent commenced a suit in said court against the appellant, to reform a deed to certain real property situated in said county. She alleged in her complaint that, on the 27th day of November, 1885, the appellant Benjamin Hyland, for a valuable considera-

tion paid him by the respondent, bargained and sold to respondent the said real property, consisting of 170 acres of land; that said appellant promised and agreed with her to execute a deed conveying to her said land during her natural life, and the remainder to her heirs and assigns forever; that on or about said time said appellant executed and delivered to her a deed of conveyance to said land, but the following words, to-wit, "and then to her heirs and assigns forever," were by mutual mistake omitted from the deed; and that, at the time said deed was executed, said appellant, in the presence of respondent, instructed and directed the person who wrote the deed and took the acknowledgment thereof to insert therein the words, to the said respondent "during her natural life, and then to her heirs and assigns forever," but the officer, or justice of the peace, who wrote the deed, failed through mistake to write in the said words. The respondent alleged that she relied upon the word of the said appellant, and, being ignorant of that kind of business, did not read said deed, and that the said omission and mistake were not noticed or found out by her and said appellant until a short time before; that the said appellant put her into the possession of the said premises, and that she had been in the absolute possession of the same since the execution of the said deed; that immediately after finding out the said mistake in said deed she applied to said appellant to correct it, but that he refused and still refuses to do so. The respondent further alleged that on or about the — day of —, 1887, the said appellant Benjamin Hyland, without any valuable consideration, made, executed, and delivered a pretended deed of conveyance to said premises to the appellant Amos D. Hyland, which was without a valuable consideration and was fraudulent. The said complaint contained a prayer for relief; that the said Benjamin Hyland be decreed to correct the said deed by adding and inserting therein the said words, and that the said deed to said Amos D. Hyland be declared void and of no effect, and be set aside; and for such other and further relief as might seem equitable and just. The appellant Benjamin Hyland filed an answer to the said complaint denying the agreement to convey the land as therein alleged; denying that the said words, "and then to her heirs and assigns forever," were omitted from the deed through mistake; denying that he instructed or directed the person who wrote the deed to insert the said words therein; denying that said person inadvertently or through mistake omitted or failed to write the said words therein, or that said respondent relied upon the words of said appellant, or that, being ignorant of business of the kind, she did not read said deed; and denied all the material allegations in the complaint. Said appellant also denied that the deed made by him to Amos D. Hyland was made without any valuable consideration, and alleged that he made, executed,

and delivered said last-mentioned deed in good faith. The said appellant Amos D. Hyland also filed an answer to the said complaint denying all the material allegations therein contained; and for further and separate answer to the said complaint alleged that the deed made to him by the said Benjamin Hyland was for a valuable consideration; and that he, without any knowledge or notice of any mistake or omission in said deed to said respondent, and without any knowledge or notice of any fraudulent intent of said Benjamin Hyland, or knowledge or notice of any fraud rendering void the title of said Benjamin Hyland to said premises, purchased the same in good faith and for a valuable consideration, and was the absolute owner in fee-simple thereof, subject only to the life-estate of said respondent. The said respondent filed replies to the new matter contained in said respective answers, denying the same. The case was referred to a referee to take and report the testimony therein, and the same was thereafter heard by the court upon the report of the said referee, which found that the equities were with the respondent, and that she was entitled to the relief demanded in her complaint. Upon which finding the decree appealed from was entered.

A. E. Gallagher, for appellants. J. J. Walton, for respondent.

THAYER, C. J., (*after stating the facts as above.*) It appears from the evidence taken by the referee in this case that at the time of the execution of the deed by the appellant Benjamin Hyland to the respondent, the said parties were husband and wife, and had been such for nearly 20 years; that they had a family of children, the fruit of their marriage; that the said appellant had had a former wife who had borne him several children, among whom was the appellant Amos D. Hyland, and that at the time of the execution of the deed by the said Benjamin Hyland to the said Amos D. Hyland,—which was so executed November 10, 1887,—a suit for a divorce was pending in said circuit court between said respondent and said Benjamin Hyland. It further appears from the evidence that the consideration for the deed from Benjamin Hyland to the respondent was a conveyance by the latter to the former of certain real property owned by her, situated in the city of Corvallis, Benton county. The respondent, in order to sustain her allegation in the complaint that the words "then to her heirs and assigns forever" were omitted through mistake in the said deed from the said Benjamin Hyland to her, relied upon her own testimony and that of several other witnesses, who testified that the said Benjamin Hyland, soon after the execution of the deed, stated on a number of occasions that he had conveyed the property in question to the respondent for life, and then to her heirs and assigns. I think the evidence upon that point, in the absence of any conflicting testimony, was sufficient to establish the fact al-

leged. The deed itself shows upon its face that the said Benjamin Hyland intended to convey his entire interest in the said property; otherwise he would not have been likely to have inserted the covenant therein, whereby he covenanted to and with the said respondent, her heirs and assigns, that he was the owner in fee-simple of said premises, that they were free from all incumbrances, and that he would warrant and defend the same from all lawful claims whatsoever.

The appellants' counsel at the hearing did not seem to claim that the evidence was insufficient to prove the fact that such mistake was made in the execution of said deed to respondent; and the evidence on the part of the respondent upon the point was more convincing as it was not controverted by the appellant Benjamin Hyland, who was evidently well acquainted with all the facts connected with the affair. Said counsel, however, did rely upon the allegations in the answer that the appellant Amos D. Hyland purchased the property in question from Benjamin Hyland in good faith, and without notice of any such mistake having been made; and upon the insufficiency of the respondent's complaint in the suit. Said counsel, in claiming that Amos D. Hyland was a purchaser in good faith, without notice, is confronted with a difficulty in regard to the sufficiency of his answer upon that point. A defendant who interposes a plea or answer of that character must state therein, as was said by BALDWIN, J., in *Boone v. Chiles*, 10 Pet. 211: "The deed of purchase, the date, parties, and contents, briefly; that the vendor was seised in fee, and in possession. The consideration must be stated with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied previous to, and down to, the time of paying the money, and the delivery of the deed; and, if notice is specially charged, the denial must be of all the circumstances referred to from which notice can be inferred; and the answer or plea show how the grantor acquired title. * * * Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchaser without notice. The case stated must be made out. Evidence will not be permitted to be given of any other matter not set out." Said answer materially fails to contain the several requirements above specified, and the evidence comes far short of proving that said appellant Amos D. Hyland was such innocent purchaser of the property. He testified in the suit, in answer to the interrogatory to state when and under what circumstances and where he purchased the 170 acres of land, as follows: "On the 10th day of November, 1887, at the court-house, I went to find father's attorney to have him make a deed to my brother, B. S. Hyland, and have him, if the attorney thought best, to take care of him his life-time. When I came back to the court-house father had made the deed to me, and said he would

rather stay with me. I agreed to take care of him his life-time for the land." In answer to another interrogatory to state what the facts were about the deed being made, executed, and delivered to him without any value or valuable consideration, he answered: "The deed was made to me before I knew it. When I found it out we made an agreement that I was to take care of him his life-time for the land. I accepted of the deed with that understanding, which I have done to the best of my ability." This substantially is all the evidence given by said appellant in regard to the affair, and of the consideration paid or agreed to be paid by him for the land. He testified that he had no knowledge, prior to his coming to Eugene City upon that occasion, of any deed having been executed by Benjamin Hyland to the respondent, nor of the alleged mistake; but the circumstances under which the deed was made and delivered to him were calculated to cast suspicion upon the *bona fides* of the transaction. He knew that a suit for a divorce had been commenced by the respondent against Benjamin Hyland, which was then pending, and that it would necessarily affect any title the latter had in the property. He received the deed to the land more as a gift than as a purchase, and was, at the time, evidently contriving with Benjamin Hyland a mode by which the latter could divest himself of his apparent title to the remainder in the land. He made no advancement as a consideration for the deed, nor any agreement as an inducement to its execution, though he testified that he promised, when the deed was delivered to him, that he would take care of his father during the latter's life-time for the land. Whether that would have been an adequate consideration for the property does not appear. It would be absurd, however, to hold that the transaction constituted said Amos D. Hyland a purchaser in good faith, and contrary to the uniform decisions of this court upon that question. *Musgrove v. Bonser*, 5 Or. 318; *Richards v. Snyder*, 11 Or. 501, 6 Pac. Rep. 186; *Wood v. Rayburn*, 22 Pac. Rep. 521.

The main ground upon which the appellants' counsel appeared to rely at the hearing was the alleged insufficiency of the respondent's complaint to entitle her to a decree of reformation of the said deed; and I think it altogether the strongest point in his case. Attorneys who prepare complaints to reform written instruments are too apt to state conclusions instead of facts. They should set out the transaction as it occurred, and not the legal effect thereof. The complaint in this case should have stated what the parties mutually agreed to do in regard to the exchange of their lands, and not the result of what they did do. If the terms of the original agreement between the parties to the transaction involved herein, and their attempt to effectuate it, had been set out, the court could have readily discovered from the facts, if truly stated, whether or not there

was such a mistake as alleged, and in what particular it consisted. Instead of doing that, however, the respondent's counsel contented himself by alleging the promise and agreement made by Benjamin Hyland to make, execute, and deliver to the respondent a deed conveying to her said premises during her natural life, and then to her heirs and assigns forever; and that he executed and delivered to her a deed of conveyance to said premises, but said words "and then to her heirs and assigns forever" were, by mutual mistake, omitted therefrom. Such a mode of alleging a cause of suit is highly objectionable. The statement is too general, and, if the case had come here upon demurrer to the pleading, I should have been in favor of sustaining the demurrer. The objection, however, is made at the hearing in this court, and it seems to me that under such circumstances every reasonable inference should be given in favor of the complaint that can be drawn therefrom. It is not a case of a defective cause of suit, but of a defective statement of cause of suit. If the complaint had lacked some material allegation the defect would be fatal, and could be taken advantage of without interposing a demurrer; but where the defect consists in alleging evidence of facts, or conclusions of facts, instead of the facts themselves, it will be waived, unless a demurrer is taken to the pleading. The fault of the complaint in this case is of the latter character. The decree appealed from will therefore be affirmed.

(19 Or. 64)

MCBRIDE v. NORTHERN PAC. R. CO.

(*Supreme Court of Oregon.* April 2, 1890.)

APPEAL—TIME OF TAKING—DEATH OF PARTY—ACCIDENTS AT RAILROAD CROSSINGS.

1. A suit is suspended during the period between the death of a party and the order granting a continuance by or against his personal representative, and this period is not to be deemed any part of the time limited for taking an appeal.

2. It is the duty of a traveler to look and listen before attempting to cross a railroad track, and especially at a crossing known to him to be dangerous from its obstructed view, and the conformation of its surroundings rendering it difficult to hear.

3. Where there is no direct evidence that a traveler did not stop, look, and listen, before he entered upon the crossing, the presumption of law is that he did his full duty, and observed the precautions which it prescribed.

4. While it is the duty of travelers when about to cross a railroad track to exercise proper care and caution by using their senses of sight and hearing, it is likewise the duty of those to whom is committed the control and supervision of the movements of the train to exercise such care and caution at such crossings, and to give the warning signals, so as to prevent injury to those traveling on the highway.

5. The granting or refusing of a motion for a new trial rests wholly in the discretion of the court, and cannot be reviewed upon appeal.

(*Syllabus by the Court.*)

Appeal from circuit court, Columbia county; **F. J. TAYLOR, Judge.**

C. B. Bellinger, for appellant. T. A. McBride, for respondent.

LORD, J. This was an action brought by

Marian Benham, as administratrix of her husband, John L. Benham, deceased, against the defendant company, for negligently causing the death of plaintiff's intestate by running over him with a locomotive while he was crossing the defendant's railroad at a public crossing. The answer denied the negligence alleged, and set up that the injury of which complaint is made was caused by the contributory negligence of the plaintiff. The reply denied the new matter, and, issue being then joined, a trial was had, which resulted in a verdict, and judgment for the plaintiff on the 18th day of May, 1888. A preliminary question is raised by the defendant on a motion to dismiss the appeal, on the ground that the appeal was not brought within the six months limited to take an appeal. The facts upon which this motion is predicated are these: On the 2d day of July, 1888, the original plaintiff, Marian Benham, sole representative of John L. Benham, died, leaving a will, in which the present plaintiff, T. A. McBride, was named as executor; and, on the 13th day of July, 1888, the will was admitted to probate, and letters testamentary were issued to him. On the 10th day of October, 1888, the second day of the term of the circuit court for Columbia county next following the judgment, the defendant moved the court that T. A. McBride, executor as aforesaid, be substituted as plaintiff in the action, showing, in an affidavit in support of the motion, the death of Marian Benham, and the appointment of the said T. A. McBride as her executor, and stating the reason for which the substitution was asked to be to enable the defendant to perfect its appeal from the judgment in this action, which was resisted by the executor McBride, and denied by the court. At the ensuing term of that court, in 1889, the executor McBride moved for his own substitution upon the ground alleged in his affidavit, to enable him to issue execution to enforce the payment of said judgment. The order of substitution was granted on the 14th day of May, 1889, and in a few days thereafter notice of appeal from said judgment was served upon him; and he now moves as plaintiff to dismiss the appeal, for the reason that the record discloses that the appeal was not taken within the six months prescribed by law. The Code prescribes, in the case of the death of a party, that the court may, at any time within one year thereafter, on motion, allow the action to be continued by or against personal representatives, or successors in interest. Hill's Code, § 38. The death of a sole plaintiff suspends the right to execution, and the suit is suspended during the period between the death and the order allowing the continuance of the suit, and that period is not to be deemed any part of the time limited for taking an appeal. *Dick v. Kendall*, 6 Or. 166. The counsel for the plaintiff admits that the decision in this case is in the teeth of his contention, and must be overruled to sustain his position; but the facts, as

disclosed by this record, so strongly serve to show and recommend the equity and justice of that decision that we have no disposition to overturn or overrule it, until better advised.

To return to the error assigned, the record discloses that in the progress of the trial, when the plaintiff had rested, the counsel for the defendant moved for a judgment of nonsuit, upon the ground that the testimony for the plaintiff failed to prove a cause sufficient to be submitted to the jury; and this constitutes the first assignment of error. The question, then, which we are called upon to decide is whether the facts submitted in evidence by the plaintiff were insufficient to warrant a verdict. Where there is no evidence for the plaintiff, or such a defect in it as the law will not permit a verdict to be given to him, it is the duty of the court to grant a judgment of a nonsuit. But in deciding this question it is to be kept in mind that the evidence for the plaintiff stands admitted and undisputed, and concedes every fair inference which may be drawn from it; and that the defendant, conceding this, claims that it is so defective, or insufficient in law to prove the cause of action alleged, as not to authorize its submission to a jury or to warrant a verdict. The defect or insufficiency of the evidence consists, not so much in a want of evidence, as that the evidence for the plaintiff, which established negligence of the defendant, also proved negligence on the part of the decedent contributing to that result. The testimony for the plaintiff shows that the intestate was a careful and thrifty farmer who resided in the vicinity of the crossing where the injury and his death occurred, and was familiar with its location and surroundings; that he was run over by the locomotive while crossing the railroad with his team at its intersection with the county road, and found dead a few moments thereafter, and that no one was with him at the time of the accident. It further shows that, about half a mile above the point where the accident occurred, the railroad track runs through a cut at the foot of a bluff, while the county road runs along parallel to the track and some 200 yards distant from it on the top of the bluff; that as the county road nears the crossing it approaches somewhat closer to the track, and, when about 100 yards from the crossing, it makes a turn toward the track and approaches it at right angles, but the view of the track is obstructed until very near it; that the track makes a bend near the crossing, about 200 feet above it, so that the smoke-stack of the locomotive can only be seen about that distance; that the county road comes down a declivity until it reaches the track and crosses the grade; that a man traveling with his team along the county road on the bluff would not be likely to hear a train on the track below, unless it sounded the whistle, although the opinion is expressed, if the team was standing still, and there was no noise from the wagon, that a train might be heard, but even this was de-

pendent on how the wind was blowing. The testimony further shows that the whistle was not sounded, but it does not disclose whether the bell was rung or not; that the train was running at a high rate of speed when it approached the crossing and the accident happened. The conclusion to be drawn from these facts may be thus summarized: That the decedent was a man of ordinary faculties, and of prudent habits; that he was acquainted with the railroad crossing and its surroundings; that the crossing was more than ordinarily dangerous—a blind crossing—where the surroundings indicate that it is difficult to see, and difficult to hear, an approaching train, and where the road to the crossing is declivous, rendering it somewhat unsafe to leave a team, when alone, and difficult to ascertain the approach of a train, unless the proper signals are given; that at such a crossing and under such circumstances the locomotive with the train approached the crossing at a high rate of speed, without giving any warning, or sounding the usual signals, and ran over and killed the decedent while in the act of crossing.

A railroad crossing is a place of danger, and one crossing it must use his senses of sight and hearing, if he would avoid injury. In view of this recognized fact, there is a multitude of decisions which hold that it is the duty of a traveler, whether on foot, or with a team, when approaching a railroad crossing, to look and listen before attempting to cross the track, and that if he neglects to do so, and is injured, he is contributorily negligent, and cannot recover. It was the duty of the decedent, before attempting to cross the track of the defendant, to use his faculties, and to look and listen if any train was approaching, and more especially at a crossing known to him to be dangerous from its obstructed view, and the conformation of its surroundings rendering it difficult to hear, particularly with a team; and if he failed or neglected to perform this duty which the law devolved upon him, his injury or death was caused by his own negligence, and he cannot recover. But whether the decedent stopped and looked and listened before he attempted to make the railroad crossing, or what he did on that occasion, the evidence for the plaintiff does not disclose, nor is it incumbent on him to show that he did stop, look, and listen, before attempting to cross, to enable him to recover. Where there is no direct evidence that a traveler did not stop, look, and listen, the presumption of law is that he performed his full duty, or that he was not contributorily negligent. "The common-law presumption is," said CLARK, J., "that every one does his duty until the contrary is proved, and in the absence of all evidence on the subject, the presumption is that the decedent observed the precautions which the law prescribed. In the case at bar, no witness was called who saw the occurrence. There is no evidence whatever whether in fact the decedent did stop, and look, and lis-

ten. The presumption is that he did. Proof of that fact was no part of the plaintiff's case. The presumption is of fact, merely, and may be rebutted, but we are without evidence on the subject. All that we have is that, as he came upon the railroad, he was struck down by the locomotive." *Schum v. Railroad Co.*, 107 Pa. St. 12. To the argument then, so ably presented, that, as there was evidence for the plaintiff tending to show that an approaching train might be heard if the wagon was making no noise and standing still, so that the decedent, if he had stopped his team and listened, could have heard the approaching train in time to have avoided the injury and escaped his death, the answer is that the law presumes that he did stop and listen, and observe the precautions which it prescribes. While it is the duty of a traveler on the road, when about crossing a railroad track, to observe the proper care and diligence by looking and listening, or both, as the necessity of the situation may require for his safety, yet where the evidence is silent as to what the party injured in fact did on the occasion, it is not to be presumed that he recklessly exposed his own life, or attempted to cross the track in the face of an approaching train. Besides this, the testimony shows, according to one witness, that "it was not very easy to hear the train unless it whistles, when it is down in the cut and you are on top of the road;" "that it may be heard if the wagon is making no noise, but cannot be heard so well as when it whistles;" and another thinks the ability to hear in such case "depends on how the wind blows;" all tending to show, in view of the difficulty both of seeing and hearing, and the declivity nature of the highway to the railroad crossing, that a traveler might be liable to get in a position of peril from which he could not extricate himself before he could see or hear the train unless warned by the usual signals. What relative position he and his team occupied to the train, or the circumstances under which he acted, we cannot know, and at best can only conjecture, upon the facts presented by this motion on record. Advancing towards the crossing down a declivity on a highway upon which he could only see the top of the smoke-stack of the locomotive from 10 to 20 yards from the crossing, and, moreover, upon a highway where it was difficult to hear when the train was in the cut unless a warning signal was given, listening, as was his duty, we may suppose, and hearing no train himself, nor any warning signal of its approach, he may have continued to advance upon the assumption that no train was near or approaching, and have entered upon the crossing before he saw the train, or reached a point in his passage where he could neither advance nor recede without danger.

In cases of this character the facts are not explainable only on the theory of negligence, as held even in those jurisdictions where contributory negligence will be presumed when there are no obstructions to the sight or hearing. *Tolman v. Railroad Co.*, 98 N. Y. 198. While it is the duty of travelers when about to cross a railroad track to exercise proper care and caution by using their senses of sight and hearing, it is likewise the duty of those to whom is committed the control and supervision of the movements of the train to exercise such care and caution at such crossings, and to give the warning signals before reaching it, as to prevent injury to those traveling upon the highway. "Where the surrounding circumstances," says one text-writer, "render the crossing specially dangerous to travelers on the highway, as where the line is curved, or there are obstructions to the view, it is the duty of the railway to take precautions commensurate to the danger." And again: "It is a duty incumbent on the railway to cause its trains to approach and pass the crossing with care, * * * and with such a rate of speed of the train as, under the conditions of the crossing, is prudent with regard to travelers on the highway." *Patt. Ry. Acc. Law*, §§ 170, 171. In view of the mutual right of the parties to use this crossing, and the duty of care and caution that devolved on each under the circumstances, we are of the opinion, upon the evidence submitted for the plaintiff, taken as it must be as true, that there was no error in overruling the motion for nonsuit.

The next error specified is that the court erred in overruling the defendant's motion for a new trial. The motion was based on the ground that the evidence was insufficient to sustain the verdict. As the record discloses that no exceptions were taken we must assume that no error of law occurred during the trial or in the charge of the court, or that the court refused to give any direction asked which the defendant desired to have certified to us. The case then, at this stage, rests solely on the error assigned in overruling the motion for a new trial. It has been frequently held by this court that the granting or the refusal of such a motion rests wholly in the discretion of the trial court, and cannot be reviewed on appeal. *State v. Fitzhugh*, 2 Or. 236; *Hallock v. City of Portland*, 8 Or. 29; *Kearney v. Snodgrass*, 12 Or. 311, 7 Pac. Rep. 309; *State v. Mackey*, 12 Or. 156, 6 Pac. Rep. 648; *State v. Clements*, 15 Or. 243, 14 Pac. Rep. 410, in which *THAYER, C. J.*, said: "This court has nothing to do with the rulings of the lower court upon a motion for a new trial, or to set aside the verdict of the jury. It deals only with questions of law, and they must be squarely presented as such." It results that we cannot do otherwise than affirm the judgment.

(19 Or. 159)

STATE *ex rel.* HARDY v. GLEASON.

(Supreme Court of Oregon. April 23, 1890.)

SUPPLEMENTARY PROCEEDINGS—PRIVILEGED COMMUNICATIONS.

1. In proceedings supplementary to execution, where an attorney for the defendant is called as a witness, and testifies that he had in his possession, after the commencement of the action, money, notes, checks, evidence of indebtedness, or other property of the defendant, he may be required to state what he had in his possession, and what he did with such property or effects.

2. The facts required to answer these questions are not privileged communications made in the course of professional employment.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

One Edwin Hardy obtained a judgment for about \$5,000 against Bigne & Watson, and, being unable to obtain satisfaction of an execution issued on said judgment, instituted proceedings supplementary to execution. In the course of an examination had before a referee appointed for that purpose, Bigne was called as a witness, and testified, among other things, that he had received from the estate of one Manciet on July 12, 1889, the sum of \$10,478.52, and failed to give any satisfactory account as to what had become of it. The appellant was present at the hearing as counsel for Bigne, and, upon the examination of the latter being concluded, was called and sworn as a witness. In the course of his examination, he was asked to state if he had had, at any time subsequent to February 13, 1889, (the date of the commencement of this action,) any money, check, certificate of deposit, promissory note, or other evidence of indebtedness, or other property whatever, belonging to Bigne, in his possession or under his control; and under the order of the court, made upon his objection, he answered: "Yes." He was then asked to state what he did have, and declined to respond on the ground that the matter was confidential between himself and his client, and he was privileged from such examination. The referee, conceiving that he had no power to rule upon the legal point here raised, referred the matter to the court; and the witness was directed to respond to the question, and state what disposition he had made of such property as had been in his possession. Thereupon the examination was resumed, and the witness was asked the question: "Just state what you did have," to which he responded: "I decline to answer the question on the ground that the relationship which existed between Mr. Bigne and myself was that of attorney and client, and all my knowledge with reference to his property came in the course of professional employment between Bigne and myself; and I claim the privilege of an attorney in these matters. It is a privileged communication between an attorney and client, and I decline to answer,—not from a desire to be contumacious before the court; but I insist upon my rights, and decline to answer. On a subse-

quent day of the examination the witness was asked the following question, viz.: "Without in any manner waiving my right to require an answer to the last interrogatory asked you, on the 28th day of March, I will now ask you to state what disposition you made of such money, checks, certificate of deposit, promissory note, or other evidence of indebtedness, or other property whatsoever, belonging to defendant Bigne, which was in your possession or under your control at any time subsequent to the 13th day of February, 1889." To which the witness responded: "I decline to answer the question for the reason that, if I were to do so, I would have to disclose the communications made by Mr. Bigne to me in a professional capacity, while he was my client, and I was acting as his attorney; and I claim the right to hold as privileged the communications made by him to me in reference to his affairs, and the disposition of any funds of his, made to me by him as his attorney and as my client, because they were of a confidential character. I refuse to answer the question for those reasons." These matters having been shown to the satisfaction of the lower court by affidavit, the appellant was brought before the court upon an order to show cause why he should not be punished for contempt in refusing to answer the interrogatories. He there filed an answer to the statements contained in the affidavit, substantially reiterating the objections he had previously made. The respondents demurred to this answer on the ground of its insufficiency to constitute a defense, and the demurrer was sustained, whereupon judgment was entered committing the appellant until he should submit to answer, and awarding to the respondents costs of the proceedings. It is from this judgment that the present appeal is taken.

C. H. Carey, for the appellant. *L. B. Cox*, for the respondent.

STRAHAN, J., (after stating the facts as above.) The only question presented by this record for our consideration is whether or not the defendant was bound to answer the questions propounded to him on his examination; in other words, whether his relation to Bigne, as his attorney, excused him from answering.

1. Section 712, Hill's Code, provides: "There are particular relations in which it is the policy of the law to encourage confidence, and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases: * * * (2) An attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon, in the course of professional employment." And by subdivision 5 of section 1038, Hill's Code, it is made the duty of an attorney "to maintain inviolate the confidence, and, at every peril to himself, to preserve the secrets, of his clients." But these provisions

introduce no new principle into the law. They are simply declaratory of the common law.

The defendant having answered that, subsequent to February 13, 1889, he did have in his possession or under his control money, check, certificate of deposit, promissory note, or other evidence of indebtedness, or other property, belonging to the defendant Bigne, it was competent for the plaintiff to ask him what he did have, and what disposition he made of the same. The facts necessary to make proper answers to these questions were not privileged. The authorities are very full and direct on this question, and their citation is decisive of the case against the appellant. *Jeanes v. Fridenberg*, 5 Pa. Law J. 65; *Williams v. Young*, 46 Iowa, 140; *Andrews v. Railroad Co.*, 14 Ind. 169; *Brandt v. Klein*, 17 Johns. 335; *In re Bellis*, 3 Ben. 386, 38 How. Pr. 79; *Rundle v. Foster*, 3 Tenn. Ch. 658; *Graham v. O'Fallon*, 4 Mo. 338; *Hager v. Shindler*, 29 Cal. 48; *Duffin v. Smith*, Peake, 108; *Dudley v. Beck*, 3 Wis. 274; *People v. Sheriff*, 29 Barb. 622; *Fulton v. Maccracken*, 18 Md. 529. The appellant's counsel has presented a carefully prepared brief, and has cited numerous authorities in support of his contention; but they only refer to various applications of the same rule already referred to, and I deem it unnecessary to refer to those authorities more particularly. They in no manner conflict with the principles already stated. It follows that there was no error in the judgment appealed from, and it must be affirmed.

(19 Or. 76)

SPAUR v. MCBEE.

(*Supreme Court of Oregon. April 7, 1890.*)

LIMITATIONS—PLEADING—EJECTMENT—EQUITABLE DEFENSES—SPECIFIC PERFORMANCE.

1. Where it is apparent on the face of a complaint that the action was not commenced within the time limited by the Code, under subdivision 7 of section 67, Hill's Code, the objection must be taken by demurrer; and, under section 71, if not so taken, it is waived, and cannot be taken by answer. Under that section, it is only where the objection does not appear on the face of the complaint that the same is to be taken by answer. *Hill v. Cooper*, 6 Or. 182, approved and followed. And *held, further*, that the amendment to section 382, Hill's Code, made in 1878, has not impaired the authority of said clause or rendered the same inapplicable.

2. A defendant sued in ejectment might, under that amendment, use his equitable title defensively in an action at law, but he could use it for no other purpose.

3. A court of law, under that provision, cannot administer complete relief in favor of such equitable owner by decreeing specific performance when proper or necessary.

4. In such case a judgment at law does not estop or preclude the party against whom it is rendered from demanding of the defendant, in a separate suit in equity brought for that purpose, a conveyance of the legal title, where the same was acquired by the defendant with notice of the plaintiff's equitable rights.

(*Syllabus by the Court.*)

Appeal from circuit court, Douglas county;
R. S. BEAN, Judge.

This is a suit in equity to enjoin the enforcement of a judgment in an action of ejectment, and to require the present defendant to convey to the plaintiff the real property in controversy. The defendant had a decree in his favor in the court below, from which this appeal is taken.

J. F. Watson, for appellant. *J. W. Hamilton* and *W. R. Willis*, for respondent.

STRAHAN, J. By his complaint the plaintiff claims to be the equitable owner of land in controversy, and to have been in actual and exclusive possession of the same ever since the year 1862. It appears that in the year 1862 one J. A. Velzian and Jesse Fry owned the land in controversy, and that the same was a part of a larger tract owned by them. That the plaintiff also owned a large tract which adjoined the lands of Velzian and Fry. That a small parcel of the plaintiff's land lay on the west side of the south Umpqua river, consisting of about 6 acres, and that the parcel in controversy was separated from the other lands of Velzian and Fry by said river, and was situated on east side thereof, and consisted of about 24 acres, and joined the plaintiff's other lands. That at this time the plaintiff and Velzian and Fry entered into an agreement to exchange their small parcels one for the other; but, inasmuch as the land which plaintiff was to receive in exchange was regarded of greater value than the other, he was to pay the difference in hogs, which he did, in the sum of \$75, the difference in value agreed upon. At that time the plaintiff entered into the possession of the 24-acre tract, and caused it to be included in his inclosure, and every year thereafter, except two or three, he cultivated the same, and when the land was not in cultivation he used it in all respects like his other lands,—sometimes using it for pasturage. That at the same time Velzian and Fry entered into the possession of the six-acre tract, and retained possession of the same. It also appears that Velzian and Fry conveyed their entire tract of land by deed to the defendant, including the 24 acres which they had sold to the plaintiff; but, at the time the defendant took said deed, he had full notice of the plaintiff's rights in and to said 24 acres. In September, 1887, the defendant recovered a judgment against the plaintiff herein, in the circuit court of Douglas county, Or., for the possession of said 24 acres, and is about to issue an execution to support the same. The defendant's answer denies the material allegations of the complaint, pleads the statute of limitations, and relies upon the judgment in ejectment as an estoppel.

1. A very decided preponderance of the evidence tends to support the plaintiff's allegations, and, I think, clearly entitles him to the relief which he seeks, unless his right thereto is defeated by something shown upon the part of the defendant, or unless there is some fatal defect or omission in his own

statement of the case; and to those matters our attention will now be directed.

2. The first point presented by the answer of the defendant, requiring notice, is his plea of the statute of limitations; but, if that objection really existed, and was available at any stage of the suit, it was waived because not taken by demurrer. The facts are fully stated by the complaint; and, if the plaintiff's equity was barred by the statute, the objection was apparent on the face of the complaint. In such case the objection must be taken by demurrer, or else it is waived. Section 67, Hill's Code, enumerates the grounds of demurrer to the complaint, and the seventh specification is "that the action has not been commenced within the time limited by this Code." And section 70 provides: "When any of the matters enumerated in section 67 do not appear on the face of the complaint the objection may be taken by answer." Section 71 provides: "If no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court and the objection that the complaint does not state facts sufficient to constitute a cause of action." This section does not make it optional with a defendant to take the objection by demurrer or answer, at his pleasure; but, construed in connection with the preceding sections, they mean that the defendant must demur where the objection appears on the face of the complaint, and when it does not so appear the objection may be taken by answer, and where it is not taken by demurrer, when that is the proper mode of raising the question, or by answer, where that is the proper mode, the same is waived, and cannot be insisted upon at the trial. This construction of the sections of the Code referred to effectually eliminates the statute of limitations from the case, and leaves it to rest entirely upon the other questions presented.

3. This leaves the question of estoppel to be considered. In *Hill v. Cooper*, 6 Or. 182, the precise question involved here came before this court, for the first time, for adjudication; and, after a careful examination of the point, it was held that, under the statute, which allowed an equitable defense by cross-bill in actions at law, a party might rely upon a legal defense in an action without being thereby precluded from afterwards asserting his equitable title in an original suit. That is what this plaintiff is endeavoring to do by this suit, after having suffered defeat in a trial in an action at law; and, under the authority of *Hill v. Cooper*, supra, his equities were not concluded by the judgment. But counsel for the respondent contend that the jurisdiction of a court of law was so enlarged by the amendment to section 378 (now section 382) of Hill's Code in 1878 as to necessarily enlarge and extend the effect of a judgment at law in such case; and they claim, in effect, that *Hill v. Cooper*, supra, is no longer an authority, under this statute, for

the principle therein announced. The amendment was in the form of a proviso to the original section, and added these words: "Provided, this section shall not be construed so as to bar an equitable owner in possession of real property, from defending his possession by means of his equitable title; and, in any action for the recovery of any real property, or the possession thereof, by any person or persons claiming or holding the legal title to the same, under such patent, against any person or persons in possession of such real property under any equitable title, or having in equity the right to the possession thereof as against the plaintiff in such action, such equitable right of possession may be pleaded by answer in such action, or set up by bill in equity to enjoin such [action] or execution upon any judgment rendered therein; and the right of such equitable owner to defend his possession in such action, or by bill for injunction, shall not be barred by lapse of time while an action for the possession of such real property is not, by the [provisions] of title 2 of chapter 1 of this Code." No doubt these provisions do greatly extend the jurisdiction of courts of law in such case, but such jurisdiction is not comprehensive enough to enable such court to act finally upon the rights set up by the plaintiff in this suit. A defendant sued in ejectment might use his equitable title defensively in an action at law, but he could use it for no other purpose. That amendment of the Code did not confer upon a court of law jurisdiction over the entire equities of the defendant, and enable it to grant full and complete relief by decreeing specific performance when proper. Besides, under our practice, the machinery of a court of law is not adapted to work out such results. A court of law might, for some one of the reasons named in the section, refuse to turn a defendant out of possession; but it would be utterly powerless to clothe him with the legal title, which in this case the defendant holds as trustee for the plaintiff, or to adjust the equities which might grow out of the relations of the parties, or be presented by the facts of the particular case. We must, therefore, hold, in this case, that the judgment at law did not estop or preclude the plaintiff from demanding of the defendant a conveyance of the legal title to the land in controversy, which the defendant acquired with notice of the plaintiff's equities.

4. One other question remains to be considered. It was suggested on the argument here that the plaintiff has not shown himself entitled to the relief which he seeks for the reason he has not conveyed the six acres, and therefore he has not done equity. Fry has been a non-resident of the state for many years, and Velzian sets up no claim to the six acres, and it does not clearly appear that the defendant has succeeded to their rights in said land; but I think it may be inferred, from all the circumstances attending the transactions, that he did. The record does not disclose what is the condition of the six

acres at this time; but the decree appealed from will be reversed, and the plaintiff will have a decree for the relief which he seeks upon the conveyance by him to the defendant of said six acres, or in default of such conveyance the court below is directed to ascertain the value of said six acres at the time of the commencement of this suit, and the value so ascertained shall be decreed to be a charge upon the 24 acres herein directed to be conveyed in favor of the defendant which may be enforced by execution, and that the enforcement of the judgment mentioned in the complaint be perpetually enjoined and restrained.

(20 Or. 3)

KOONTZ v. OREGON RY. & NAV. CO.

(Supreme Court of Oregon. March 4, 1890.)

RAILROAD COMPANIES—FIRES—PLEADING—EVIDENCE.

1. Where the language is that "an engine" of the defendant company, at the time and place specified, etc., by reason of negligence, caused the destruction of the plaintiff's property, *held*, the allegation does not identify the particular engine which caused the mischief.

2. It is the duty of the plaintiff, in an action of this character, to state as definitely as possible what train caused the injury, so that the company may be able to identify the engine, and investigate what its condition was, and the conduct of its agents and servants at that time.

3. The escape of fire from a passing engine, whereby property is destroyed, raises a presumption of negligence in the construction and management of such engine, and casts on the defendant the burden to rebut such presumption.

4. When the presumption raised is rebutted by proof of proper construction of the engine, and the use of proper appliances and careful management, the plaintiff cannot maintain the action without making proof of other negligence.

5. In such an action, where the objection was that the evidence of the emission of sparks by plaintiff's engine, prior and subsequent to the burning in question, was improperly admitted, *held*, not error; that such evidence was admissible.

ON REHEARING.

1. In consequence of the difficulty in identifying a passing engine, so as to make direct proof of negligence, and for the reason that the business of running railroads supposes a unity of management and a similarity in construction of the engines, the admission of evidence, as to other and distinct fires from the one alleged, is permitted.

2. When a court is asked to declare a fact established, the evidence must so completely establish that fact as to remove all doubt; otherwise it is for the decision of the jury.

(Syllabus by the Court.)

Appeal from circuit court, Umatilla county; J. A. FALL, Judge.

Rufus Mallory, for appellant. Tustin & Crews and Bailey & Ballery, for respondent.

LORD, J. This is an action to recover damages for the destruction of the plaintiff's mill by fire emitted from a locomotive operated by the agents of the defendant. It is enough to say that after issue was joined, and a trial had, the verdict and judgment were for the plaintiff. The appeal presents several assignments of error, but we shall only notice those which were chiefly relied upon at the argument to work a reversal. It is insisted that the plaintiff, by the form of

his pleading, has specified a particular engine which caused the mischief or loss, and by reason thereof has precluded himself from introducing evidence in relation to any other. The fifth paragraph of the complaint is as follows: "That on the morning of the 30th day of April, 1888, about the hour of one o'clock A. M., the said defendant was, by its agents, servants, and employes, running an engine and train of cars over its road where the same passes along the said mill, warehouse, and granary of plaintiff as aforesaid; and plaintiff avers that said engine of defendant was unskillfully and imperfectly constructed, and unskillfully, carelessly, and negligently run and managed by the said defendant, and by its said servants and employes, and that by reason of its said defective and improper construction, and the said unskillful, careless, and negligent operating and running of said engine by defendants, and its said agents, servants, and employes, there were emitted and ejected from said engine of defendant, opposite to and close to said mill, warehouse, and granary of plaintiff, a large quantity of sparks and burning cinders and coals; and the same were then and there by said engine, by reason of its defects and careless and negligent running and operation, thrown and scattered upon and over said mill, warehouse, and granary of plaintiff, and about the same, and did ignite and set fire to the same, and caused the same, with the said contents thereof, to be burned, consumed, and utterly destroyed, to the great damage of the plaintiff, in the sum of \$39,361.72." In its answer the defendant admits that at or about the date mentioned in said paragraph, it was, by its agents, servants, and employes, running an engine and train of cars upon and over its road where the same passes plaintiff's said mill, warehouse, and granary, but denies that said engine was unskillfully or improperly constructed, or unskillfully, carelessly, or negligently run or managed by the defendant, and denies all other allegations of the paragraph quoted.

It will be observed that the language of the allegation is that "an engine," at or about the time and place specified, by reason of the negligence stated, caused the destruction of the plaintiff's property; but such allegation does not undertake to identify any particular engine which occasioned that loss of property, as averred. It was "an engine," but what particular engine of the many operated by the defendant is not indicated. By what name or number it was known, whether "Annapolis" or "Alexandria," or was No. 59 or 69, the allegation does not purport to specify. The evidence of the plaintiff indicates and tends to show that he endeavored to ascertain the particular engine it was that passed at the time and place alleged, and that he was unable to find out the particular engine it was. He knew that his mill property had been destroyed, and that the company, according to his verified complaint, had negligently caused the loss; but he was unable to

say, and does not undertake to say, that he can identify the particular engine complained of.

The form of expression is not definite, but indefinite, as to the engine; but sufficiently specific, in connection with the other facts alleged, as to time and place when the accident occurred, to enable the defendant to ascertain, with a reasonable degree of certainty, what engine passed at the time alleged. A failure in this regard would have rendered the complaint liable to a motion to be made more definite. It is the duty of a plaintiff in such an action to state in his complaint, as definitely as possible, what train caused the injury, so that the company may be able to identify the engine, and investigate what its condition was, and the conduct of its agents and servants at such time. But the complaint is not objected to in this particular, but, on the contrary, the contention is that the allegation is so specific as to identify the particular engine, and limit the plaintiff in this proof to that engine. On its own contention, then, it may be taken for granted that the allegation is sufficiently definite to enable the defendant to ascertain the engine which caused the loss, and to prepare itself to meet the charge of negligence; but the allegation does not purport to identify the particular engine, or that the plaintiff knew what engine of the company it was, so that he could distinguish it from any other owned and operated by the defendant. The cases disclose, and the fact is, that it is not possible often for the plaintiff to know, so that he can identify, what particular engine occasioned the destruction of his property; but he may be able so to state other facts, as to time and place, and the kind of train, etc., as to enable the defendant to identify it with its means of knowledge, which the company is assumed to possess for the proper management of its trains, and the general conduct of its business. It will be noted that thus far the contention has been that the plaintiff, by the form of his allegation, had identified a particular engine as causing the alleged destruction of his property, and as a consequence, if this view was correct, that his proof must be limited to that engine, and could not logically include evidence relating to any other. It will be seen, then, that the conclusion deduced rests on the assumption that the allegation specified a particular engine to which the evidence for the plaintiff must be confined, but we have found, as a result of our interpretation, that such is not the true purport or effect of that allegation, and, the premise failing, it results that the conclusion must go with it.

To exclude, therefore, the evidence objected to, it must rest on some other basis than the argument suggested. This brings us to the consideration of several propositions involved in the contention of the defendant, which, for convenience, may be thus summarized: (1) That in actions of this character the burden of proof is on the plaintiff to show neg-

ligence; and (2) that the allegation and testimony for the plaintiff, taken together, so definitely point out the particular engine which caused the mischief that it was error to admit evidence relating to other engines; and (3) that the evidence for the defendant showed that the engine which passed the property at the time alleged was No. 59, and entitled the defendant to its instruction as asked.

Upon the first proposition, the contention of counsel for the appellant is that the negligence of the defendant will not be presumed from the mere fact that the fire was caused by fire escaping from the defendant's engine. Upon this subject the authorities are in open and irreconcilable conflict, and we must choose with which we shall side, for what seem to us the better and more cogent reason. In many of the states, the escape of fire from a passing engine, whereby property is destroyed, raises a presumption of negligence, which shifts the burden of proof, and imposes on the defendant the duty to rebut such presumption by showing that it used safe appliances and competent servants. In other states, the mere fact that fire escaped from a passing engine, and property was destroyed, does not, of itself, raise a presumption of negligence, without some additional evidence to prove negligence. See 8 Amer. & Eng. Cyclop. Law, 9-11, where all the cases, by states, are carefully collated *pro* and *con* upon this subject. Also 3 Lawson, Rights, Rem. & Pr. § 1361, and notes 1 and 2.

The reason suggested for the support of the contention for the defendant is founded upon the principle that no liability can result to another from the proper and lawful use by any person of his property; that a railroad company has the right to use fuel for fire to generate steam to propel its trains, and that if it exercise such right in a lawful manner, and with care and circumspection, using the most approved appliances to prevent the escape of fire, and exercising due care and skill in the management of its locomotives, and damages occur by the emission of sparks, it is *damnum absque injuria*, and no right of action arises; that negligence is the gist of the action; and that the burden of proof is upon the plaintiff to establish such negligence by satisfactory evidence, and that it cannot be inferred from the simple fact of an injury or loss of property. "Where, then, there is neither negligence nor folly," said WILLIAMS, C. J., "in doing a lawful act, the party cannot be chargeable with the consequences." *Burroughs v. Railroad Co.*, 15 Conn. 124. "Negligence," said HUBBARD, J., "cannot be inferred from the simple fact of causing the fire, for the reason that the use of fire to propel a railroad engine is lawful, and sparks and coals may escape, notwithstanding all the safeguards which modern improvement has suggested." *Sheldon v. Railroad Co.*, 14 N. Y. 224. For the most cogent reasons in support of this rule we are referred to *Railroad Co. v. Yelzer*, 8 Pa. St.

374, which is perhaps recognized as the leading American case on this subject. It was an action to recover damages caused by a fire set by sparks emitted from the defendant's engines while in use upon its road. The trial court instructed the jury that, if they believed the fire was caused by sparks from the defendant's engines, such fact of itself was evidence of negligence. Upon appeal to the supreme court, the instruction was held erroneous, and ROGERS, J., in delivering the opinion of the court, among other things said: "It is a principle, well settled by many adjudicated cases, that an action does not lie for a reasonable use of one's right, though it be to the injury of another. For the lawful use of his own property, a party is not answerable in damages, unless on proof of negligence."

Turning, then, to the position assumed by the trial court, that it "would be a matter of extreme difficulty" for the plaintiff to prove negligence, where numerous trains were passing in rapid succession, and that "it would be absolutely beyond all proof to distinguish the one which caused the injury," the learned judge proceeds: "It is said the proof of negligence in managing the fires of any particular engine, running, as the engines of this company do, at all hours of the day and night, very many trains passing both ways, and with a speed that would defy or baffle observation, would always be a matter of extreme difficulty. The fire lodged in a wood or in a house might not break out into a conflagration for hours after, and twenty engines may have passed shortly before or after the fire was communicated, among which it would absolutely be beyond all proof to distinguish the one which caused the injury. From all this the learned judge draws the conclusion it would be unreasonable to require proof of negligence. It may be very true that there may be some difficulty in the proof arising from the circumstances stated, and, if so, they ought to be taken into consideration by the jury. But because there is some perplexity in it, arising from the manner in which the business of the road is done, that is no reason that every principle of law should be uprooted by requiring no proof of negligence whatever. We see neither reason nor justice in the position. * * * The plaintiff in this suit declares for negligence,—negligence, according to his own showing, is the gist of the action; and yet he has been allowed to recover damages without any proof of negligence, or any attempt even to prove it."

On the other hand, the opposite rule, that proof of the escape of fire from a passing engine establishes a *prima facie* case of negligence in the construction and management of such engine, and casts on the defendant the burden to show proper cause, and to rebut the presumption, is sustained by a cogency of reasoning and a sense of justice and fair dealing difficult to answer and overcome. It is based on the idea that the means of re-

butting the presumption is entirely in the power of the defendant; that the plaintiff cannot be expected to know, much less to prove, that the engine was defective in its appliances or construction, or that it was negligently managed on the occasion of the destruction of his property; and that in such case, to impose the *onus* on the plaintiff to prove some positive act of negligence, or circumstances tending to show a want of due care or skill, would, in many instances, be equivalent to a practical denial of justice. It is not claimed that the presumption is very satisfactory or strong, but it is indulged merely to compel the company to show that it had performed its duty in this particular. *Spaulding v. Railroad Co.*, 30 Wis. 110. But its effect is to shift the burden of proof upon the defendant, where it properly belongs. Such proof cannot be expected from a stranger. "The engines are all alike to him. He does not know them apart, nor does he know when any particular engine is used, or who manages it. And, when it passes at the rate of fifteen or twenty miles an hour, he could not see enough of it to ever afterwards identify it. What the engine is, and how it is managed, is peculiarly within the knowledge of the company." *Railroad Co. v. Stanford*, 12 Kan. 354. The reason of the rule is founded in the necessity of the case. It has been thus forcibly stated by Judge THOMPSON: "All information as to the construction and working of its engines, and of the particular one in fault, is in possession of the company, as are also the means of rebutting the charge of negligence entirely in its power. An outsider can hardly be expected to prove that in the construction of the engine, or in the use of it at the time the injury occurred, the company was guilty of negligence. He can only prove that his property was destroyed by one of the company's locomotives, and having done this it is but proper to call on the defendant to show that he was not negligent, that he employed careful and competent servants, and that he had used the most improved appliances to prevent the escape of fire from his engines." 1 *Thomp. Neg.* 153, subd. 3. "The reasons given," said Mr. Chief Justice DIXON, "for requiring the companies to show that this duty has been performed on their part, are that the agents and employees of the road know, or are at least bound to know, that the engine is properly equipped to prevent fire from escaping, and that they know whether any mechanical contrivances were employed for that purpose, and, if so, what was their character; while, on the other hand, persons not connected with the road, and who only see trains passing at a high rate of speed, have no such means of information, and the same is inaccessible to and cannot be obtained by them without great trouble and expense." *Spaulding v. Railroad Co.*, 30 Wis. 110.

In the nature of things, the plaintiff cannot have access to the engine for the purpose of ascertaining if it is properly constructed, and it is wholly impossible for him to prove

how the agents and employes of the company were operating the engine when the property was destroyed. The difficulty is inherent, and to hold otherwise would operate often as a denial of justice. As the facts are peculiarly within the knowledge of the company, it is no hardship to devolve upon it the *onus* of proving the proper construction of the engine, and its careful management. The case in hand illustrates the justice of such a rule. The plaintiff was not able, even, to ascertain the particular engine which passed at the time alleged, and caused the destruction of his property. He wrote to the agent of the company defendant, but failed to elicit an answer; and, when he sought personally to ascertain the fact, he was treated as an intruder, and utterly failed to obtain the information desired. How, then, could it be expected that he should be able to tell, still less to prove, that the engine was not properly constructed, or used improper appliances, or that it was not operated with skill and care by the agents of the defendant? He knew his property had been destroyed, and that it had been caused by sparks emitted from the engine of the defendant company, and when he had proven this much it was no hardship to require the defendant to show that its engine was not the cause. It is not disputed that railroad companies have the legal right to use fire to generate steam to propel their locomotives, but they have no right to scatter fire along their track, and if they do so, and the property of others contiguous thereto is destroyed, in the absence of explanation, they cannot avoid the imputation of negligence. In this view it results that we regard the rule—exception, it may be, to the general rule—holding that property destroyed by fire caused from a passing engine raises a presumption of negligence which shifts the burden of proof as founded in the sounder reason, and better adapted to attain the ends of justice.

It is next insisted that, under the pleading and proof in the case, the particular engine that hauled the train at the time it was alleged that the property was destroyed by it, although not identified as to its number, was so definitely pointed out as, in fact, to make its identification complete, and that evidence in relation to fires caused by other engines prior and subsequent thereto was inadmissible and error. The case must be considered from the stand-point of the plaintiff, and the proof he submitted. The allegation in the pleading does not identify the engine that caused the mischief, and the testimony for the plaintiff, tending to show that the fire was caused by an engine of the defendant on the night alleged, does not indicate what engine it was, or from which it would be possible to identify or distinguish it from other engines of the defendant company. No one can read that testimony, and say what particular engine, from any other owned and operated by the defendant, caused the destruction of his property. He had furnished the data by which the defendant might be able

to identify it, but what the defendant might be able to prove towards its identification could not help him. He was bound to proceed in the first instance with evidence to establish his allegations, and, if he failed to submit enough, the defendant would move for a nonsuit, before it submitted any evidence in the case, much less to identify the engines which caused the fire.

The plaintiff introduced evidence tending to show that the fire which destroyed his property was caused by sparks emitted from an engine of the defendant company, but what particular engine he did not know, nor does the evidence disclose, for he had been unable to ascertain this fact, and could not make proof of its identification. He showed that an engine passed and scattered fire, and then showed that other engines of the same general appearances scattered fire in large quantities, and to a great distance, and set other fires along the track, prior and subsequent thereto. The pleading and testimony for the plaintiff does not identify the engine which caused the mischief, and there was no error in admitting the testimony in relation to other engines. A like argument was urged in *Railroad Co. v. Gantt*, 39 Md. 124. Counsel for the appellant contended "that the declaration specially averred that one of the defendant's locomotives was so negligently managed, on a particular day named, that the sparks and cinders from said locomotive set fire to the plaintiff's premises, etc. This specific averment was explicitly denied, and the plaintiff himself, in his testimony, expressly proves that, if the fire was caused at all by any locomotive of the company, it was caused by the locomotive Annapolis, which was drawing the freight train towards the junction on the day designated. The issue, then, before the jury was whether the defendant on that occasion 'so negligently managed' the locomotive Annapolis that sparks and cinders from that locomotive set fire to the plaintiff's premises. There was no proof that the Annapolis had thrown out such sparks on the occasion referred to, or any other. But that other engines, on other occasions, had set fire to leaves on other people's property, was surely irrelevant to the issue." Here the contention was that the allegation and testimony of the plaintiff identified the particular engine, and limited the proof to that engine; but the court held otherwise, and decided that the plaintiff might show that, within a week before the fire in question, the engines of the defendant, in passing, had scattered large sparks, which were capable of setting fire to combustible materials along the road, and that frequent fires, occasioned by such sparks, had been put out within that time. The argument there was, as here, that, according to the allegation and testimony for the plaintiff, if the fire was caused by an engine of the defendant, it was caused by No. 59, which the defendant sought to show hauled the train on the night designated; but the evidence offered

and submitted by the plaintiff does not show it was No. 59 which threw out sparks on the occasion alleged, or any other number or name, or what particular engine it was, except that it was an engine of the defendant company. "The plaintiff is not bound," says Mr. Lawson, "to prove which particular locomotive caused the fire." 3 Lawson, Rights, Rem. & Pr. § 1361. Said BRADY, J.: "The further objection that proof of prior and subsequent emission of sparks by the defendant's engines, or some of them, was improperly permitted, is untenable. Such evidence has been declared to be admissible in actions of this class." *Home Ins. Co. v. Pennsylvania R. Co.*, 11 Hun, 184, citing *Sheldon v. Railroad Co.*, 14 N. Y. 218; *Field v. Railroad Co.*, 32 N. Y. 339; *Webb v. Railroad Co.*, 49 N. Y. 420. The supreme court of the United States has ruled in the same way. In *Railroad Co. v. Richardson*, 91 U. S. 454, the plaintiff was allowed to prove that at various times during the same summer, before the fire occurred, some of the defendant's locomotives scattered fire when going past the property destroyed, without showing that either of the locomotives which it was claimed caused the fire was among the number, and without showing that the former locomotives were similar in their make, state of repair, or management to the latter ones. Mr. Justice STRONG, in delivering the opinion of the court, said: "The question, therefore, is whether it tended in any degree to show that the burning of the bridge, and the consequent destruction of the plaintiff's property, were caused by any of the defendant's locomotives. The question has often been considered by the courts in this country and in England, and such evidence has, we think, been generally held admissible, as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company. *Piggot v. Railroad Co.*, 3 Man. G. & S. 229; *Sheldon v. Railroad Co.*, 14 N. Y. 218; *Field v. Railroad Co.*, 32 N. Y. 339; *Webb v. Railroad Co.*, 49 N. Y. 420; *Cleveland v. Railroad Co.*, 42 Vt. 449; *Railroad Co. v. McClelland*, 42 Ill. 358; *Smith v. Railroad Co.*, 10 B. I. 22; *Longabaugh v. Railroad Co.*, 9 Nev. 271. There are, it is true, some cases that seem to assert the opposite rule. It is, of course, indirect evidence, if it be evidence at all. In this case it was proved that engines run by the defendant had crossed the bridge not long before it took fire. The particular engines are not identified, but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire. And it seems to us that, under the circumstances, this probability was strengthened by the fact that some engines of the same defendant, at other times during the same season, had scattered fire during their passage." We are unable, therefore, to sustain this assignment as error.

It is next claimed that the evidence for the

defendant showed that the engine which passed the property on the night referred to was No. 59, and entitled the defendant to the instruction asked without modification, and for some other reasons to have the verdict set aside. To support the proposition involved, the argument assumes: (1) That the evidence for the defendant indisputably identifies the engine that did the mischief as No. 59; and (2) that it was properly constructed and carefully managed on that occasion; and, (3) if this is so, that the presumption of negligence raised by the simple fact of injury from the escape of fire from a passing engine is rebutted and overcome, and the plaintiff cannot recover, and the court must so declare as a matter of law.

The consideration of the points involved will be aided by understanding the attitude of the case. In addition to the presumption raised by the mere fact of an injury by fire from a passing engine, there was evidence introduced by the plaintiff tending to show that, whatever engine it was that ran by the mill on the night alleged, it was running at a high rate of speed, and was emitting an unusually large quantity of sparks, and that, in view of the proximity of the mill and granary to the railroad track, there was a want of ordinary care in not observing proper precautions to prevent fires to property so exposed along its track. The case made by the plaintiff did not stand simply on a presumption of negligence raised by the mere fact of injury from the escape of fire, but was strengthened by these independent facts and circumstances which of themselves afforded a legitimate inference that the agents or employes in charge of the engine were not exercising proper care and caution in operating it, considering the danger to the mill property situated near the track. Assuming, then, for the purposes of the case, that the defendant did introduce evidence tending to show that the engine in use that night was No. 59, and that it was properly constructed and supplied with the latest modern safeguards, and carefully managed, in order to rebut the presumption raised by the mere fact of injury from the escape of fire, yet, as there was other evidence for the plaintiff tending to show that the engine was carelessly managed on that occasion, the evidence was in conflict on this point, and when the facts are disputed the question is for the jury, and not for the court. But there was no evidence to show that the engine was carefully managed on that night. All that was offered on this point was that the engineer who operated the engine on that occasion was recognized as a competent and skillful engineer, and not that he carefully operated it at the time alleged. An engineer may have the reputation of being careful and skillful, and still, on the particular occasion, have managed his engine carelessly and negligently. Besides, the evidence for the defendant indicates that the engineer, though competent and skillful, was inclined to be of

a daring and reckless spirit, and, from the expressions used in describing him, that he was not always careful and prudent. So that, if it be conceded there was evidence for the defendant (which there was not) that its engine was managed with proper care and caution on that occasion, such evidence is disputed and controverted by the evidence for the plaintiff, and reserves the case for the jury, and their verdict is conclusive upon us, and cannot be set aside. But more, as the mere fact of injury from the escape of fire from a passing engine raises a presumption of careless management, as well as improper construction, and the use of improper appliances, when so alleged and charged, it follows that, unless the evidence for the defendant shows that the engine was carefully managed at the time, as well as properly constructed, and the use of proper appliances, such presumption is not rebutted and overcome. It is when the presumption raised is repelled by proof of proper construction, and the use of proper appliances and careful management, that the plaintiff cannot maintain the action without making proof of other negligence or want of ordinary care.

But what is the proof of the identity of the engine as No. 59? There is the register, upon which an entry was made from the train-book, not produced. But it seems to have been the subject of some change, which, it is argued, casts suspicion on it, and indicates that it had been tampered with. Referring to it, the witness testifies "he did not know how the figure came to be changed," and that he "did not know, outside this book, what train left Umatilla that night." The only man on the engine that night who testified was the fireman, (the engineer was dead,) and he was inclined to think that the engine was No. 63 until he was "buzzed" about it. Among other things, he testified: "We were running on pretty fast time. Don't know whether we were on time at Echo or not. I have no recollection of that particular trip. There was no reason I should notice it [engine] more than any other. My impression is that it was engine 59 we ran on that night. I am only sure of it by circumstantial evidence, seeing the register in the call-book at the office at La Grande. It ran in my mind that it was engine 63 or 59. I was kinder thinking it was 63, and might have talked so to others. Everybody was buzzing me about that engine I was running on that night." Considering that the register was only a copy from the original entry book, not produced in evidence, and the condition it was in unexplained, together with the doubt and uncertainty in the mind of the only witness whom so many were buzzing, and it can hardly be said that the identity of the engine was indubitably established. It is quite probable that the proof failed to satisfy the jury of the identity of the engine used on the night the property was destroyed. The credibility of witnesses and the weight of the evidence is for the jury, and the fact is for them to de-

cide; and, unless the evidence was sufficient to satisfy them that the engine in use on that night was No. 59, the defendant has no evidence of the condition of the engine that caused the fire.

Turning, now, to the instructions, it is enough to say that the one to the effect that the mere fact of injury from the escape of fire from a passing engine does not raise a presumption of negligence, without additional evidence of negligence, was error, as already shown, but was not prejudicial error to the defendant. Nor is any complaint made on this ground; but the contention was that this instruction, taken in connection with another given, to which no exception is taken or objection is made, authorized the court to set aside the verdict, and that it was its duty so to do. Upon the assumption claimed, the criticism seems just, and the conclusion seems logical; but the view already expressed is in conflict with that assumption, and the facts show a case for the decision of the jury. The trouble with the instructions asked and modified is that it assumes that engine No. 59 was identified, and asserts consequences on that hypothesis. If it was identified, then it was for the jury to consider all the facts and circumstances, and decide whether the alleged negligence was made out; but if it was not identified, and some other engine of the company did the mischief, then the defendant had no proof of the particular engine that caused the fire, and the jury, upon the facts, could not have found for the defendant. Besides, it does not follow, if the jury should believe that the fire was caused otherwise than by engine No. 59, that the verdict should be for the defendant, for they might believe that the particular engine the defendant introduced evidence tending to show was No. 59 did not cause the fire, but that it was communicated by some other engine of the company. Upon the whole, we think the judgment must be affirmed.

ON REHEARING.

LORD, J. There is no positive testimony as to the fact of ignition. The testimony for the plaintiff did not show directly that the fire which burned his mill was caused by the engine which hauled the train on the night alleged, but it did tend to show a state of facts from which the inference might be drawn that the fire which destroyed his property was communicated from that engine, and caused his loss. It was shown about the time alleged, on the night of the fire, that a passenger train passed the mill, and it was observed by some persons in the vicinity that large quantities of sparks were emitted from the engine, and flew over in the direction of the mill, which, taken in connection with other evidence tending to show the improbability of the fire originating any other way, raised a strong inference that the firing of the mill was caused by sparks from the engine that hauled that train. What particular engine this was the evidence does not disclose, nor

was the plaintiff able to ascertain, to make proof of its identification from other engines of the company. But to strengthen the inference that the burning of the mill originated in sparks from this engine, and to show habitual negligence of the officers and agents of the railroad company, he introduced evidence to show that other engines of like appearance and construction frequently scattered fire in large quantities, and set other fires along the track, prior and subsequent to the burning complained of. Was this error? The case shows that, when the fire started, no one was present, and the object of his evidence was to account for its origin. He could show that sparks escaped from a passing engine of the company on that night under circumstances which raised an inference that it caused the destruction of his property. What particular engine this was he could not identify, so as to distinguish it from any other engine of like appearance and construction used by the company, and consequently he could not make any direct proof of defects in the construction or negligence in its management. On account of this difficulty of identifying a passing engine, especially at night-time, so as to make direct proof of such negligence, and also for the reason, as stated by Mr. Thompson, that the business of running railroad trains supposes a unity of management and a general similarity in the construction of the engines, the admission of evidence as to other and distinct fires from the one alleged to have caused the injury is permitted. Nor is it requisite that the testimony must also show that the engine which it is claimed caused the fire was one of those which had previously or subsequently scattered fire along its track, but it is enough, as was shown, that it was similar in appearance and construction, and under the same general management. Hence it is quite generally held that evidence that sparks were frequently ejected from passing engines, causing fire along its track, on other occasions, is relevant and competent to show habitual negligence, and to strengthen and sustain the inference that the fire originated from the cause alleged. As the plaintiff must proceed with his evidence in the first instance, the fact that the defendant may be able to prove the identity of the engine cannot have the effect to make the admission of such evidence error.

It may be granted that the admissibility of such evidence trenches somewhat on the general doctrine regarding relevancy in actions of this character, but the authorities indicate that its allowance is justified by the necessities of the case. As the testimony for the plaintiff failed to identify the engine which caused the destruction of his property, did the evidence for the defendant, supplementing the evidence for the plaintiff, show conclusively that the engine which hauled the train on that night was identified as No. 59? No question is raised but what the defendant sought to show that it was engine No. 59; but was the evidence in this regard of such

undisputed and conclusive character as would authorize a court to withdraw its consideration from the jury, as to whether it was identified or not, or, what is the equivalent, to assume by its instruction that the engine was identified as No. 59? The argument for the motion assumes that it was, and we must briefly consider the evidence to test its soundness. After the evidence for the plaintiff, it devolved upon the defendant to identify the engine, and to show that it was properly constructed, furnished with safe appliances, and carefully managed on that occasion, to overcome the *prima facie* case made. Without more ado, it may be admitted, for present purposes, that if the engine in question was identified by the evidence as No. 59, it further showed that it was properly constructed and furnished with the best appliances for safety, and that it was in charge of an engineer, recognized by his class as competent and skillful, but it omits to show that he carefully operated and managed it on that occasion.

Was the identity of the engine so completely established as No. 59 that it would be error to submit that question to a jury? Mr. Warlick, who was a witness for the defendant, testified that on the night in question he "was firing" the engine; that "we were running on pretty fast time. Don't know whether we were on time at Echo or not. I have no recollection of that particular trip. There is no reason why I should notice it more than any other. My impression is that it was engine 59 we run on that night. I am only conscious of it by circumstantial evidence, seeing the register in the call-book at La Grande. It ran in my mind that it was engine 63 or 59. I was kinder thinking it was 63, and might have talked so to others; 63 was an engine that had never stopped up on us. Everybody had been buzzing me about that engine I was running on that night. The conductor was speaking to me about it the other night," etc. It seems to me that the fair inference from the testimony of this witness is that the impression which he had that the engine run on that night was No. 59 was derived solely from the register; that in his own mind there was some conflict as to whether it was 63 or 59, with the stronger and prevailing recollection in favor of 63,—“kinder thinking it was 63,”—which is corroborated by his conversation that he had so talked to others that it was 63. To say the least, the legitimate effect of his evidence is to create a ground of doubt as to the identity of the engine, and, when such is the case, nothing is more elementary than that the question is for the decision of the jury, and not for the court. There is no other evidence of the identification of the engine as No. 59, except from the entry in the register, and Mr. Robbins and Mr. Stevens base their testimony of its identity upon its record. Nor is there any claim outside this book that they can testify to the identity of the engine which hauled the train on that night. The train-book in which the original entries were made

by the conductors was not produced, but the conductor testified that the record in the registry was made from it. There seems to have been some alteration or change in some figure in the registry; but, as no explanation is vouchsafed, its purport we are unable to determine. On one side it is claimed that the change is immaterial, and in no way effects the question involved, while on the other it is as strenuously insisted that it is of such a nature as to cast suspicion on the register, and to destroy its value as record evidence. Whatever the change was, Mr. Robbins testified that he did not know how it "came to be changed." Between these conflicting claims as to the value of this record evidence we have no means of determining, or, if we had, no authority to determine which is correct, and cannot, therefore, express any opinion which shall reflect on any one; but the jury, the tribunal constituted to try such facts, under the guidance of the court, enjoyed full opportunity to see and inspect the register, to see and hear the testimony of the witnesses, and to observe and note all the surrounding facts and circumstances, which specially fitted them, as the law intends, to determine the right of the matter. Upon such a state of facts, the court has no right to intervene. When a court is asked to declare a fact established as a matter of law, the evidence ought to so completely and irrefutably establish the fact as to free the mind from all doubt and hesitation. A party on whom rests the burden of proof is bound to prove each circumstance which is essential to the conclusion, and in such case proof means anything which serves to convince the mind of the truth or falsehood of the fact or proposition. The identity of the engine is foremost among the facts essential to be proven by the defendant to satisfy the minds of the jurors it was No. 59, in order to follow it with the necessary evidence of its proper construction and careful management. Looking to the evidence of the fireman, aided by the proof of the record, and the testimony of the witness in respect to it, it may be, despite all criticism, that it ought to have convinced the jury of the identity of the engine, and yet that is no reason that the court should invade their province, and withdraw the question from their consideration. To do that, the evidence must not only be undisputed, but it must be free from all doubt and uncertainty. Now, if we turn to the evidence of the fireman, his predominant impression was that the engine was No. 63, or, to say the least, his mind was involved in doubt, and vibrating between 63 and 59; or, if we turn to the register, its credibility is attacked as a record, and depends for its weight and value upon the credibility of the witnesses who testified in respect to it; and in such case, when the fact is involved in doubt, and depends upon the credibility of witnesses, it is plain law that the question is for the decision of the jury, and not for the court. To conclude, the witnesses on this question were

the agents and employes of the company, and the jury were the exclusive judges of the weight and credibility of their testimony, under the circumstances. It was for the jury to say, and not the court, that the engine was No. 59, as well as whether it was properly constructed, furnished with safe appliances, and carefully managed on that occasion. As the amendment to the instruction asked indicates, the trial court regarded the evidence of the identity of the engine as No. 59 not wholly free from doubt, and more properly to be submitted to the jury to resolve such doubts than to dispose of it on his own responsibility, and in so doing, upon the facts as disclosed by this record, we are not prepared to say there was error.

(19 Or. 85)

PUGH v. GOOD.

(Supreme Court of Oregon. April 7, 1890.)

WITNESS FEES—COMPENSATION OF SHERIFFS.

1. When the pleadings present an issue on a material fact, the party having the *onus* of proof may subpoena witnesses to support the issue on his part, and if such witnesses are not sworn because the adverse party at the trial admits the fact, thus rendering evidence unnecessary, such party, if he recover costs, may tax the fees of such witnesses as disbursements, and recover the same of the adverse party.

2. If a witness attend upon the trial of a cause, and is not sworn, the party causing him to be present cannot recover from the adverse party the expense incurred for such witness, unless some sufficient reason exists which would legally excuse his failure to testify. It must be made to appear that his attendance was necessary at the time, but that by reason of some unforeseen event, or other sufficient cause, his testimony became unnecessary.

3. A party is bound to assume that the only issues triable in a cause are made by the pleadings, and if he subpoena witnesses to testify to matters outside of such issues, he does so at his peril. In cases where collateral inquiries are permissible a party may bring witnesses to testify in relation to the same, but, before he can properly charge as disbursements the expense incurred in procuring the same, he must show that the attendance of such witnesses was necessary. *Jackson v. Siglin*, 10 Or. 93, approved and followed.

4. An officer can make no charge for any act performed by him by virtue of his office, unless the legislature has, by some statute, authorized such charge.

5. By the terms of section 2940, Hill's Code, if services be rendered by a sheriff in cases where a constable is authorized to act, in a justice court, for instance, he must charge the fees allowed by law to a constable for the performance of that particular service, and no more.

6. The law has not specifically provided compensation in a justice's court for the following services, but the compensation provided covers and includes these items: Making copy of summons, certificate and return; making copy of subpoena, certificate, and return on same; making copy of notice of appeal; return on same. Nor is a sheriff allowed, as a separate item, 10 cents for making his return and subpoena in the circuit court.

(Syllabus by the Court.)

Appeal from circuit court, Marion county; R. P. BOISE, Judge.

This is an appeal from the taxation of costs. The action was originally commenced in the justice's court for Salem precinct to recover \$100 for work and labor alleged to have been done on the brick building situate at the north-west corner of State and Com-

mercial streets, in the city of Salem, Or., now occupied by Gibson & Singleton as a drug-store, and for making drawings and specifications therefor, and overseeing and superintending the work thereon, and for altering front of said brick building, and fitting up same for a drug-store, all of which were furnished, rendered, and performed to and for said defendant at his special instance and request, and all of the same was and is of the value of \$100; and that said defendant promised and agreed to pay plaintiff said sum therefor. Then follows a statement that the amount is due and unpaid, etc. The answer was a denial. The plaintiff had judgment in the justice's court for the amount claimed, from which an appeal was taken, with the like result. The plaintiff then filed his bill for costs and disbursements of both courts, which amounted to \$80.65. The defendant objected to various items thereof, and, the plaintiff having filed his amended verified statement, the entire amount was taxed and allowed by the clerk, and upon appeal from such taxation the court affirmed the same, declaring that the "finding and taxation of costs and disbursements by the clerk of the court are legal and correct." From this judgment this appeal is taken.

George H. Burnett, for appellant. *W. M. Kaiser*, for respondent.

STRAHAN, J., (after stating the facts as above.) A proper disposition of this cause requires an examination of the defendant's objections to the items claimed as disbursements, and whether such items were properly taxable. The items of plaintiff's cost-bill are as follows in the circuit court:

Trial fee.....	\$12 00
Clerk's fees.....	9 60
Sheriff's fees.....	19 80
Attorney's fees.....	5 00
Officers' fees in the trial of said cause in said justice's court, as follows:	
Justice's fees.....	7 40
Sheriff's fees.....	6 25
Witness fees as follows in the trial of said cause in said circuit court:	
W. F. Boothby, 1 day, 2 miles.....	2 20
Harry Gibson, 1 day, 2 miles.....	2 20
Harry Singleton, 1 day, 2 miles.....	2 20
W. H. Byrd, 1 day, 2 miles.....	2 20
Witness fees in trial of said cause in said justice's court for Salem precinct, as follows:	
W. H. Byrd, 1 day, 2 miles.....	1 70
Henry Rogers, 1 day, 2 miles.....	1 70
W. F. Boothby, 1 day, 2 miles.....	1 70
Harry Gibson, 1 day, 2 miles.....	1 70
Total.....	\$75 65

The defendant objected to the allowance of plaintiff's claim for mileage and attendance of witnesses on circuit court, as follows:

Harry Gibson, 1 day, 2 miles.....	\$2 20
Harry Singleton, 1 day, 2 miles.....	2 20
W. H. Byrd, 1 day, 2 miles.....	2 20

—Because said Gibson and Singleton and Byrd were not necessary or material witnesses in said action, and as to said Byrd and Singleton for the further reason that they were not sworn as witnesses in said cir-

cuit court. The defendant also objected to the allowance of plaintiff's claim for mileage and attendance of witnesses on justice's court, as follows:

W. H. Byrd, 1 day, 2 miles.....	\$1 70
Henry Rogers, 1 day, 2 miles.....	1 70
Harry Gibson, 1 day, 2 miles.....	1 70

—Because said Byrd, Gibson, and Rogers were not necessary or material witnesses in said action, and as to said Rogers for the further reason that he was not sworn as a witness at the trial of said action in the justice's court. The plaintiff essayed to meet defendant's objections to the claim for the witness Rogers by the following statement in his amended verified statements: "Plaintiff alleges that the witness Rogers was necessary and material in the trial of said cause in the justice's court, for the reason that the defendant, by his answer, raised the issue as to whether or not said plaintiff performed the work sued for by plaintiff, and said Rogers was a material witness to show that plaintiff did superintend said work and labor on said drug-store building, but he was not sworn, for the reason that defendant, on the trial of said cause in said justice's court, admitted that plaintiff did said work and labor as alleged." Opposed to the defendant's objections to the other witness fees, both in justice's and circuit courts, the amended verified statement of plaintiff contains the following: "The witnesses W. H. Byrd and Harry Gibson were necessary and material witnesses on the trial of said cause in said justice's court, for the reason that the defendant made the defense therein in such trial that the account sued for by plaintiff was assumed by said Harry Gibson and Harry Singleton, and that plaintiff was to look to them for his money; that this defense by defendant rendered it absolutely necessary to call said Harry Gibson and W. H. Byrd to dispute the same, which they did in said justice's court; that Harry Gibson, Harry Singleton, and W. H. Byrd were necessary and material in the trial of said cause on appeal in the said circuit court, for the reason that it was necessary to have such witnesses subpoenaed on the trial of said cause in said circuit court, and plaintiff paid said witnesses their fees in advance by the said sheriff; that the defendant never notified plaintiff that he would abandon said defense relied on in said justice's court; that said witnesses were not sworn, for the reason that defendant abandoned such defense in the circuit court, and said plaintiff had every reason to believe that defendant would attempt the same defense in the circuit court, which would render said witnesses necessary. The defendant attempted by such defense in said justice's court to show his non-liability to plaintiff, and by these witnesses plaintiff could show that the account had not been transferred to or assumed by said Gibson and Singleton, and that said plaintiff had no knowledge of any such transfer or assumption of said account sued on." The

clerk of the circuit court overruled defendant's objections to the various witness fees, not because the witnesses were shown to be material in the prosecution of the action, but because, as he puts it in his allowance, "they were regularly subpoenaed, and paid for their attendance."

The sheriff charged \$19.30 for his fees in the circuit court, and the defendant objected to the entire amount except the following items:

Serving notice of appeal.....	.25
Making and delivering copy of notice of appeal.....	.40
Mileage, (serving notice of appeal,) two miles.....	.20
Serving subpoena on W. F. Boothby.....	.25
Making and delivering copy of subpoena.....	.10
Mileage, serving same, two miles.....	.20

Amount..... \$1.40

The sheriff charged \$6.25 for his fees in justice's court, and defendant objected to all of that sum except the following, which are taken from the schedule of constable's fees established by law, as the service could have been performed by a constable, and is paid for by constable's fees:

Serving justice's summons.....	.50
Mileage on same, two miles.....	.20
Attending court.....	.50
Serving subpoena on W. F. Boothby.....	.50
Mileage on same.....	.20

Amount..... \$1.90

The appellant claims that these are the only services performed by the sheriff in either court for which he is permitted to make any charge, and that the amount allowed by law for the same is correctly set out in his objections. The following are the charges of the sheriff for services in the justice's court, which are claimed to be illegal, for the reason that the schedule of constable's fees makes no allowance for the same:

Making copy of summons.....	.20
Serving copy of complaint.....	.50
Five charges for certificate and return.....	1.25
Four charges for copying subpoena.....	.80
Making copy of notice of appeal.....	.80
Serving same.....	.50
Mileage on same.....	.20
Return on same.....	.10

The following are excessive and unnecessary:

Excessive mileage on service of summons....	.40
Serving three subpoenas (immaterial witnesses).....	1.50
Mileage on same.....	.60

Total overcharge in justice's court..... \$6.35

It is claimed by the appellant that the following are the only items for services by the sheriff in the circuit court properly taxable:

Serving notice of appeal.....	.25
Making and delivering copy of notice of appeal, four folios, at 10 cts.....	.40
Mileage serving same, 2 miles.....	.20
Serving subpoena on W. F. Boothby.....	.25
Making and delivering one copy of same, 1 folio.....	.10
Mileage on same, 2 miles.....	.20

Total..... \$1.40

The appellant claims that the following charges by the sheriff are illegal, because there is no law providing for their payment:

Four returns on subpoenas.....	.40
Mileage to pay fees advanced.....	.60
The following are excessive and unnecessary:	
Excessive charges copying 1 subpoena.....	.10
Excessive mileage serving 1 subpoena.....	.20
Serving three unnecessary subpoenas.....	.75
Copying same.....	.60
Mileage on same.....	1.20

Total overcharge in circuit court..... \$3.85

These several charges will now be separately examined.

1. And first as to the claim for witness fees paid Henry Rogers. I think the answer presented an issue as to whether or not the plaintiff performed the work and labor mentioned in the complaint, and the plaintiff had the right to subpoena witnesses to support his allegations, and that in such case if the defendant, upon the trial, conceded that the plaintiff did the work, thereby rendering it unnecessary to call witnesses to prove it, he may still charge for the attendance of such witnesses. The allowance for Henry Rogers' attendance in the justice's and circuit courts is affirmed.

2. Henry Gibson and W. H. Byrd attended as witnesses in the justice's court, and were not sworn, and the plaintiff seeks to recover for their attendance. If a witness attend upon the trial of a cause, and is not sworn, the party causing him to be present cannot recover from the adverse party the expense incurred for such witness unless some sufficient reason exists which would legally excuse his failure to testify. In other words, it must be made to appear that his attendance was necessary at the time, but that by reason of some unforeseen or other sufficient cause it became unnecessary for such party to cause such witness to be sworn. The plaintiff has assumed this to be the law, and has endeavored to give a reason why these witnesses were not sworn. According to his version of the matter, it was to meet an issue not made by the pleadings. This he could not properly do. He was bound to assume that the only issues triable in this cause were such as were made by the pleadings, and, if he subpoenaed witnesses to testify to matters outside of such issues, he did so at his peril. No doubt there may be cases where collateral questions may be inquired into upon the trial, and a party may bring witnesses to testify in relation to the same, but, before he can properly charge as disbursements the expense incurred in procuring the attendance of such witnesses, he must show that the attendance was necessary. The attendance seems to have been unnecessary, and, the witnesses not having been sworn, or having testified in the cause, the items objected to must be disallowed.

3. Harry Gibson, Harry Singleton, and W. H. Byrd also attended as witnesses in the circuit court, but they were not sworn, and the reason given for their attendance, in the amended verified statement, is wholly insufficient, and the claim for their *per diem* and mileage for attendance in that court

must be disallowed, for the same reasons stated respecting Byrd and Gibson.

4. The next objection is to the charge made for fees paid to the sheriff for services in said cause rendered in the circuit court, amounting to \$19.80. The defendant concedes he is entitled to \$1.40, and no more. It was held by this court in *Jackson v. Siglin*, 10 Or. 93, that the statutes which give costs are to be construed strictly, and that the rule is inflexible that an officer can demand only such fees as the law has fixed and authorized for the performance of official duties. And on every occasion, where the question has been presented to this court, charges for constructive services have been constantly disallowed, and it would seem too plain for argument that an officer can make no charge for any act performed by him by virtue of his office unless the legislature has by some statute authorized such charge. The sheriff's claim is itemized, and, inasmuch as the items occur in chronological order, it will be most convenient to consider the claim for services rendered in the justice's court and the circuit court together: but a different rule is provided by statute as to amount of compensation. If the service was rendered in a justice's court, the sheriff must charge the same amount allowed a constable for that service, and no more; and if rendered in any court where a constable is not permitted to act, his fees are governed by the sheriff's schedule of fees. Hill's Code, § 2340. The following charges are made by the plaintiff for money alleged to have been paid for services in the justice's court for which the law has provided no compensation, and the same are not, therefore, taxable as disbursements, but the compensation provided must be intended to include these items:

Making copy of summons.....	.20
Serving copy of complaint.....	.50
Certificate and return.....	.20
Making copy of subpoena.....	.20
Certificate and return.....	.20
There are three other copies of subpoenas, with a certificate and return for each, amounting to.....	1.20
Making copy of notice of appeal.....	.30
Return.....	.10
Serving subpoena on Gibson and Byrd, 50 cts. each.....	1.00
	\$3.90
To which must be added <i>per diem</i> claimed for Gibson & Byrd, and disallowed.....	8.40
Total disallowed in justice's court.....	\$7.30

When the sheriff consents to act as constable, and to discharge duties which a constable is authorized to perform, he can charge no other or different fees than are allowed by law to a constable for the same services; and if, as sheriff, he may charge for making copies pertaining to service of papers in courts of record, he cannot do it in justices' courts.

The following charges for disbursements in the circuit court are claimed by the plaintiff, and disallowed:

Four returns by sheriff, 10 cts. each.....	.40
Mileage to pay fees advanced.....	.60
Henry Gibson.....	2.30
Harry Singleton.....	2.30
Dr. Byrd.....	2.30
Serving three unnecessary subpoenas.....	.75
Copying same.....	.60
Mileage on same.....	1.20

Total overcharge in circuit court.....\$10.15
Add amount disallowed in justice's court.... **\$7.30**

Total.....**\$17.45**

This amount must be deducted from \$57.62, the amount allowed the respondent in the court below, leaving the amount of costs and disbursements which the plaintiff is entitled to recover \$40.17. The defendant objected in the court below to the amount of fees claimed by the clerk, and pointed out the several items which he claimed were taxable, and that none others were proper; but he did not argue his objections here, and we therefore express no opinion in relation to the same. The judgment of the court below is modified in the particulars above specified, and in all other respects it is affirmed.

(1 Wash. St. 29)

SAYWARD v. CARLSON.

(Supreme Court of Washington. Jan. 20, 1890.)

MASTER AND SERVANT—PERSONAL INJURIES—PRACTICE—FELLOW-SERVANT.

1. Where judgment by default has been entered against a non-resident defendant, on attachment of his property found within the jurisdiction of the court, and service by publication, his motion to set aside the default, and subsequent filing of his answer, are a waiver of objections to the jurisdiction taken before entry of the default.

2. In an action by a servant for injuries received through his master's negligence, where the complaint alleges that defendant left his work to go to the water-closet, and was injured while on the way, and the proof shows that he was on his way to his work, but had not yet commenced work for the day, the variance is immaterial.

3. The evidence showed that plaintiff was employed in defendant's saw-mill, and had been assigned to begin work at 8 o'clock on an upper floor; that he arrived early, and went into the engine-room to talk with the engineer, whence he afterwards went, by an unusual route, to the water-closet, being injured on the way. If he had gone directly to the room in which he was to work, and thence by the usual way to the closets, he would not have been hurt. There was no rule prohibiting plaintiff's taking the route he did. *Held*, that plaintiff was not guilty of contributory negligence.

4. Where the proof shows that plaintiff's injury was caused by the negligence of a fellow-servant, defendant may move for nonsuit without having pleaded such defense in his answer.

5. Code Wash. T. 1881, § 1, making the common law of England the rule of decision in all courts of the territory, does not confine the courts to the decisions of English courts, and of American courts which have followed them, for interpretation of the law.

6. A person employed as head carpenter in a saw-mill, to make repairs around the building and on vessels used in connection therewith, is, while moving lumber in the mill, the fellow-servant of a sawyer working in the same premises.

Error to district court, King county.

J. R. Lewis and *B. F. Dennison*, for plaintiff in error. *N. Soderberg*, (*J. L. Murphey*, of counsel,) for defendant in error.

STILES, J. On the 29th day of March, 1885, the defendant in the court below was the proprietor of the Port Madison Mills, at Port Madison, Kitsap county. At the mills he carried on the business of manufacturing lumber, rough and dressed; and from thence, by means of schooners which he owned, he shipped the lumber to various ports of the Pacific ocean for market. The mill premises consisted of an inclosed yard containing one or two acres, with gates for the entrance and exit of employes as the business required. Inside of the yard, and occupying one side of it, was the mill proper, which was a two-story structure 60 or 70 feet in width, and some 300 feet long. In the second story were the saws and principal mill apparatus; the engines and planing machinery being on the floor below. The boiler-house and carpenter shop were across an open area from the mill, distant 50 or 60 feet, but within the yard. Adjacent to the mill was a wharf upon which lumber from the mill was run, and thence loaded into the vessels as they required cargoes. At the date named, defendant, who himself resided at Victoria, B. C., had one Meigs employed at the Port Madison Mills as his general superintendent and manager. Meig's authority was very full, so that some of the men who had worked in the mill for years supposed him to be the proprietor. But all hands were paid their wages by defendant's checks signed by Meigs, "agent." Under Meigs, and next in authority, was one Bucklin, who was general foreman over all the work there carried on, and from whom the men in the mill, engine-room, boiler-room, and log chute, and on the wharf, took their general orders; each gang of men, however, as a rule, having a subforeman, who was a laborer himself, and directed the work of those with him. At the date named, there were about 75 men employed in and about the mill premises, in connection with the business of the defendant there carried on. Some had regular employment in certain positions, as the engineer, the fireman, the head carpenter, the head sawyer, and perhaps some of the men in other places, while others had no regular employment, but were shifted from one place to another as occasion required their services. The plaintiff below, Carlson, was one of the last-named class, and had been employed in the mill since December 8, 1883. During that time he had been tallyman on the wharf, trimmer, scantling sawyer, gang sawyer, hook tender, and tallyman in the mill. On Saturday, March 27th, he had been acting as tallyman in the mill, and at the close of work on that day was assigned by Bucklin to the scantling saw for the next Monday.

One Beaton was the head carpenter of the establishment, whose duty it was to attend to such carpentering as needed to be done about the premises, either alone or with such assistance as he required. Beaton had been for some time engaged in repairing the schooner Vidette, one of the defendant's ves-

sels, which lay at or near the mill, and had occasion to use some ship's knees in connection therewith. There were ship's knee timbers lying in the water at the mill; and on Saturday the log hauler for the mill drew up some of the timbers into the mill to be sawed, preparatory to being dressed by Beaton at the carpenter shop. The sawing of these timbers required peculiar handling; and Beaton, Bucklin, and some others did the work at the mill saw on Saturday, after the regular work was over, leaving the sawed knees lying on the floor to be removed by Beaton. At that time the mill was running on three-quarter time; work commencing at 8 o'clock in the morning. Carlson's time to begin work was, therefore, 8 o'clock; but Beaton was working on full time, commencing at 7 o'clock.

Between 7 and 8 o'clock on Monday morning, Beaton and two other men, who were in general employ similar to Carlson's, but who at that time were detailed to assist the former, went into the mill to remove the ship's knees sawed the previous Saturday to the carpenter shop. There were a number of the knees, which were triangular timbers, weighing one or two hundred pounds each. There were means by which the knees could have been taken from the mill to the carpenter shop without any danger of injury to any person; but this would have involved carrying each one part of the length of the mill to the front end, down a stairway, and thence back the length of the mill to the shop. A much nearer way was to take them to a window of a small room built out at the side of the mill at the rear, and throw them to the ground, some 15 feet. The latter plan was adopted. Beaton recognized the fact that some person might be passing under the window, and might be injured by a falling knee. Therefore, he directed the men who were about to throw out the first knee to call out warning to any one thus passing. His men looked out and called the warning, and then dropped the knee. The plaintiff, Carlson, at that moment was passing under the projecting room, where he could not see the window, nor the men see him; and he did not hear the warning. So, as he emerged from the overhanging room, he was struck by the falling knee, and severely injured. This action was brought against the proprietor of the mill, Sayward, to recover damages for the injury on the ground that it was the negligence of the defendant's servant in throwing the knee from the window that caused it.

The material allegations of the complaint here involved were as follows: "That, at all the times hereinafter mentioned, plaintiff was employed by defendant as a workman in said saw-mill, in the capacity of tallyman; that on the 29th day of March, A. D. 1885, the plaintiff then being in the employ of defendant in the capacity of tallyman, as aforesaid, in said same saw-mill, having a necessity to go to the water-closet, situate under saw-mill, left his work and went towards said water-closet by the way usually traveled

by himself and other workmen employed by defendant in said saw-mill; that, in going from his work to said water-closet by the way aforesaid, the plaintiff was compelled to pass directly under the fire-room of said saw-mill, and while passing under said window certain workmen employed by the defendant as carpenters, and there engaged in repairing the bark Vidette near said mill, by the order and direction of the superintendent having charge and control of said carpenters for and in behalf of defendant, without giving any notice or warning whatever to this plaintiff, threw out of said window a ship's knee weighing 400 pounds or more, and the same fell a distance of 16 feet, striking this plaintiff, who was then passing under said window as aforesaid, upon the head, arm, and shoulder, severely bruising and wounding him, and rendering him senseless, and plaintiff remained in a state of insensibility for the space of ten hours, and was confined to his bed by reason of said injury for a period of one day; that said accident happened, and said injuries were received, wholly on account of the carelessness and negligence of the said superintendent having charge and control, for and in behalf of the defendant, of the carpenters employed by the defendant as aforesaid, and through no fault or negligence on part of plaintiff."

The defendant being a non-resident, plaintiff endeavored to obtain jurisdiction of his person and property by attaching the latter, and making the service of the summons by publication. Numerous motions were made in the court below by the defendant's counsel, appearing specially therefor, for the purpose of preventing the court from assuming jurisdiction upon the attempted service made; and the denial of these motions is here assigned as error. But, whatever weight these motions may have had at the time, we are satisfied that a subsequent motion to open a default which had been entered, which was not upon a limited or special appearance, as well as the subsequent answer, waived all objections to the jurisdiction, and brought the defendant fully before the court.

The answer of the defendant was a general denial. The cause was tried upon the issues thus made, and there was a verdict and judgment for the plaintiff. Upon the plaintiff resting his case, the defendant moved for a nonsuit and for a dismissal of the action, upon the following grounds, viz.: (1) That the complaint did not state facts sufficient to constitute a cause of action; (2) that plaintiff had failed, on the proofs, to make out the cause of action stated in the complaint; (3) that, on the proofs, plaintiff's injuries were caused by his own negligence; (4) that, on the proofs, plaintiff's injuries were caused by a fellow-servant of plaintiff. The court denied the motion, and error is assigned here upon the denial. Upon these errors we are of the opinion:

1. That the complaint was sufficient.
2. The second ground of the motion was

based upon the testimony, which showed that plaintiff was injured while on his way to his work in the morning, and before he had commenced work for the defendant for the day, instead of under the circumstances alleged in the third and fourth paragraphs of his complaint, quoted above. But we do not look upon the facts proven and those pleaded as materially varying. The defendant could not have been surprised, and an amendment of the complaint to accord with the facts would have been allowed of course.

3. The third ground for nonsuit was taken in view of certain facts which we have not yet stated in full. Plaintiff, as above set forth, was on Saturday assigned to go to work on the next Monday morning, at 8 o'clock, at the scantling saw, in the second story, and near the front end, of the mill. The scantling saw was not far from the principal entrance to the second story, which was reached by broad steps from the ground, placed there for the accommodation of the mill men. Plaintiff's most natural and easy mode of reaching the place of his labor was up the steps, and thence a few feet to his machine. But, at some time between 7 and 8 o'clock, plaintiff entered one of the mill-yard gates, and went to the furnace-room, across the open space from the mill, to have a social chat with the fireman, intending to go thence by another route to his work, in time to begin at the hour. At the rear and on the ground floor of the mill there were water-closets built for the accommodation of the men, which were approached from the upper floor by a stairway at that end of the building. The most direct way to reach these closets from the furnace-room was across the yard and under the mill, but for those at work on the upper floor the proper way was along the mill to the stair at the rear. At the house where plaintiff lived, there was accommodation of the same kind, which he could have used before going to the mill. But, after remaining a short while in the furnace-room, plaintiff decided to go to the mill closets, and thence to his work, up the back stairs. He went across the yard, not in a direct line or path, but in such a course that he brought himself along-side the mill, so that, in passing thence towards the back end and the closets, he walked under the projecting room where Beaton and the others were with the knees, coming out again, from beneath the room, at the precise moment when the first knee dropped and struck him. Had he visited the closet at his own house, or not gone to the furnace-room, or walked in the most direct line across the yard to the mill closets, or taken his proper station in the mill, and thence gone to the closet by the back stair, he would not have gotten under the overhanging room, and the injury would not have occurred. In addition to this, it appeared that, during the hours when the mill was running, there were slab-cars running back and forth through the yard in such a way as to make it dangerous for persons to be

there, and that at all such times there was at many places about the mill more or less danger, so that persons employed there had to be constantly on the lookout. Upon these facts the defendant urged that plaintiff had himself so contributed to his injury that he could not in any event recover; and it was contended that, as the nature of his employment did not at that time or at any time demand his presence at the furnace-room, or in the yard, or anywhere except where his work for the moment was, (to-wit, that morning, at the scantling machine, at 8 o'clock,) he was to be treated as a stranger who was trespassing without leave, and that he could not be excused by the plea of a necessity to visit the closets. But it was proven that no rule of the establishment prohibited the men from going into the mill by the route adopted by plaintiff, or required them to reach the second story by the front stair, and that many of them did daily go to and fro about the yard as he did. He reached the vicinity of the mill a few minutes early. The gates were open, and he did what, under the usual condition of things at that hour, he might have done without actual risk. Therefore, we cannot agree that his acts amounted to contributory negligence, besides which, the testimony on that point fully warranted a submission of it to the jury; and we find no error in the motion for a nonsuit, on that ground.

4. Were Beaton and Carlson fellow-servants? Plaintiff maintains that the defendant was not entitled to avail himself of that objection to a recovery unless he pleaded it in his answer, and that a general denial did not raise that issue. It may be, but we do not so decide, that the claim is correct when the objection is taken as a defense. But the gist of the complaint is that the master has injured the servant. Therefore, when the plaintiff's proofs show that it is not the master, but some other person,—a fellow-servant,—who committed the wrong, there can be no affirmative judgment, and a motion for a nonsuit is the proper method of moving the court to a negative judgment. The most earnest and learned efforts of counsel in this cause were directed to the enlightenment of the court upon the proper rules of decision for the determination of this question. It was agreed that, if Beaton and Carlson were fellow-servants, there could be no recovery, but there was a radical difference as to the standard by which their relations were to be judged and declared. Plaintiff in error maintained that section 1 of the Code of 1881, which makes the common law of England the rule of decision in all the courts of Washington Territory, was decisive as to the first step of the inquiry, namely, where the court should look for the proper rules. We agree to this. But we do not subscribe to the next proposition, that resort can be had only to the decisions of English courts, or to those of American courts which have followed them,

to ascertain what the common law of England is or was, unless the English decisions commend themselves to reason, or have been so long and generally followed that to depart from them would tend to unsettle what has, by "immemorial and universal usage," been understood to be settled. The common law grew with society, not ahead of it. As society became more complex, and new demands were made upon the law by reason of new circumstances, the courts originally, in England, out of the store-house of reason and good sense, declared the "common law." But, since courts have had an existence in America, they have never hesitated to take upon themselves the responsibility of saying what is the common law, notwithstanding current English decisions, especially upon questions involving new conditions. Therefore we have the common law as declared by the highest courts of this, that, and the other state, and by the courts of the United States, sometimes varying in each. And we understand by section 1 of the Code that, where there are no governing provisions of the written laws, the courts of the late territory and of this state are, in all matters coming before them, to endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the common law, but not that the decisions of English courts are to be taken blindly, and without inquiry as to their reasoning or application to the circumstances. We have been led to these remarks because of the fact that upon this question of injuries by servants of the same master, negligently inflicted upon each other, has given rise to extensive discussion and wide divergence of decision in both English and American courts.

Up to a certain point, undoubtedly, the common-law rule was and is that the master is not liable if one of his servants negligently injure another. It was indirectly stated so to be in *Priestley v. Fowler*, 3 Mees. & W. 1, in 1837, but was first distinctly announced in *Murray v. Railroad Co.*, 1 McMul. 385, in 1841, and was reannounced in Massachusetts, in 1842, in *Farwell v. Railroad Co.*, 4 Metc. 49. The first positive announcement of the rule in England was in *Hutchinson v. Railway Co.*, 5 Exch. 343. The theory of the South Carolina case was that each of the servants, in his separate department, represented the principal, and that they were engaged in a joint undertaking. In Massachusetts the ground of the decision was that by refusing a resort to the common employer the safety of each employe would be more effectually secured, by reason of the greater skill and care with which they would conduct their several operations. *Hutchinson v. Railway Co.* seems to have rested upon the conclusion of the court that the principle of holding the master liable would "carry us to an alarming extent." The English cases down to this time, except as they have been

restricted by statute, have been kept well up to the general rule, in which they have rather followed, than been followed by, many American cases, notably those decided in Massachusetts. See *Holden v. Railroad Co.*, 129 Mass. 268. But, almost contemporaneously with the assertion of the general rule of the exemption of the master, other American courts refused adherence to it as a universal rule. The rise and progress of great railroad corporations, operating over long lines of road, with hundreds of employes, from president down, caused a closer inspection of the real relations of the men, who, although they were employed and paid by the same master, were often so widely separated in their spheres of duty that reason seemed to call for some substantial modification of the decisions as to what the rule really was when applied to cases where there was so large a delegation of the authority of the master to the negligent servant that the master could be said to be present and acting only in the person of the servant. The courts of last resort of many of the states, and the supreme court of the United States, have given their adherence to this view; and according to their decision the common law of such cases is that the rule of exemption to the master only applies when the negligent servant and the servant injured are in a common employment. The leading authority upon this subject—for this case, at least—is the supreme court of the United States, which in *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, said: "There is, in our judgment, a clear distinction to be made, in their relations to their common principal, between servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of the corporation clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence,"—and held a railroad conductor who neglected to inform his engineer of an order to wait at a station ahead for a train going in the opposite direction, whereby a collision occurred, not to be the fellow-servant of the engineer. Other courts have applied the principle to far more complicated cases, and have not hesitated to give the employes of natural persons the benefit of the new common law, the announcement of which was at first based upon that peculiarity of corporations which compels them to act by agents only. Doubtless the United States supreme court would do the same, in a proper case.

Yielding our adherence to the doctrine that, to exempt the master and make the two servants fellow-servants, they must be engaged in the same common employment, in the same department of service, and act under the same immediate direction, we look vainly for any agreement among the courts as to what "common employments" are. The diversity of employments and myriad circumstances under which men act and are

injured make it impossible to define them. Some general definitions there are, and with them each case must be compared as it arises, and the rules extended so as to make a reasonable application. We find in *Crispin v. Babbitt*, 81 N. Y. 516, what seems to us the most correct, brief, statement of some of the points to be regarded in cases of this kind which has come to our notice. The court said, (page 520:) "The liability of the master does not depend upon the grade or rank of the employe whose negligence causes the injury. A superintendent of a factory, although having power to employ men or represent the master in other respects, is, in the management of the machinery, a fellow-servant of the other operatives. On the same principle, however low the grade or rank of the employe, the master is liable for injuries caused by him to another servant if they result from the omission of some duty of the master which he has confided to such inferior employe. * * * *Flike v. Railroad Co.*, 53 N. Y. 549. * * * The liability of the master is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employe performing it. If it is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows. If the act is one which pertains only to the duty of an operative, the employe performing it is a mere servant; and the master, although liable to strangers, is not liable to a fellow-servant for its improper performance. *Wood, Mast. & Serv. § 438.*" These are flexible rules, in which the doctrine that the delegated powers and duties of the master make a servant, at times, the very master himself as to other servants, is the central feature; and they seem to us eminently just to both master and servant. They would fully sustain the decision in *Brodeur v. Valley Falls Co.*, (R. I.) 17 Atl. Rep. 54, cited by plaintiff in error. There a machine repairer in a cotton-mill, while crossing a yard adjoining the mill, was killed by an empty barrel thrown from the fourth story by a negligent mill operative; and it was held that they were fellow-servants. Under these rules, *Bucklin*, the foreman of the Port Madison Mill, when, on Saturday, he assisted *Beaton* to saw the ship's knees, was the fellow-servant of *Beaton*, although ordinarily he might not have been so in any matter wherein was involved the matter of providing safe and sound machinery for the sawing of the knees; that being a duty due from *Sayward*, the performance of which was confided to *Meigs* and *Bucklin*. But, had *Bucklin* there carelessly handled a knee so that *Beaton* had suffered injury therefrom, there would have been no wrong imputable to *Sayward*; and so, when we come to apply this law to *Carlson* and *Beaton* at the time of the former's injury, if *Carlson* was a servant at all, we are clearly

led to hold that he was a fellow-servant with Beaton.

We are urged to the consideration that Beaton was a ship-carpenter employed by Sayward to repair ships, and therefore in a different department of labor from that of defendant. The complaint denominated him "superintendent having charge and control of carpenters" engaged in repairing the bark *Vidette*. But, looking at the testimony offered to sustain that allegation, we do not find it sustained; but, on the contrary, it clearly appeared from that testimony, as well as that produced by the other side, that Beaton was simply a mill carpenter, employed to make repairs wherever needed about the establishment. Sometimes he had men working with him whose work he did superintend, but, in the execution of the work, he was only a fellow-servant with them. At this unfortunate time his work was in making some repairs to the *Vidette*, his master's vessel, by which part of his business there carried on was prosecuted. The repairs to the vessel were entirely consistent with Beaton's general occupation. He was still a mill hand, just as much as the fireman or the engineer. In fact, were we to seek a nice distinction, we might justly say that the sawing of ships' knees was clearly within the line of the mill's work; that it made no difference that they were sawed for the *Vidette*; that in sawing them Beaton, for the time, became a mill-sawyer; that in removing the knee, on Monday, he was merely a lumber shover; and that he did not become a carpenter until he got out of the mill and began carpenter's work. But our decision is upon broader grounds. Here was a department of a business carried on by the aid of 75 or 100 men, at a particular place, where no man had to go off the premises to perform his work. The employees, from highest to lowest, must necessarily have soon become personally acquainted with each other; and they knew there were dangers to be looked out for, and it is always, among dangers, the unexpected that happens. The two recent cases in the Michigan supreme court (*Mining Co. v. Kitts*, 3 N. W. Rep. 240, and *Sell v. Lumber Co.*, 33 N. W. Rep. 451) are cases in which the facts are of the same general character as that at bar; and the conclusions were, in substance, identical with our own in this case.

The defendant's motion for nonsuit and dismissal should have been granted by the court below. For the error in not sustaining the motion the judgment entered must be reversed. Judgment reversed, with directions to the successor of the court which tried the cause to grant the nonsuit and dismiss the action.

ANDERS, C. J., and HOYT and SCOTT, JJ., concur.

DUNBAR, J., did not sit at the hearing.

COGSWELL *et al.* v. HOGAN *et al.*

(Supreme Court of Washington. Jan. 22, 1890.)

APPEAL—TIME—WAIVER.

The time limited in which an appeal may be taken from the district to the supreme court (Code Wash. T. § 453, and Acts 1883, p. 59) is fixed in the interest of the commonwealth, and cannot be waived by the parties to the suit.

Error to district court, second judicial district, Pierce county.

F. Campbell and John V. Evans, for plaintiffs in error. *Parsons & Caldwell*, for defendants in error.

HOYT, J. The notice of appeal in this cause was not filed or served until long after the expiration of the time provided by statute in which an appeal can be taken. Code Wash. T. § 453, and Acts 1883, p. 59. And the question presented by the motion to dismiss is as to whether or not an appeal thus taken can avail the parties thereto. That the notice of appeal is the essential step in bringing a case to this court is not questioned, but it is claimed by counsel for plaintiffs in error that the limitation as to time of appeal can be waived by the parties, and that there has been such waiver in this case. It is not necessary for us to decide as to said alleged waiver, as, in our opinion, it could not, if expressly made, give this court jurisdiction of a cause that was not brought here within the time prescribed by statute. We agree with the conclusions of the supreme court of the territory, as expressed by Justice GREENE in the case of *Stark v. Jenkins*, 1 Wash. T. 421, that the limitation of the time of appeal "is in the interest of the commonwealth, that there be an end of litigation, and is mandatory on the courts." At the expiration of the time limited the cause of action is an adjudicated matter, and no consent of parties nor willingness of courts can recall a controversy thus wisely, by limitation of law, passed into the realm of ended suits. That such is the universal construction of such statutes is abundantly proved by the authorities. See *Fairchild v. Daten*, 33 Cal. 286; *Yturvide v. U. S.*, 22 How. 290. If this limitation was one that could be waived by the parties at all, then it could be waived at any time, and, if the parties should desire, this court would have to review causes in which final judgments had been rendered, 5, 25, or 100 years; and as the legislature, of course, never intended this result, we must hold that it intended that there could be no extension of the limited time.

The motion filed in this cause is broader than it should be; but, in the view we have taken, this is immaterial. The motion to dismiss the appeal must be granted, and it is so ordered.

ANDERS, C. J., and SCOTT, DUNBAR, and STILES, JJ., concur.

(1 Wash. St. 117)

SILSBY v. ALDRIDGE et al.*(Supreme Court of Washington. Feb. 13, 1890.)***REPLEVIN—CHATTEL MORTGAGE—VARIANCE.**

In an action for certain personal property, plaintiffs alleged ownership, and introduced a chattel mortgage of it to them by third persons, to secure a debt not yet due, containing the usual provisions against removal or disposition. The property had never been in their possession, but was delivered to defendant by mortgagors shortly before the action. *Held* a fatal variance, not to be cured by amendment under Code Wash. T. § 108, providing that plaintiffs, in such action, failing to establish ownership, may prove a right of possession by virtue of a special property, and amend.

Error to district court, Thurston county.

Action by J. A. Silsby against Clayton Aldridge and others to recover personal property. Code Wash. T. § 108, provides that where plaintiff, in an action to recover possession of personal property on a claim of ownership, shall fail to establish his ownership, but shall prove that he is entitled to the possession by virtue of a special property therein, he shall be entitled to amend. Section 1998 provides that where a mortgage debt is not due, and there is danger that the property will be removed or lost, the owner may bring an action for the debt, and the court, if it deem fit, may make an order to secure the property.

Charles H. Ayer, for plaintiff in error.
Root & Mitchell, for defendants in error.

STILES, J. Plaintiffs in the court below alleged that they were the owners of two oxen and their yokes, which property the defendant had taken into his possession unlawfully, and without plaintiffs' consent; and they demanded the return of the property. Defendant denied the ownership of the property by plaintiffs and the unlawfulness of the taking, and alleged title in himself. At the trial, plaintiffs, to sustain their allegation of ownership, produced, and, over the objection of the defendant, were allowed to put in evidence, a chattel mortgage, executed by certain third parties to the plaintiffs, covering the oxen in question and other property. The testimony on the part of the plaintiffs showed that the mortgage debt was not yet due, and that the mortgage had not been foreclosed. It did not appear that the mortgaged property had ever been in the possession of the plaintiffs; but it had remained in the possession of the mortgagors until a short time previous to the commencement of the action, when, upon the written request of one of the mortgagors, it had been delivered by the other mortgagor to the defendant. The mortgage contained the usual provision against removal and disposition by the mortgagors. A motion for a nonsuit was made by the defendant and denied by the court, and there was a verdict for the plaintiffs. There were other matters complained of by the plaintiff in error, but they grew out of the value accorded to the chattel mortgage, and need not be touched upon.

In our judgment, the chattel mortgage, under the statutes of Washington, did not con-

vey to the holders any title to the property in question. Chapter 141 of the Code provides ample means for the creditor when his security is threatened, and the common-law right of possession seems to be completely abrogated in that regard. Therefore, proof of the existence of the mortgage did not tend to support the allegation of ownership, and the motion for a nonsuit should have been granted.

We are urged to hold that, under section 108 of the Code, there was an immaterial variance, which could have been cured by amendment. But it was not a mere variance, but a failure of proof. Indeed, had the facts been pleaded, instead of the mere conclusion of ownership, under our view of the chattel mortgage act, plaintiffs would have no cause of action. While the mortgage was not foreclosed, the mortgagors could have recovered the possession; or, if the possession of the defendant endangered the security of the plaintiffs, they could, under the statute, have the property taken into possession, and held for disposal, according to the provisions of sections 1989 et seq. *Byrd v. Forbes*, 8 Wash. T. 318, 13 Pac. Rep. 715; *Marsh v. Wade*, (Wash. T.) 20 Pac. Rep. 578. The judgment is reversed, with directions to the successor of the court below to sustain the defendant's motion for a nonsuit, and dismiss the action.

ANDERS, C. J., and HOYT, SCOTT, and DUNBAR, JJ., concur.

(1 Wash. St. 6)

BURNS v. CONNERS.*(Supreme Court of Washington. Jan. 23, 1890.)***JUDGMENT—REVIVAL—LIMITATIONS.**

A motion to revive the lien of a judgment under the provisions of Code Wash. T. § 523, is not the commencement of an action, within the meaning of section 27, prescribing that an action on a judgment must be commenced within six years from its rendition.

Error to district court, Skagit county.

Motion by Samuel J. Burns to revive a judgment against James J. Connors. Code Wash. T. § 523, provides that a judgment may be revived on motion after five years from its rendition, but defendant may demur or answer, alleging "any defense."

W. R. Andrews, (O. Jacobs, of counsel,) for plaintiff in error. *G. M. Haller*, for defendant in error.

ANDERS, C. J. Plaintiff in error recovered judgment against the defendant in the court below on the 4th day of December, 1878, for the sum of \$611.42, together with interest and costs. No part of the judgment having been paid in March, 1888, the plaintiff filed his motion in the court below, in pursuance of the provisions of chapter 29 of the Code of Washington Territory, to revive said judgment, and to continue the lien of the same, and for leave to issue execution. To this motion the defendant interposed a demurrer, on the ground that the same did not state facts

sufficient to constitute a cause of action, and because it appeared upon the face thereof that no judgment in said cause had been entered within six years before filing the motion. From the judgment of the district court sustaining the demurrer the plaintiff appeals to this court, and assigns the decision of the court below as error.

We are of the opinion that the proceeding prescribed by statute to revive the lien of a judgment is not the commencement of an action, but only a mode by which to secure the fruits of an action already had and determined between the parties, and that section 27 of the Code is not applicable thereto. 5 Wait, Act. & Def. 641-643; Murch v. Moore, 2 Or. 189; Tyler's Ex'rs, v. Winslow, 15 Ohio St. 364.

We are also of the opinion that section 27 of the Code limiting to six years the time within which an action may be commenced upon a judgment or decree of any court of the United States, or of any state or territory within the United States, when viewed in connection with chapter 29, does not apply to judgments rendered by the courts of this state or of the late territory. The district court erred in sustaining the demurrer to plaintiff's motion. The judgment is therefore reversed, and the cause remanded to the court below, with directions to overrule the demurrer.

HOYT, SCOTT, DUNBAR, and STILES, JJ., concur.

(1 Wash. St. 123)

MEEKER v. GARDELLA *et al.*

(Supreme Court of Washington. Feb. 24, 1890.)

USE AND OCCUPATION—DAMAGES—EVIDENCE—EXCEPTIONS.

1. Defendant appealed from a judgment in ejectment giving plaintiffs possession of land, and the judgment was affirmed. *Held*, that plaintiffs could sue defendant alone for the use and occupation of the land pending the appeal, and were not bound to sue on the appeal-bond.

2. In an action for such use and occupation, it appeared that defendant took possession of the land as tenant of plaintiff's grantor, and that the lease was canceled by the court for the reason that defendant did not fully disclose to plaintiff's grantor, whose agent he was, the facts relative to the premises, though she was ignorant in regard to them, and he fully informed in regard thereto. *Held* that, as defendant was in possession under color of title, and there was no evidence of willfulness in detaining the land, plaintiffs were entitled only to the fair rental value of the premises, with interest thereon to the time of the trial.

3. In the absence of any allegation in the complaint of special damages, it was error to allow plaintiffs to give evidence of a custom of farmers to sell hops while growing, and to show their highest market value before their maturity.

4. A verdict for a certain amount "and legal interest," in an action for use and occupation, is bad for uncertainty, and will not support a judgment unless the words "and legal interest" be treated as surplusage.

5. Defendant's exception to the charge was "to the giving of which, and to the giving each part thereof." *Held* that, as no specific parts were excepted to, and some parts of it were proper, the exception was insufficient.

6. Although it was error for the court to order the United States marshal to summon a talesman, when the sheriff was present, such error was harmless, where the juror was not challenged, or shown to be in any way unfit to try the case.

Appeal from district court, Pierce county, Roger S. Greene, for appellant. Judson, Sharpstein & Sullivan, for appellees.

ANDERS, C. J. On the 24th day of March, 1885, a judgment was rendered in the district court of the second judicial district of Washington Territory, holding terms at Tacoma, against appellant, who was defendant, and in favor of appellees, who were plaintiffs, for the recovery of the possession of certain lands in Pierce county, described in the complaint in this action. Appellant, however, did not relinquish the premises to appellees, but appealed the cause to the supreme court of the territory, which court, on the 4th day of February, 1887, affirmed the judgment of the court below. 13 Pac. Rep. 709. Soon after the last-mentioned date, appellant surrendered the premises in dispute to appellees. The present action was brought to recover damages for the wrongful withholding, and for use and occupation, of the land and premises during the pendency of the appeal of the former cause to the supreme court, and for the conversion by appellant of certain hop-poles claimed by appellees. On the land in controversy there was a cultivated hop-yard of about 25 acres, a fruit-bearing orchard, and about 25 acres of meadow land, besides considerable pasture. Appellant, while in possession, from March, 1885, till March, 1886, gathered the hops and fruit, and cut the hay grown on the land, and disposed of the same for his own benefit, and also had the use of the pasture. The principal controversy during the trial in the lower court was as to the measure of plaintiff's damages; but, before entering into the discussion of that question, we will advert to some other matters which arose in the course of the trial.

It appears from the transcript that, in getting a jury to try the cause, the regular panel became exhausted, and, while the sheriff of the county was present in the court-room, the judge ordered the United States marshal to summon a talesman from the by-standers, which he accordingly did. To this proceeding the defendant objected, and he now assigns the action of the court in that behalf as error. For the court to thus order a *venire* or summons to be served by some other person, when the duly-elected and qualified sheriff was present, and, so far as the record shows, not disqualified, was to depart from the usual and regular course of practice; but, as it does not appear that appellant interposed any challenge to the juror so summoned, or that the juror was in any way unfit to try the case, we think that, if the court erred, it was error without prejudice to the defendant. *State v. Elliott*, 45 Iowa, 486; *Territory v. Hart*, 14 Pac. Rep. 768, 774.

Appellant also claims that the court erred in permitting evidence to go to the jury as

to the custom of farmers of selling hops while growing, and before maturity, and that the court wrongfully allowed plaintiffs to show the highest market value of hops before they were gathered or ripe, as well as afterwards; and, under the pleadings, we are of the opinion that such testimony should not have been permitted by the court. It related to a matter of special damage not set up in the pleadings; and, besides, it does not appear that appellees would or could have sold the hops before maturity if they had been in possession of the farm and hop-yard themselves.

Counsel for appellant further contends that the court erred in overruling the demurrer to the amended complaint. He bases his objection to the complaint on the ground that the action should have been brought on the appeal-bond of appellant filed in the action of ejectment. The position of counsel is not tenable. The bond was given to the appellees, not to provide them any exclusive remedy against appellant for damages, but to indemnify them against payment of costs, and secure to them their damages for being kept out of possession of their property, and the satisfaction of the judgment appealed from, in case of its affirmance. Appellees were not bound to sue on the bond, but were at liberty to bring their action for use and occupation directly against the defendant, Meeker, alone.

In proving damages in the court below, plaintiffs were permitted to show the highest market value of the produce of the farm during the year 1885. They claimed that the measure of their damages was the highest market price of the crops taken by defendant, without any diminution on account of expense of gathering and fitting them for market or for use. On the other hand, the defendant insisted that the market price of the various crops at maturity, and ungathered, with interest thereon, was the correct measure of damages, and all he ought to pay. We do not think that, in the case as presented on the argument, either rule contended for by the respective counsel is the correct measure of damages. As before stated, the action is for use and occupation. The defendant was not a mere naked trespasser. He was holding, under color of right, adversely to plaintiffs; and in that case the true measure of damages is the fair rental value of the premises together with interest thereon to the time of the trial. *Sedg. & W. Tr. Title Land*, §§ 665, 666, and cases cited; *Vandevoort v. Gould*, 36 N. Y. 646. And the value of the crops raised and harvested by the defendant was immaterial, except so far as it might assist in determining the fair rental value of the premises; and this, no doubt was the real object of counsel in introducing the testimony above mentioned. Where the action is for use and occupation, the crops raised and harvested by the defendant while in exclusive possession belong to him, and not to the owner of the land. *Page v. Fowler*, 39 Cal. 412; *Stockwell v. Phelps*, 34 N. Y. 363; *Field*,

Dam. 593. Appellant concedes the highest market value of the crops to be the measure of damages, if the detention of the lands was willful, which he claims, however, was not the case. The complaint in this action states that the defendant wrongfully continued to hold the exclusive possession of said premises, notwithstanding the judgment and decree of said district court, from the date of the rendition of said judgment to the month of March, 1886, when he yielded possession to plaintiffs. On the trial in the district court, appellees introduced in evidence the pleadings, findings of fact, and conclusions of law, and judgment of the district court, in the original action, as well as the opinion and judgment of the supreme court in the case. The district court in that action found that the defendant held the premises in controversy by color of title adverse to plaintiffs, and allowed him the value of improvements he had placed on the land as a set-off against the damages for detention, but canceled the lease under which he claimed, for the reason that "the defendant did not at the time of the making of the lease, or at the time of the making of the so-called 'extension' of the same, so fully disclose the facts relating to said premises to the said Mary I. Walker [plaintiffs' grantor] as to enable her to contract intelligently and prudently in reference thereto; nor had she been informed by anybody of the facts necessary to give her an intelligent and correct idea of the character and value of the land described in the so-called 'lease and extension.' Her agent, the defendant, was fully informed in regard to these matters; but she had but little or no knowledge in reference thereto, having been absent and away from said premises for a long period of time." The court gave judgment for the possession of the premises in favor of plaintiffs, as before stated, but awarded no damages for the detention beyond the value of the improvements. Appellees claim that this documentary evidence shows that the appellant not only wrongfully, but willfully, detained the land from them up to the time of the judgment in the former action, and that he continued to hold in the same manner during the time for which damages are now sought. But we think there was no evidence of willfulness in the case, and that the value of the several crops and of the pasturage, less the value of the labor bestowed thereon, is the amount of the damages, upon the theory of the case apparently adopted by counsel. That sum, in the absence of injury to the premises, is all appellees lost by being out of possession, and they should receive no more than a just compensation for the damages suffered.

The defendant requested the court below to instruct the jury as follows: "*First*. Plaintiffs are entitled to recover fair compensation for whatever actual damages they have suffered by reason of the acts proved in evidence, and complained of in their complaint. *Second*. They are not entitled to re-

cover anything in excess of such fair compensation. *Third.* You will decide all the issues in this case according to the weight of evidence. *Fourth.* The plaintiffs are not entitled to recover any sum whatever unless the fair preponderance of the evidence shows that a sum as large as that is a just and fair compensation to them for the damage actually suffered by them, and complained of in the complaint. *Fifth.* The amount of your verdict for the plaintiffs will be based upon the evidence, and will consist of the aggregate of the following items: (1) The value of the hay crop at the date proper to harvest it, and as it stood in the field, unharvested, together with interest upon that value from that date to the day of your verdict; (2) the value of the fruit crop at the date proper to gather it, and as it hung on the trees, ungathered, together with interest thereon from that date to the day of your verdict; (3) the value of the hop crop at the date proper to pick it, and as it hung on the vines, unpicked, together with interest on that value from that date to the day of your verdict; (4) the value of the pasturage for each month of the pasturing season, together with interest on each month's value from the close of the month to the date of your verdict; (5) the value of the hop-poles of the plaintiffs, removed by the defendant, at the time and place of removal, together with interest thereon from such time to the day of your verdict. *Sixth.* There is no evidence in this case that defendant willfully, wantonly, or maliciously has witholden from Mary I. Walker or from plaintiffs, or any of them, possession of the lands described in the complaint. *Seventh.* There is no evidence before you that Mr. Ezra Meeker acted otherwise than in actual good faith, under color of title, and in an honest belief that he was in the right in holding possession of the premises described in the complaint pending the appeal to the supreme court. *Eighth.* In the absence of willfulness or malice or actual bad faith on Mr. Meeker's part in using and occupying the premises pending the appeal to the supreme court, the plaintiffs have no right to claim or recover in this action, on account of crops taken, a sum as damages which shall include more than the actual value of the crops at the time when taken, together with interest from that time, after deducting all that part of such value which is due to the labor and expense of getting and harvesting the crops." The court refused to give any of these instructions, and failed to give the same, or the substance thereof, in any other form or language. They were as favorable to the plaintiffs, under the circumstances of the case, as the law would warrant, and should have been given, especially the last instruction asked. *Smith v. Railroad Co.*, 38 Iowa, 518; *Chamberlain v. Collinson*, 45 Iowa, 429; *Coal Co. v. Long*, 81 Ill. 359; *Weymouth v. Railroad Co.*, 17 Wis. 550; *Forsyth v. Wells*, 41 Pa. St. 291; *Maye v. Yappen*, 23 Cal. 306; *Ege v. Kille*,

84 Pa. St. 333; *Stockbridge Iron Co. v. Cone Iron-Works*, 102 Mass. 80.

The court, of its own motion, instructed the jury upon the law of the case. The defendant's exception to the charge is "to the giving of which, and to the giving each part thereof." He did not point out the specific parts of the same to which exception was taken, otherwise than as stated above. The instruction as given consisted of a series of separate propositions; and, as we cannot say that no part of the charge was sound, the exception thereto is insufficient. *Beaver v. Taylor*, 93 U. S. 54; *Code Wash. T. § 221*, subd. 6; *Ayrault v. Bank*, 47 N. Y. 576.

The jury returned the following verdict: "We, the jury in the above-entitled cause, find for the plaintiffs, and assess the damages at three thousand and fifty dollars and legal interest." The verdict was bad for uncertainty, and would not sustain a judgment for any sum whatever except by treating the words "and legal interest" as surplusage. It was the exclusive province and duty of the jury to fix the exact amount of damages by their verdict, and it was error to include in the judgment \$600 more than was found by the jury. For the errors above indicated the judgment of the court below must be reversed, and the cause remanded for a new trial in accordance with this opinion; and it is so ordered.

DUNBAR, SCOTT, and STILES, JJ., concur.

HOYT, J., not sitting.

(1 Wash. St. 230)

WESTERN MILL & LUMBER CO. v. BLANCHARD *et al.*

(Supreme Court of Washington. March 8, 1890.)

SALE—DELIVERY—EVIDENCE—PAYMENT—INTEREST.

1. Where, in an action for the price of certain logs, plaintiffs testify that, by the contract, the logs were to be delivered to defendant at the place where the contract was made, and defendant's agent, who made the contract, testified that he told plaintiffs that the logs could only be scaled at defendant's mill, evidence that the agent had no authority to purchase logs to be delivered elsewhere than at the mill is admissible as tending to show what the contract was; the place of scaling and place of delivery being treated as the same.

2. It was shown that payment was to be made 60 days after presentation to defendant of a draft drawn by its agent. There was no proof that the draft was ever issued, though payment was demanded of the agent several days after the contract was made. On a verdict for plaintiffs for a certain sum, "with legal interest," the court gave judgment for interest from a date 60 days after the making of the contract. *Held*, that such judgment was unauthorized.

DUNBAR, J., dissenting.

Appeal from district court, Jefferson county.

Action by Dudley Blanchard and George B. Blanchard against the Western Mill & Lumber Company. There was judgment for plaintiffs, and defendant brings error.

Struve, Haines & McMicken, for appellant. *C. H. Hanford and Eben Smith*, for appellees.

SCOTT, J. Appellees, who were plaintiffs below, brought suit to recover the contract price for certain saw-logs sold by them to appellant which were lost while being towed from the place of purchase to the company's mill. The controversy was as to which party assumed the risk of towage,—whether, by the contract made, the logs were delivered at the place where purchased, or whether they were to have been delivered by appellees at the mill aforesaid. The contract was made upon the part of appellant through one Villie, its special agent for that purpose. Upon the trial of the cause, appellant offered testimony to prove that Villie only had a special and limited authority to contract for the purchase of the logs to be delivered at the mill. Appellees objected to this testimony as immaterial. The court sustained the objection. Villie had testified previous to the offer that, in making the contract, he told appellees that he could not purchase the logs to be scaled at the place where the bargain was made, and that it was contrary to the company's rule to scale logs away from the mill. He also testified that the logs were to be paid for according to the scale at the mill, by the terms of the agreement.

Appellees claimed that by the contract the logs were delivered at the place where the bargain was made, and that appellant assumed the risk of towage, and they contend here that their proof as to the place of delivery was not contradicted by the testimony upon the part of appellant; that appellant's proof of a scaling to be made at the mill, by which the amount of the payment was to be determined, is not inconsistent with appellees' claim that the logs were delivered at the place where the bargain was made, and that thereby appellant assumed the risk of towage. We think, however, that the evidence was fairly contradictory upon this point. The place of scaling, whereon the payment was to be based, seems to have been treated at the trial below as synonymous with the place of delivery; and, if Villie's testimony was true, he substantially told appellees that he had no authority to buy the logs to be delivered at any other point than the mill. In this view of the case, the proof offered by appellant that Villie, as a matter of fact, had no such authority, was material, in that it was a circumstance to be weighed in connection with Villie's testimony as to what contract he actually did make; and the court should have admitted it.

It is also claimed by appellant that appellees recovered too large a sum. The contract was made December 7, 1886, as alleged in the complaint. It is admitted that the agreement as to the time, place, and manner of payment was that the appellant should pay for the logs at the city of San Francisco, where its principal place of business was located, 60 days after presentation to it there of a draft to be drawn by its agent at Port Hadlock upon it as drawee, and delivered to appellees immediately after delivery of the

logs. There is no proof that the draft was ever issued or demanded, but it appears that payment was demanded at Port Hadlock, December 10, 1886. The cause was tried in March, 1889. The jury returned a verdict in favor of appellees for \$4,230.87, "with legal interest." No time was specified in the verdict from which interest was to be allowed. Appellees claimed interest, in their complaint, from December 7, 1886. The court rendered judgment upon the verdict for \$4,230.87, "with legal interest thereon from and after the 6th day of February, 1887," and further added that the total sum for which judgment was rendered was \$5,135.79. In *Meeker v. Gardella*, ante, 837, (decided at this session of the court,) we held that a verdict similar to the one in this case would not support a judgment for any sum except by treating the interest clause as surplusage. The only contention made by appellants here, however, is that too large a sum was included in the judgment as interest; that, by the terms of payment agreed upon, no interest should have been charged for 60 days from and after the time necessary for presentation of the draft at San Francisco. In rendering the judgment, 61 days were allowed from the date of the contract, and less than 60 days from the day payment was demanded at Port Hadlock, as the non-interest bearing time; and, as it would, necessarily, have taken some days to have presented the draft at San Francisco, it is evident that not enough time was allowed, in any event, if there could have been any judgment at all on the verdict for accrued interest, and we are of the opinion that such a judgment was unauthorized. For these reasons the judgment of the lower court is reversed, and the cause remanded.

ANDERS, C. J., and HOYT and STILES, JJ., concurring. DUNBAR, J., dissenting.

(20 Nev. 425)

Fogg et al. v. NEVADA C. O. RY. CO. et al
(No. 1,312.)

(Supreme Court of Nevada. Jan. 31, 1890.)

NUISANCE—RAILROAD TRACK IN STREET.

1. Under Gen. St. Nev. § 8273, providing that anything which is injurious to health, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action, etc., a steam railroad and railroad track laid on wooden ties, and raised six or eight inches above the level of the street, and running along the middle of a public street 80 feet wide, is not such a special and peculiar injury to the residents on said street, different, in its nature as to danger of fire, danger to vehicles, foot-passengers, and children of tender years, from that sustained by the general public, as will warrant its abatement as a nuisance.

2. A bill to restrain such alleged nuisance, brought by owners of several and distinct lots having no common interest, is demurrable for misjoinder of parties.

Appeal from district court, Washoe county; R. R. BIGELOW, Judge.

Action to restrain a nuisance brought by Fogg, Brookins, and Peterson against the Nevada-California-Oregon Railway et al.

Judgment for defendants, and plaintiffs appeal.

Leonard & Lindsay, for appellants. *S. D. King*, for appellees.

HAWLEY, C. J. Action to restrain a nuisance. Demurrers to the complaint were interposed upon the grounds (1) that the complaint does not state facts sufficient to constitute a cause of action; (2) that there is a misjoinder of parties plaintiff; (3) that there is a misjoinder of causes of action. The demurrers were sustained, and judgment by default entered in favor of defendants for their costs. Plaintiffs appeal.

The complaint alleges that plaintiffs, Fogg, Brookins, and Peterson, are the separate owners of three certain town lots in Reno; that each of said plaintiffs has a dwelling-house upon his lot, in which he resides with his family, consisting, among others, of children of tender years; that said premises abut and front on East street, which runs at right angles to Third and Fourth streets,—all public streets in the town of Reno; that Brookins' lot abuts and fronts for 100 feet on the west side of East street; that Fogg's and Peterson's lots each abut and front for 50 feet on the east side of East street; that East street extends from Fourth street on the north, to Third street on the south, a distance of 400 feet; that East street, throughout its entire length, is of the uniform width of 80 feet; that since January, 1886, the "defendants, acting in concert, without authority of law, have wrongfully and unlawfully maintained, and do so now maintain, a steam railroad and railroad track of the width of three feet and four inches, in, over, and upon said East street, from the line of said Fourth street towards Third street, a distance of about 200 feet, and over and upon the aforesaid premises of plaintiffs;" that in May, 1889, the defendants in the same manner built and constructed over and upon the premises of plaintiffs, on East street, a branch track of same width, "from a point about 85 feet south of said Fourth street, southerly, in and upon said East street, a distance of about 235 feet;" that said tracks and railroad are a part of the general system of railroad communication for the carriage of freight and passengers between Reno and the state of California; that the main track, as constructed on East street, runs in the center of said street from Fourth street on the north, a distance of 75 feet, at which point said track bifurcates, one line running south-westerly, over and along East street, leaving it in a westerly direction at a point 170 feet south of Fourth street; the other running in a south-easterly direction, leaving East street on the east side thereof, at a point about 275 feet south of Fourth street, and north of Third street; that said tracks are laid on wooden ties imbedded in the soil, and are raised a height of from six to eight inches above the general level of the street; that said tracks and railroad so constructed and operated "are

an existing, continuing, and constantly recurring common nuisance and obstruction in said East street;" that by reason thereof each of said plaintiffs has sustained special damages, and is obstructed "in the free and lawful use of his said premises, and the comfortable enjoyment of his life, and his said property is seriously interfered with;" that defendants, at divers times in the day and night, run their trains, "rendering passage on said East street for vehicles and foot-passengers, and especially for children of tender years, extremely dangerous, and thereby rendering the destruction by fire of each of said plaintiffs' said dwelling-houses extremely probable by and from sparks of fire" from the locomotives; that the tracks and railroad, so constructed, operated, and maintained, render the approach for vehicles to the front of each plaintiff's residence "extremely difficult and unsafe, and practically prevent and hinder the approach of vehicles;" that defendants almost daily leave freight-cars standing for hours at a time in front of plaintiffs' residences, and unload freight of different kinds on East street, and use said street "to all intents and purposes as a freight depot, to the great annoyance and special damage of the plaintiffs, and each of them;" that "said nuisance, trespasses, wrongs, and injuries so inflicted upon plaintiffs, and each of them, greatly decrease the value of said several lands and premises of plaintiffs, and each of them, to their irreparable damage;" that defendants threaten to continue the nuisance, etc. The prayer is for an abatement of the nuisance, and for an injunction. No damages are asked.

Did the court err in sustaining the demurrers to this complaint? To enable the plaintiffs to maintain this action, it must be clearly shown that they have sustained, or will sustain, a special and peculiar injury, irreparable in its nature, and different in kind from that sustained by the general public. Appellants, in order to avoid this rule, which is universal, claim that this action is based upon the provisions of section 251 of the civil practice act, which, it is contended, changes the common-law rule upon this subject, and hence that the authorities from other states, based upon such rule, are not applicable to this case. The statute reads as follows: "Anything which is injurious to health, or indecent and offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered." Gen. St. § 3273. This statute, instead of changing, simply affirms the rule above stated. *Prosser v. City of Ottumwa*, 42 Iowa, 511; *Innis v. Railway Co.*, 76 Iowa, 167, 40 N. W. Rep. 701. It was copied from the stat-

ute of California, and, prior to its adoption by the legislature of this state, the supreme court of that state, in construing the statute, held, in *Blanc v. Klumpke*, that if the nuisance complained of only affects "the plaintiff in common with the public at large, although in a greater degree, he cannot have his private action." 29 Cal. 159. This principle, under the same statute, was subsequently affirmed in *Yolo Co. v. City of Sacramento*, 36 Cal. 195, and in *Grisby v. Water-Works Co.*, 40 Cal. 406. The contention of appellants, as to the construction of the statute, is untenable.

Appellants claim that the allegations of the complaint are sufficient to show that they have sustained damages special and peculiar to themselves, and different in character from that which is common to the public. It must be admitted that it is sometimes difficult to determine whether or not the alleged injuries caused by a common nuisance are of a kind that give to individuals a right of action. Among other things, regard must always be had to the locality where the alleged nuisance exists, as the application of certain facts might be different in large cities from that of smaller towns and villages, or in the country. The people in each locality are, of course, equally entitled to the free protection of the law; but the danger of fire, depreciation of property, deprivation of its enjoyment, inconvenience or annoyance in crossing a street or road, would be different in degree and kind in different localities. *Robinson v. Baugh*, 31 Mich. 297; *Sparhawk v. Railway Co.*, 54 Pa. St. 430. "To enumerate all the special instances would be an endless, as well as utterly useless, task, for the fact that a nuisance has been restrained in one case furnishes no reason why it should be refused or granted in another, as each case must stand upon its own facts, circumstances, and equities, and no definite or precise standard can be given." *Wood, Nuis.* § 809. As the plaintiffs declined to amend their complaint after having been granted a reasonable time so to do, it must be presumed that the facts are stated in the complaint as strongly as they could be drawn in favor of the plaintiffs. The averment relative to the branch track does not merit any consideration, as it is not specific enough to enable us to determine whether or not any special injury, other than is alleged by the construction of the main track, is occasioned thereby. Its exact location is left uncertain. It is not shown upon which side of the street or of the main track it runs, nor is it stated how far distant from the main track or from the sidewalk it is. The allegation of the complaint, relating to the danger from fire and to the depreciation in value of appellant's property, are wholly insufficient to enable them to maintain this action thereon, for the reason that they are merely conclusions of law. No facts are stated which enable the court to determine whether there is any danger of fire from the locomotives attached to defendant's cars.

The mere running of railroad trains, propelled by steam, through the public streets of a town, is not of itself sufficient to constitute a nuisance on account of the remote probability that a fire might be, at some indefinite time in the future, occasioned by sparks escaping from the locomotives, and igniting the buildings adjacent to the street. It is not alleged that any sparks of fire have ever occurred from this cause, or that defendants are not using the most improved appliances and the best means within their reach to prevent the destruction of property by fire. Courts do not deal with such remote probabilities as are alleged in this averment. Something tangible and real, upon which opinions can be based and judgments formed, must be stated. It is not enough to allege that the party fears such things might happen. He must state the facts upon which his fears are founded. The allegation with reference to the depreciation in value of the lots owned by plaintiffs is subject to the same objection. No facts are stated which justify the conclusion drawn. No tenants have been lost, no sales prevented. The question whether property adjacent to a street, upon which a railroad track is laid, is increased or decreased in value, depends upon the facts and circumstances surrounding each case. Conclusions are also drawn in certain other averments which are not supported by the facts stated. Injunctions ought not to be granted in cases of this character, unless "the threatened use of property or the act sought to be restrained is clearly shown to be such as leaves no doubt of its injurious results; such results as are recognized to be substantial legal injuries. The bill must set forth such a state of facts as leaves no room for doubt upon the question of nuisance, for, if there is any doubt upon that point, the benefit will be given to the defendant. Mere allegations of conclusions or opinions as to the contemplated injuries are not sufficient. The precise manner in which he is to be injured must be stated." *Garnett v. Railroad Co.*, 20 Fla. 902. In *Lewiston T. Co. v. Shasta & W. W. R. Co.*, the court said, citing from previous cases, "that where the damages are special—that is, such as do not necessarily arise, or are not implied by law, from the act complained of—the facts out of which the damages arise must be averred in the complaint." 41 Cal. 565.

The allegations in the complaint relative to the danger and difficulty of vehicles, foot-passengers, and children of tender years passing to and from appellants' residences, and on, along, and over the street, constitute an annoyance and inconvenience which appellants suffer in common with the general public, and affords no ground for a private action. "The courts very wisely have unwaveringly adhered to the rule that an individual, in order to be entitled to a recovery for injuries sustained from a public nuisance, must make out a clear case of special damages to himself, apart from the rest of the public, and of a different character, so that they cannot

fairly be said to be a part of the common injury resulting therefrom. It is not enough that he has sustained more damage than another; it must be of a different character, special and apart from that which the public in general sustain, and not such as is common to every person who exercises the right that is injured." Wood, Nuis. § 646.

Appellants refer to several cases where the courts have sustained the right of an individual or individuals to abate a public nuisance, and recover damages, on account of obstructions caused by railroad cars standing in the streets, or so running along a street as to prevent egress and ingress to the property of the individual. The cases are too numerous to be reviewed at any length. We cite enough, however, to illustrate the general principles upon which the distinctions referred to are founded. In the recent case of *Jackson v. Kiel*, 22 Pac. Rep. 504, the complaint alleged facts showing clearly "that the ingress and egress to and from plaintiff's property by vehicles was had solely by means of the intersection of Wyncoop street [in the city of Denver] with Tenth,—the street upon which his lot fronts; in no different way, circuitous or otherwise, could his premises be thus reached;" that the defendant "kept a large number of railway cars on Wyncoop street, across the space of its intersection with Tenth; that during the entire period covered by the complaint the obstruction thus created rendered it absolutely impossible for vehicles of any kind to reach plaintiff's premises." These facts were held sufficient to show that "plaintiff had suffered a special and peculiar private injury." In *Railway Co. v. Nave* the respondents were the owners of large buildings used as warehouses fronting on second street in the city of Atchinson, which street was only 50 feet wide. There was a broad-gauge railroad in the center of the street, which of itself did not interfere with or injure the business of respondents. Appellants obtained the right of way to construct a street railway on second street within 15 feet of the sidewalks. The respondents, in the ordinary and usual transaction of their business, used transfer wagons 20 to 22 feet in length, and 7½ feet wide. The laying down of the second track was such an obstruction of the street as to interfere directly with the use of their buildings and the conducting of their business, and upon these facts the court said "that the injury resulting from the obstruction of the street is one that is special and peculiar to the plaintiffs below, and independent of and different from the general injury to the public." 38 Kan. 752, 17 Pac. Rep. 591. In *Neitzey v. Railroad Co.*, the defendant, in addition to its main track on a street 60 feet in width, laid four other separate tracks, "and, not content with passing over its main track, converted the whole street, to the width mentioned, to the purposes of a freight depot or station, by placing cars on those tracks, and allowing them to remain permanently; by loading and

unloading its cars, a great deal of the freight of which was of a very noxious and offensive character, such as manure, fertilizers, etc.; that it allowed cattle-cars to stand there, and cars that had been used for the transportation of cattle, manure," etc. The court very properly said that the railroad company was not authorized, under the acts of congress "to convert the public highways, the streets and avenues of the city, into freight-yards. The proper place for cars, when not in use, is the depot, station, or yard of the company, and the proper place to load and unload freight is a freight station;" yet, notwithstanding these facts, if the inconvenience resulting from them only affected the general public, it was held that it should only be treated as a public nuisance. "But when these cars have been used for the conveyance of offensive matter, so as to infect the whole atmosphere with noxious odors, and when the freight loaded and unloaded there consists of similar material, and the process of bringing the cars there and taking them away for the purpose of loading and unloading causes annoyance by jarring the neighboring houses, and the smoke from the engines penetrates the dwellings, all this then becomes more than a public nuisance,—it becomes a private nuisance," actionable by individuals who have suffered this species of injuries. 5 Mackey, 34.

From these and other authorities cited in the briefs of counsel, and from the discussion of the principles and review of the authorities in Wood on Nuisances, in chapter 19, relating to private actions for injuries from public nuisances, section 645 et seq., and in chapter 25, relating to remedies in equity, section 777 et seq., it will readily be seen that the controlling principle which gives the right of action to private individuals to abate a public nuisance is the invasion, impairment, or destruction of a common right which they possess, independent, separate, and distinct from the rights enjoyed by the general public. If the alleged wrongful act is only an obstruction to the exercise and enjoyment of a right common to the public as well as to the individuals, then the remedy is by an information filed by the attorney general or district attorney on behalf of the public, or by indictment. But if the facts alleged and proven constitute an injury to the health, or is indecent or offensive to the senses or creates an obstruction to the right of enjoyment and use of the property of individuals which is common to them, then the nuisance becomes as to them a private nuisance, constituting a special and peculiar injury, distinct from that of the public, for which they can maintain an action, although such wrongs and injuries might also so far affect the public as to be actionable by information or by indictment.

The averments under consideration do not state facts sufficient to enable appellants to maintain this action. East street is 80 feet wide. The main track is in the center thereof, leaving ample room for foot-passengers and vehicles to pass each other on both sides

of the track. The obstructions complained of do not prevent ingress or egress to the premises of appellants; do not invade any right, or destroy the use of their property, or impair its value, to any appreciable degree. They constitute an annoyance and inconvenience, at times, to appellants and their families; to pedestrians and drivers of vehicles having occasion to travel on or across the streets at the places mentioned in the complaint. Appellants have the undoubted right to pass over the street, but the injury to them in being occasionally prevented from so doing is an injury and danger also suffered by the rest of the public. "It makes no difference, as to the remedy, that they would probably have more occasion to use this part of the road than most others would. The injury still consists in their being deprived of the enjoyment of a common public right, which is not their private property." *Higbee v. Railroad Co.*, 19 N. J. Eq. 279; *Hogan v. Railroad Co.*, 71 Cal. 86, 11 Pac. Rep. 876; *Wood, Nuis.* § 646. Mere inconvenience, such as is alleged in the complaint, is not sufficient to authorize the plaintiffs to maintain this suit. There must be an injury of such a character as to affect the ordinary use and enjoyment of the property of plaintiffs. It must be real and substantial. There must be an interference to a convenience that exists as a legal right in the plaintiffs distinct from the rights of the public. *Wood, Nuis.* §§ 790, 800, 801; *Sparhawk v. Railway Co.*, 54 Pa. St. 427, 430.

The mere fact that the alleged inconvenience and annoyance is greater in degree to the plaintiffs than it is to other citizens does not authorize a private action to be maintained. All the authorities agree that, to support the action, the damage must be different, not merely in degree, but different in kind, from that suffered in common; hence it has been well settled that, though the plaintiff may suffer more inconvenience than others from the obstruction, by reason of his proximity to the highway, that will not entitle him to maintain an action. *Wood, Nuis.* § 646; *Ranch Co. v. Brooks*, 74 Cal. 465, 16 Pac. Rep. 250; *McCowan v. Whitesides*, 31 Ind. 237; *Hartshorn v. Inhabitants of South Reading*, 3 Allen, 504; *Clark v. Railroad Co.*, 70 Wis. 597, 36 N. W. Rep. 327; *Wesson v. Iron Co.*, 13 Allen, 101; *Proprietors, etc., v. Newcomb*, 7 Metc. 283; *Brainard v. Railroad Co.*, 7 Cush. 510; *Stetson v. Faxon*, 19 Pick. 160; *Shaubut v. Railroad Co.*, 21 Minn. 504; *Houck v. Wachter*, 34 Md. 272; *Marini v. Graham*, 67 Cal. 132, 133, 7 Pac. Rep. 442.

There is but one other averment in the complaint which requires any further discussion. It is the one principally relied upon by appellants as clearly showing a special and peculiar injury to them, to-wit, the averment that they respectively own the land in fee of said East street "to the middle thereof, in front of his said premises; said ownership in said street in said plaintiff being subject only to an easement in the general public for use

for the ordinary purposes of a public street in said town of Reno." Numerous authorities are cited to show that the law presumes such ownership independent of any such averments in the complaint. Appellants, therefore, claim that they have such an interest in the street as to enable them to enjoin defendants from maintaining a railroad track and running cars thereon without their consent, "without employing legal methods and making compensation therefor." Admitting, for the purposes of this decision, (without considering the question,) that they own the land, as claimed, to the middle of the street, it is apparent that such an interest would only give them an individual right of action, and that, in relation to this averment, the other grounds of the demurrers are well taken. The rule is well settled that where the injury is common to several different property owners, they may all unite in one action for an injunction to restrain a private nuisance; but the injury here complained of is not of such a character.

We have been referred to several cases like *Reid v. Gifford*, 1 Hopk. Ch. 419, where several proprietors of distinct lands and mills, and of separate parts of a natural water-course, were permitted to join in one suit for a common injury to their property. The correctness of that principle is not questioned. We have already stated that the rule governing such cases is well settled. In *Schultz v. Winter* this court had occasion to distinguish the facts in that case from those mentioned in *Reid v. Gifford*, and in deciding that the demurrer to the complaint was well taken, said: "The complaint not only fails to show any community of interest between the plaintiffs, but clearly negatives any common interest. * * * They ask not that the waters of the creek may flow over their lands in the natural channel, but that each, * * * may divert, use, and dissipate certain specified portions thereof." 7 Nev. 133.

The injury to the lands of plaintiffs, which we are now considering, is not a common injury to them. There is no community of interest between the plaintiffs in regard thereto. The injury to the fee of Fogg, as the owner of a town lot, is an individual injury to him. Neither Brookins nor Peterson have any interest in the land owned by Fogg, and hence cannot recover for any injury which simply relates thereto. So of each of the parties. In the cases where injunctions were issued upon the ground of plaintiff's interest in the land to the middle of the street, the actions were brought by the individual owner or owners of the land. In *Hinchman v. Railroad Co.* the complainants were, as here, respectively, the owners of lots abutting on the street, and claimed title to the middle of the street, and sought to enjoin the construction of defendant's railroad upon the ground, among others, that it was "taking the property of complainants for public use 'without just compensation.'"

The court, after stating the presumption of law to be "that the owners of the land on each side of the street own to the middle of the street, and have the exclusive right to the soil, subject to the right of way," said: "The bill is objectionable on the ground of a misjoinder of parties. The complainants are owners of several and distinct lots, having no common interest, but seeking to enforce several and distinct claims. They seek to enforce no common right, as in case of right of common, nor to obtain relief against a common wrong. * * * The bill seems to have been framed under the impression that the nuisance was a grievance common to all the land-owners, and therefore that all might properly be joined. But each complainant seeks relief for special injury to his own property by the construction of the railroad. On this ground the bill is clearly demurrable. 17 N. J. Eq. 82. See, also, *Yate v. Railroad Co.*, 10 Ind. 174; *Dacey, Parties*, rule 78, p. 347; *Id.* rule 80, p. 401; *Railroad Co. v. Prudden*, 20 N. J. Eq. 539; *Demarest v. Hardham*, 34 N. J. Eq. 472. The judgment of the district court is affirmed.

(18 Or. 426)

MCALLISTER v. CITY OF ALBANY.

(Supreme Court of Oregon. Feb. 11, 1890.)

EXCAVATIONS IN STREETS—LIABILITY OF CITY FOR INJURIES.

A municipal corporation, upon whom its charter imposes the duty to keep its streets in a reasonably safe condition for travel, is liable to persons for injuries caused by neglect to keep proper lights and guards at night around an excavation which it has authorized to be made in the street, although it has provided in its contract for such precautions with the contractor.

(Syllabus by the Court.)

Appeal from circuit court, Umatilla county; J. A. FELL, Judge.

John Burnett and Chas. Wolverton, for appellant. *J. K. Weatherford and D. R. N. Blackburn*, for respondent.

LORD, J. This is an action to recover damages for injuries sustained by the plaintiff in consequence of a ditch dug across a certain street of said city for the construction of a sewer being left open, and without lights or guards, into which the plaintiff drove his team, and seriously injured himself and team. Among other defenses, the main one relied upon, and the only one necessary for us to decide, is that the defendant claims that the act occasioning the injury was caused by one Walter East, to whom the defendant had let a contract for the construction of a sewer, and that by the terms of said contract the said East was an independent contractor, and as such had the exclusive control of digging said ditch, and the direction and management of the laborers engaged in the work, and that the said contractor is alone liable, and that the plaintiff ought not to have or maintain an action against the defendant. Our inquiry, then, is reduced simply to this: Who is liable to the plaintiff

for the injuries he has sustained,—the contractor or the defendant?

No rule of law is better settled than that one who contracts with another for the performance of certain work is not liable for injuries produced to third persons by the negligence of the latter in the performance of that work when the relation of master and servant does not exist. Whether the rule applies to a municipal corporation owing a duty to the public to keep its streets safe for travel is a question which has been much discussed, and upon which there is some diversity of judicial opinion. To the general rule, as stated, the cases indicate that there are two exceptions: *First*, where the work is intrinsically dangerous to the public, however skillfully performed, and the injury results directly from the work; in such case the liability cannot be avoided by contract, either by individuals or municipalities; and, *second*, where the law devolves the duty upon a municipal corporation to keep its streets in a safe condition for travel; in such case the authorities are not agreed, but the later and better considered cases hold that the municipality is liable to persons for injuries arising from neglect to keep proper lights and guards around a ditch or excavation which it has caused to be made in the streets, and that such liability cannot be evaded by contract. Under the first exception, Mr. Dillon, after stating that "the principle of *respondent superior* does not extend to cases of independent contracts, where the party for whom the work is to be done is not the immediate superior of those guilty of the wrongful act, and has no choice in the selection of workmen, and no control over the manner of doing the work under the contract," (section 1028) adds: "It is important to bear in mind that it does not apply where the contract directly requires the performance of a work intrinsically dangerous, however skillfully performed. In such a case the party authorizing the work is justly regarded as the author of the mischief resulting from it, whether he does the work himself or lets it out by contract." Dill. Mun. Corp. § 1029. As the case in hand comes under the second exception, further reference to the doctrine and cases under the first exception is not required.

It is unnecessary to recite the provisions of the charter at length; for it is not denied but that the charter of the defendant imposes the duty to keep its streets in a safe condition for travel, and that this obligation it assumed as a governmental agency. The charter not only imposes the duty, but it confers the necessary powers to carry out and effect the object for which the duty was imposed. Can it devolve the performance of this duty upon another, or can it evade it by contract or otherwise? It would seem, from the intrinsic nature of the duty confided to the city, that it could not delegate it to another, by contract or otherwise, so as to escape liability for negligence. Mr. Dillon says: "Ac-

cording to the better view, where a dangerous excavation is made, and negligently left open, without proper lights, guards, or covering, in a traveled street or sidewalk, by a contractor under the corporation for building a sewer or other improvements, the corporation is liable to a person injured thereby although it may have had no immediate control over the workmen, and had even stipulated in the contract that proper precautions should be taken by the contractor for the protection of the public, and making him liable for accidents occasioned by his neglect." *Id.* § 1027. In *Storrs v. Utica*, 17 N. Y. 104, it was held that a municipal corporation, owing to the public the duty of keeping its streets in a safe condition for travel, is liable to persons receiving injury from neglect to keep proper lights and guards at night around an excavation which it has caused to be made in the street, whether it has or has not contracted for such precautions with the persons executing the work. This is regarded as a leading case, and, like the case in hand, was an action against the city for negligence in suffering to remain open, and without proper lights and guards, at night, an excavation in the street made in the construction of a sewer, by reason of which negligence the plaintiff drove a wagon in the sewer, and was injured. After reviewing previous decisions of the court, Judge COMSTOCK says: "But in *Blake v. Ferris* [5 N. Y. 48] there was a difference in the facts which may justify the doubt I have suggested. In that case there was no complaint of negligence in the actual performance of the work. The ditch was carefully and skillfully dug. There was no careless projection of rocks against horses or travelers. The plaintiff's carriage and horses were driven into the ditch because it was not guarded at night. The cause of the accident, therefore, was not in the manner in which the work was carried out by the laborers. If it had been, their immediate employer, and he only, was liable for the injury. But, in a sense strictly logical, as it seems to me, the accident was the result of the work itself, however skillfully performed. A ditch cannot be dug in a public street, and left open and unguarded at night, without imminent danger of such casualties. If they do occur, who is the author of the mischief? It is not he who causes the ditch to be dug, whether he does it with his own hands, employs laborers, or lets it out by contract?" The learned judge then proceeds: "The principles suggested become plain propositions in the case of a municipal corporation, which owes to the public the duty of keeping its streets in a safe condition for travel. * * * Although the work may be let out by contract, the corporation still remains charged with the care and control of the street in which the improvement is carried on. The performance of the work necessarily renders the street unsafe for night travel. This is a result which does not at all depend on the care or negligence of the

laborers employed by the contractor. The danger arises from the very nature of the improvement; and, if it can be averted only by special precautions, such as placing guards or lighting the street, the corporation which has authorized the work is plainly bound to take those precautions. The contractor may very probably be bound by his agreement not only to construct the sewer, but also to do such other acts as are necessary to protect travel. But a municipal corporation cannot, I think, in this way, either avoid indictment in behalf of the public, or its liability to individuals who are injured." It is true the question is not entirely free from difficulty, and that the doctrine of *Barry v. St. Louis*, 17 Mo. 121, and *Painter v. Mayor*, 46 Pa. St. 213, relied upon and cited by counsel for the defendant, sustains their position; but we think the weight of authority, as well as sound reason and public policy, is against them. See *Storrs v. Utica*, 72 Amer. Dec. 441, note; *Robbins v. Chicago*, 4 Wall. 657; *Water Co. v. Ware*, 16 Wall. 566; *St. Paul v. Seitz*, 3 Minn. 297, (Gil. 205); *Mayor v. McCary*, 84 Ala. 470, 4 South. Rep. 630; *Mayor v. O'Donnell*, 53 Md. 110; *Logansport v. Dick*, 70 Ind. 65; *Detroit v. Corey*, 9 Mich. 165; *Springfield v. Le Claire*, 49 Ill. 476; *Circleville v. Neuding*, 41 Ohio St. 465; *Nashville v. Brown*, 9 Heisk. 1; *Wilson v. Wheeling*, 19 W. Va. 323; 2 Dill. Mun. Corp. §§ 1027, 1029, 1030. It is undeniable that the ditch dug across the street for the purpose of constructing the sewer was performed by the contractor under the express authority of the city. It let the contract to him to do the work as specified, and authorized him to excavate the street for that purpose, but the primary obligations to keep the street in a reasonably safe condition for travel devolved upon it by laws from which it could not divorce itself by contract. Such a ditch, left uncovered, and not properly lighted or guarded at night, across a public street, necessarily involved great danger and liability to injury to those who might have to travel it. The public have a right to assume that a duty imposed by law is performed, and that, in the absence of notice by lights or safeguards, such duty will be attended to, and the street kept in a reasonably safe condition for travel. Such a duty cannot be evaded by contract. When the municipality makes a contract with a person for the construction of a sewer, which necessarily requires an excavation in the street that will render it unsafe and dangerous to travelers at night, unless protected by lights and guards, and such person, although an independent contractor, in the prosecution of the work leaves the street in an unsafe condition for travel, by reason whereof an injury is sustained by another, the corporation will be liable, without regard to the stipulations in the contract in respect thereto. While the defendant very properly has provided in its contract that the contractor shall, in the prosecution of the work, observe all necessary precautions

against accidents from leaving the street in an unsafe condition, yet it cannot avoid liabilities for injuries resulting from negligence to observe these precautions not caused by the plaintiff's want of ordinary care, and must see to it that such duty is fully performed, to avoid liability therefor. The judgment must be reversed, and the cause remanded for such further proceedings as may be necessary in accordance with this opinion.

(18 Or. 470)

ROSENBURG et al. v. CROISAN et al.

(Supreme Court of Oregon. Feb. 11, 1890.)

EXECUTION SALE—REDEMPTION OF LAND.

1. A successor in interest of a judgment debtor may redeem after confirmation of the sale.

2. Under our statute, the right to redeem is not merely a privilege personal to the debtor, but is a right of property, and subject to bargain and sale.

(Syllabus by the Court.)

Appeal from circuit court, Marion county;
R. P. BOISE, Judge.

S. T. Richardson and M. W. Hunt, for appellant. *Tilmon Ford and Louis H. Tarp-ley*, for respondent.

LORD, J. This is a proceeding to compel the execution of a sheriff's deed. The facts are these: The plaintiffs were purchasers at a sheriff's sale of the land in controversy, and subsequently the sale was confirmed, and thereafter one Smith made a quitclaim deed of the same to the defendant Skiff, who served notice to redeem from plaintiffs, and which plaintiffs refused to allow; that, after the expiration of four months after confirmation of the sale, the plaintiffs demanded a sheriff's deed from the defendant Croisan, as sheriff, and the said defendant refused, etc. The only question presented by the facts, which were stipulated, is, could the defendant Skiff redeem the premises from the plaintiffs as successor in interest of said Smith and the judgment debtor? The lower court held in the affirmative, and the appeal is to determine the correctness of that holding. It will be noted that the confirmation of the sale had been made to the plaintiffs as purchasers before the judgment debtor, Smith, transferred his right of redemption to the defendant Skiff, and the contention of the plaintiffs is that the statute does not authorize a successor in interest to redeem after confirmation of the sale. The proper solution of the question requires an examination of the provisions of our statutes in regard to the subject, and the purpose of them. It is provided by section 300, Code Or., that "property sold subject to redemption, * * * or any part thereof separately sold, may be redeemed by the following persons or their successors in interest: (1) The judgment debtor or his successor in interest in the whole or any part of the property separately sold," etc. Section 303 provides that "the judgment debtor or his successor in interest may redeem the property at any time prior

to the confirmation of sale, on paying the amount of the purchase money, with interest at the rate of ten per centum per annum," etc. "But, if the judgment debtor do not redeem until after confirmation of the sale, thereafter he shall redeem within four months from such order of confirmation, and not otherwise."

The construction given to these by counsel for plaintiffs is that the former section is intended to name the classes of persons who may redeem, and the latter the time within which each person of that class may redeem; and that as the last section (303) mentions the judgment debtor or successor in interest prior to the confirmation as one who may redeem, but wholly omits the successor in interest after the confirmation of the sale, the right to redeem belongs only to the judgment debtor, who is expressly mentioned; and that, therefore, the time within which the defendant Skiff, as a successor in interest of Smith, the judgment debtor, is entitled to redeem, is after sale, and before confirmation, but not after confirmation. His argument is, as the proceeding is statutory, and the right conferred statutory, that a person claiming the right to redeem must show, not only that he comes within a class entitled to redeem, but he must show that he comes within the time limited by that class to redeem, and unless he does so, under the canons of construction, the court cannot aid him by intendment or construction, not supported by the words of the statute. It is said that the statutory right to redeem is not a property right which is subject to bargain and sale, but a mere privilege conferred by law, and, when a certain class of persons are enumerated who are invested with the right to redeem, it excludes all other classes not named. *Powers v. Andrews*, 84 Ala. 291, 4 South. Rep. 263. But our section, (300,) in enumerating the classes who may redeem, expressly mentions the successor in interest, which plainly means and recognizes that the statutory right to redeem is a property right, subject to sale and transfer like other property rights derived from law and conferred upon the judgment debtor or his successor in interest, to whom he may transfer such right to redeem. In the light of the statute, the right to redeem is regarded as valuable, and, in order to give the judgment debtor the benefit of it, he may exercise such right himself, or he may transfer it to another who becomes his successor in interest, and entitled to exercise such right. The right, then, under our statute, is not merely a privilege personal to the judgment debtor, but a right of property which is the subject of bargain and sale. It follows, on principle, that so long as the right to redeem exists in the judgment debtor, and his property while it so exists, it is the subject of bargain and sale, and, as this continues after confirmation, he may sell or assign it, and his successor in interest redeem the property. Nor is there anything in the statute in contradiction of it. There was no need of mentioning

expressly the successor in interest, after the right to redeem was conferred upon him and authorized; for that indicated that such right was regarded not as a mere personal privilege, but a right of property, and subject to a contract of bargain and sale, and, so long as such right to redeem exists in the judgment debtor, he may have a successor in interest, and, as such right may exist in him after confirmation, it is the subject of contract or sale, and his successor in interest may redeem after confirmation, and consequently the defendant Skiff was authorized to redeem. Nor is this result inconsistent with the construction of these provisions, as stated by Mr. Justice DEADY in *Lauriat v. Stratton*, 6 Sawy. 348, 11 Fed. Rep. 107, in which he says: "A redemption, then, by either of the successors in interest of Mary R. Hall, at any time while the property was subject to redemption, whether before or after the confirmation of the sale, put an end to the proceeding, and thereafter such successor held the property as though no sale of the same had ever been made." This view is in harmony, too, with the general impression which has prevailed in the profession as to the interpretation of these provisions, and the right of the successor in interest to redeem after confirmation. While it is due to say that the counsel for the plaintiffs presented his point clearly and argued it ably, we are not prepared, for the reasons stated, to concur in his conclusions, and must therefore affirm the judgment.

(23 Or. 20)

WOOD v. LOST LAKE & C. MANUF'G CO.
et al.

(Supreme Court of Oregon. March 4, 1890.)

CORPORATIONS—INSOLVENCY—SALARY OF PRESIDENT.

1. A director of a private corporation is not legally entitled to compensation for services rendered in the performance of duties appertaining to his office, unless it is provided for by a resolution or by-law of the corporation, adopted prior to the time of the performance of the services; nor will the auditing and allowance of a claim for such services by the board of directors of the corporation render it legally binding upon the corporation, in the absence of proof of such prior resolution or by-law.

2. Where the president of a board of directors of a private corporation presented a claim for salary to the board, which it allowed, and the corporation thereafter made an assignment for the benefit of its creditors, in accordance with the statute in such case made and provided, and the president subsequently presented to the assignee of the insolvent corporation a claim for the amount of salary so allowed, to which certain parties interested in the insolvent estate filed exceptions, on the grounds that the claimant had rendered no services as president, and the matter was thereupon tried by jury, and it appeared upon such trial that the by-laws of the corporation provided that the salary of the president and its other officers should be fixed by the board of directors, but that no agreement had been made or anything said upon the subject, nor any action taken by the corporation in regard thereto prior to the time of such allowance by the board, *held*, that the claim was not a valid or binding obligation upon the cor-

poration, and could not legally be enforced against its estate in the hands of the assignee.

(Syllabus by the Court.)

Appeal from a judgment of the circuit court for the county of Wasco, rendered in a case of exceptions to the appellant's claim against an insolvent estate. The Lost Lake & Columbia Manufacturing Company, a corporation organized under the laws of this state, on or about the 23d day of September, 1887, made a general assignment for the benefit of its creditors. The corporation was organized about the 1st day of September, 1883, for the purposes of constructing and maintaining a canal and flume for water-power, and of building and operating a mill to manufacture lumber at Hood River, Wasco county. It thereupon engaged in the enterprise and business for which it was organized, and prosecuted the same until it made the assignment, during which time it manufactured and sold large quantities of lumber to divers parties. On the 17th day of September, 1887, the mill was accidentally destroyed by fire, which occasioned the assignment. The appellant was a stockholder and director in the corporation during its existence, and was also the president of its board of directors. It appears from the bill of exceptions that on the 22d day of September, 1887, the board of directors held a special meeting, at which, among other proceedings, the following were had: "Present, B. P. Cardwell, T. A. Wood, and E. C. Miller; T. A. Wood in the chair. The president reported that information had been received that on the morning of the 17th the saw-mill owned by this company had been destroyed by fire. A bill for salary was presented by the president, T. A. Wood, for \$4,800. On motion, the bill was ordered paid. A bill for salary was also presented by the manager, E. C. Miller, for \$400. On motion, the same was ordered paid." That the board then proceeded to adopt a preamble and resolutions to the effect that, as the corporation was indebted in a sum exceeding \$14,000, it had not the money to pay the indebtedness, and, as it was desirable that the property should be equally divided among its creditors, that, therefore, the president and secretary be and were authorized, empowered, and directed to make a general assignment of all its property for the benefit of its creditors; in pursuance of which, the said assignment was made at the time aforesaid to one Joseph L. Melrath. That the said assignee duly qualified and entered upon the discharge of his trust. That subsequently the appellant presented a claim against the estate of the insolvent, including in the claim the said \$4,800, which was allowed by the assignee. Thereafter, however, certain of the creditors of the estate, who had presented claims against it, filed exceptions to the appellant's said claim, upon the grounds that he had not rendered any services as president of the corporation during the time for which he had charged the salary allowed by the board. That the appellant filed an

answer to the said exceptions, raising an issue of fact, which was tried by jury.

It appeared on said trial that the by-laws of the corporation provided as follows: "The salaries of the president, vice-president, and controller shall be fixed by the board of directors. Those of all subordinate officers shall be fixed by the manager, subject to the approval of the board." And it also appeared that there was no agreement that the appellant should receive any salary for acting as president, and nothing was said nor any action taken by the corporation in regard thereto prior to the meeting of the directors before referred to, and their alleged proceedings at that meeting. Upon the trial of the said issue, the jury returned a verdict that the appellant had a just and valid claim against the insolvent corporation for \$1,429.91 for moneys advanced and interest, and for the further sum of \$800 for services, making a total of \$2,229.91. On this verdict the judgment appealed from was entered.

E. B. Dufur, for appellant. *J. H. Woodward*, for respondent.

THAYER, C. J., (*after stating the facts as above.*) The appellant's counsel urged at the hearing two points with much force and reason: *First*, that the board of directors of the insolvent corporation having fixed and allowed the appellant's compensation for services as president of the board for the time charged,—\$150 a month, for the previous 32 months,—the allowance so made was conclusive upon the exceptors; *second*, that the uncontroverted testimony given on the part of the appellant at the trial proved, as a matter of law, that he was entitled to such allowance, and that it was error on the part of the jury to find thereon that he was only entitled to \$800. I was inclined to believe, when the question was presented at the argument, that the allowance of the appellant's claim by the board of directors, as shown by the proof, was, at least, *prima facie* evidence that he was entitled to the sum allowed. Section 3225, Ann. Code, provides: "From the first meeting of the directors the powers vested in the corporation are exercised by them, or by their officers or agents, under their direction, except as otherwise specially provided in this chapter;" and my first impression was that an allowance so made would be regarded as correct and valid, unless impeached for fraud or collusion. I find, however, upon an examination of authorities bearing upon the subject, that such an allowance on account of past services cannot legally be made, and some of them go so far as to hold that a board of directors of a corporation cannot contract with one of its own members for compensation, unless authorized to do so by the charter of the corporation. In *Association v. Stonemetz*, 29 Pa. St. 534, the court, by PORTER, J., in the concluding part of the opinion says: "If the services of the director become important to the corporation, let him resign, and enter its

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employment like any other man. If it be proper that directors generally should receive compensation, let it be so provided in the organic act which creates the body. Those who commit their money to its care will then do it with their eyes open. Until this be provided, there is no reason, in law or morals, for allowing their property to be taken without their knowledge or consent." The decision in this case is very pronounced that a resolution passed by a corporation after such services are rendered is without consideration, and imposes no obligation on the corporation which can be enforced by action. So, also, is the decision in *Kilpatrick v. Bridge Co.*, 49 Pa. St. 118. Both these decisions hold that corporations are not liable for services performed by their officers, unless rendered in accordance with an express contract for compensation entered into prior to such performance. The same principle was also adhered to in *Cheaney v. Railway Co.*, 68 Ill. 570. In the latter case a director in a railway corporation was appointed a member of the executive committee thereof, and acted as such for a length of time; he was also appointed an agent of the company to transact other of its affairs. He charged for his services in both cases, and presented a claim therefor to the company amounting to \$4,000, which was audited by its executive committee, and the board of directors of the corporation, at a meeting subsequently held by them, appropriated \$25,000 to pay this claim and certain other ones. The court, in an action to enforce the payment of the said claim, held that the claimant was not entitled to recover for the services rendered by him for the company as director; that, in order to entitle him to recover compensation for such services, it must have been provided for and fixed in the by-laws, or by resolution of the directors spread upon the minutes of their proceedings before the services were rendered. The court, however, held that the claimant was entitled to recover for services rendered for the company which did not pertain to his duty as such director. This doctrine was recognized as the law and maintained in *Graves v. Mining Co.*, decided by the supreme court of California, and reported in 22 Pac. Rep. 665. From these, and a great many other authorities which might be cited, it is evidently a settled rule of law that a director in a corporation acquires no legal claim against it for services performed by him in the discharge of duties pertaining to the office or trust, unless a compensation therefor was fixed by a resolution or by-laws of the corporation prior to the performance of the services, and that the auditing and approval of such a claim by the auditing officers of the corporation does not impart to it legal validity. If, however, services are performed by such director for the corporation at its instance and request, in regard to matters outside of the duties devolving upon him by virtue of his office or trust, then he is entitled to claim compensation therefor upon a *quan-*

tum meruit, although none had been fixed by the corporation prior to the performance thereof. The appellant in this case, therefore, had no standing in court without proving that the compensation for the services claimed by him had been fixed by the corporation in the manner indicated before they were rendered, or that said services were not germane to the duties of his position of trust, and that he was directed by the corporation to perform them. Otherwise no legal obligation can be established against the corporation, although the services were rendered in the expectation of a remuneration therefor. *Railroad Co. v. Ketchum*, 27 Conn. 170. According to this view, which seems to be sustained by an overwhelming weight of authorities, the appellant had no legal right to demand the \$4,800 for salary as president of the board of directors, notwithstanding his claim therefor had been approved by the board. It is unnecessary, therefore, to consider the second question presented by the appellant's counsel, which is above set out, nor the instruction of the court as to the right of the jury to inquire into the merits of the appellant's claim. The instruction, under the strict rules of law, was more favorable to the appellant than the court was authorized to give. The appellant may have been justly entitled in morals to the salary claimed, but, unfortunately for him, the law does not recognize his claim therefor as a legal obligation. The services for which the appellant claimed compensation were a part of the duties of his office, and compensation therefor, not having been fixed as suggested, cannot be enforced. The judgment appealed from must, for the reasons mentioned, be affirmed.

(19 Or. 97)

JANEWAY v. HOLSTON.

(Supreme Court of Oregon. April 21, 1890.)

APPEAL—RECORD—BILL OF EXCEPTIONS.

The stenographic notes taken at the trial of a cause, transcribed in full, and copied in the record, and signed by the trial judge, to which are prefixed a statement calling it a "bill of exceptions," and the further statement that "the following exceptions will be relied upon by the defendant," followed by a reference to the testimony of sundry witnesses, giving the page, all the cross-examination of a certain witness on a particular subject, all the testimony introduced on the part of the defendant, charge of the court to the jury, giving pages and certain lines, do not constitute a bill of exceptions, or present anything for review on appeal.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

W. H. Adams, *Grant Manguam*, and Ed. Mendenhall, for appellant. Glavin & Gilbert, for respondent.

STRAHAN, J. This is an action for malicious prosecution, in which the plaintiff recovered a judgment for \$200 damages, from which the defendant appeals. The complaint states a cause of action, and the verdict and

judgment are in due form; but the appellant seeks a reversal on the ground of alleged errors accruing at the trial. For these, our attention is invited to an alleged bill of exceptions. This paper consists of the stenographic report of the entire trial, prefixed to which is the following, after entitling the cause:

"BILL OF EXCEPTIONS.

"The following constitutes the bill of exceptions in the above-entitled case, and the following exceptions will be relied upon by the defendant, to-wit:

"Testimony of J. T. Smith, page 20 'a.'

" "A. T. Howarth, " 22 'a.'

" "A. M. Hoskins, " 24 'a.'

" "Wm. McCollum, " 26 'a.'

" "George Aboret, " 29 'a.'

" "Chas. Moore, " 30 'a.'

" "B. Janeway, " 12 'a.'

"Pages 10, 11, 12. All of cross-examination as to what witness was worth when he signed bail-bond. All of the testimony introduced on the part of the defendant. Charges of the court to the jury, page 64 'a,' 'b,' 'c,' 'd.'"

The reporter's notes contain ample material from which a bill of exceptions might have been constructed, but the wildest liberty in the use of language cannot torture this writing into one. Section 230, Hill's Code, defines an exception, and section 231 points out the method of making the same a part of the record so as to make the same reviewable in this court; and we have several times endeavored to point out the necessity of observing these provisions of the Code in the preparation of a case on appeal to this court. If these provisions of law be utterly disregarded, there is nothing presented which we can properly examine. It is true, we might labor through this voluminous roll of manuscript, and we might, possibly, find something which we might conceive to be erroneous; but it is not covered nor pointed out by a particular and specific exception, and so separated from other matter that its identity can be known. Rather than to undertake to further define and point out the proper form of a bill of exceptions, we prefer to refer to precedents, a number of which may be found in sections 1141, 1142, et seq., Green, Pl. & Pr. under the Code. Any standard work on Code practice will furnish substantially the same forms. There being no questions presented by the record for review on this appeal, the judgment of the court below must be affirmed.

(19 Or. 122)

LUPER v. WERTS et al.

(Supreme Court of Oregon. April 14, 1890.)

WILLS—EXECUTION—EVIDENCE—PROBATE.

1. Under the statute of Oregon, every will, in order to be effective, is required to be in writing, signed by the testator, or by some other person under his direction, in his presence, and attested by two or more competent witnesses subscribing their names to the will in the presence of the testator.

2. And, in order to admit the will to probate, it must be proven to have been so signed and attested, and that the testator, in the case of the disposal of goods and chattels, was over the age of 18 years, and, in the case of the disposal of real property, was of 21 years of age and upwards, and was of sound mind.

3. To prove the execution of the will, it must be shown that the witnesses who subscribed their names to it did so at the request of the testator; that they saw him sign it, heard him acknowledge it, or observed acts which unmistakably indicated that he had signed it.

4. The acknowledgment, however, cannot be inferred from mere silence. *Lord, J.*, dissenting.

5. The proof of a will should not fail because the testimony of the subscribing witnesses thereto is insufficient to establish its execution, provided it can be proven by other competent evidence or by circumstances clearly indicating its execution; but, where such proof is not made, courts have no more authority to adjudge the will effective than they would have to attempt to enforce an oral expression of a party regarding the disposition which should be made of his property at his death.

(Syllabus by the Court.)

Appeal from a decree of the circuit court for the county of Linn reversing a decree of the county court of said county rendered in a matter of probate of the alleged will of Martin Werts, deceased. The said Martin Werts died in said county of Linn on the 30th day of September, 1888. The deceased at the time of his death, was an inhabitant of said county, and left real and personal property owned and possessed by him in his life-time, and left an instrument of writing, in the form of a will and testament, which purported to dispose of said property. On the 15th day of October, 1888, the said instrument of writing, by order of the said county court, was admitted to probate, in the common form, as the last will and testament of the deceased. Thereafter, and on the 3d day of November, 1888, the appellant, Sarah L. Luper, filed in said county court a petition to vacate the order admitting said will to probate, alleging in her said petition that she was the daughter and only heir at law of the deceased, except the widow of deceased, Mary Werts, and that the pretended will was void in that the testator did not make, sign, or declare, in the presence of the witnesses to said instrument, that the same was his last will and testament, nor was the same attested by such witnesses; that the said testator was not, at the time of signing said instrument, of sound mind and memory; and that he was induced to sign the same by undue influence exerted over him by said Mary Werts and others named as legatees and devisees therein. An answer was filed to the said petition by the respondents, the administrators with the will annexed of the deceased, denying the allegations thereof as to the unsoundness of mind and memory of the deceased, as to the undue influence, and as to the will not having been properly attested by the witnesses. A large amount of testimony was taken on both sides bearing upon the said issues, and upon which the said county court decreed that the said order admitting the will to probate be revoked and the said will set aside, upon the ground that

the same had not been duly attested; from which decree the respondents took an appeal to the said circuit court, where the matter was again heard, and a decree rendered reversing the decision of the county court, and determining that the said instrument of writing was a valid will of the said testator, and duly executed as such. From which decree the appeal herein was taken.

J. K. Weatherford and *W. R. Bilyeu*, for appellant. *Hewitt & Irvine* and *Chas. E. Wolverton*, for respondents.

THAYER, C. J., (after stating the facts as above.) It appears from the allegations and proofs herein that Martin Werts and Mary Werts were husband and wife; that at the time of their marriage said Martin was a bachelor, and said Mary a widow,—had been the wife of one Smith, by whom she had several children then living; that after the marriage said Martin became the head of the family, and nurtured and supported the said children during their minority; that he and the said Mary had, as the fruit of their marriage, a daughter, the said Sarah L. Luper, appellant herein; that, after the said Martin Werts arrived at the age of about 70 years, and became enfeebled in health, he conceived the idea of making a will disposing of his property, which consisted mainly of a tract of land in the town of Tangent, Linn county, and employed one J. J. Beard, a resident of said place, who was supposed to have some skill as a scrivener, to prepare it for him; that the said Beard subsequently prepared a writing to which the said Martin Werts, on the 17th day of July, 1888, subscribed his mark, and which was also subscribed by M. Peyser and said Beard as witnesses. The said instrument is as follows:

"This my last will and testament. I give to my wife all of my farm and appurtenances, also my houses and lots in Tangent, during her natural life, also all the personal property she can dispose of at her will; and at her death the farm shall be divided as follows: That part of my farm lying north of the county road running through my farm shall be divided equally north and south. I give to Sarah Luper, my daughter, the east half of said land, containing (82) eighty-two acres, more or less, and the west half I give to Mary E. Simpson, the wife of J. H. Simpson; and all of the farm lying south of said county road I give to my granddaughter Mary Smith, also give my organ to Mary Smith. I also give my house and lots in Tangent, at the death of my wife, Mary Werts, to Lucinda Smith, the wife of L. F. Smith. I name and request E. L. Bryan to be the executor of this will.

his
"MARTIN X WERTS.
mark.

"Witness: M. PEYSER, J. J. BEARD.

"Dated this 17th day of July, 1888."

The said Sarah L. Luper mentioned in said writing was the daughter of the said Mar-

tin Werts; the said Mary E. Simpson, a daughter of his wife by the former marriage; the said Mary Smith, a granddaughter of his wife, a daughter of her son, by the former marriage; and the said L. F. Smith, husband of the said Lucinda Smith, was a son of the wife by her former marriage. Mary Smith, the granddaughter, had resided with Martin Werts from the time she was six months old, and had been reared by him and his wife as their child.

That the said Martin Werts, at the time he executed the said writing, was competent to make a will, I think, was established by the evidence beyond a question. He was able to comprehend the condition of his property, his relations to the persons who were, should, or might have been, the objects of his bounty, and the scope and bearings of the provisions of the writing he intended as his will, which was held by this court in *Chrisman v. Chrisman*, 16 Or. 127, 18 Pac. Rep. 6, to be sufficient evidence of testamentary capacity. Nor do I think that the evidence in the case was sufficient to warrant the presumption that undue influence was exercised over the said Werts in regard to the disposition which he should make of his property in view of death, or which induced him to execute the said writing he intended as his will. Nor do I discover from the provisions of the writing any evidences that the signer of it was actuated by a spirit of bias or prejudice against any one who might be expected to be the recipient of his bounty, or in favor of any one upon whom he sought to bestow it. His bequest to his wife of his real property during her natural life, and all the personal property absolutely, was, under the circumstances, a just and wholesome provision, and displayed wisdom and forethought. She was an old lady, and was entitled to security against want and dependence, and to that attention which the possession of property commands. Why he attempted to bequeath to Mary E. Simpson a part of his farm, or to Lucinda Smith the house and lots in Tangent, does not appear; but it certainly was not strange or anomalous, under the circumstances of their relations. And the bequest to Mary Smith, a child he had raised from an infant, and who was still of a tender age, requiring provisions for her support and maintenance, was very natural and proper. The appellant, it is true, was his own child, and it would ordinarily be expected that he would bestow the main part of his property upon her; but he was under no legal or moral obligation to do so. She had a husband, and her father may have considered that her pecuniary circumstances were already adequate to her condition in life. Children have no vested rights in the property of their father while he is living, or any interest in it beyond a bare expectancy, the realization of which depends entirely upon his will; and, if he were to disinherit them, it would not affect the validity of his will, except as it evinced an unnatural feeling which, if proved to have been en-

gendered by some designing party, might be evidence of undue influence.

The more serious question in the case is, whether the said writing was executed with the formality which the law requires in the execution of wills. The statute of this state (section 3069, Ann. Laws) provides: "Every will shall be in writing, signed by the testator, or by some other person under his direction, in his presence, and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator." And it was held by this court in *Hubbard v. Hubbard*, 7 Or. 42, that "where a will has been probated in common form, and the validity of the will is attacked by a direct proceeding, it lies upon the person seeking to maintain the validity of the will to reprobate the same by original proof, in the same manner as if no probate thereof had been had, except as to such matters as are admitted by the pleading. In every such proceeding the *onus probandi* is upon the party propounding the will." This seems to be regarded as the proper rule upon the subject, and I believe it to be correct in principle. The formal probate having been made *ex parte*, is not considered of any importance when the validity of the will is attacked by a direct proceeding. The practice, however, in such cases, would be very much simplified if the legislature were to require the probate court, when a petition for the probate of a will was filed, to issue a citation, to be served upon the parties interested in the estate, to show cause why the will should not be admitted to probate, and have any contest which might be made against it determined upon the return of the citation. In the latter case the burden of proof to show that the will offered for probate was executed according to law would be upon the proponent; and the court, in *Hubbard v. Hubbard*, *supra*, seems to have concluded that the same rule would obtain upon a direct attack of the validity of the will after a formal probate thereof had been had, which seems to me to have been a reasonable conclusion. The determination, therefore, that the said paper signed by the decedent, and evidently intended as his last will and testament, was executed in conformity with the requirements of the section of the statute above set out, must depend upon the sufficiency of the evidence given upon the part of the proponents to establish the fact. The legislature, for obvious reasons, required the observance of certain forms in the execution of a will. It requires that the will shall be attested by two or more competent witnesses subscribing their names to it. The said paper was signed by two persons who were competent to be witnesses; but whether they attested it as required by the statute is the question to be solved under the evidence given, and facts and circumstances surrounding the transaction. Proof of the attestation does not alone depend upon the testimony of the subscribing witnesses to the will. The latter may

have both died, still the proof could properly be made. In the latter case, proof that their signatures to the will was in their own handwriting would probably be sufficient, but in this case the proponents have attempted to establish proof of the attestation by the testimony of the subscribing witnesses and that of others.

The testimony upon that point is substantially as follows: J. J. Beard, one of the subscribing witnesses, in answer to interrogatories propounded to him, testified that he was 44 years old, resided at Tangent, and was a railroad agent; that he had resided there since 1873; that he was acquainted with Martin Werts in his life-time,—had been acquainted with him 12 or 13 years; that he transacted business for him,—made out a deed, acknowledged a mortgage, and wrote out a will for him; that the will was made July 17, 1888, at the request of Werts, who told him what provisions to make in the will at the time it was made, the names of the legatees mentioned in the will, and all the terms thereof. "Question. Did he seem to comprehend at that time what property he had? Answer. He named over what is mentioned in the will. Q. State whether he seemed to know and comprehend the names of the heirs, and those dependent on his bounty? A. He named over all that are mentioned in the will. Q. Where was the will written? A. At my office at Tangent, Linn county, Or. Q. Where was it signed? A. At the same time. Q. State how it was signed. A. Mr. Werts signed it by a mark. Q. What kind of a mark, and who made the mark? A. It was a mark made with a pen and ink,—a cross. I made the mark while Mr. Werts had hold of the end of the pen. Q. Who wrote the name at the bottom, 'MARTIN WERTS,' and the words 'his mark,' above and below the cross? A. I did. Q. At whose request? A. Well, I don't know whether he requested me to write it or not. I don't think he did. I asked him if he could sign it, and he said: 'No, he couldn't write.' I wrote his name, and asked him to make his mark. Q. Did you know whether it was his desire to have you write his name for him, or not? A. I do not know whether it was or not, but presume it was. Q. State whether he knew you wrote it, and assented to your writing it. A. I told him I wrote it. Don't know that he made any remark. Don't know that he said anything at all. Q. He made his mark, as you have described, after the will was written? A. Yes, sir. Q. State whether the will was read to him or not. A. Yes, sir; it was. Q. Before or after he signed it? A. Before he signed it. Q. State whether or not he was satisfied with the provisions contained in it when it was read to him. A. He did not say whether he was or not. Q. What did he say when you read it [the will] to him? A. I read it to him, and asked him if that was right, and he said: 'That is the way mother said to do it.' Q. He understood, then, fully, what was in the will at the time he signed

it? A. I read the will to him. Q. Who are the witnesses to the will? A. M. Peyser and J. J. Beard. Q. J. J. Beard is yourself, isn't he? A. Yes, sir. Q. How did you come to sign as a witness? A. There was no one else there to sign it except me and Mr. Peyser, that I knew of at the time. Q. Well, you can state how you came to sign it as a witness, and why you signed it as a witness. A. I knew it was necessary to have two witnesses to it, and there was no one else there to witness it, that I was aware of, at the time, except Mr. Peyser and myself. Q. State whether you signed it as a witness in the presence of Mr. Werts. A. Yes, sir. Q. State how Mr. Peyser came to sign it as a witness. A. I asked him to. Q. How did you come to ask him to sign it? A. I wanted another witness to it, and he was the only man there, and I asked him. Q. Did Mr. Werts hear you ask him? A. I do not know that he did. I went out of the room to get Mr. Peyser. He was out on the front porch, and I stepped out. He might have heard me. Q. What knowledge did Mr. Werts have that you were about to get or were getting another witness at the time you went to get Mr. Peyser, or before going? A. I presume I told him I was going to call another witness. Q. How far did you find Mr. Peyser from where you were writing the will? A. About forty feet. Q. How long had Mr. Peyser been there? A. Probably 10 or 15 minutes. Could not say, positively. Q. Could he have heard what you were saying to Mr. Werts? A. He might have heard part of it. Don't know that he did. Could if he had been listening to hear me read the will. Q. What did you say to Mr. Peyser when you got him to witness the will? A. I asked him to come in and sign this as a witness. Q. State what was said when he signed it. A. I believe he asked if it was a note, and I said, 'No;' and he said it would not make it any better by his name being on it than it was. I believe that was all that was said. Q. Did Peyser know what he was signing, and the capacity in which he was signing, when he signed it as a witness? A. He knew the capacity in which he was signing. Don't know whether he knew it was a will or not, but presume he did. Couldn't say, positive. Q. Why did you presume that he knew it was a will? A. Well, he could have heard me reading it, if he had been listening, and ought to have known what it was, if he heard it. Q. How long after you signed it until you called Peyser to sign it? A. I called Mr. Peyser to sign it before I signed it at all. Q. State whether Mr. Peyser looked at the instrument and saw the manner in which Mr. Werts had signed the paper. A. I don't know whether he did or not. I called him in, and he sat down and signed the paper. Q. Did he sign after Mr. Werts had made his mark? A. Yes, sir. Q. Was he acquainted with Mr. Werts, do you know? A. Do not think he was. Do not know, but do not think he was. Q. How long did Peyser remain in the room? A. I

think he got up and went right out as soon as he signed his name. It was a very small room, and there wasn't room for so many in there. Q. Before or after you signed it as a witness? A. I think he stepped right out of the door, and I sat right down and signed it. He wouldn't have to step but a couple of feet. Q. Did Peyser know that you were signing, also, as a witness? A. I do not know whether he did or not. Q. How long after that did old man Werts leave the office? A. Well, right away. He got up in a very few minutes. He went out, I think. He and Mr. Peyser went out into the front part of the store together. Q. What directions did Mr. Werts give you regarding the will after it was executed? A. After he had gone out into the front room, I took the will, and asked him what I should do with it. He told me to keep it, and read it after he was dead. I asked him if I hadn't better give it to Mr. Bryan, and he said it didn't make any difference, and that I had just as well keep it. Q. Was Peyser present at this conversation? A. I believe he was in the store. Yes, sir. Q. (Here a paper was handed the witness, and he was asked:) Is that the will of Martin Werts, executed at the time referred to by you heretofore in this deposition? A. This is the will that I wrote at the request of Martin Werts." The witness further testified that he made the proof upon which the will was formally admitted to probate; that all the facts stated in the affidavit of proof, except the part thereof wherein it is stated "that he then and there declared his will to be the same as stated in his last will and testament," were true.

Mr. Peyser, the other witness to the will, testified that he was 48 years of age. His residence was Albany, Or., and his occupation, trading. That he saw Martin Werts around Tangent, but did not know what his name was. Upon the will being shown to the witness, and he being asked if he recognized the signature, "M. Peyser," and, if so, to state who wrote it, answered: "I wrote it myself." That, the way he came to write it, he was at Tangent on business; and Mr. Beard called him to witness a paper, and he did so. "Question. What other signature, if any, did you see attached to the instrument at the time you signed your name? Answer. I saw a name there, but did not pay any attention to it, whatever. Q. Point out the name you saw on the paper at the time you signed your name there. A. I couldn't do it. I didn't pay no attention to the name. Q. Was the name you saw at the time you signed your name located toward the right-hand side of the paper you signed, or the left? A. The right side. Q. State whether J. J. Beard's name was signed to that paper as a witness at the time you signed it. A. No, sir. Q. State what knowledge you had of J. J. Beard signing it after you signed it. A. I have none whatever. Q. What did J. J. Beard do immediately after you signed it? A. I could not tell what he did. He was

present when I signed it as a witness,—was standing right on the side of me. I think he gave me his chair. I believe it was his chair. Q. Did you see Mr. Beard doing anything before you went out, or while you were going out? And, if so, state what he was doing. A. I didn't take any particular notice. Could not tell whether he took a seat or not, or about the time I left. Q. Where was Martin Werts at the time you wrote your name to the will? A. There was an old gentleman sitting there in the office. I didn't know his name, as I was not acquainted with the old gentleman at all. I was only acquainted with him by sight. I could not tell the distance he was sitting from me when I wrote my name as a witness to the instrument, but it was not very far. He could see me plainly at the time I signed my name, if his attention had been directed towards me, or if he had wished to see me. He was in the same room with me at the time I signed it. Q. Where was J. J. Beard at the time he called you to witness the paper? A. He just came out of a little room where, I believe, the post-office was kept. I was standing in the door or on the porch of the building. I must have been 20 feet or more from the little room. Q. Give your best judgment how far this old man who was in the room was from J. J. Beard at the time he called you to witness the instrument. A. I could not tell the distance, but Mr. Beard was standing close to me. Q. Where was Mr. Beard at the time he called you,—how far from the post-office room? A. I could not tell. I didn't take any particular notice. I cannot approximate the distance." The witness was here shown a diagram of the ground floor of the building, showing that it was partitioned into three rooms,—a large front room, occupied as a store, and two small rooms, one of which was a bedroom and the other a post-office room, with a doorway between them, and one from the bedroom into the store. The storeroom is about 30 feet in length. The witness was then asked "where he stood, and where J. J. Beard stood, at the time Beard called him to sign as a witness," to which he answered, in substance, that he stood in the front part of the building, and that Mr. Beard stood somewhere back in the store; that he came out of the post-office room, and was standing near the door which goes from the store into the bedroom; that the old man was in the post-office room when witness went in there after being called by Beard; that he did not see him go into the room. Thought he heard some one in the room before he went in, but did not hear anything said which he could understand. It was a human voice, but could not tell whether the party was reading or talking. "Question. What was the condition of the old man's mind at the time you signed the instrument as a witness? Answer. Well, I couldn't tell what his mind was. He looked kind of strange to me,—kind of wild look on him. Q. What did you understand you were sign-

ing your name to that instrument for, at the time you signed it? A. Well, I didn't understand anything. They simply called me in to witness the paper, and I made the remark: 'You don't want me to sign any money matter, do you?' Q. What was the extent of your acquaintance with the old man at the time of signing the instrument? A. Not any. Q. You knew him when you saw him, didn't you? A. I knew him when I saw him in Tangent, but did not know his name. That is all the place, to my recollection, that I saw him."

J. A. McGee testified: "I heard Joe Beard reading the will. I don't know where Mr. Peyser was when the will was read. I didn't hear Mr. Werts say anything."

J. A. Sibbetts testified: "I seen Mr. Werts go into the post-office the day the will was written. I seen him at the front door at the time. Some one called Peyser on the inside of the office. Peyser stood opposite the door, on the outside. I recognized the voice of the person calling Peyser as that of J. J. Beard. It was simply a request to step into the office. I heard no reading or talking in the back room until Mr. Peyser was called. I heard nothing about writing a will at that time. I was sitting on a chair on the north side of the outside door when Mr. Werts entered the post-office. This was the front door of the post-office building. When Mr. Beard called Mr. Peyser, he (Peyser) was standing about three and one-half feet, [away,] and on a line with the south side of the door. I had been sitting exactly in the same position and place I have described all the time after Mr. Werts went into the post-office up to the time Beard called Peyser. Can't state definitely the length of time Peyser had been on the porch prior to the time he was called by Beard. I only noticed him about fifteen or twenty minutes before he was called. It might have been longer. When Beard called Peyser, it was in just an ordinary business tone."

The foregoing is not literally all the testimony in the case upon the question of the attestation of the instrument, but it is the material part thereof; and, unless it establishes the attestation of the alleged will as required by the section of the Code above set out, the proponents of it must fail in their proof of its due execution.

The statute of this state (section 757, Ann. Code) defines what a "subscribing witness" is. He "is one who sees a writing executed or hears it acknowledged, and, at the request of the party, thereupon signs his name as a witness." And I think the word "attestation," in the absence of any statutory definition, implies the same thing. A subscribing witness to a will, therefore, must be something more than a person who subscribes his name as a witness to it. The testator must either sign the will in the presence of the witness, or must acknowledge to him, by word or act, that he had signed it. It is not necessary that the witness know the contents of the instrument subscribed by him, or its

nature or character; but he must be able to testify that the principal in the affair put his name upon the identical piece of paper upon which he placed his own. *Canada's Appeal*, 47 Conn. 450. Counsel for the proponents, at the hearing, did not question the correctness of the rule as here indicated, but insisted that the facts and circumstances of the transaction authorized the inference that the decedent acknowledged the execution of the instrument. As to the witness Beard, no acknowledgment by the decedent of the execution of the instrument was necessary, as he was personally cognizant of the fact that the decedent signed it by making his mark; but the witness Peyser did not see the signing done, and could not obtain such a knowledge of its having been done as would render him a competent witness to the fact unless, at the time he subscribed the instrument, the decedent in some manner acknowledged its execution. Said counsel lay down the proposition that it is not essential in the execution of a will that the witnesses to it see the testator subscribe the instrument,—that he acknowledges or adopts the signature in their presence is sufficient; that the acknowledgment is not required to be made in any particular words or in any specified manner, but if, by sign, motion, conduct, or attending circumstances, the attesting witness is given to understand that the testator had already subscribed the instrument, it is sufficient acknowledgment. And the counsel cite in support of the proposition the following authorities: *In re Will of Convey*, 2 N. W. Rep. 1084; *Raudebaugh v. Shelley*, 6 Ohio St. 307, 315; *Haynes v. Haynes*, 33 Ohio St. 615; *Nickerson v. Buck*, 12 Cush. 342; *Tilden v. Tilden*, 13 Gray, 110; *Schouler, Wills*, §§ 321, 322. This proposition, as a matter of law, is undoubtedly correct, and the authorities cited fully support it. The difficulty, however, which the said counsel have to contend with, is in the application of the principle to the facts of this case. If it appeared from the evidence bearing upon the point involved that the decedent acknowledged or adopted the signature to the instrument as his own in the presence of the witness Peyser, either from the testimony of the latter or from that of any other witness, or that, by any sign, motion, conduct, or attending circumstances, he gave said witness to understand that he had already subscribed the instrument, I should not hesitate to hold, as I am at present advised, that it was a sufficient acknowledgment; but I fail to discover any evidence which would warrant such a conclusion. The evidence shows that the decedent, while the said witness was subscribing his name to the instrument, maintained "mere silence," which "is not enough." *Haynes v. Haynes*, supra. If the decedent had said to the witness Peyser, "this is my will," or if the witness Beard had said in the presence of the decedent and Peyser: "This is the will of Mr. Werts. He has signed it, and wants you to subscribe your name to it as a witness,"—

or used any language of that import, the contention of the proponents' counsel might have been tenable. Under the testimony, however, as it stands, I do not see how, by the most liberal construction of it, Peyser could have been a competent witness to the will. He could not testify that the decedent signed the will. He did not see him sign it, and was not informed by any one, so far as appears from the evidence, that he did sign it, or adopt the signature thereto as his own. The facts in the case of Nickerson v. Buck and in Tilden v. Tilden, supra, from which the courts, in those respective cases, inferred that the testators to the said wills had acknowledged the execution of the same, were much stronger than in this case; yet I think the courts there, especially in the latter case, extended the doctrine of inferential evidence to its utmost verge.

It is not a pleasant duty to be compelled to determine that the intention of a party to honestly dispose of his property by will and testament was thwarted by his failure to comply with an apparently technical exactment of the law, but the aim and object of the statute in requiring the observance of certain formalities in the execution of such instruments is entitled to due consideration; otherwise a door to fraud and forgery in the disposition of estates *causa mortis* would be thrown wide open. Counsel for the proponents, strenuously urge that the witnesses to the instrument in question, in giving their testimony as to its execution, exhibited a disposition to suppress the facts regarding it, and insist that the will and testament of a party, honestly made, should not be defeated by the failure of memory of the witnesses nor by their false swearing. The argument, viewed from a moral stand-point, is undoubtedly sound; but I do not see how it can aid the proponents' case herein. They were required to prove the due execution of the will; and, if they have failed in that respect in consequence of the lack of memory or the false swearing of the witnesses, it is the misfortune of those interested in the matter of its proof. If the court believed that the witnesses to the said instrument had willfully neglected and refused to state under oath all the facts they knew concerning its execution, still it would not be authorized to hold that the instrument was a valid will of the decedent unless there were other evidence in the case showing that it was executed in compliance with the requirements of the statute. The proof of a will should not fail because the testimony of the subscribing witnesses thereto is not sufficient to establish its execution in accordance with the statute, provided it can be proved by other competent evidence to have been so executed; but where such proof is not made the courts of this state have no more authority to adjudge it effective than they would have to attempt to enforce an oral expression of a party regarding the disposition which should be made of his property at his death. Under the view herein expressed, the decree

of the circuit court must be reversed, and that of the county court affirmed.

LORD, J., (*dissenting*.) Peyser is an unwilling witness, of an unreliable character, whose testimony, as disclosed by the record, indicates a purpose to defeat the will. That it ought not be allowed to succeed, if it can be prevented consistently with a proper administration of the law, is admitted. The difficulty lies in determining the sufficiency of his evidence as an attesting witness. The testimony of Beard, the other witness to the execution of the will, is conceded to be competent and sufficient; and the will must stand or fall upon the sufficiency of the testimony of Peyser, in the light of the surrounding facts and circumstances.

Briefly, the facts are these: The testator sought Beard, and requested him to write his will; and together they went to a small office in the back of a store, where Beard wrote it and the testator signed it. Beard then went to the front door of the store, and asked one Peyser to come into the back office and witness it, but without disclosing to him the nature of the instrument. When Peyser signed it, he saw the signature of the testator to the will, who was sitting quite near to him, and knew the purpose for which Peyser signed it, but he did not declare to Peyser, in words, that it was his signature; nor did Peyser know it, other than from the fact of his presence and acquiescence under the circumstances. When the will was offered for probate, Peyser swore that the instrument and the signature was the same as when he witnessed it, so that as to its identity there is no doubt. But the contention is that such a witness as Peyser must be able to swear that he knew that it was the signature of the testator either from seeing him write it, or from his acknowledgment by words or acts, and that the testimony of Peyser falls short of this requirement. It is admitted that the testator is of sound mind, and that the will is the product of his own free agency; nor is it doubted, in view of all the facts in evidence, that it was executed by him as his last will and testament. It is clear, from the evidence, that the testator knew what he was doing when he procured Beard to write his will and he himself signed it, and what Peyser was doing when he witnessed it, so that if there is anything in his conduct, under the circumstances, at the time Peyser signed, which amounted to an acknowledgment that the will was executed by him, we ought so to declare, and not allow his last will and testament to be set aside and defeated. Within a little more than an inch from the place on the paper where Peyser signed as a witness was the signature of the testator, which he admits that he saw at that time, and within a few feet of him sat the testator; and no one else except Beard was present. Peyser was there at the instance of Beard, who had called him into the office to witness a document which he saw was already executed

and when he proceeded to witness it, and the testator, knowing the facts, looked on and said nothing, was not his silence, in the light of the facts, an acknowledgment that the will was executed by him? When I see a man's name to a paper document, and he is present, and no one else except the scrivener, and I am there to witness it, and when I do so he looks on, but says nothing, is not his acquiescence, under the circumstances, an acknowledgment to me that the will and signature are his own? In the light of the facts, Peyser had a right to assume and understand that the will was executed by the testator then present, because his conduct in the premises was declaratory of that act; and, when that assumption is sustained by the undisputed testimony of the other witness, and is inconsistent with any other conclusion to be drawn from the whole evidence, it carries to the mind a declaration or acknowledgment as direct and positive that the testator, then present, executed the instrument, as if he had so declared or acknowledged it to him in words. In determining this question, we are to consider all the facts in evidence relative thereto, and not base our conclusions upon isolated testimony of the witness Peyser; and, when thus viewed, if it is clear from the attending circumstances that the testator executed the will, and that Peyser knew it, because, as a reasonable being, the conduct of the testator, under the circumstances, so informed him, it is our duty to hold such facts equivalent to such an acknowledgment, and uphold the will.

In *Tilden v. Tilden*, 13 Gray, 113, the only difficulty in the case there was, as here, upon the fact of a proper attestation of the witness. The court say: "In reference to this witness, it is said that there was no publication of the will by the testator, no actual signing in his presence, no direct acknowledgment that he had signed the paper, and no knowledge on the part of the witness whether the testator's signature was on the paper at that time." And yet the court, upon the evidence, found that the instrument had been duly signed by the testator, and duly attested as his last will and testament. See, also, *Dewey v. Dewey*, 1 Metc. 349; *Nickerson v. Buck*, 12 Cush. 339; *Haynes v. Haynes*, 33 Ohio St. 615; *Schouler, Wills*, §§ 321, 322.

There is no suggestion that there has been any fraudulent substitution of a false paper or will, nor is there anything in the facts to countenance any such supposition. We are all convinced that the will was executed by the testator, only my associates think that the testimony of Peyser does not fulfill the requirements of the law. To my mind, in view of the facts and circumstances, Peyser could not avoid knowing that the testator, then present, executed the will. The facts so informed him, and authorize the inference that the testator acknowledged the signature of the will to be his act, though he did not expressly so state. In my judgment, then,

the facts as disclosed by this record authorize us to find that the instrument was duly signed by the testator, and was duly attested as his last will and testament. It ought, therefore, to be upheld, and his property disposed of according to its direction.

(19 Or. 106)

FREEKSEN v. TURNER.

(*Supreme Court of Oregon. April 14, 1890.*)

ASSUMPSIT—COMPLAINT—SUFFICIENCY—EVIDENCE.

1. Where the allegations of a complaint indicate a fact, and evidence thereof is admitted under it, an exception to its admission is not tenable, although the allegations regarding the fact are vague and indefinite.

2. The remedy of the defendant, in such a case, is by motion to compel the plaintiff to make the complaint more definite and certain.

(*Syllabus by the Court.*)

Appeal from circuit court, Linn county.

O. H. Irvine, for appellant. *J. J. Whitney*, for respondent.

PER CURIAM. This action was brought by the respondent against the appellant to recover the value of labor performed by the respondent in summer-fallowing certain land belonging to the appellant, and was tried in the circuit court by a jury. It appears from the bill of exceptions that upon the trial thereof the respondent offered himself as a witness in his own behalf, and, after testifying, in substance, that he and appellant had entered into a written agreement or lease for the leasing of appellant's farm to him for the year ending October 1, 1889, which provided, among other things, for doing the summer-fallowing in controversy, his counsel asked him: "What, if any, oral agreement or understanding was made between plaintiff and defendant on the day said written contract was executed, and after the execution thereof, in regard to defendant paying for said summer-fallow in case he (defendant) should sell said farm, or not rent the same to plaintiff for another year?" The appellant's counsel objected to the question upon the ground that the same was incompetent; that there was no allegation in the pleadings of any modification of any written contract of rental for the year ending October 1, 1889. The trial court overruled the objection, and the witness was allowed to testify that on the day the written contract was executed, and after the execution thereof, the respondent and appellant made and entered into an oral agreement or contract whereby the appellant agreed to pay the respondent for said summer-fallowing, in case appellant should sell said farm, what the same was reasonably worth.

The appellant's counsel excepted to the ruling, which constitutes his only ground of error relied on in this court. We have examined the pleadings in the case, and are of the opinion that the admission of the said testimony was not error affecting the substantial rights of the appellant. The respondent alleged in his complaint that in November, 1886, the appellant and himself entered into

a written contract whereby the appellant rented and leased to respondent his land, and set out the terms and conditions of the said lease. He further alleged that, after the termination of said written lease, he and appellant had a further understanding that he was to occupy and cultivate said land, put the plow-land into grain, harvest the grain, put one-third in the warehouse for appellant, for the use or rent of the land; that respondent continued to so cultivate the land up to the — day of September, 1889, and, after the termination of said written lease, it was understood and agreed between the parties that appellant was to pay respondent for all and any work done by him on said land, with the exception of that which was necessarily done in putting in the grain, harvesting, and storing it; that respondent duly performed all the conditions of said written contract or lease on his part, and thereafter duly performed all the conditions of said oral agreement or understanding between respondent and appellant on his part. It is evident that the respondent intended to count upon an oral agreement where there previously had been a written agreement between the parties, by which the land was leased. It is true that the written agreement, to which the oral agreement is claimed by respondent to have been supplemental, was alleged to have been made in November, 1886. If it were not, however, made at that time, but made, as alleged by appellant, in 1888, it was only a variance, and could not have prejudiced the appellant in his defense.

The complaint is not a model of good pleading. It is very loosely drawn, and ambiguous; but the remedy, in such cases, is by motion to make the pleading more definite and certain. The judgment appealed from will be affirmed.

(1 Wash. St. 189)

TAYLOR v. OSBORN *et al.*

(*Supreme Court of Washington*. March 5, 1890.)

Appeal from district court, Walla Walla county.

A. B. Isham, for appellant. D. J. Crowley, for appellees.

SCOTT, J. This appeal was taken under the act of 1888, (page 59,) and it appears that the statement of facts was settled without the notice to appellees required by section 3 of said act. Appellees were notified December 8, 1888, that appellant would apply on December 5, 1888, to have the statement of facts settled. The statute requires a 10-days notice. The statement was settled *ex parte*, no one having appeared for appellees. Objection is made in their brief to the consideration of the matters contained in the statement, for want of such notice, which objection we sustain. There being nothing in the record upon which error can be based, the judgment of the court below is affirmed.

DUNBAR, STILES, and HOYT, JJ., concur.
ANDERS, C. J., not sitting.

GRUBER v. BAKER *et al.* (No. 1,311.)

(*Supreme Court of Nevada*. April 3, 1890.)

DEEDS—ESTOPPEL—CANCELLATION—MAINTENANCE—FRAUD.

1. A person who has purchased land, and taken a deed therefor, is estopped, in a suit by the grantor to cancel it on the ground of fraud, to claim that a conveyance under which the grantor claims title to part of the land, was intended as a mortgage, and did not give her the absolute title.

2. Where a deed intended as a mortgage is recorded, and no defeasance appears of record, a *bona fide* purchaser from the grantee acquires an absolute title, free from the equity of redemption of the mortgagor.

3. A mortgagor, who by his representations induces a third party to receive an absolute deed from the mortgagee, is estopped to afterwards deny that the mortgagee had a right to convey the absolute title.

4. An attorney employed by the parties to a deed to draw it up, cannot, in a controversy between one of the parties and a third person, be compelled, over the objection of such party, to testify as to communications between himself and his clients, at the time the deed was made, tending to show that it was intended as a mortgage.¹

5. Gen. St. Nev. § 3023, declares that "every action shall be prosecuted in the name of the real party in interest." *Held* that, where two co-tenants separately convey their interest in land, a subsequent deed from one of them, conveying to the other all his interest and title in the land, for the expressed purpose of enabling the grantee to sue in her own name to set the first deed aside for fraud, and recover all the land, and providing that, in the event of recovery, such grantee shall recover to the grantor his interest, and pay him his proportion of any damages recovered, does not give the grantee such an interest in the grantor's interest as will entitle her to sue in her own name to set both the deeds aside.² BELKNAP, J., dissenting.

6. Complainant owned a part interest in a mine, but lived at a distance, and took no part, personally, in its management. Her brothers hauled the ore from it, and acted as her agents. A rich vein of ore was discovered, but was concealed by the foreman so that it could not be seen. Defendants, who were informed by the foreman of the discovery, and also that he had concealed it, and were kept posted as to developments, negotiated with complainant for the purchase of her interest, and received a deed from her. Neither complainant nor her agents were informed of the discovery and its value. *Held*, that the deed was obtained through fraud.

Appeal from district court, Lyon county;
R. R. BIGELOW, Judge.

M. N. Stone, W. E. F. Deal, and T. Coffin, for appellants. R. M. Clarke and R. H. Lindsay, for respondent.

MURPHY, J. This was a bill in equity to set aside deeds made by Caroline Gruber and A. A. Pollard to Joseph Munckton, and from Munckton to W. H. Baker, and to have the same canceled, annulled, and declared void, on the grounds that the same were obtained by fraud and inadequacy of consideration. The complainant avers that on the 3d day of December, 1887, Oest, Pollard, and Caroline Gruber were the owners, as tenants in com-

¹As to what communications to an attorney are privileged, see *Griffin v. Griffin*, (Ill.) 17 N. E. Rep. 782, and note; *In re Layman's Will*, (Minn.) 49 N. W. Rep. 286; *Hughes v. Boone*, (N. C.) 9 S. E. Rep. 266, and note; *In re Bauer's Estate*, (Cal.) 21 Pac. Rep. 759; *Tyler v. Tyler*, (Ill.) 21 N. E. Rep. 616.

²See note at end of case.

mon, of a mining claim, situate in the Devil's Gate and Chinatown mining district, at Silver City, Lyon county, Nev., known and commonly called the "Oest Mine;" Oest being the owner of one-half, Pollard one-quarter, and Mrs. Gruber one-fourth. They worked the mine as copartners, sharing the profits and bearing the losses in proportion to their respective interests. Oest and Pollard lived at Silver City, Mrs. Gruber at Dayton, four miles distant; but one Mat. Bay, a brother of Mrs. Gruber, lived at Silver City, and acted as agent for her in the working and management of the mine. W. H. Neighley was foreman at the mine, subject to Oest's orders. During the time of the ownership of Pollard and Gruber, developments of great importance were made, without the knowledge of either Pollard or Gruber, by cutting and excavating through the clay wall, generally called the "foot wall," a body of gold and silver bearing ore 5 feet in thickness, 30 feet in length, and of unknown depth, which ore was of the net value of \$500 per ton, and of the aggregate value of \$250,000. That before the discovery of this body of ore the mine was not worth to exceed \$8,000, but after the development the property was worth \$250,000. That said development was made known to Oest. That Pollard and Mrs. Gruber had no knowledge of the discovery, nor could they, with reasonable diligence, know or discover the same. And plaintiff avers that it was the duty of Oest, as co-owner, copartner, and manager, to have made the said development and discovery known to his co-owners, and to have extracted and sent the said ore so discovered to the mill for reduction; that the facts of the said discovery were concealed from Pollard and Mrs. Gruber by the said Oest, and were by him imparted to Joseph Munckton and W. H. Baker, for the purpose of cheating and defrauding the said Pollard and Mrs. Gruber; that Oest, Munckton, and Baker then entered into an agreement, confederation, and conspiracy to fraudulently acquire the interests of Pollard and Mrs. Gruber for a grossly inadequate price and consideration, and to cheat and defraud them out of their said interests in said mine. The complaint contains specific averments constituting the alleged fraud. The answer of the defendants Munckton and Baker contain specific denials of each and every allegation of the complaint in so far as it alleges fraud, and also denies the ownership of the property by Mrs. Gruber, and alleges that she is not the real party in interest in this action. The plaintiff had made Fred. Oest a party defendant, but during the trial the action was dismissed as to him, and proceeded against Munckton and Baker. The cause was tried before the court without a jury. Judgment was rendered in favor of the plaintiff for the surrendering and cancellation of the deeds mentioned, and for the sum of \$22,000 damages, and costs of suit. Defendants appeal from the judgment, and from the order of

the court overruling their motion for a new trial.

Appellants claim that the court erred in overruling their motion wherein they asked to have Adam Bay made a party plaintiff. The ground for their motion was that, some time prior to the sale of the mine by Mrs. Gruber to Munckton, Adam Bay owned one-fourth interest in the mine. He borrowed \$2,500 from his sister, Mrs. Gruber, giving her his note and a mortgage on his interest in the mine to secure the payment thereof. Some time thereafter, Adam Bay gave to Mrs. Gruber a deed to his interest in the mine, and Mrs. Gruber entered satisfaction of the mortgage in the records of Lyon county, Nev. The appellants claim that, notwithstanding Mrs. Gruber has entered satisfaction of the mortgaged debt, and holds a deed to the property, that it was the intention of the parties, and that it was so understood between them, that the deed was given and received to operate as a mortgage only. The testimony given on the trial of this cause does not support the appellants' views. Mrs. Gruber says that there was no understandings between herself and Adam Bay that the deed given was merely to secure the payment of the money loaned; that it was given by Bay, and received by her, as an absolute deed, and conveying to her all the right, title, and interest of Adam Bay in and to said property to her; and that she had dealt with the property as her own. Munckton testified: "I saw Adam Bay. He was on his wagon. I asked him if he would take less than \$4,000 for his interest. He said: 'Anything that Mat. does about this is satisfactory to me.' I then went to Mat., and told him I had concluded, if this affair was settled up, that I would give him \$4,000 for their interest, and he said, 'All right,' and I gave him \$20 on the bargain to bind it, and then he said: 'You have got to take a deed from Mrs. Gruber.'" Mat. Bay is the brother of Adam Bay and Mrs. Gruber, and was acting as the agent for Mrs. Gruber. Munckton, having received the deed from Mrs. Gruber, is now estopped from denying her right to made the deed, or her title to the property. If Adam Bay had any interest in the property at the time of the sale from Mrs. Gruber to Munckton, he having stood by, and did not disclose his title and object to the sale, he is now precluded by estoppel from claiming the property, or any interest therein, from Munckton, who was induced to buy and take the deed from Mrs. Gruber by the declarations of Adam and Mat. Bay that she was the true owner. Where a deed intended as security is recorded, the defeasance not being recorded, a purchaser for value from the grantee, without notice of the defeasance, will hold an absolute title as against the grantor and his grantees. It is an absolute deed as regards third persons, and a *bona fide* purchaser will take the land discharged of the equity of redemption of the mortgagor. Brophy Min. Co. v. Brophy &

D. Gold, etc., Min. Co., 15 Nev. 107. And a party is also estopped from asserting title to property when his declarations have induced another, who was about to purchase it, to believe that it was owned by a third person. *May v. Council*, 39 N. W. Rep. 880; *Shuford v. Shingler*, 8 S. E. Rep. 806; *Ratcliff v. Iron-Works*, 10 S. W. Rep. 367; *Wise v. Newatney*, 42 N. W. Rep. 346; *Williams v. Fletcher*, 21 N. E. Rep. 787; *Birch v. Stepler*, 11 Colo. 408, 18 Pac. Rep. 530.

On the trial of this cause the defendants called J. A. Stephens, an attorney at law, who drew up the mortgage and deed from Adam Bay to Mrs. Gruber mentioned in the fore part of this opinion, and endeavored to prove by him the understanding had between Adam Bay and Mrs. Gruber, at the time of the drawing of the deed, as to whether the deed was not drawn and intended as a mortgage to secure the payment of money due by Adam Bay to Mrs. Gruber, and to enable Mrs. Gruber to escape the payment of state and county taxes upon the mortgage. Stephens declined to answer the question for the reasons: (1) He was acting as the attorney for Bay and Gruber, and what was said to him at that time was received by him in the performance of his professional calling, and what was said he claimed to be a privileged communication; (2) if he was compelled to answer the questions, it would injure former clients of his. The plaintiff also objected to the witness answering the questions. The rule that an attorney cannot disclose communications made to him by his clients is not, as now understood, confined to communications made in contemplation of, or in the progress of an action or judicial proceeding, but extends to communications in reference to all matters which are the proper subject of professional employment. An attorney employed by two or more parties to give advice in a matter in which they are mutually interested can, no doubt, on litigation subsequently arising between themselves, be examined as a witness, at the instance of either of the parties, as to communications made when he was acting as attorney for all. But he cannot disclose such communication in a controversy between such parties, or either of them, and third persons. The communication made to Stephens by Adam Bay and Mrs. Gruber when he drew the deed for them were privileged. *Gulick v. Gulick*, 39 N. J. Eq. 516; *Michael v. Foil*, 100 N. C. 189, 6 S. E. Rep. 264; *Britton v. Lorenz*, 45 N. Y. 56; *Whiting v. Barney*, 30 N. Y. 330; *Yates v. Olmsted*, 56 N. Y. 632; *Williams v. Fitch*, 18 N. Y. 550; *Root v. Wright*, 84 N. Y. 76.

The complaint in this action was filed on the 14th day of December, 1888. On the same day, A. A. Pollard made, executed, and delivered to Caroline Gruber a deed purporting to convey all his right, title, and interest in and to said mine and mining claim. Said deed contains the following clauses: "Also, all equitable right of title, claim, or demand, in said mine of the said first party; also, all

right of action to set aside a certain deed made by the said first party to Joseph Munckton dated December 3, 1887; also, all claim for damages arising from said deed; also, all claim or demand or right of action for damages, or for an accounting, or for the value of ores taken from said mine." On the same day, and as part of the same transaction, Pollard and Gruber entered into the following agreement: "The undersigned mutually acknowledge and agree as follows: 1st. The action this day commenced in the name of Caroline Gruber against Joseph Munckton and others is for the mutual benefit of the undersigned. Each of us are to share equally the advantages, and to bear equally the costs and expenses. The assignment this day made by A. A. Pollard to Caroline Gruber was made for the purpose of enabling her to maintain the aforesaid action in her own name. When judgment is recovered, and the litigation finally terminated, said Caroline Gruber will assign and convey to said A. A. Pollard his part of the judgment and interest in the mine recovered. Witness our hands this 14th day of December, A. D. 1888. MRS. CAROLINE GRUBER. [L. s.] A. A. POLLARD. [L. s.]" This agreement was duly acknowledged before a notary public, and was entitled to be recorded, if it was not, in the records of Lyon county, Nev. Appellants claim that this action cannot be maintained, as to the Pollard interest, in the name of the plaintiff, because she is not the real party in interest; that the assignment of Pollard to Gruber does not convey the legal title to the property, but merely the right to sue in her own name, and, immediately upon the termination of the suit, she binds herself to rededeo to him his one-fourth interest in the mine and mining claim, and pay over to him one-half of whatever sum of money she may recover from the defendants as damages for the alleged fraud; that such an agreement cannot be enforced under the laws of this state; it savors of maintenance.

Section 3026, Gen. St., reads: "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act." The only interpretation that can be placed upon this section of the statute is that, whenever a thing in action transferable by law is absolutely assigned, so that the ownership passes to the assignee, without conditions or reservations, and the legal title or equitable claim is fully vested in him, he is the real party in interest, and must sue in his own name. Is Mrs. Gruber either the legal owner, or has she such an equitable claim in the Pollard interest in this mine, or in this cause of action, to permit her to maintain this action in her own name? We think not. From the reading of the deed, and agreement between the parties, it was not intended that Mrs. Gruber should have any claim upon or interest in the property deeded to her by Pollard. She was merely permitted to commence an action in her own name for the cancellation of the deeds given

by herself and Pollard to Munckton, and by Munckton to Baker, and the recovery of damages for the alleged fraud; and she was, upon the termination of the suit, to reconvey to him the same interest in the mine, and to account and pay over all moneys received by her in the nature of damages in proportion to his interest in the property. It would be doing violence to the statute to say that Mrs. Gruber was the real party in interest, under the facts in this case. Nor can we admit the correctness of the views expressed by the learned attorney for the respondent, that Mrs. Gruber was a trustee of an express trust. Were we to so decide, she would be permitted to do things indirectly, which another section of the statute directly prohibits. It never was intended by the framers of this law that a party, being of sound mind, capable of managing his own affairs, residing in the immediate vicinity, who did appear in court and testify as a witness on the part of the plaintiff, should be permitted to divest himself of the title, create a trust for the purpose of commencing and prosecuting an action at law or in equity, in the name of the assignee or trustee, for his benefit, and upon the termination of the suit reconvey to him all the proceeds of such suit. We cannot sanction any such construction of our statute, and it made no difference that Mrs. Gruber had a deed to the mine. The defendants had a right to demand that they be confronted by Pollard, who was the real party in interest.

In the case of *Robbins v. Deverill*, 20 Wis. 148, the court held that a partner could not maintain an action in his own name for the benefit of the firm, although the demand had been transferred to the plaintiff alone by words of absolute assignment. In the case of *Hoagland v. Van Etten*, 22 Neb. 683, 35 N. W. Rep. 869, the court said: "The language of the statute is plain and unambiguous: 'Every action must be prosecuted in the name of the real party in interest, except,' etc. This case is not within any of the exceptions named, and therefore must be considered with reference solely to section 29 [of the Code.] If a party, having no interest in the subject-matter of the suit, who holds simply as assignee, and is to deliver to his assignor the proceeds of the action, may maintain an action on such an assignment, then section 29 has no meaning whatever. We do not care to enter into a discussion of the propriety or impropriety of requiring actions to be brought in the name of the real party in interest. The statute contains a plain provision which this court has no authority to disregard. We hold, therefore, that an assignee having no interest in the result of the suit, and not entitled to any portion of the proceeds thereof, is not entitled, under section 29, to maintain an action as the real party in interest." And in Minnesota "it was held, in some cases, that the beneficial owner of a negotiable bill or note payable to bearer, or indorsed in blank, might institute suit on it in the name of any one who would allow his name to be used for

that purpose, and that, unless the maker had a defense to the note, good against the real owner, he could not be permitted to show that the plaintiff was not the real party in interest. * * * Although this rule might be correct at common law, it certainly is not good under the statute of this state, which provides that 'every action shall be prosecuted in the name of the real party in interest.' * * * It is apparent from the language used that it was not the intention of the indorser to make the indorsee the owner of the note, or of the money after collection, but simply to give him authority on the note to collect it. The relation of the indorser and indorsee is that of principal and agent. The agent cannot be the 'real party in interest' in a suit brought on the note." *Bank v. Hollister*, 21 Minn. 385; *Bank v. Clark*, 23 Minn. 268. In the case of *Sinker v. Floyd*, 104 Ind. 292, 4 N. E. Rep. 10, it is said: "We are satisfied that under our Code an action for a breach of covenant must be prosecuted in the name of the real party in interest, and that the real party in interest is the person entitled to the money recovered as damages." And in the case of *Bostwick v. Bryant*, 16 N. E. Rep. 383, the same court said: "The statute provides that every action must be prosecuted in the name of the real party in interest. * * * The answer shows clearly that Anna S. Bloomer is the owner of the note, and the real party in interest. The plain provisions of the statute cannot be avoided." *Board v. Jameson*, 86 Ind. 163. In the case of *Phillips v. Bush*, 15 Iowa, 64, the court held that, when A. sold certain lands to B., making false and fraudulent representations as to the locality of the land sold, and at the request of B. conveyed the same to C. as security for the payment of an indebtedness from B. to him, in an action for damages for such fraudulent representations, A. was liable, and B., being the real party in interest, was the proper party plaintiff, notwithstanding the legal title was in C." The rule that actions must be prosecuted in the name of the real party in interest has always been the rule in equitable actions, as distinguished from actions at law, and the statutory enactment is nothing more than that which has always prevailed in equity. *Grove v. Judy*, 24 W. Va. 298; *Kellum v. Sayre*, 30 W. Va. 198, 3 S. E. Rep. 589; 1 Van Santv. Eq. Pl. 72.

Under the old practice, when law and equity were administered by different tribunals, the rule respecting parties in courts of law differed from those in courts of equity. The blending of the jurisdiction made it necessary to revise those rules to some extent. In doing so the legislature had this purpose in view: to do away with the artificial distinctions existing in courts of law, and to require the real party in interest to appear in court as such, knowing that the true rule had always prevailed in the courts of equity, that he who had the right was the person to pursue the remedy. We have adopted that by

enacting section 3026, and it seems to us too plain for misconception. In construing statutes, we must consider the sections together, and that interpretation should be placed upon the language which will give each and every section of the act its proper effect, and which at least will make it compatible with common sense and the plain dictates of justice. *Maynard v. Newman*, 1 Nev. 271; *Ex parte Siebenhauer*, 14 Nev. 368.

Champertry and maintenance were defined as offenses in very early stages of the English law. The English doctrine of maintenance arose from causes peculiar to the state of society in which it was established. It was a principle of the common law that a right of action could not be transferred by him who had the right. When we seek the reason of this rule, we find it was an apprehension that justice would fail, and oppression would follow, if the right of action might be assigned. In early times this rule concerning rights of action was rigorously enforced, but this rigor has, however, been relaxed. The apprehension that justice would be trodden down if property in action should be transferred is no longer entertained, and the common-law rule now serves only to give form to some legal principles. The statute of limitation, statute of frauds, and the giving of costs against the unsuccessful party, have all taken place since the law of maintenance was enacted; and all these have contributed to prevent groundless and vexatious litigation. In states where the common-law rule still prevails, the laws concerning maintenance are still in force, and they all hold that a right of action may be transferred to a purchaser for a valuable consideration with complete effect. But we fail to find, in any decided cases, where a party has been permitted to maintain an action in his own name where he had no interest whatever in the result of the suit. We have no statute concerning champertry and maintenance in this state. Section 3021, Gen. St. Nev., reads: "The common law of England, so far as it is not repugnant to, or in conflict with, the constitution and laws of the United States, or the constitution and laws of this state, shall be the rule of decision in all the courts of this state." This court has held in a number of cases that the English statutes in force at the date of the Declaration of American Independence, in so far as they were applicable to our situation, are a part of the common law which we have adopted. Why are not champertous contracts void in this state? True, they are not so declared by statute, but they were so at common law, and the common law of England has been recognized as part of our system; its principles being the rule of our decisions, except as modified by statute. Of course, these principles must be applicable to the nature of our institutions, and to the genius of our form of government; to our wants, habits, and necessities. In a number of states they have no statutes against champertry or maintenance, yet the courts of last resort hold that the common law on these

subjects prevails. The modern decisions of the courts of the United States and England make a distinction which before prevailed in the rules of the common law, between maintenance which is innocent and that which is unlawful. To maintain the suit of another is now, and always has been, held to be unlawful, unless the person maintaining has some interest in the subject of the suit, or unless he is connected with the assignor by ties of consanguinity or affinity. Landlord and tenant, executors, administrators, trustees of an express trust, the exercise of legal profession by an attorney, and acts of charity to the poor, are all cases in which it is not unlawful to give aid in the conduct of a suit before a court of justice.

The reason of the rule, as applied to champertry and maintenance, with us, is to prevent litigation and the prosecution of doubtful claims by strangers to them. If the owner is not disposed to attempt the enforcement of a doubtful claim, public policy requires that he should not be allowed to transfer his right to another party for the purpose of prosecution, thereby encouraging strife and litigation. It has, therefore, been deemed beneficial to the public interest to prohibit a transaction such as is attempted in this case, as being contrary to public policy, and void. The deed passed from Pollard to Gruber with the understanding that it was not to convey any interest in or title to the property whatever, but merely for the purpose of allowing Mrs. Gruber to maintain this action in her own name, for the benefit of Pollard, to set aside a deed made by Pollard to Munckton, and which Pollard claimed had been obtained by fraud. Therefore, Mrs. Gruber is not the real party in interest, within the meaning of the statute, and places the parties within the rule of law that the assignment of a bare right to file a bill in equity for a fraud committed upon the assignor will be held void as being against public policy; and such an assignment cannot be maintained in either a court of law or equity, nor can a trust be created in such an assignment.

In *1 Perry, Trusts*, § 69, he says: "The mere right to file a bill in equity for a fraud committed upon the assignor, or to sue for a tort, cannot be assigned, and a trust created in such rights." *Bigelow, Fraud*, 214, says: "A right of action for fraud cannot be conveyed at law or in equity. Equity will not enforce the demand of an assignee or a grantee of a right to sue for fraud when the action is confined to that wrong." *2 Story, Equity Jur.* § 1040*h*, says: "So an assignment of a bare right to file a bill in equity for a fraud committed upon the assignor will be held void, as contrary to public policy, and as savoring of the character of maintenance." To the same effect are, *Ryall v. Rowles*, 2 Lead. Cas. Eq. *820; *8 Pom. Eq. Jur.* § 1276; *Adams, Eq.* (7th Amer. Ed.) *57; *1 Pars. Cont.* 226; *1 Amer. & Eng. Cyclop. Law*, 883, tit. "Assignments;" *Dayton v. Fargo*, 45 Mich. 153, 7 N. W. Rep. 758; *Dickinson v. Seaver*, 44

Mich. 624, 7 N. W. Rep. 182; Brush v. Sweet, 38 Mich. 574; Morris v. Morris, 5 Mich. 181; Carroll v. Potter, Walk. Ch. 355; Marshall v. Means, 12 Ga. 66; Morrison v. Deaderick, 10 Humph. 344; Smith v. Harris, 43 Mo. 557; Milwaukee & M. Ry. Co. v. Milwaukee & W. R. Co., 20 Wis. 183; Crocker v. Bellangee, 6 Wis. 645. In Pomeroy's Remedies and Remedial Rights, § 153, he says: "The following are illustrations of personal interests or rights which cannot be assigned: * * * the right of a grantor to avoid his conveyance on the ground of fraud." In the case of Jones v. Babcock, 15 Mo. App. 150, THOMPSON, J., in delivering the opinion of the court, said: "We shall affirm the judgment in this case upon the sole ground that the bare right to complain of a fraud is not a vendible commodity. 'It has always been held,' said BLISS, J., 'that the assignment of a bare right to file a bill in equity for fraud upon the assignor, is void, as against public policy.' Smith v. Harris, 43 Mo. 557, 562. 'The case charged in substance, is that Frances J. Jones and Richard S. Jones, her husband, had made certain conveyances in trust to the defendant, Leicester Babcock, to secure certain debts; that Babcock, in 1874, secretly purchased the notes thereby secured, advertised the property for sale, sold the same as trustee, and caused it to be bid in in the name of the *cestui que trust*, but really for himself; that this fraud was not discovered until March, 1880; and that in May, 1880, Frances J. Jones and Richard S. Jones conveyed by quitclaim deed their right, title, and interest in the premises thus sold under these deeds of trust to this plaintiff. What did this quitclaim deed convey to this plaintiff beyond the bare right to prosecute a suit in equity to set aside a trustee's sale on the ground of fraud. That was all the grantors had to convey; and, while they could have asserted such a right themselves, they could not assign it to another. * * * Here no title has passed, but the trustee's sale in question was not void in the sense that no title passed to the purchaser. It was merely voidable at the election of the parties prejudiced thereby.'"

In the case of Jones v. Hill, 9 Bush, 695, the court said: "It is a general rule, to which we can see nothing in this case constituting an exception, that a contract or conveyance will not be set aside for actual or constructive fraud except at the option of the party defrauded." And to the same effect are the cases of Ayers v. Hewett, 19 Me. 286; Tufts v. Matthews, 10 Fed. Rep. 610; Norton v. Tuttle, 60 Ill. 134. In Livingston v. Iron Co., 2 Paige, 393, it is said: The complainant cannot recover upon the bill in its present shape. "Although the conveyance of the land was obtained by a fraudulent misrepresentation it was not void. It was only voidable at the election of the vendor. And the defendants, or some of them, were in the actual possession of the premises, claiming title to the same under their deed, at the time of the conveyance to the complainant. The legal title to this property could not pass to

the complainant under that conveyance, while it was thus held adversely. If John Livingston was still living, he would be a necessary party to a bill to rescind the sale on the ground of fraud." In Prosser v. Edmonds, 1 Younge & C. 496, Lord Chief Baron ABINGER said: "The remaining cause of demurrer, namely, that the plaintiffs have no right to equitable relief, raises an important and curious question, which is this: whether or not parties who either became purchasers for a valuable consideration, or who take an assignment in trust of a mere naked right to file a bill in equity, shall be entitled to become plaintiffs in equity in respect of the title so acquired. Now, in the course of the argument, it was urged that an equitable, as well as a legal interest may be the subject of conveyance, and that the assignee of a chose in action may file a bill in equity to recover it, though he cannot proceed at law for that purpose. But, where an equitable interest is assigned, it appears to me that, in order to give the assignee a *locus standi* in a court of equity, the party assigning that right must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to overset a legal instrument. * * *

In the present case, it is impossible that the assignee can obtain any benefit from his security except through the medium of the court. He purchases nothing but a hostile right to bring parties into a court of equity as defendants to a bill filed for the purpose of obtaining the fruits of his purchase. * * * What is this but the purchase of a mere right to recover? It is a rule, not of our law alone, but of that of all countries, that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is no where tolerated, and is against good policy. * * * There are many cases where the acts charged may not amount precisely to maintenance or champerty, yet of which, upon general principles, and by analogy, to such acts, a court of equity will discourage the practice." This decision has never been reversed; but, upon the contrary, whenever the question has been raised on the right of the assignee to sue in his own name, to set aside a conveyance obtained by fraud, when he was not the real party in interest, his application has been denied. 2 Spence, Eq. Jur. 867; De Houghton v. Money, L. R. 2 Ch. App. 164; Hill v. Boyle, L. R. 4 Eq. 263. In deciding this case in the court below, the judge said: "I am still of the opinion, under the principles stated in the cases of McMahon v. Allen, 35 N. Y. 403; Graham v. Railroad Co., 102 U. S. 148, and Dickinson v. Burrell, L. R. 1 Eq. 337,—that, where, not only the right to bring the action is assigned, but also an interest in the property is conveyed, to the assignee, as was done here, the assignee can maintain the action." We cannot agree with the learned judge who presided at the trial of this cause, that "all interest in the property was conveyed to the assignee." All that was transferred was the mere right to

commence and maintain this action in the name of Mrs. Gruber; and, upon the termination of the suit, she was not only to redeed to him a portion of the property recovered, but the entire portion as represented by the Pollard interest.

The case of *McMahon v. Allen*, has no application to this case whatever. In that case Allen was the agent and attorney of Harrison. Allen knew that his client was in debt, and, so knowing, induced Harrison, by fraudulent representations, to convey to him his interest in his mother's estate. Harrison, being ignorant of the fraud practiced upon him, made a general assignment for the benefit of his creditors of all his property and rights of action, with full power to sue for and collect the same. The assignee filed a bill to set aside the conveyance to the agent. It cannot control the present case, because the assignment and conveyance was made for the benefit of the creditors of Harrison, with full power to sue for their benefit, which made them the parties beneficially interested; and they were the real parties in interest when they were trying to secure their own just demands. It is an elementary principle of law that all the property which a debtor has shall be responsible for his debts. Therefore, when Harrison sold the property to Allen, the creditors had such an interest in the property as would entitle them to maintain an action in their own names, under the statute of frauds, to set aside the conveyance to Allen, without any assignment from Harrison whatever.

The case of *Graham v. Railroad Co.* supports the views we have expressed in this opinion, and approves the decision in the case of *Prosser v. Edmonds*, and draws the distinction between that case and the cases of *McMahon v. Allen*, and *Dickinson v. Burrell*, and a number of other cases. The supreme court also approves of the opinions rendered in the cases of *Crocker v. Bellangee*, 6 Wis. 645, and in *Milwaukee & M. Ry. Co. v. Milwaukee & W. R. Co.*, 20 Wis. 183, by saying: "A deed obtained from the grantor through fraudulent representations made by the grantee is not void, but voidable only at the election of the grantor, and that the conveyance of the same land by the grantor to another person is not the exercise of such election, and does not avoid the former deed; that, in order to avoid such former deed, some proceeding must be had by the grantor to which the grantee is a party; and that a subsequent purchaser from the grantor cannot set up the alleged fraud of the first grantee to defeat his title,—the court holding that the right of a vendor to avoid a sale or deed on the ground of fraud practiced by the vendee is not a right or interest capable of sale and transfer, so as to enable a subsequent vendee of such right, for such cause, to attack the title of the first vendee: that it is a mere personal right, incapable of sale or transfer. * * * In other words, is this mere right to litigate the question, and to set aside the deed or release on account of fraud

practiced upon the assignor, a subject of assignment and transfer? And will a court of equity allow the assignee to stand in the shoes of the assignor in respect to the remedies?" The court held that the assignee could not maintain the action in his own name.

In the present case, at the time Pollard made the deed to Mrs. Gruber, he had no title to convey, Pollard having prior thereto conveyed all his right, title, and interest in and to the mining claim to Munckton, and placed him in possession of the same, his deed to Munckton was not void, but merely voidable, and was a valid deed, as between the parties, until such time as Pollard should have instituted proper proceedings to have the same set aside on the ground of fraud perpetrated upon him by Munckton. It cannot be disputed that, if an innocent party had purchased from Munckton, before these proceedings had been commenced, not knowing of the fraud,—if a fraud had been perpetrated,—he would hold the legal title to the property, as against Pollard.

The case of *Dickinson v. Burrell* is not in conflict with that of *Prosser v. Edmonds*. In deciding that case, Lord ROMILLY said: "The demurrer is mainly supported on the case of *Prosser v. Edmonds*, which was decided, after long deliberation, by Lord ABINGER; but I am of opinion that the case before me does not fall within the rule established by that decision." His lordship then said: "If James Dickinson had thought fit, after the sale to Edens, * * * to sell the same property to A. B., saying that the previous sale was a fraudulent one, and that, though he himself would not take any steps to set it aside, if A. B. thought fit to do so he might, and that he would sell all his interest in the property to A. B. for a sum of money then *bona fide* agreed on, in such a case, in my opinion, A. B. could have maintained this suit. * * * I think that the distinction between the conveyance of the property itself and the conveyance of a mere right to sue, or what in substance is a right to sue, * * * has been adopted and approved in many other cases; and it is, I think, founded in reason and good sense. I am, therefore, of opinion that, if the present plaintiffs had given valuable consideration for the execution of the indenture, * * * they would have been entitled to maintain this suit. * * * It is contended that in a case of this description the fact that the conveyance is voluntary suggests the possibility of some secret understanding or subordinate agreement by which the property, when recovered, is to be reconveyed, or to be discharged from the trusts, and that in fact the voluntary conveyance is made only colorable, and for the purpose of instituting or maintaining such a suit as the present. This may possibly be shown hereafter, in the progress of the cause; but on this demurrer, where I am bound to take the allegations as true, I cannot entertain any such suspicion. I am

bound by the allegations in the bill, which I must assume to be true; and, that being so, the right to sue is, in my opinion, incidental to the interest conveyed to the plaintiffs, and the demurrer must be overruled." The opinion does not only approve of the rule laid down in *Prosser v. Edmonds*, but also decides, that, where the property is conveyed for the purpose, merely, of maintaining a suit in the name of the assignee, it will not be permitted; for the judge says, if there is any secret understanding or subordinate agreement, by which the property, when recovered, is to be reconveyed or to be discharged from the trusts, and that in fact the voluntary conveyance is made only colorable, and for the purpose of instituting or maintaining such a suit as the present, this may possibly be shown hereafter, in the progress of the cause, —intimating that, if such a state of facts were shown upon the trial of the cause, the bill would be dismissed, but upon the demurrer he could not inquire into the facts of the case; and the demurrer was overruled. In the present case, we have the written agreement of the parties, as well as the testimony of Pollard, as to the understanding between themselves, that the property was to be reconveyed to him upon the termination of the suit. See, also, *Traer v. Clews*, 115 U. S. 539, 6 Sup. Ct. Rep. 155, where it is held that the mere right to file a bill in equity for a fraud committed upon the assignor will be void, as contrary to public policy. The mere fact that Mrs. Gruber and Pollard are tenants in common does not change the principle of this rule. They are strangers to one another in so far as their titles are concerned. One could sue without the other's consent, or sell her or his share to whom they pleased, and for whatever price they saw fit to fix upon it. In fact, they are independent of each other, and may deal with each other in the same manner as owners of separate property.

The assignment to Mrs. Gruber of the Pollard interest being for the sole purpose of having her maintain this action in her own name, she is not the real party in interest, and to allow her to prosecute this suit as to the Pollard interest would be contrary to public policy. The court, therefore, erred in holding that Mrs. Gruber could maintain this suit as to the Pollard interest. The bill must be dismissed as to his interest.

The next inquiry is as the character of the evidence that is requisite to establish fraud. A party alleging fraud must clearly and distinctly prove the fraud as alleged. If the fraud is not proved as alleged, relief cannot be had, although the party against whom relief is sought may not have been perfectly clear in his dealings; for fraud will not be carried, by way of relief, one tittle beyond the manner in which it is proven. The rules of evidence are the same in equity as at law; and when certain facts, as proved, amount to a fraud, is a question for the court. But the court is not justified in finding such facts upon any less or different kind of proof than

would be required to satisfy a jury, for the law in no case will presume fraud. The presumption is always in favor of innocence, and not of guilt. In no doubtful matters should the court lean to the conclusion that a fraud had been committed; nor should it be assumed on doubtful evidence. The facts sufficient to establish a fraud should be clear and convincing. Circumstances of mere suspicion will not warrant the court in coming to the conclusion that a fraud has been committed. We do not wish to be understood as holding that, in order to establish fraud, it requires direct or positive proof; for in matters that regard the conduct of men the certainty of mathematical demonstration cannot be expected or required, and much of human knowledge on all subjects may be inferred from facts that are established. Care should be taken, however, not to draw conclusions hastily from premises that will not warrant it; but, if the facts established afford a sufficient and reasonable ground for drawing the inferences of fraud, the conclusion to which the proof tends must, in the absence of contradiction, be adopted. The motives with which an act is done may be, and often is, ascertained and determined by circumstances connected with the transaction. Various facts and circumstances evince sometimes, with unerring certainty, the hidden purposes of the mind. Therefore, fraud may be shown by circumstances. But when the evidence, whether it be direct or circumstantial, is so strong as to produce conviction in the mind of the judge of the truth of the charge, it will be sufficient. This we take to be the extent of the rule that fraud must be proved. But this does not authorize the finding of fraud on less than a preponderance of the evidence, taken as a whole, for it is difficult to see how any disputed question of fact can be found except by the greater weight of evidence. The difference in the weight may be slight, but, unless it preponderates on the side of the plaintiff, the matter in dispute cannot be said to be proved; and this rule is adhered to more strictly in actions of this character than in any other class of civil cases, for it is said that while the law abhors fraud, it is also unwilling to impute it on slight and trivial evidence, and thereby cast an unjust reproach upon the character of parties. What amount or weight of evidence is sufficient proof of a fraud is not a matter of legal definition. The proof, however, must be satisfactory. It should be so strong and cogent as to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest. It need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference of fraud may be drawn. As an allegation of fraud is against the presumption of honesty, it requires stronger proof than if no such presumption existed.

The evidence in this case shows the following state of facts: Neighley was the foreman of the mine, and had control of the same. Oest was at the mine every day or two. Pollard crushed the ore at his mill, kept the books and accounts, paid the men, and was the superintendent, in so far as it was necessary to have one. The Bay Bros. who were acting as agents for Mrs. Gruber, had the contract for the hauling of the ore to the mill for reduction, were at the mine every day or two to haul the ore away. A rich body of ore was discovered in the mine on or about the 23d day of November, 1887. The man employed in the mine, and who made this discovery, went to Oest's house, called him out of bed, and informed him of the development in the mine. Neighley, on his return to the mine in the morning, found the prospect in the blacksmith shop which had been left there, and immediately proceeded to seek from whence it came, and found the place. Neighley then notified Oest and Munckton of the discovery. Baker was also notified of the strike, and was taken into the mine by Neighley, and permitted to examine the place from which the rich quartz came; and Neighley took samples of the ore, and prospected them for Baker's benefit. Immediately after the discovery in the mine and the examination as made by Baker, Munckton proceeded to negotiate for the purchase of Mrs. Gruber's interest in the mine. The place from whence the rich quartz came was concealed by directions of Neighley, so that, if an owner had gone into the mine, he could not have found the place from which the rich ore came, with ordinary diligence, without some one who was aware of the covering up had pointed it out to him. Munckton had been, and was being, informed every day or two as to the condition of the mine, from the time of the discovery until he had purchased the Gruber interest, by Neighley and others employed in the mine, and was also notified by Neighley that the place from whence the rich rock came was covered up so that it would not do the owners any good if they did go into the mine; and, although the agent of Mrs. Gruber was at the mine nearly every day, and did ask Neighley every day, during the negotiations, as to the condition of the mine, he was informed that there was no improvement in the ore body or the mine. And this fraud and deception was kept up from the date of the discovery until Munckton had received his deed for the property. Although the evidence is conflicting, yet the preponderance of the evidence is in favor of Mrs. Gruber's claim. Munckton, knowing that Neighley was perpetrating a fraud upon Mrs. Gruber, cannot be permitted to avail himself of the benefits thereof. He, knowing what Neighley was doing, became a party to the fraud; and in actions of this nature the true measure of damages are the profits derived from the property while in the possession of the purchaser. The facts in this case support the judgment as to the Gruber interest. The

judgment of the court will be that Munckton and Baker shall reconvey to Mrs. Caroline Gruber one-fourth interest in the Oest mine, and the said Munckton and Baker pay to Mrs. Gruber the sum of \$11,000; that the action for the Pollard interest be dismissed; and that the appellants have judgment for their costs on appeal.

HAWLEY, C. J., (*concurring*.) The right of Mrs. Gruber to maintain this action in her own name for the one-quarter interest deeded to her by Pollard is the only question upon which there is any difference of opinion among the members of this court. The terms of the agreement executed contemporaneously with the deed clearly show that there was no absolute sale, no conveyance of the property, nor of any interest therein. Mrs. Gruber acquired no right, title, or interest in or to the one-quarter interest of Pollard in the Oest mine by the deed, or in the fruits of the litigation, so far as that interest is concerned. All that was conveyed to her, or that was intended to be conveyed, was the mere naked right to sue in her own name for the sole benefit of Pollard. There are some very respectable authorities which maintain the doctrine that the right to bring an action to cancel a deed for fraud cannot be conveyed or assigned even to a purchaser for value. Other—more numerous and better considered—cases declare that the party who has been defrauded may sell his equitable interest in the property to a third party, and that such third party may establish the fraud in equity, and thereby be protected in his purchase. These authorities recognize the distinction between an absolute conveyance of the property, and the assignment of a mere right to sue for the benefit of the grantor. Where the conveyance is made to another person, *bona fide*, for a valuable consideration, such person can maintain the action in his own name; for he is the real party in interest. If a conveyance is made to a trustee for the benefit of creditors, minor heirs, or persons who may inherit an interest in the estate, or in any case where the assignee has an interest in the fruits of the litigation, the action can be maintained, for the same reason. But, if the transaction relating to the assignment or conveyance of the property amounts simply to a mere right in the assignee or grantee to sue in his name for the sole benefit of the assignor or grantor, then the action cannot be maintained. All the authorities agree that the assignment of a bare right to file a bill in equity for a fraud committed on the assignor cannot be maintained in the name of the assignee. The fraud upon Mrs. Gruber and Pollard arose out of the purchase of their separate interests in the Oest mine, at the same time, in the same manner, and from the same cause; but Mrs. Gruber was not thereby defrauded or damaged by the sale of Pollard's interest, nor was Pollard injured by the fraud upon Mrs. Gruber. They were both equally interested in having the trans-

action declared fraudulent, and beyond that their interests and rights were entirely separate and distinct. Neither had any right, title, or interest whatever either in the damages, or in the property to be recovered by the other.

It is claimed that the assignment of the Pollard interest to Mrs. Gruber ought to be sustained because it tended to lessen the litigation, and to avoid the unnecessary expenses of separate suits; in other words, that appellants, instead of being prejudiced, have really been benefited by the assignment. The contention is not well founded. If two persons were injured in a collision upon a railroad, at the same time and place, one of them might, by assigning his cause of action for damages to the other, for the purpose of settling all disputed questions in one suit, materially lessen the expenses of the litigation, and cases might be imagined where such a course would be beneficial, instead of prejudicial, to the railroad corporation, the defendant in the action. But is it not equally clear that cases might frequently arise when it would be detrimental and injurious to the interests and legal rights of the defendant? If such a practice were permissible, the parties injured, by blending the causes of action into one suit, and thereby uniting the weaker with the stronger and clearer case, might stand a much better chance for a recovery on both than if each was made to rest exclusively upon its own merits. Would not the defendant in such an action, irrespective of the question of expense or injury, and without any proof that the assignment was champertous, have the right to object, and have his objections maintained, upon the ground that the law does not permit such actions to be assigned? It is within the power of the legislature, whenever it is deemed advisable so to do, in the interest of public justice, to make causes of action for fraud assignable, so as to authorize any person to maintain such a suit for the benefit of another; and, in my opinion, it is a safer and better course for the courts to leave the question of practice, if any change is needed, to be decided by legislative action. It may be that no harm or injury has resulted in this particular case to appellants; but they had the legal right to prove, as they did, that Mrs. Gruber had no interest whatever in the interest in the mine deeded to her by Pollard, or in the damages to be recovered thereon, and to object to her maintaining the suit as to the Pollard interest on that ground, and to rely in support of the objection upon the numerous authorities which without exception declare that such assignments are void as against good policy, and savor of maintenance. This conclusion is based upon the theory that such assignments, if allowed, would have a tendency to encourage litigation, and lead to improper intermeddling and undue interference in the prosecution of such suits. I am of opinion that, as a general rule, it would lead to such injurious results, and that the reasons given

in the decided cases are substantial, wise, and just, and ought to be sustained. Entertaining these views, I concur in the judgment announced by Mr. Justice MURPHY.

BELKNAP, J., (dissenting.) Caroline Gruber, A. A. Pollard, and Fred Oest owned the Oest mine as tenants in common, and worked it as copartners. They were engaged in the partnership business for some time prior to the ore discovery, and until the sale to Munckton. The business was unprofitable. The relations of the Bay Bros., who were Mrs. Gruber's brothers, and who represented her interest in the mine and partnership, were unfriendly with Mr. Oest, the principal owner; and Mrs. Gruber had offered her interest for sale. In this condition of affairs, and on the night of the 20th of November, 1887, the rich ore was struck. All information of the discovery was withheld from Mrs. Gruber and her brothers and from Pollard, by direction of Oest, for the purpose, as he declared, of getting rid of the Bays. Subsequent explorations made for the purpose of ascertaining the extent and value of the ore body were conducted pursuant to this plan. The rich ore was not mined, but low grade and unprofitable ores were worked, for the purpose of discouraging the plaintiff, and inducing her to sell. Munckton received early information of the discovery from Oest, and, at his request, from Neighley, the foreman; and defendant Baker, a brother-in-law of Neighley, was allowed to examine the mine, and shown the discovery. Negotiations entered into at first for the purpose of purchasing only Mrs. Gruber's interest resulted in the purchase of her interest and Pollard's as well. A joint deed was made by them to Munckton,—Baker's interest being concealed; and afterwards Munckton conveyed to him one-half of the interest acquired. Pollard was superintendent, but gave little personal attention to the workings of the mine. He and the other owners relied upon the reports of its condition made to them by Neighley, the foreman. During the period between the strike and the sale, and while the negotiations were pending, both Pollard and the plaintiff, by her agent, inquired of Neighley concerning the condition of the mine. He stated that no change had taken place and that there was nothing new to report. Relying upon these statements, and with no suggestion to the contrary, plaintiff sold her one-quarter interest for \$4,000, and Pollard a like interest for \$2,000. The ore discovered yielded in gross \$112,000, of which sum, \$56,000 were profits, one-half of which, or \$28,000, defendants received.

Leaving out of consideration the acts of Oest, Neighley was bound to truthfully report to the plaintiff, or her agent, and to Pollard. Instead of stating the truth, he concealed it. If Munckton had been ignorant of this concealment, and dealt at arms-length with the sellers, it might well be argued that he was under no obligation to inform them

of the value of their property. But it is manifest that he knew of the fact and purpose of the concealment. Upon this point the learned judge before whom the cause was tried says: "But all the evidence and the circumstances, taken together, convince me that Munckton and Baker knew the plaintiff and Pollard had not learned of the discovery of ore, and knew of the means by which the knowledge had been kept from them." And again: "Munckton knew of it; and, if he had thought that Pollard and the Bays also knew it, (as he certainly would, if he did not know to the contrary,) he would certainly have mentioned it in the course of the negotiations, defeating the whole scheme." The discovery greatly enhanced the value of the mine. It was the inducement to defendants to purchase; and, if the sellers had known of it, they naturally would have used the fact for what it was worth. But plaintiff asked no more for her interest than the price she had offered it at before the strike, and Munckton conducted his negotiations so as not to disclose the fact of the discovery. From these facts the district court must have concluded that Munckton's conduct was inconsistent with ignorance of the concealment. They are sufficient, in connection with the fact that knowledge of the strike was concealed from plaintiff and Pollard, and communicated to Munckton, in order that he might purchase, to support the finding of the district court upon this point. The scheme to defraud did not originate with Munckton. Others set in on foot, and bore a more active part than he in the perpetration of the fraud, but he consummated it by purchasing with guilty knowledge of the general plan. He cannot, therefore, retain the avails of the scheme. The decree of the district court directs a cancellation of the deed of conveyance to the defendants, requires a reconveyance, and that they repay to the plaintiff the profits acquired from the mine.

Appellants claim that the measure of damages should have been the difference between the market value of plaintiff's interest and the value she received. In an action at law, when a plaintiff affirms a contract and seeks only damages caused by fraudulent representation, the difference between the actual value and the price paid may afford compensation. But this is not a case of that character. Plaintiff does not affirm, but repudiates, the contract, and seeks a rescission of it. Under the rule invoked, she would receive \$1,000 damages,—that sum being the difference between the price paid and the market value,—while the profits upon the ore—amounting, for the one-half interest, to the sum of \$28,000—would inure to the benefit of the defendants. The injustice of this view is clear, and it is equally clear that the court, in placing the plaintiff, so far as it could, as if no fraud had been practiced, adopted the only rule of damages that could afford adequate relief.

Objection was taken that Adam Bay was

not made a party plaintiff. Appellants urge that he was the real owner of a one-quarter interest in the mine, standing in the name of the plaintiff at the time of the sale; that, although the legal title was in the plaintiff, she was in fact a mortgagee. We will not consider the testimony upon this point. Defendant Munckton had purchased his interest and that of Baker from her, and was in possession under her deed. They were, therefore, estopped to deny her title. This view renders it unnecessary to consider the objection to the ruling of the court excluding the testimony of Mr. James A. Stephens, the attorney who drew the deed from Adam Bay to Mrs. Gruber, and by whom defendants offered to show that it was intended as a mortgage.

Further objection is made to the character of proof by which plaintiff's case was established. Neighley, the foreman above mentioned, and who actively participated in the perpetration of the fraud, was plaintiff's principal witness, and as such detailed the means by which the fraud was accomplished. It is said that he stood before the court precisely as an accomplice in crime who confesses his own participation in it. Concede this, and yet upon all material points the testimony of the witness was corroborated.

Appellants also contend that the transfer by Pollard to Mrs. Gruber was simply the transfer of a lawsuit, and is void asavoring of maintenance. "Maintenance" is defined by Blackstone as "an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it." And "champerty" is defined as "a species of maintenance, * * * being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them if they prevail at law." 4 Bl. Comm. 134. "The doctrine of the common law as to champerty and maintenance," says Judge Story, "is to be understood with proper limitations and qualifications, and cannot be applied to a person having an interest, or believing that he has an interest, in the subject in dispute, and *bona fide* acting in the suit; for he may lawfully assist in the defense or maintenance of that suit." 2 Story, Eq. Jur. § 1048a. Applying these principles to the facts, the agreement between Pollard and Mrs. Gruber does not come within the rules of maintenance, nor within the reason of laws upon that subject. Each had an equal interest in the mine, and had alienated it under a similar state of facts. If either had brought suit to annul his or her deed, the other had such interest in the subject of the litigation as would sustain an agreement for the prosecution of the suit. *Call v. Calef*, 13 Mete. 332; *Finden v. Parker*, 11 Mees. & W. 675. And, in order that relief for both could be obtained by one suit, Pollard conveyed to Mrs. Gruber. This tended to reduce the expenses of the litigation, and could not have prejudiced appellants. There is an entire absence of officious intermeddling by

maintaining or assisting another to prosecute the suit; the agreement expressly providing that they shall divide the expenses of the litigation,—in other words, each shall pay in proportion to his or her interest.

The case of *Prosser v. Edmonds*, 1 Younge & C. 481, is relied upon by appellants in support of their contention. In that case a debtor had been fraudulently induced to make certain deeds of conveyance. Subsequent creditors, to whom the debtor afterwards assigned his interest in the property, brought a suit in equity to annul the first conveyance. The debtor made no complaint, and refused to be made a party plaintiff to the suit. It was held that the second assignment could not be sustained. The distinction between that case and this is: There the debtor made no complaint. Here the transferor is, in effect, a suitor maintaining his share of the expenses of the suit. The class of cases to which *Prosser v. Edmonds* belongs holds that an assignment or transfer will not be upheld when it is, in effect, the transfer of a lawsuit to be prosecuted at the expense of the assignee or transferee. The decisions are placed upon two grounds: (1) that such transactions involve the offenses of maintenance or champerty, or lead to their mischievous consequences, and are, therefore, repugnant to the policy of the laws upon these subjects; and (2) they are contrary to the common law, which forbade the transfer of a disputed title to real property by a party out of possession, upon the principle that such transfers savored of maintenance. As to the first ground, the agreement set forth involves none of the ingredients of the offenses named, and, as to the second, expressly permits the transfer interdicted by the common law. Section 3026, Gen. St. The reasons, therefore, which have required courts to disregard the transfer of disputed rights, do not exist in the present case. I will not consider whether plaintiff is the real party in interest, within the meaning of section 4 of the civil practice act, as this ground was not relied upon by appellants. As opposed, however, to the view expressed in the opinion of Mr. Justice MURPHY, Prof. Bliss, in discussing similar statutes requiring actions to be brought in the name of the real party in interest, says most of the courts have held that, in actions brought by the transferee, it does not concern the defendant for what purpose the transfer was made, and he cannot object unless he has some defense, or holds some claim, against the real owner. Bliss, Code, Pl. § 51. I think the judgment should be affirmed in all respects.

NOTE.

CHAMPERTY AND MAINTENANCE—WHAT CONSTITUTES. Conveyances of land held adversely to the grantor at the time are void in *Kentucky*. *Bentley v. Childers*, 7 S. W. Rep. 628; *Combs v. McQuinn*, 9 S. W. Rep. 495; *Adkins v. Whalin*, 7 S. W. Rep. 912. But this does not apply where there was no adverse possession at the time the contract for conveyance was made. *Greer v. Wintersmith*, 4 S. W. Rep. 222; *Thacker v. Belcher*, 11 S. W. Rep. 8. They are made so by statute in *New York*, but it is held that the statute does not apply where the adverse

holder claims under a common grantor with the other parties, and, by mistake in construing his deed, holds land not embraced therein. *Harris v. Oakley*, 7 N. Y. Supp. 232. The essential ingredient of champerty is the intent to promote litigation. *The J. Carl Jackson*, 29 Fed. Rep. 396.

In *Fowler v. Callan*, (N. Y.) 7 N. E. Rep. 169, a devisee conveyed part of the property devised to an attorney in consideration of the latter's agreement to defend a suit attacking the will, and to indemnify the devisee against liability for costs. The court said that it did not affect the validity of such contract that it would have been condemned by the old rules relating to champerty and maintenance, and held that it was not prohibited by the statutes of New York. See, also, a note to that case on the same subject. A contract between an attorney and client for a contingent fee is not unlawful in *Iowa*, *Winslow v. Railroad Co.*, 32 N. W. Rep. 380; nor in *Massachusetts*, *Manning v. Sprague*, 18 N. E. Rep. 673; *Blaisdell v. Ahern*, 11 N. E. Rep. 681; but an agreement to give an attorney one-half of the amount recovered, the clients paying no part of the costs, is champertous, *Lancy v. Harvender*, 16 N. E. Rep. 464. In *Illinois*, it has been held that an agreement by attorneys to render professional services in clearing the title to land for a certain per cent. of what the client may sell the land for is not champertous where the attorneys do not agree to prosecute the litigation at their own expense. *Phillips v. Commissioners*, 10 N. E. Rep. 230. See, also, *Aultman v. Waddle*, (Kan.) 19 Pac. Rep. 730; *Chester v. Jumel*, 5 N. Y. Supp. 809. On the general state of the law concerning champerty in the United States, see *Court-right v. Burnes*, 18 Fed. Rep. 317, and note, p. 823; *The Holladay Case*, 27 Fed. Rep. 830, and note; *Gilman v. Jones*, (Ala.) 5 South. Rep. 785.

(83 Cal. 246)

FARNUM *et al.* v. PHENIX INS. CO. (No. 13,365.)

(*Supreme Court of California*. Feb. 27, 1890.)

INSURANCE—CONDITIONS OF POLICY—WAIVER.

1. An express provision in an insurance policy that the company shall not be liable thereon until the premium is actually paid, is waived by the unconditional delivery of the policy to the insured under an agreement that a credit shall be given for the premium.

2. An agent who has power to countersign and deliver policies, and who is responsible to the company for collection of all premiums on policies issued by him, binds the company by an agreement to give credit on the premium for a certain time, though he is expressly authorized to give such credit only for a shorter time.

3. An insurance company cannot cancel a policy for failure of insured to fulfill certain conditions, without giving notice to the insured, and a notice sent by mail is ineffectual unless received.

4. A tender of the full amount of the premium within the term of the credit allowed is a sufficient compliance with the condition of payment to sustain an action on the policy.

5. A provision in the policy that "the use of general terms, or anything else less than a distinct specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver" of any condition, did not have the effect to render the waiver invalid, as not indorsed on the policy, since the agent had ostensible authority to waive the indorsement.

6. A provision in the policy that the damage "may be determined by mutual agreement, * * * or, failing to agree, the same shall be submitted to * * * arbitration," does not require arbitration unless the parties fail to agree; and the fact that the company, when proofs of loss to a certain amount were furnished, made no objections to the amount, but denied its liability on other grounds, and denied the existence of the policy, is sufficient proof that the company acquiesced in the amount of the loss, and waived submission to arbitration.

Appeal from superior court, San Joaquin county; J. W. SWINNERTON, Judge.

Action by N. O. Farnum et al. against the Phenix Insurance Company. Plaintiffs appeal from a judgment of nonsuit.

Louittit, Woods & Levinsky, for appellants. *J. C. Campbell* and *P. W. Bennett*, for respondent.

VANCLIEF, C. The action is upon a policy of insurance, and the appeal is from a judgment of nonsuit. The grounds of defendant's motion for nonsuit, and upon which the motion was granted, are presented by a bill of exceptions, and the record discloses the following facts: The defendant is a foreign fire insurance corporation doing business as such in this state, having general agents for the state, located in San Francisco, and a duly-appointed local agent for the county of San Joaquin, located at Stockton. On May 2, 1887, plaintiffs verbally applied to the Stockton agent for a policy of insurance upon their frame barn, windmill, tank, and tankhouse, situated about two miles south-east of Banta, in San Joaquin county. The land upon which these buildings stood was the property of G. W. Trahern, the father of one of the plaintiffs, who had permitted plaintiffs to erect the buildings thereon, but the buildings were the property of plaintiffs, who resided upon the land, and used and occupied the buildings. At the time the insurance was applied for the local agent was informed that the land belonged to Trahern. The policy, as applied for, was issued insuring the buildings for the term of five years from May 1, 1887; the insurance on the barn being for \$1,000, and upon the other structures for \$200. The policy does not refer to the ownership of the land on which the buildings stood. On September 5, 1887, the barn was totally destroyed by fire, and it was admitted that when destroyed it was of the value of \$1,000. Notice and proof of the loss were duly given and made by plaintiffs, upon receipt of which the defendant, without questioning the amount of the loss, denied all liability on the policy. No offer or request was made by either party to submit the question, as to amount of the loss, to arbitration. At the time of the fire and loss no part of the premium had been actually paid, but it was in evidence that the local agent of the defendant, at the time the policy was issued and delivered, verbally agreed and promised to give the plaintiffs a credit on the premium until October 1, 1887, and that the policy was taken by plaintiffs with that understanding, and upon that condition, though the agreement for such credit was not indorsed in writing upon the policy. The policy was countersigned by the local agent, and delivered to plaintiffs, on May 24, 1887. It was admitted that it was the custom of defendant to allow its agents to give credit for premiums for the term 60 days; and it was proved that the local agent was, by virtue of his appointment, made responsible for the collection of all premiums on policies issued by him. On June 25, 1887, the local agent mailed to plaintiffs, at Banta, a writ-

ten notice stating that "the premium on policy No. 73,143, on barn, tank, etc., \$1,200, amounting to \$73.50 on five-years policy, falls due on the 1st of July, and our instructions from the home office are imperative to collect in sixty days;" and inclosed in the same envelope was a notice that, "unless the premium thereon shall be paid on or before 12 o'clock noon of July 1, 1887, we shall cancel the insurance under said policy on our books, for non-payment of premium, without further notice, and terminate our liability thereunder from that date." It was proved that there was a regular daily communication by mail between Stockton and Banta; but neither of the plaintiffs actually received said notice. At the expiration of the time named in the notice, the premium being still unpaid, the general agents of defendant at San Francisco made an entry in the books in their office to the effect that the policy was canceled, but no notice of the cancellation was given to either of the plaintiffs. On September 30, 1887, plaintiffs tendered to the local agent of defendant the full amount of the premium, which he refused to receive. The pleadings admit that the amount of the premium was thereupon immediately deposited by plaintiffs, subject to the order of defendant, and that defendant was notified in writing of such deposit, and payment of the amount to defendant is offered in the complaint. The policy recites a consideration of \$73.50, but does not expressly acknowledge receipt of payment. It contains the usual conditions of fire policies as to the use and occupancy of the premises: The following clauses are the only ones relevant to the points to be considered: "The company shall not be liable by virtue of this policy, or any renewal thereof, until the premium therefor be actually paid." "The use of general terms, or anything less than a distinct specific agreement, clearly expressed, and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein." "The insurance may be terminated at any time, at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy." "The amount of solid value and of damage to the property * * * may be determined by mutual agreement between the company and the assured, or, failing to agree, the same shall be submitted to competent and impartial arbitrators. * * * It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable by any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided. In witness whereof the Phenix Insurance Company has caused these presents to be signed by its president, and attested by its secretary, in the city of Brooklyn, county of Kings, N. Y.; but the same shall not be binding until countersigned by

Henry C. Keyes, agent for the company at Stockton. STEPHEN CROWELL, President. PHILANDER SHAW, Secretary. Countersigned at Stockton this 24th day of May, 1887. HENRY C. KEYES, Agent."

1. The defendant contends that there is no liability upon the policy, because the premium was not actually paid before the loss, and because the agreement for credit was not indorsed in writing upon the policy. It seems to be settled by a controlling preponderance of authority that an express provision in a policy of insurance that the company shall not be liable on the policy until the premium be actually paid, is waived by the unconditional delivery of the policy to the assured as a completed and executed contract, under an express or implied agreement that a credit shall be given for the premium; and that in such case the company is liable for a loss which may occur during the period of the credit. *Boehen v. Insurance Co.*, 35 N. Y. 181; *Wood v. Insurance Co.*, 32 N. Y. 619; *Goit v. Insurance Co.*, 25 Barb. 190; *Trustees v. Insurance Co.*, 18 Barb. 69; *Sheldon v. Insurance Co.*, 26 N. Y. 460; *Bodine v. Insurance Co.*, 51 N. Y. 117; *Bowman v. Insurance Co.*, 59 N. Y. 521; *Church v. Insurance Co.*, 66 N. Y. 222; *Manufacturing Co. v. Insurance Co.*, Id. 618; *Latoix v. Insurance Co.*, 27 La. Ann. 113; *Pino v. Insurance Co.*, 19 La. Ann. 233; *Insurance Co. v. Neyland*, 9 Bush, 430; *Heaton v. Insurance Co.*, 7 R. I. 506; *Eagan v. Insurance Co.*, 10 W. Va. 583; *Hodge v. Insurance Co.*, 33 Hun, 584; *O'Brien v. Insurance Co.*, 22 Fed. Rep. 586; *Tennant v. Insurance Co.*, 31 Fed. Rep. 322; *Insurance Co. v. Norton*, 96 U. S. 234; *Young v. Insurance Co.*, 45 Iowa, 378; *Wagon Co. v. Insurance Co.*, 20 Fed. Rep. 232; *Post v. Insurance Co.*, 43 Barb. 351; *Van Schoick v. Insurance Co.*, 68 N. Y. 440. The reason for this rule is well expressed in the case last above cited, as follows: "The fact that the insurer delivered to the insured the written contract as the consummated agreement between them, and did not then exact present payment of the premium, as a necessary precedent to delivery, was too plainly in contradiction with the condition for prepayment for it to be supposed that it was meant by the insurer, or supposed by either party, that it was intended to make that condition a potent part of the contract. * * * It would be imputing a fraudulent intent to the defendant in this case to say or to think that they did not mean, when they delivered this policy to the plaintiff, to give him a valid and binding contract of insurance, or that they did not mean that he should believe that he had one, or that they did not suppose that he did so believe." In *Insurance Co. v. McCrea*, 8 Lea, 520, it is said: "It seems to be well settled that, when a contract of insurance is executed with a full knowledge of an existing fact which would render it void under a condition precedent embodied therein, the condition or its breach will be considered as waived, because otherwise it would

be an unmeaning form, the only effect of which would be to deceive and defraud."

In *Tennant v. Insurance Co.*, supra, Ross, J., holds that an extension of credit for an insurance premium pursuant to custom, by an agent having power to countersign a renewal receipt upon a life-policy, made the renewal of the policy binding in favor of the assured, notwithstanding the terms of the policy making the actual payment of the premium a condition precedent to the binding force of the renewal, and notwithstanding the death of the insured before the payment of the premium, and assigns as the reason for so holding that "it would manifestly operate as a fraud upon him to hold that the insurance did not become operative until the premium was actually paid." It should also be remarked that it would be manifestly unjust for an insurance company, which extends the time for the payment of the premium upon an executed and delivered policy, to charge the full amount of premium upon the risk for the entire period covered by the policy, and to accept such full amount at the expiration of that period if no loss occurred meanwhile, and yet to deny the validity of the policy, and its liability upon it during the period of credit, in case a loss should occur during that period.

In this case the local agent of defendant at Stockton had unquestionable power to extend a credit upon the premium for the period of at least 60 days. He represented the full power of the company to make a consummated and binding contract of insurance by countersigning and delivering the policy; and when he countersigned and delivered it unconditionally as a completed contract, under a specific agreement for payment of the premium at a future date, he thereby waived, to the full extent to which the company itself could then have waived, the actual payment of the premium as a condition precedent to its liability on the policy. "An insurance agent, clothed with authority to make contracts of insurance or to issue policies, stands in the stead of the company to the assured." *Rivara v. Insurance Co.*, 62 Miss. 728. In *Insurance Co. v. Block*, 109 Pa. St. 538, it was held that the counter-signature of an authorized agent upon a policy which is unconditionally delivered by him to the insured, and which, by its terms, requires such countersigning to make it valid, is a virtual acknowledgment of the receipt of premium, and estops the company to deny the validity of the policy, upon the ground that the premium was not actually received by the officers of the company. The policy in this case does not formally express receipt of premium, but it recites a consideration of \$73.50 for the contract of insurance, and declares that the policy shall not be binding until countersigned by the agent at Stockton, and thus impliedly authorizes him to consummate a binding contract of insurance for the consid-

eration expressed. If the policy had contained a formal receipt of premium, its unconditional delivery would have been conclusive evidence of payment, so as to have estopped the defendant from denying the validity of the policy, notwithstanding the declaration in it that it shall not be binding until the premium is actually paid, (Civil Code, § 2598; *Basch v. Insurance Co.*, 35 N. J. Law, 429; *Insurance Co. v. Fennell*, 49 Ill. 180;) and upon principle the same result should follow where the policy is delivered as a valid and completed contract, upon a consideration expressed therein, the receipt of which is impliedly acknowledged, an authorized credit having been agreed upon as an equivalent and substitute for cash payment. The promise to pay the premium at a future time was a sufficient consideration for the contract to insure, as there can be no question that the promise to pay at a future day was binding on the plaintiffs, and could have been enforced by the defendant.

It is no answer to this to say that the Stockton agent was not authorized to give so long a credit as that given in this case,—from May 2 to October 1, 1887,—but was limited to a credit of 60 days; for it is sufficient that he had authority to give a credit of 60 days. The credit given was a valid credit for 60 days, at least, and the giving of any credit by authority of the company was a waiver of actual payment as a condition precedent to the liability of the company. The only remedy of the company thereafter was to rescind or to cancel the policy for non-payment of the premium within the 60 days, upon personal notice to the plaintiffs, which the bill of exceptions shows was not received by either of the plaintiffs. When credit is given by an insurance company it has no right to cancel the policy for non-payment of premium, except after putting the insured in default, (*Latiox v. Insurance Co.*, 27 La. Ann. 113,) and personal notice of intended cancellation must be given to the insured, (*Insurance Co. v. Turnbull*, 86 Ky. 230, 5 S. W. Rep. 542.)

If the notice is sent by mail, and not received, as in this case, the cancellation for non-payment of premium is ineffective. *Mullen v. Insurance Co.*, 121 Mass. 171. Notice of cancellation to the agent who negotiated the policy will not bind the assured, (*Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. Rep. 207; *Assurance Society v. Insurance Co.*, 84 Va. 116, 4 S. E. Rep. 178; *Insurance Co. v. Turnbull*, 5 S. W. Rep. 542,) nor to any other person than the one obligated to pay the premium, (*Chadbourne v. Insurance Co.*, 31 Fed. Rep. 533.)

Again, the local agent at Stockton, being clothed with general power to receive proposals for insurance and to countersign and deliver policies in San Joaquin county, is presumed to have the power of the company within that county to waive the immediate payment of premiums, and to make contracts for credit. *Wagon Co. v. Insurance*

Co., 20 Fed. Rep. 232; *Post v. Insurance Co.*, 43 Barb. 351. Whether an agent has general or only particular powers is not determined by simply calling him a local agent. *Murphy v. Insurance Co.*, 3 Baxt. 448. An agent who, under general instructions from the home office, has authority, within a certain territory, to deliver policies and receive premiums, is a general agent, and has authority to waive cash payment. *Insurance Co. v. Booker*, 9 Heisk. 606. A local insurance agent is presumed to have power co-extensive with the business intrusted to his care, and his powers will not be narrowed by limitations not communicated to the person with whom he deals. *Baubie v. Insurance Co.*, 2 Dill. 156. Where, by the terms of a policy, a particular local agent is to countersign it to make it valid, so that the insured must deal with him, and no one else, he represents the power of the company, so that any policy which he countersigns binds the company to any person insured through his agency, who has no notice of limitation of his power, though he may have exceeded his authority, and violated his duty to his principal. *Insurance Co. v. Earle*, 33 Mich. 151, 153; *Viele v. Insurance Co.*, 26 Iowa, 58; *Murphy v. Insurance Co.*, 3 Baxt. 440; *Whited v. Insurance Co.*, 76 N. Y. 415.

A local agent having ostensible general authority to solicit applications and make contracts for insurance, and to receive first premiums, binds his principal by any acts or contracts within the general scope of his apparent authority, notwithstanding an actual excess of authority. *Insurance Co. v. Wilkinson*, 13 Wall. 234; *Insurance Co. v. Neyland*, 9 Bush, 436; *Rivara v. Insurance Co.*, 62 Miss. 721; *Insurance Co. v. McLanathan*, 11 Kan. 533; *Insurance Co. v. Kasey*, 25 Grat. 271; *Wheaton v. Insurance Co.*, 76 Cal. 415, 18 Pac. Rep. 758; *Insurance Co. v. Barnes*, (Kan.) 21 Pac. Rep. 165; *Insurance Co. v. Hogue*, Id. 641. By the authorities above cited it appears that the plaintiffs were entitled to the whole term of the credit for which they contracted, through the defendant's local agent, and could not thereafter be put in default for a failure to pay or tender the premium before the expiration of the period of credit actually given. That credit from May 2 until October 1, 1887, was actually given, must be assumed as a fact for the purposes of the motion for a nonsuit, it appearing from the bill of exceptions that evidence to that effect was given on behalf of the plaintiffs without any counter-evidence whatever, unless the contents of the letter addressed to the plaintiffs by the defendant's agent at Stockton may be so construed. That letter only purports to notify them that "instructions from the home office are imperative to collect in sixty days," and that the premium "falls due on the 1st of July,"—two months after the policy was delivered,—thus clearly indicating that a credit of 60 days had been given with the sanction of the company; but, as the letter was not

received by the plaintiffs, it can have no effect as evidence against them for any purpose. It also appears by the terms of the written appointment of the local agent that he was made responsible to the company for the collection of all premiums on policies issued by him, and that it was the custom of the company to allow its agents to give a credit of 60 days on premiums. From these facts it may fairly be inferred that the company was content to substitute the personal liability of the agent for the condition of prepayment of the premium. *Elkins v. Insurance Co.*, 113 Pa. St. 386-394, 6 Atl. Rep. 224; *Insurance Co. v. Hoover*, 113 Pa. St. 591, 8 Atl. Rep. 163; *Insurance Co. v. Elkins*, 124 Pa. St. 484, 17 Atl. Rep. 24.

It is urged by respondent's counsel that actual payment of the premium is a condition precedent to a recovery upon the policy, notwithstanding an agreement for credit, and that it was so decided in *Bergson v. Insurance Co.*, 38 Cal. 546. But it appeared in that case that issue was taken on the fact of payment, and that there never was any actual payment or tender of the whole premium, and that the policy was canceled for non-payment of a part of the premium, within the period of the credit given by the company, and after due notice. The case also holds that an acknowledgment of the receipt of the premium in a delivered policy may be contradicted so as to defeat a recovery upon the policy; but this rule has been changed by section 2598 of the Civil Code. The decision in that case is no authority against the position that a tender of payment of the premium in full, within the term of the credit allowed, is a sufficient compliance with the condition of payment to sustain an action on the policy. The company cannot refuse such a tender, and then successfully insist upon a nonsuit, because the premium was not actually paid. *Eagan v. Insurance Co.*, 10 W. Va. 588; *Boehen v. Insurance Co.*, 35 N. Y. 132; *Bodine v. Insurance Co.*, 51 N. Y. 119; Civil Code, § 1485.

2. The next important question relates to the effect of the provision in the policy that "the use of general terms, or anything less than a distinct specific agreement, clearly expressed, and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein." So far as such provision has been held to constitute a limitation upon the power of agents, it has been applied to cases of waiver of conditions made after the signing and delivery of the policy as a consummated contract, such as the waiver of conditions relating to assignment of the policy, to increase of risk, or to occupancy of the insured premises. *Shuggart v. Insurance Co.*, 55 Cal. 408; *Gladding v. Association*, 66 Cal. 6, 4 Pac. Rep. 764; *Enos v. Insurance Co.*, 67 Cal. 621, 8 Pac. Rep. 379; *Walsh v. Insurance Co.*, 73 N. Y. 5. In the last case cited, it is expressly held that the conclusion that such a provision limits the power of agents after the policy has been

delivered, and the restriction upon their power to waive conditions as to the use or vacancy of the premises, known to the insured, "does not interfere with that class of cases which have established that conditions for pre-payment of premiums and the like, which enter into the validity of the contract of insurance at its inception, may be waived by agents, and are waived, if so intended."

It has been expressly adjudged by the supreme court of Iowa, in a well-considered case, that the insured is not bound to take notice of the conditions in the policy that the premium must be actually paid, nor of the provision that the waiver of condition must be indorsed in writing on the policy when the policy is executed and delivered to him as a valid and completed contract, by an agent having authority to countersign it, and who before or at the time of the delivery of it has given the insured a credit upon the premium by parol; and that, if a loss occurs in such case before the credit expires, the company is bound, notwithstanding that the agreement for credit was not indorsed upon the policy. *Young v. Insurance Co.*, 45 Iowa, 378. And it has been repeatedly held that where any fact, which would constitute a breach of a condition precedent to any liability of the company on the policy, is fully known to an agent of the company, local or general, who is authorized to consummate the contract of insurance, the knowledge of such agent is the knowledge of the company, and his act in executing and delivering the policy, as a valid and completed contract, is an exercise of the power of the company, and constitutes a waiver by the company of such condition precedent, and also a waiver of the general requirement that waivers or conditions expressed in the policy shall be in writing indorsed on the policy. *Van Schoick v. Insurance Co.*, 68 N. Y. 434; *Whited v. Insurance Co.*, 76 N. Y. 418-421; *Insurance Co. v. McCrea*, 8 Lea, 518-520; *Insurance Co. v. Jones*, 62 Ill. 458; *Insurance Co. v. Earle*, 83 Mich. 151-153; *Viele v. Insurance Co.*, 26 Iowa, 58; *Murphy v. Insurance Co.*, 3 Baxt. 440; *Gelb v. Insurance Co.*, 1 Dill. 449; *Devine v. Insurance Co.*, 32 Wis. 471; *Pelkington v. Insurance Co.*, 55 Mo. 172; *Insurance Co. v. Lyons*, 38 Tex. 258; *Insurance Co. v. Hall*, 12 Mich. 202; *Carroll v. Insurance Co.*, 38 Barb. 402; *Manufacturing Co. v. Insurance Co.*, 2 Paine, 501; *Insurance Co. v. Schettler*, 38 Ill. 166. It is also well settled that an insurance company cannot so limit its capacity to contract by general stipulations against waiver of conditions, or that its contracts or waivers must be in writing, that it cannot, by its agents, make an oral contract or an oral waiver not forbidden by the statute of frauds. *Trustees v. Insurance Co.*, 19 N. Y. 305; *Insurance Co. v. Norton*, 96 U. S. 234; *Carrugi v. Insurance Co.*, 40 Ga. 141; *Lamberton v. Insurance Co.*, 39 Minn. 129, 39 N. W. Rep. 76; *Insurance Co. v. Earle*, 33 Mich. 153; *Reiner v. Insurance Co.*, 42 N.

W. Rep. 208; *Steen v. Insurance Co.*, 89 N. Y. 326. Whether or not any particular agent has the general power of the company to make an oral contract, or an oral waiver of a condition, notwithstanding the provision in the policy requiring a writing, is a question of fact. *Insurance Co. v. Norton*, 96 U. S. 234; *Steen v. Insurance Co.*, 89 N. Y. 326.

The authorities before cited show that a local agent, who is clothed with general power to solicit and consummate contracts of insurance within a certain territory, stands in the stead of the company, and represents its whole power to give validity to the contracts which he is authorized to execute and deliver, and to waive conditions precedent to liability by oral agreement, including the condition as to the mode of waiver of such conditions precedent. In this case, the circumstance that the company had general agents for the state located at San Francisco does not affect the question, since it conferred its whole power in regard to the policy in question upon its agent at Stockton, who appears to have received his appointment and instructions directly from the "home office," in the state of New York, and who signed himself as the direct agent of the defendant. Of the authorities hereinbefore cited, the following directly affirm the ostensible power of such a local agent to bind the company by waiver of any condition precedent to its liability, and to dispense with the requirement that such waiver shall be in writing indorsed on the policy, so far as to estop the company from questioning its original liability on the ground that the waiver made at the time of delivery of the policy was not indorsed upon it. *Geib v. Insurance Co.*, 1 Dill. 449; *Insurance Co. v. Earle*, 33 Mich. 151-153; *Whited v. Insurance Co.*, 76 N. Y. 418; *Viele v. Insurance Co.*, 26 Iowa, 58; *Murphy v. Insurance Co.*, 3 Baxt. 440; *Insurance Co. v. McCrea*, 8 Lea, 513-520.

3. It is contended by counsel for respondent that the judgment of nonsuit should be sustained because the plaintiffs did not demand nor obtain an award of arbitrators as to the amount of loss. This, it is said, was a condition precedent to a right to maintain this action. No arbitration is contemplated or required by the terms of the policy, except in case of a failure of the parties to agree upon the amount of the loss. After the fire, and within the time prescribed by the policy, the plaintiffs furnished to defendant the requisite proofs of loss to the extent of \$1,000,—the amount alleged in the complaint,—and thereupon, without questioning or making any objection to the amount of the loss claimed or to the proofs thereof, the company, for other reasons, not only denied its liability, but denied the existence of the policy, claiming that it had been canceled two months before the loss. This was sufficient evidence that the defendant acquiesced in the amount of the loss claimed, and thereby waived its right to have it determined by arbitration. *Lasher v. Insurance Co.*, 18 Hun, 98, 55 How.

Pr. 318; *Insurance Co. v. Putnam*, 20 Neb. 331, 80 N. W. Rep. 246; *Mentz v. Insurance Co.*, 79 Pa. St. 478; *Insurance Co. v. Badger*, 53 Wis. 284, 10 N. W. Rep. 504; *Wallace v. Insurance Co.*, 4 McCrary, 123, 41 Fed. Rep. 742; *Nurney v. Insurance Co.*, 30 N. W. Rep. 350. Then, it is well settled by a long line of authorities that the denial of all liability upon other grounds is a waiver even of the condition requiring proofs of loss. *Insurance Co. v. Ruckman*, 127 Ill. 364, 20 N. E. Rep. 77; *Insurance Co. v. Spiers*, 8 S. W. Rep. 453; *Transportation Co. v. Insurance Co.*, 34 Conn. 561; *McBride v. Insurance Co.*, 30 Wis. 562; *Donahue v. Insurance Co.*, 56 Vt. 382; *Insurance Co. v. Erb*, 112 Pa. St. 149, 4 Atl. Rep. 8; *Zielke v. Assurance Corp.*, 64 Wis. 442, 25 N. W. Rep. 436; *O'Brien v. Insurance Co.*, 52 Mich. 131, 17 N. W. Rep. 726; *Wagon Co. v. Insurance Co.*, 20 Fed. Rep. 232; *Carroll v. Insurance Co.*, 72 Cal. 297, 13 Pac. Rep. 863. Under the circumstances, an offer by the plaintiffs to arbitrate would have been an idle act, which "the law neither does nor requires." Civil Code, § 3532.

None of the California cases cited to this point by respondent's counsel are opposed to the position here assumed. In *Old Saucelito L. & D. Co. v. Commercial Co.*, 66 Cal. 253, there was an actual dispute as to the amount of the loss, and plaintiff alleged that it had offered to submit to arbitration; but the court found to the contrary. 5 Pac. Rep. 232. So, in the case of *Adams v. Insurance Co.*, 70 Cal. 198, 11 Pac. Rep. 627, it appears that the only dispute between the parties was an express dispute as to the amount of the loss. In *Carroll v. Insurance Co.*, 72 Cal. 297, 13 Pac. Rep. 863, the difference as to the amount of loss had been submitted to arbitration, and an award had been made. The defendant pleaded this award as a limitation upon the amount to be recovered, and the plea was held good. As it appears from the bill of exceptions that the evidence on the part of the plaintiffs, substantially, and even strongly, tended to prove all the facts necessary to entitle the plaintiffs to recover, I think the judgment of nonsuit was erroneous, and should be reversed, and that the cause should be remanded for a new trial.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment of nonsuit is reversed, and the cause remanded for a new trial.

(87 Cal. 104)

DUFF v. DUFF. (No. 13,078.)

(*Supreme Court of California*. March 31, 1890.)

ACTION TO SET ASIDE CONVEYANCE—FRAUD.

1. A complaint for relief on the ground of fraud stated that plaintiff's ancestor had executed a power of attorney to defendants' ancestor, empowering him to sell for him certain realty; that soon thereafter he left the state, and never returned, and during the next 10 years defendants'

ancestor secretly, without consideration, and without notice to plaintiff's ancestor, conveyed to defendants (who were conversant with the fraud) the property in question; and that shortly after the death of plaintiff's ancestor, who devised all his property to plaintiff, she was first informed of the fraudulent conveyances. *Held*, that the complaint showed a good cause of action for concealed fraud, not barred by laches or lapse of time.

2. In an action for relief on the ground of fraud in relation to real estate, where the complaint avers that the conveyances alleged to be fraudulent were without consideration, but the allegations in the complaint show that there has been a great lapse of time, the court, taking into consideration the probability of the statute of limitations being invoked, will not refuse relief in equity on the ground that, the conveyances being alleged to be without consideration, plaintiff's complaint shows a complete and adequate remedy at law by ejectment.

3. In a suit in equity for relief on the ground that defendants' ancestor, who was, by power of attorney, authorized to sell for plaintiff's ancestor certain realty, had fraudulently exercised this power by a conveyance to defendants, a special finding of the jury that property referred to in a letter, being a power of attorney, is held in trust for plaintiff, as stated in it, should find that the property referred to in the letter is held in trust "in the manner and proportions mentioned" in the letter.

In bank. For opinion on former appeal, see 12 Pac. Rep. 570.

S. M. Buck, Horace L. Smith, and John A. McQuaid, for appellant. *S. M. Wilson, Wilson & Wilson, J. D. H. Chamberlain, G. W. Hunter, and W. L. Duff*, for respondent.

WORKS, J. A statement of this case will be found in *Duff v. Duff*, 71 Cal. 513, 12 Pac. Rep. 570. It was there held that the complaint stated a cause of action; the law relating to the question of the statute of limitations, as applicable to an action of this kind, was stated; and the cause was reversed for certain errors of law occurring at the trial. The cause was again tried by the court below without a jury, and findings and judgment rendered in favor of the plaintiff as to the greater portion of the property in controversy, and in favor of the defendants as to the balance. A new trial as to the issue found in favor of the plaintiff was denied, and as to that portion of the finding in favor of the defendants a new trial was granted. The defendants appeal from both of these orders, and from the judgment.

It is earnestly contended by the appellants that the findings of the court, and especially those relating to the fraud charged, and the statute of limitations, were not sustained by the evidence. We have gone over the evidence, and find it to be such that we cannot disturb the judgment on this ground.

Numerous assignments of errors of law occurring at the trial are assigned and extensively argued in the briefs. We cannot undertake to discuss these alleged errors in detail. They relate mainly to rulings made in the admission and exclusion of evidence. A careful reading of the briefs of counsel and the record has convinced us that no error was committed, in any of these rulings, that should reverse the judgment. The cause has

been twice tried, once by the jury and once by the court, and decided each time in favor of the plaintiffs. The last trial appears, from the record before us, to have been a very full and fair investigation of the complicated affairs of this family, so far as it affects the title to this land, and we are satisfied that a correct result was reached. Judgment and orders affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; FOX, J.; THORNTON, J.

(82 Cal. 576)

TILLMAN v. AVERETT *et al.* (No. 12,263.)
(*Supreme Court of California*. Jan. 27, 1890.)

Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Wm. H. Webb, for appellant. *Gell & Morehouse*, for respondents.

THORNTON, J. Appeal from a judgment by plaintiff. The complaint states his cause of action, in which the pleader sets it forth by using the common counts for goods sold and delivered, for services performed and money paid, etc. The defendants denied the allegations of the complaint, and set up a counter-claim by proper averments. The action seems to involve a settlement of the respective accounts of the parties. The court found that the plaintiff was not entitled to a judgment, and entered judgment for defendants for their costs. We find no error in the record. The evidence is not before us in any shape in which we can consider it. There is no bill of exceptions and no statement, and, if there was, the appeal was not taken within 60 days after the rendition of the judgment, so as to entitle the appellant to have it considered by the court. Judgment affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

(83 Cal. 84)

PAIGE v. ROCKY FORD CANAL & IRRIGATION CO. (No. 12,645.)

(*Supreme Court of California*. Feb. 1, 1890.)

RIGHTS IN WATER-COURSES.

1. A stream which had been a natural water-course was obstructed by a flood, and from that time water flowed to plaintiff's lands, situated on the stream, only in time of freshets. Plaintiff purchased the right to turn other streams into the old channel for purposes of irrigation. Defendant corporation had obtained from plaintiff's grantors the right to turn water into the stream, with the privilege of turning it out again, and of clearing the obstructions from the stream. *Held* that, this being a natural water-course, defendants were not entitled to take out more water than they turned in, and would be restrained from building a dam across the stream, whereby all the water would be diverted, and none would flow by plaintiff's land.

2. Though the natural flow of water after the stream was obstructed only reached plaintiff's land on occasions of freshets, yet, when the flow of water was increased by the removal of the obstructions by defendants, the increase of flow accrued to the benefit of plaintiff, and not to that of defendants, who had no right to the natural flow.

On rehearing. For former opinion, see 21 Pac. Rep. 1102.

Brown & Daggett, for appellant. *Atwell & Bradley*, for respondent.

PER CURIAM. We granted a rehearing in this case, after affirmance of the judgment of the superior court, because we were in doubt whether there was not a fatal conflict in the findings as to appellant's claim of prescriptive right to maintain the dam in the South fork of Packwood creek, and to divert the waters of the creek through its canal. After the reargument, and a careful re-examination of the findings, we are satisfied that they are entirely consistent. They are not so clearly expressed as they might have been upon one or two points, but, reading them and construing them all together, their evident meaning is that, although the appellant maintained a dam in the South fork of Packwood creek for more than five years continuously prior to the commencement of this action, and also maintained its ditch during the same period, it did not maintain such dam or ditch under any claim of right adverse to the respondent's right, and consequently that its continuous maintenance of the dam and ditch was no bar to the action. We are in all respects satisfied with our former opinion. Judgment and order affirmed.

HOGUE v. OWEN. (No. 13,537.)

(Supreme Court of California. Feb. 3, 1890.)

In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Grady & Welsh, for appellant. *Geo. A. Nourse*, for respondent.

FOX, J. On motion of counsel for respondent, and on reading the certificate of the clerk of the court below, and the affidavits filed on behalf of the respective parties herein, filed on said motion, it is by the court now ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed.

We concur: WORKS, J.; THORNTON, J.; PATERSON, J.; SHARPSTEIN, J.; MCFARLAND, J.

(14 Colo. 217)

ATCHISON v. GRAHAM.

(Supreme Court of Colorado. Feb. 28, 1890.)

CHATTEL MORTGAGE—POSSESSION—EVIDENCE.

A mortgagee of horses left in the mortgagor's livery stables after default went to the stables and "checked off" the horses mortgaged without separating them from other horses in the stables, or putting up any notice of ownership. He left an agent in charge of them, with instructions not to allow them to be taken from the stables; but the mortgagor still fed and cared for them, and testified that he drove them, and used two of them in his business, until defendant levied an execution on them. Held, that there was not a sufficient change of possession to entitle the mortgagee to recover them, within the meaning of Gen. St. Colo. § 1523, providing that every sale of goods

and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be conclusively presumed to be fraudulent and void as against creditors of the vendor, though section 163 provides that where the mortgage is recorded the mortgagor may remain in possession for two years.¹

Commissioners' decision. Appeal from superior court of Denver.

A. B. McKinley, for appellant. *Steele & Malone*, for appellee.

PATTISON, C. This is an action of replevin, brought by appellant to recover certain personal property of which she claimed ownership and right of possession. The facts out of which the litigation arose, briefly stated, are as follows: September 6, 1884, appellant, through the agency of one E. J. Adams, loaned H. E. Kinney and George V. Horne, who were then doing business as copartners, the sum of \$840. On that day they gave their promissory note for that sum, payable three months after date, at the rate of 3½ per cent. per month from date until paid. To secure the payment of the note they made, executed, and delivered to Adams a chattel mortgage upon certain personal property, consisting of horses, harness, carriages, etc., then in their possession at the Kentucky Livery Stables in this city. The chattel mortgage contained the usual covenants, among which was the following: "We will well and truly pay, or cause to be paid, the said promissory note * * * when the same shall become due and payable, without days of grace. * * *" It was also provided that, until default "in the keeping or performance of some one or more of the conditions, covenants, or agreements above, herein, or hereinafter mentioned, the said parties of the first part may keep, retain, and use the said property, goods, and chattels." Upon default the mortgagee was authorized to take immediate and full possession of the property. Immediately after the note and mortgage were made they were transferred by Adams to appellant. The property remained in the possession of the mortgagors, and was used by them in their business, until December 6, 1884. In the evening of that day, Thomas Atchison, the husband of appellant, accompanied by Adams and one Brandt, went to the livery stables of the mortgagors, and demanded payment of the note. The note not being paid, Atchison, as agent of appellant, undertook to take possession of the property under the mortgage. No objection was made to the proceeding by the mortgagors. Accompanied by them, Atchison and Adams went through the stables, identifying the property described in the

¹ As to what is a sufficient change of possession of chattels sold, as against the seller's creditors, see *Murch v. Swenson*, (Minn.) 42 N. W. Rep. 290, and note; *Distilling Co. v. Atkins*, (Ark.) 7 S. W. Rep. 137, and note; *Harness Co. v. Schoelkopf*, (Tex.) 9 S. W. Rep. 336, and note; *Wolcott v. Hamilton*, (Vt.) 17 Atl. Rep. 89, and note; *Preston v. Southwick*, (N. Y.) 21 N. E. Rep. 1081.

mortgage, and placing the same in charge of Brandt as custodian, with instructions that he should not permit the property to be taken from the stables. The property was not separated from other property belonging to the mortgagors, nor was its position changed in any respect. Atchison and Adams then left the stables, and Brandt remained as the representative of appellant. On Monday, December 8th, the mortgagors confessed a judgment in favor of one Snyder for the sum of \$1,474. The same day an execution upon the judgment confessed was issued and delivered to appellee or his deputy, A. H. Weber. Weber, upon the receipt of the execution, and at about 5 o'clock in the afternoon, went to the stables of the judgment debtor for the purpose of levying the execution. When he reached the stables he began to execute the process by making a list and inventory of the property in the usual form. While he was engaged in making the levy, he was informed by Brandt that the property was in his possession as agent of the mortgagee, and the mortgage itself was then and there exhibited to him. He thereupon proceeded no further with the execution of the process. Subsequently, having secured indemnity, he returned, and levied the execution upon the mortgaged property in the usual way. After the levy had been perfected, appellant caused demand to be made for the delivery of the property, and upon refusal brought this action.

The complaint is in the usual form. The answer put in issue the allegations of the complaint, and, for a second defense, justified the taking under the execution issued upon the judgment as above stated. A replication was filed, and upon these issues the cause was tried to the court, and judgment rendered for defendant. Motion for a new trial was made and granted. Before the trial an amended answer was filed by defendants, setting up as a further defense to the action that the mortgage was invalid, because, at the time it was made, a contract was entered into between the mortgagors and the mortgagee, by the terms of which the mortgagors were authorized, in effect, to sell the property mortgaged, and apply the whole or some part of the proceeds to their own use. The allegations of the amended answer were put in issue by further replication by appellant. In November, 1885, a second trial was had before the court without a jury, which trial resulted in a second judgment against appellant, from which this appeal was taken.

The sole question presented to this court is whether the judgment of the court below is sustained by the evidence. In considering this question, the defense interposed by the amended answer will be ignored, for the reason that there is no evidence which shows, or tends to show, that the mortgagors were to sell the mortgaged property. The discussion will be confined to the simple question whether, after default in the payment of the note, there was an actual delivery and change

of possession of the property, within the meaning of the law, as settled by this court. That the note given by the mortgagors matured December 6th, there can be no question. Days of grace were expressly waived by the provisions of the mortgage itself. That days of grace may be waived is elementary. 3 Rand. Com. Paper, § 1057. Failure to pay the note, therefore, upon that day, was a breach of the condition of the mortgage, which entitled the mortgagee to take immediate possession of the mortgaged property.

The question presented is whether the appellant actually took possession of the property, within the meaning of the chattel mortgage act and the statute of frauds of this state, as interpreted and construed by this court. The rights and duties of mortgagees under the chattel mortgage act of this state have never been fully defined by this court. It is an elementary principle that "a chattel mortgage at common law is void against creditors, unless accompanied by an actual delivery of the property to the mortgagee." Jones, Chat. Mortg. § 176. This principle of the common law has been adopted as a part of the statute law in this state. Section 163 of the General Statutes provides that "no mortgage on personal property shall be valid as against the rights and interest of any third person or persons unless possession of such personal property shall be delivered to and remain with the mortgagee, or the said mortgage be acknowledged and recorded as hereinafter directed." Registry of the mortgage is, by this section, made a substitute for the delivery and change of possession of the property. Under this provision, personal property mortgaged may remain in the possession of the mortgagor, if the mortgage so provides, and it is acknowledged and recorded in accordance with the statute.

It is claimed by appellant that, under section 165, the mortgagor may retain possession of the property for the full period of two years, because that section declares that such a mortgage shall be "good and valid from the time it is so recorded, for a space of time not exceeding two years, notwithstanding the property mortgaged or conveyed by deed of trust may be left in the possession of the mortgagor." This construction of the language quoted cannot prevail. The time during which the property was to remain in the custody and possession of the mortgagor is in this case fixed and determined by the mortgage itself, and the rights of the parties, in this respect, are defined by the mortgage and not by the statute. The mortgage provides that the property shall remain in the possession of the mortgagors until default in payment or the maturity of the debt. Under the chattel mortgage act, the property may remain with the mortgagor for the period "that such conveyance shall provide for the property so to remain," but in no event can the mortgagor retain possession of the property more than two years. The statute now un-

der discussion is that which was in force at the time the mortgage in question was made. By the amendment of 1887 it is provided that such mortgage shall "be good and valid from the time it is so recorded until the maturity of the last installment of the mortgage indebtedness, but not exceeding two years, if the principal of said mortgage indebtedness be not exceeding \$2,500," etc. Laws 1887, p. 75. The section of the chattel mortgage act in force when the mortgage in question was made is a literal transcript of section 3 of the Revised Statutes of Illinois of 1845, c. 20. This section has been construed again and again by the supreme court of that state. In *Reed v. Eames*, 19 Ill. 594, it is held that "under a chattel mortgage the mortgagee must take possession of the property upon the default of payment of the debt. Suffering property to remain with a mortgagor after a default in payment is a fraud *per se*, not subject to explanation. * * * The word 'so' in the proviso to the act respecting chattel mortgages has reference to the two years of time; meaning that, if the conveyance so expresses it, the property may remain with the mortgagor two years." *Thompson v. Yeck*, 21 Ill. 73; *Funk v. Staats*, 24 Ill. 632; *Reese v. Mitchell*, 41 Ill. 365; *Lemen v. Robinson*, 59 Ill. 115; *Dunlap v. Epler*, 88 Ill. 82. In 1874 the chattel mortgage statute of Illinois was revised, and such mortgages were declared to be valid, "from the time it is filed for record until maturity of the entire debt or obligation." Rev. St. Ill. 1874, § 4, c. 95.

Under the statute and the authorities cited, it is clear that upon default it became the duty of Kinney & Horne to deliver the property to appellant, and that it became her duty to take actual and exclusive possession, and to assume absolute dominion and control over it. A chattel mortgage is in law a conditional sale of chattels, and operates to transfer the legal title to the mortgagee. Upon breach of the condition the title becomes absolute, and the mortgagee may then treat the mortgaged property as his own. After default, therefore, in the payment of the debt secured, the relations of the mortgagee to the property, the rights of the creditors and subsequent purchasers in good faith, are to be defined and determined by the principles which are applicable to the relation between vendees and creditors upon a sale of personal property. *Jones, Chat. Mortg.* § 375; *Funk v. Staats*, supra. The sufficiency of the delivery and change of possession, therefore, in this case, is to be determined by section 1523 of the General Statutes of this state, which declares that "every sale made by a vendor of goods and chattels in his possession, or under his control, * * * unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void as against creditors of the vendor, * * * and this presumption shall be conclusive." This section has been

repeatedly construed by this court. In *Cook v. Mann*, 6 Colo. 21, the rule is stated in the following language: "The vendee must take the actual possession, and the possession must be open, notorious, and unequivocal; such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands, and that the title has passed out of the seller and into the purchaser. This must be determined by the vendee using the usual marks or *indicia* of ownership, and occupying that relation to the thing sold which owners of property generally sustain to their own property. The possession must be exclusive of the vendor. A concurrent or joint possession is not admissible." The same rule is announced in *Wilcox v. Jackson*, 7 Colo. 521, 4 Pac. Rep. 690. In *Bassinger v. Spangler*, 9 Colo. 175, 10 Pac. Rep. 809, it was held: "It [the statute] admits of no excuse for leaving personal chattels, capable of manual delivery and removal, in the apparent possession of the vendor; nor does it admit of a construction whereby there may be a joint or concurrent possession in both vendor and vendee. Nor can a case be taken out of the statute, nor can the statute be satisfied, by proving that the sale was *bona fide*." The same doctrine was announced in April last in *Sweeney v. Coe*, 12 Colo. 485, 21 Pac. Rep. 705. The rule is an arbitrary one. The reason of the rule has nothing whatever to do with its application, nor is it affected by the honesty or the good faith of the parties. Whenever personal property capable of manual delivery is left in the possession of the vendee, such possession cannot be explained, and constitutes a fraud in law. That there was no delivery of the property in controversy—no actual and continued change of possession within the meaning of the statute—will be apparent upon an examination of the evidence.

Adams, the first witness sworn in behalf of plaintiff, said: "When we went there on December 6th, we told them we would have to make the foreclosure. Horne made no serious objection to our foreclosing the mortgage. He said there were three days' grace, and I told him there was not. We checked off the stock, and I told Mr. Brandt to take charge of it. We didn't change the position of the stock nor the harness, nor separate it from the other property in the stables. We left it just as we found it. We did not put any notice or sign on the stable on December 6th."

Brandt, the custodian of the property, states: "We went to 549 Holladay street,—Kinney & Horne's stables. We went in the office, and stayed there about an hour, until Horne came, and then we went to work checking off the goods mentioned by me, and I was put in charge. I held the light while they were checking off. I stayed there all night. I did not go away. I had my breakfast, dinner, and supper brought to me during the three days. I went out on the sidewalk, through the barn, and went across the

street. I did not drive the horses under my charge. While I was there Hess, the hostler, fed the horses and took care of them. I do not know whether he had any pay. I suppose he was working for Kinney & Horne. I did not move the horses out of the stable. I left all the property there. There was other property in the stable. The property put in my custody was not moved. It was watered and taken care of, and left right in the barn in the same place."

Atchison testified: "We did not separate the property in the chattel mortgage from the property that was not in the chattel mortgage. We did not put a sign over the door. I do not know as I noticed any sign there. I do not know who fed the horses in the barn. All the horses in the mortgage were not on the one side of the stable, I think. I think they were on both sides."

Horne, one of the mortgagors, called as a witness for defendant, testified: "Atchison said let the goods remain there for a few days. He said he would not move the goods. He would give us a few days to try and fix it up. We rented the barn. We paid the rent on it from the 6th to the 10th of December. Brandt sat in the office. He did not attend to the horses. I never saw him attend to hitching them up, or feed them, or curry them, even. He took no part whatever in anything pertaining to the horses or buggies. When I was there I attended to business the same as usual. Hess took charge of the horses. He was in our employ. We paid him, and paid him while Brandt was there, up to the time the sheriff came. We paid for the feed of the horses. They did not disturb any of the property,—they left them just as they found them. They did not take down the sign nor put up any sign. We offered horses for sale during this time. We used two of the horses in the package delivery, which were mentioned in the mortgage. 'George H.' was one of them. He worked all the while until the sheriff took possession. I drove the horses while Brandt was there."

Hess testified: "I was there when Atchison and Brandt came there on the evening of the 6th. They came there in the afternoon, and stayed around the office. I had charge of the horses there,—attended to feeding and currying them. Brandt once in a while came back to the stable,—very seldom. I hitched up the horses every day. Brandt drove home to his meals mostly every day. I was under the direction of Kinney & Horne. Brandt never employed me. He did not say anything to me about feeding or currying them. I did not notice any change in the sign over the stable. No notice was put up. There was no change in the position of the stock between the 6th and 10th of December. Kinney & Horne used part of the stock most every day."

If, upon this evidence, the court below had found that there was a delivery and change of possession of the property, such a finding

could not have been sustained. To satisfy the statute, the possession of the vendee or mortgagee after default must be exclusive. He must exercise exclusive dominion and control over the property. Such dominion cannot be shared with the vendor or mortgagor. If the property is capable of manual delivery, it must be removed and taken from the possession of the vendor, or it must be so dealt with as to give notice to the community that there has been a change of ownership. If, to accomplish this end and satisfy the statute, it is necessary to remove the property from the place where it has been kept, such removal must be made, however great the expense or hardship may be. The change of possession must not only be actual, as between the parties, but apparent to the community. In this case Kinney & Horne, the mortgagors, were the proprietors of the stable where the property was allowed to remain. No steps whatever were taken which would constitute notice to persons accustomed to deal with them that they were not still the owners of the property, or that their relation to the property was in any wise changed. Within the meaning of the statute, therefore, there was no change of possession, and for that reason, default having been made in payment, the mortgage was void as to creditors, both under the first section of the chattel mortgage act and the section of the statute of frauds, which has been cited, and the plaintiff was therefore not entitled to recover.

The judgment should be affirmed.

RICHMOND, C., concurs. REED, C., dissents.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

(12 Utah, 497)

FLYGARE v. MALONEY.

(Supreme Court of Utah. April 12, 1890.)

PRACTICE—COUNTER-CLAIM—DISMISSAL.

In an action before a justice of the peace to recover possession from a tenant at will who has been given notice to quit, an answer alleging that defendant was in under a verbal lease for more than a year, but that he had made lasting improvements, expecting to hold possession until a certain time, and praying affirmative relief, does not constitute a counter-claim or prayer for affirmative relief, and hence the action may be dismissed by plaintiff at any time before trial, as provided by Comp. Laws Utah 1888, § 3343, subd. 1.

Appeal from first district court; H. P. HENDERSON, Judge.

John N. Perkins and *Achilles Perrin*, for appellant. *Richards & Rolapp*, for respondent.

ZANE, C. J. The plaintiff instituted this action on the 15th day of July, 1889, by filing a complaint with a justice of the peace, and alleged, with other facts, that he was the owner of the room described, and entitled to its possession; that the tenancy was

at will; that he had terminated it by notice to quit served one month before the first day of the month in which he instituted his suit; and that the defendant unlawfully detained possession. To this complaint the defendant filed his answer, in which he admitted that the lease was verbal, and for a longer time than one year, but denied the other allegations of the complaint; and, as a further and second defense, the defendant alleged that he went into possession on the 1st day of July, 1888, under a verbal lease, and made valuable and lasting improvements on the room, with the expectation that he was to hold possession of it until February, 1891; and he also prayed for affirmative relief, and for a removal of the case to the district court. The question of removal was argued and submitted, but, before decision, plaintiff stated to the court that he would abandon its prosecution, and entered a motion to dismiss; and the justice, without the consent of the defendant, allowed the motion, and ordered its dismissal. From this order the defendant appealed to the district court; and, on motion of the plaintiff, that court, the defendant objecting, dismissed that appeal. From that order the defendant appealed to this court, and assigns the granting thereof as error.

The statute provides that an order of dismissal may be entered in a justice's court when the plaintiff voluntarily dismisses the action before it is finally submitted, (Comp. Laws Utah 1888, § 3595;) and division 1, § 3343, Id., provides that an action may be dismissed by the plaintiff at any time before trial upon the payment of costs, if a counter-claim has not been made, or affirmative relief sought, by the cross-complaint or answer of the defendant. The facts stated in the answer are not sufficient to constitute a counter-claim, or to entitle the appellant to affirmative relief. It follows that the order of the justice dismissing the suit was correct, and that the judgment of the district court appealed from was not erroneous.

Judgment affirmed.

ANDERSON and BLACKBURN, JJ., concur.

(19 Or. 108)

WOODS v. TOWN OF PRINEVILLE.

(Supreme Court of Oregon. April 14, 1890.)

TOWN ORDINANCES—ENFORCEMENT—DRUNKENNESS.

1. The power is conferred upon the council of the town of Prineville, by its charter, (Sess. Acts 1880, p. 116,) to prevent and restrain drunkenness. Under this power the council may prohibit the furnishing or giving intoxicating liquors to an habitual drunkard, or one who is in the habit of becoming intoxicated.

2. The proceedings in a recorder's court to enforce the ordinances of the town are necessarily summary; but in pleading the substance of all that is legally necessary must appear, and in declaring on an ordinance it is sufficient to plead its legal effect. It might have been set out *in hæc verbis*, but this form is not indispensable.

3. In declaring upon a town ordinance, it is generally sufficient if the complaint follow the de-

scriptive words of such ordinance. In enforcing a town ordinance, its passage must be made to appear, and its legality will then be determined by the charter, and by what is contained in such ordinance.

(Syllabus by the Court.)

Appeal from circuit court, Wasco county; J. H. BIRD, Judge.

The information upon which the defendant was convicted before the recorder of the city of Prineville is, in substance, as follows: "The said Linn W. Woods on the 10th day of February, 1889, in the town of Prineville, within the corporate limits thereof, did furnish Alex. Conley intoxicating liquors, to-wit, beer and whisky; the said Alex. Conley being then and there an habitual drunkard, and prior thereto having been declared an habitual drunkard by the town council by an ordinance which made it unlawful for any person to furnish the said Alex. Conley any spirituous, malt, or vinous liquors," etc. The plaintiff sued out a writ of review, and brought the record into the circuit court, where the same was examined, and the judgment of conviction was affirmed, from which he has appealed to this court. Before pleading not guilty in the recorder's court, the present plaintiff demurred to the information, but the same was overruled, and he then pleaded not guilty. Counsel stipulated that this cause should be heard here, instead of Pendleton.

J. F. Moore, for appellant. Geo. W. Barnes and M. E. Brink, for respondent.

STRAHAN, J., (after stating the facts as above.) The argument of appellant's counsel presents five points for consideration on this appeal, but there is really but one question, and that is the sufficiency of the complaint upon which the appellant was tried before the recorder. So far as may be necessary to the proper disposition of the case, these objections will be separately noticed.

1. The first question presented is the alleged invalidity of the ordinance under which the complaint was made. That depends on the authority conferred by the charter. By section 21 of the charter, the council has power, "within the corporate limits, * * * (4) to license, tax, regulate, restrain, or suppress bar-rooms, tippling-houses, and all places where spirituous or malt liquors are sold, billiard saloons, bowling-alleys, theatrical and other exhibitions, shows, and public amusements, and to suppress bawdy-houses, gaming and gambling houses: provided, that no law, or part thereof, authorizing any tribunal or officer of Wasco county to grant tavern or grocery license, shall apply to persons vending liquor within the corporate limits of the town of Prineville." The plain intent of this section was to confer upon the council authority to license, tax, regulate, restrain, or suppress bar-rooms, tippling-houses, etc., and the exclusive authority to license the sale of liquors, within the corporate limits of said town. Subdivision 15 of the same section of the charter empowers the

council to prevent and restrain "drunkenness." To prohibit the sale or giving of intoxicating liquors to an habitual drunkard is one way of "preventing" and "restraining" drunkenness. It is not for the court to say whether it is the best way or not, nor is it material. It is evident, if no liquor is sold or given to such person, to that extent the object of this provision of the charter is accomplished. I think that the ordinance, so far as it prohibits the furnishing of intoxicating liquors to an habitual drunkard, is within the powers granted by the charter, and must be upheld.

2. It is next objected that said ordinance is not properly pleaded. In discussing this objection, it must be remembered that this proceeding was instituted in an inferior court, where rigid technicality would be subversive of the whole purpose of the law in the organization of such courts. Their proceedings are necessarily summary; but the substance of all that is legally requisite must appear. There are two modes at common law of bringing any writing upon the record by pleading,—one was to set it out *in hac verba*, and the other was to plead it according to its legal effect,—and this rule remains unchanged by any provision of our Code. The pleader evidently sought to avail himself of the latter mode, and while the matter might have been stated with greater fullness and particularity, I am not prepared to hold that it is insufficiently pleaded. The substance of so much of the ordinance as was material is stated, and from this its legal effect is apparent.

3. It is next claimed that the complaint is insufficient because it fails to allege that the defendant knowingly furnished the spirituous liquor, etc. On this point, so far as appears, the complaint follows the descriptive words of the ordinance, and in indictments founded upon statutes that is ordinarily sufficient. It will hardly be claimed that a strict rule ought to be applied to this pleading.

4. It is next suggested that the validity of the ordinance was not proven, and the evidence offered was insufficient. Neither of these is presented by this record. The passage of the ordinance by the council was all on that subject which the town need make appear on the trial before the recorder. When its passage was shown, its legality or illegality did not depend on proof, but upon the charter, and what it contained: Whatever evidence was offered does not appear, and, if it did, review is not the proper proceeding to retry a question of fact, unless, possibly, in some exceptional case, which has not as yet been brought before the courts of this state.

5. It is next contended that this ordinance is in conflict with the general statute of the state which makes it unlawful for any person to knowingly sell any spirituous or intoxicating liquors to any intoxicated person, v.28p.no.15—56

or to any person in the habit of becoming intoxicated. Sess. Acts 1876, p. 8. The course of legislation in this state, and the tendency of judicial opinion, are to leave this question in the hands of municipalities. Charters with enlarged powers have been constantly granted to the cities and towns, to enable them to deal with it in such manner as their particular condition may require. The charter of the town of Prineville is an example of that charter. Counsel for appellant cite *Barton v. La Grande*, 17 Or. 577, 22 Pac. Rep. 111, as tending to support his objections to the insufficiency of this complaint; but the main question there was the construction of the charter relating to the right of appeal, and in what cases the writ of review was the appropriate remedy. The insufficiency of a complaint in such case was not involved. Such legislation as that under consideration relates to the peace and good order of the town. It is an exercise of the police power of the state, confided to the authorities of the town by the charter, and as long as it is kept within proper limits will be steadily upheld. The judgment of the court below will be affirmed.

(19 Or. 217)

BAILEY v. DAVIS.

(Supreme Court of Oregon. May 8, 1890.)

AGISTMENT—LIEN BY SERVANT—INSTRUCTIONS.

1. When the relation of master and servant exists, the servant can acquire no lien on his master's cattle, for depasturing or feeding them, under section 3684, Hill's Code.

2. An instruction to the jury based on no evidence in the case is abstract, and may be misleading.

(Syllabus by the Court.)

Appeal from circuit court, Umatilla county; JAMES A. FEE, Judge.

This is an action of replevin to recover about 50 head of cows. The complaint is in the usual form. The answer, after denying the material allegations of the complaint, alleges in substance that the defendant was entitled to the possession of the property described in the complaint, and that he had a special property therein, under and by virtue of the following facts, to-wit: That on or about the 28th day of November, 1888, at Umatilla, Or., the defendant, at the request of one Cripe, who was then and there the owner, and in the lawful possession, of said property, took said cows to care for, attend, feed, and herd, and that defendant so cared for, and bestowed labor and attention in feeding and herding, said cows from the 28th day of November, 1888, until the 9th day of April, 1889, and that said care and attention was reasonably worth \$155.20, and that he has a lien on said property for said sum. The other facts appear in the opinion. The defendant had judgment. Plaintiff appeals.

J. J. Balleray, for appellant.

STRAHAN, J., (after stating the facts as above.) As near as we can determine from

this record, the defendant sought to retain the possession of the cattle in controversy under section 3684, Hill's Code, which gives to any person who shall depasture or feed any horses, cattle, hogs, sheep, or other livestock, or bestow any labor, care, or attention on the same, at the request of the owner or lawful possessor thereof, a lien for his just and reasonable charges, and authorizes him to retain the possession of such property until such charges be paid.

On the trial the plaintiff gave evidence tending to prove that he was the owner of all of said property, and was entitled to the immediate possession thereof, and that, prior to the commencement of the action, he had demanded the same from the defendant, who had refused to deliver it. The plaintiff's evidence further tended to show that about the month of October, 1888, plaintiff leased the property in controversy to one A. J. Cripe, and that prior to the month of April, 1889, Cripe forfeited said lease by failing and neglecting to pay the rent mentioned in said lease for the use of said cattle, and that about April 1, 1889, Cripe "left between two days;" that the cattle in controversy were known as the "John Ward and John Knight Dairy Cows." The defendant testified, as a witness in his own behalf, in substance: "I know the band of cows mentioned in plaintiff's complaint. I was herding them about the 1st of last April. I know the cattle's brand. It was O K. Those branded O K, Cripe got of Bailey. Two more, known as the 'Wagenblast Cows,' came from town, here. It was reasonably worth \$35 per month to herd the cows. I herded them for about three months at the request of A. J. Cripe. The herding amounted to \$155. When the plaintiff demanded them of me, on the 6th of April, 1889, I refused to surrender them, and told him I held them for my labor of herding. I had possession of them at that time. I had the possession of them all the time, and herded them on the Umatilla reservation, and not on Cripe's ranch." On his cross-examination the defendant testified: "The cows belonged to the O K Dairy, on Wild Horse creek. I first went to work there in November, 1888, on the dairy ranch. There were some cows there then,—some of the O K cows. The John Knight cows were there. The cows were not all there. A. J. Cripe was running the ranch when I first went there. A. J. Cripe was running the place when I first had anything to do with the cattle. On November 8th, I believe, arrangements between myself and Cripe were made. I hired to work for him at the dairy for \$30 per month and board. I continued to work till about the 7th of February on dairy work, then went to herding. Cripe agreed to pay me \$35 per month for herding, and board me. The arrangements for me to herd were made out at the ranch. I think Fred and Jack Bowman and Henry Dobson were present. He was to pay me by the month. I did not herd in a

pasture. I herded on the reservation. I paid nothing for the privilege. I had plenty of grass of my own. I got it by driving on. I had as much right as any other herder. I owned no land, and bought no privilege. Cripe told me to drive on the reservation. From February 7th, I worked around the ranch evenings and mornings. Cripe was living there. I milked some of the cows. I drove them out in the morning and back at night, and helped milk. Sometimes four hands milked, and sometimes three. They were Cripe's hands. * * * I swear that Cripe turned over those cattle to me for the purpose of being herded. He said he wanted me to take the cattle of him, and herd them, and bring them in and take them out. They were milked in the barn,—driven in, and tied in the barn. They slept there at nights,—every night. It was in Cripe's barn. Cripe told me that I could hold the cows for my pay; that he couldn't pay me till spring. I told him I would wait till spring." John Knight testified that he was interested with Cripe in these cattle; that witness left the ranch in December. "Saw defendant there up to the time that Cripe run away. He first helped on the farm. Helped milk after witness came away. Hauled straw in December and January. Was with Cripe when defendant first came to work. I paid \$50 for the privilege of herding these cattle on the reservation from June 1, 1888, to June 1, 1889. He (Cripe) came in on the same privilege, and that is the way the cattle came to be herded on the reservation." There were some other witnesses, but this is the material part of all the evidence.

The court gave this instruction, to which an exception was taken: "*First.* That if the jury find from the evidence that, at the time of the demand of the plaintiff for the possession of the cows in question, and at the time of the commencement of this action, the defendant was in possession of said cows, and that the defendant held said cows, and herded and cared for the same, prior to said time, at the request of the owner or lawful possessor, and that the defendant took and held said cows for such purpose at the request of the owner or lawful possessor, then the defendant is entitled to the possession of said cows, and may retain possession of the same until the just and reasonable charges of such care, attention, and herding are paid."

1. This instruction follows the language of the statute very closely, and in a proper case no objections could be urged against it; but, under the facts before the jury in this case, it was purely abstract, and was necessarily misleading. It assumed, and the jury doubtless understood, that there was some evidence before them upon which the instruction could be based; but there was none whatever. The defendant's relation to Cripe was that of a servant; and the relation of master and servant, and none other, existed between Cripe and the defendant. The de-

feudant had no more lien for driving these cows out to the reservation for Cripe, and back in the evening, than he had for helping to milk them upon their return, or for hauling straw; and he had no lien in either case. Nor, while said relation of master and servant continued, could he have any separate or independent possession of said property. Whatever service he performed, or whatever authority he exercised, was for Cripe, and in its performance he represented him. The instruction given by the learned circuit judge was at variance with this view, and was error. It is true that the court followed the foregoing instruction by a number of others, by which the jury was informed that no man working about the ranch has any lien on the property of his employer, and has no lien on his employer's cows, though part of his services should consist in herding them; and this: No man employed, for wages, to herd cattle, has any lien on the cattle for reasonable compensation. The court further told the jury: "If you find the defendant was a hired man, working for wages, you must find for the plaintiff." And further: "Where the relation of master and servant exists, no lien accrues." These instructions were correct statements of the law, but they do not purge the case of the error already committed by the court in giving the first instruction.

2. Here is an instruction given by the court which is erroneous for the same reasons that No. 1 was an error: "It is for the jury to say whether or not there was an actual transfer of the possession of the property; and, if you find from the evidence that these cattle were turned over to the defendant for the purpose of being herded, and defendant performed said service, and that he had the actual and exclusive possession, then he has a lien thereon, provided that the relation of master and servant did not exist, and that an original and independent contract had been made for such herding; but, if you find these cattle not turned over as above stated, then you must find for the plaintiff." All of this instruction, down to the proviso, necessarily assumes that there was some evidence before the jury which would authorize the jury to find the facts therein recited. I look in vain for such evidence, but fail to find it, and it is for that very reason such instructions are always erroneous. However correct they may be as abstract propositions of law, and as applied to a proper case, they, in effect, tell the jury that there is evidence before them from which such facts may be found; and in that way such instructions may work serious injury to one party or the other. A number of other exceptions were taken, and appear in the transcript; but it is believed those already noticed sufficiently indicate the views of this court to answer all the purposes of another trial, should one be found necessary. The judgment appealed from must therefore be reversed, and the cause remanded to the court below for a new trial.

MESSINGER *et al.* v. WATSON *et al.*

(Supreme Court of Oregon. Jan. 9, 1890.)

Appeal from circuit court, Jackson county; L. R. WEBSTER, Judge.

A. S. Hammond, for appellants. Watson, Hume & Watson, for respondents.

PER CURIAM. As this involves no principle of law not already passed upon by the court, but depends for its proper determination wholly upon the facts, it is enough to say that our examination of it leads us to the conclusion that the findings of the court below are sustained by the evidence, and that its decree must be affirmed.

(19 Or. 141)

FERRERA v. PARKE *et al.*

(Supreme Court of Oregon. April 16, 1890.)

CONVERSION—NONSUIT—PLEADING.

1. Under section 246, Hill's Code, a judgment of nonsuit on the defendant's motion is improper if the defendant was required to produce evidence to meet the plaintiff's case.

2. A pleading which is defective by reason of the omission of some material allegation may be aided by the pleading of the adverse party. If the omitted allegation be supplied by the adverse pleading, it is the same as if it were inserted in the party's own pleading.

(Syllabus by the Court.)

1. Conversion is based on the idea of an assumption by the defendant of a right of property, or a right of dominion over the thing converted, which casts upon him all the risks of an owner; and, consequently, it is not every wrongful detention of property that amounts to conversion.

2. A demand and refusal will not be sufficient evidence of conversion when it appears that the property demanded was not at the time in the possession or under the control of the defendant on whom the demand was made, but that it had been previously mislaid or was lost.

(Per Lord, J., dissenting.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

This is an action to recover damages for the conversion of certain chattels. It is alleged in the complaint that on the 15th day of February, 1887, the defendants were partners doing business at the city of Portland, and that on that day the plaintiff was the owner and in the possession of certain personal property, to-wit, "a plan and drawing of a macaroni and faroni paste factory, and of the machinery, utensils, and apparatus to be used in said factory, in the manufacture of macaroni and faroni," made and prepared by the plaintiff, by E. Gravano & Co., in Foce, near Genova, Italy, of the value of \$2,500, and that the defendants thereafter converted the same to their own use, to plaintiff's damage in the sum of \$2,500; that before the commencement of this action, at divers times, the plaintiff demanded said property of the defendants; and that they refused, and still refuse, to return or deliver the same to the plaintiffs. The complaint further alleges that he had expended \$500 in preparations to run and operate said macaroni and faroni paste factory, and that he

was unable to begin or conduct said business by reason of said wrongful conversion, and demands judgment for \$3,000 damages. The answer denies the material allegations of the complaint, and then alleges as a further defense that in the year 1887 the defendants were engaged in a machinery business in the city of Portland, Or., and on or about the _____ day of January, in said year, the plaintiff delivered to the defendants a plan and drawing of certain structures and machinery for the purpose of having the defendants procure for him certain machinery to comport with said plan and drawing; that, while said plan and drawing were in the possession of the defendants for said purpose, they became accidentally lost, and defendants have since been unable to find the same. The answer then expressly admits that plaintiff demanded a return of said property, and that defendants failed to return it, but that they say the demand was made after its loss. The reply denies the new matter in the answer, except the delivery of said property to the defendants, and the purpose for which it was delivered. All the evidence is in the record. The plaintiff's evidence tended to prove that he delivered said property to the defendants, substantially, for the purpose specified in defendants' separate answer, and that they were to return the same to him in 10 days, with their estimates; that the plaintiff continued to visit the house almost daily for nearly a year, and on many of those occasions he asked to have his plans returned to him. Finally one of the defendants told him that it was too bad, but that he had seen the same in San Francisco; that he had been expecting to have it returned to the plaintiff, but that the same could not be found any more. The plaintiff's evidence further tended to prove the value of said property. The plaintiff further gave evidence tending to prove that the defendant sent said plans and specifications to their house in San Francisco, to get a bid there as to the cost of doing the work. The plaintiff having rested his case, the defendants introduced evidence tending to support their defense; and then, on their motion, the plaintiff was nonsuited, from which judgment this appeal is taken.

C. H. Carey, for appellant. *L. B. Cox*, for respondent.

STRAHAN, J., (after stating the facts as above.) The journal entry disposing of this cause in the court below recites that, after the plaintiff had introduced his evidence in chief, and the defendants their evidence in chief, and the plaintiff his evidence in rebuttal, and the plaintiff having announced that he had no more evidence to offer, the defendants filed their written motion for judgment of nonsuit, which was duly argued and submitted to the court, and by the court sustained; and then follows the usual judgment of nonsuit, which awards costs to the defendants.

The practice on this subject in this state is regulated by section 246, Hill's Code, which provides: "A judgment of nonsuit may be given against the plaintiff, as provided in this title, * * * (3) on motion of the defendant, when the action is called for trial, and the plaintiff fails to appear, or when, after the trial has begun, and before the final submission of the cause, the plaintiff abandon it, or when, upon the trial, the plaintiff fails to prove a cause sufficient to be submitted to a jury." Under this section of the Code, the test is whether or not the plaintiff's evidence tends to prove a cause sufficient to be submitted to a jury, and in passing on this question the evidence submitted by the defendant, if any, cannot be considered for any purpose; for the reason that, if it is necessary for the defendant to meet the plaintiff's case by evidence, then the case becomes one for the jury, and could not be withdrawn from them in this summary manner. This view has been steadily maintained by this court in every case in which the question has arisen. In *Grant v. Baker*, 12 Or. 329, 7 Pac. Rep. 318, this court said: "To authorize the court to nonsuit a plaintiff, the latter must fail to prove a cause sufficient to be submitted to a jury. It must be such a case that, if the jury were to find a verdict for the plaintiff, the court would be required to set it aside for the want of evidence to support it. Civil Code, §§ 243, 244. It would have to be a case where there was a total failure of proof of some material allegation of the complaint." So, in *Salmon v. Olds*, 9 Or. 488, it was held that a defendant was not entitled to a nonsuit where, upon the pleadings and evidence introduced, a *prima facie* case has been made out against him. So, also, in *Tippin v. Ward*, 5 Or. 454, it was held that a case should be submitted to the jury unless there is an entire lack of evidence tending to maintain the issues on the part of the plaintiff, or unless, upon the whole case made by the plaintiff himself, it appears beyond doubt that the plaintiff has no right to recover; and the same principle was applied in *Southwell v. Beezley*, Id. 459. *Prima facie*, the plaintiff made a case sufficient to be submitted to the jury. He showed the delivery of his property to the defendants for a particular purpose, gave testimony tending to prove its value, a demand on the defendants for its return, and their failure to return it. The jury had the right to pass on this evidence, and to say, under proper instructions of the court, whether or not the plaintiff was entitled to a verdict. He was, unless the effect of this evidence was counterbalanced in some way by the defendants, and they presented another question proper for the jury to consider. The defendants set up that the property was lost while it was in their custody. Whether the defendants had the right to send said property to San Francisco; whether it was lost, and, if so, was it under such circumstances as would exonerate the defendant.

from all liability? were all questions presented by the defendants, and they were for the jury, under proper instructions by the court. The learned counsel for the respondent, in support of the practice adopted in the court below, cites *Jansen v. Acker*, 23 Wend. 481; *Rudd v. Davis*, 8 Hill, 287, 7 Hill, 529; *People v. Cook*, 8 N. Y. 67; *Lomer v. Meeker*, 25 N. Y. 361; *Geary v. Simmons*, 39 Cal. 224. These authorities certainly do tend very strongly to support the respondent's contention, but they are at variance with what has already been settled in this court. The particular statutes under which these cases were decided, if any, were not brought to our notice; and if there were no statutes governing such practice, but those cases simply announced the general course of procedure in those states, the cases could not be accepted as controlling authority in this state.

Respondent's counsel has criticised the complaint, and doubtless it would have been more in harmony with the spirit of Code pleading if it had alleged, among other things, the delivery of this property to the defendants, and the object of such delivery, etc., and the defendants' failure to return it; but the defendants have supplied that by an "express aider" in their answer. Bliss, Code Pl. § 437. These allegations are contained in the defendant's answer, with the further matter designed to excuse such failure.

These are questions which should have been tried out before that jury, upon the merits of which we indicate no opinion at this time, but reverse the judgment, and remand the cause for a new trial.

THAYER, C. J., (*concurring*.) I concur with Judge STRAHAN in his conclusions in this case regarding the rule of nonsuit of a plaintiff under the Code of this state; and as to the sufficiency of the evidence upon the part of the appellant to establish *prima facie* cause of action against the respondents herein for the conversion of the plans in question. That said plans were delivered to the respondents with the understanding that they should make and furnish to the appellant an estimate of the cost of constructing the machine which the plans represented, was conceded; and the appellant testified that the respondents were to give him an answer regarding the matter within about 10 days, but that he had never been able to obtain any such estimate, or to recover back his plans, although he had called for them, and demanded their return, a great number of times. This of itself was sufficient to prove a conversion of the plans, unless their detention was satisfactorily accounted for; and it cannot reasonably be claimed that the failure of the respondents to return the plans to the appellant was excused by anything which appeared in the testimony adduced by the latter. The appellant himself testified that one of the respondents, Mr. Parke, told him that he saw the plans in San Francisco, and that he had been looking for them to send them back to appellant, but had

missed them, and that they could not be found. He, however, testified in the same connection that, when he placed the plans in the hands of the respondents, he did not know that they had a house in San Francisco; that he never authorized them to send the plans to San Francisco. It also appeared from the testimony of Mr. Arthur, manager of the respondent's business at Portland, when on the stand as a witness for the appellant, that he had a vague recollection that the plans were sent to San Francisco either by himself, Mr. Campbell,—mechanical engineer for the respondents,—or were taken there by Mr. Parke, and, upon his cross-examination by respondents' counsel, he testified that the object in sending the plans to San Francisco was simply to get a bid from the home office on what they could manufacture the machine for; that they were endeavoring to secure a price; that the facilities for manufacturing in San Francisco were much better than in Portland; that he continued with respondents at their Portland house until about July 1, 1888; and that during the time he was there the respondents never undertook to make use of these plans, or to appropriate them.

The main point in the case is whether the appellant, by leaving the plans with the respondents at Portland, under the circumstances, and for the purpose as testified to by him, authorized the respondents to send them to their home office in San Francisco, for the purpose claimed by them. If the respondents were not so authorized, then they were guilty of wrongful conversion of the property, as "any interference subversive of the right of the owner of personal property to enjoy and control it is a conversion." *Budd v. Railway Co.*, 12 Or. 271, 7 Pac. Rep. 99. It was not necessary that the respondents should have made use of the plans for their own benefit, or appropriated them to their own personal advantage, in order to constitute a conversion. The question is, did the respondents exercise dominion over them in exclusion or in defiance of the appellant's right? 4 Amer. & Eng. Cyclop. Law, 108. The gist of the conversion is the usurpation of the owner's right of property, and not the actual damages inflicted. *Id.* 113, note 3. Nor is it necessary that the act should be willful or intentional to render it a conversion. "If a carrier, by mistake, delivers goods to the wrong person, he is liable in trover." *Id.* 112, note 3. "Honesty of purpose is not a defense, and can in no measure shield the defendant from liability, except to prevent the giving of punitive damages." 6 Wait, Act. & Def. 164. "And it makes no difference [in case of bailment] that the depositary did the act for the benefit of the depositor, or that it really inured to his benefit. He has no right to use the property for any purpose other than that for which it was left with him, upon any consideration or for any purpose,—not even for its preservation." *Id.* 165. "Any unauthorized possession lawfully acquired, or any unauthorized

of the trust under which it was placed in the defendant's hands, is an actionable conversion." Id. 166.

The appellant, if he testified truthfully,—and, for the purposes of this appeal, we must presume he did,—delivered the plans in question to the respondents for the specific purpose of obtaining from them certain information which they were to furnish in 10 days. That certainly did not authorize the respondents to send the plans to San Francisco, when it would require at least double the specified time to send them there, have the estimate made, and have them returned. It was clearly the duty of the respondents, before sending the appellant's plans out of the state and exposing them to loss, to have consulted with him in regard to the matter. He had evidently been to great trouble and expense in procuring the plans, and had the same right to exercise control over them that every one has to exercise dominion over that which belongs to him, which right he was deprived of when the plans were sent away without his consent or knowledge. The respondents doubtless acted in good faith in the affair, and intended no wrong, but they seem to have been careless and indifferent. At least, they had no intelligent idea as to when, how, or by whom the plans were sent away, though the appellant, evidently, was as constant in calling upon them in regard to the matter as any person having a favorite object in view would be likely to be. He probably became a source of annoyance to the managers of the respondents' business, and received very little attention, but he had rights which they were bound to respect; and the workings of his Italian brain, if encouraged, might have produced results important to himself and the community. The respondents, at all events, should not have usurped his right to exercise dominion over his own property, and exclude him from its control, which I think they did do, if they sent the plans to San Francisco without his consent. Whether they did so or not, and whether they acted prudently in the affair, are, in my opinion, proper questions to be submitted to a jury.

LORD, J., (*dissenting*.) The evidence for the plaintiff only shows that the plans "were missed, and could not be found," or, at most, were mislaid or lost. It does not make out a *prima facie* case of conversion. The argument for the plaintiff proceeded upon the theory that the defendants, in sending the plans to their San Francisco house without the consent of the plaintiff, involved such a misuser of the plans as operated as a conversion of them in law. The contract did not provide where the estimate of costs was to be made, and the defendant sent their plans to their San Francisco house because of its superior facilities to ascertain the cost of constructing the works which was the object of the contract; but the plaintiff did not know the defendants had a San Francisco house. It is not a case, upon its facts, where a bailee

contracts to return the thing bailed at a fixed time, or where time was made the essence of the contract by stipulation, or where, from the nature of the property or the character of the interest involved, time becomes an essential of the contract, nor where the thing bailed was contracted to be done or to be returned at a particular place or at a particular time, without knowing that the defendants had a San Francisco house, or any stipulation as to the time when the estimate was to be made, or when the plans were to be returned, other than the law infers was consistent with the purpose of the contract in estimating the cost. The plaintiff left the plans with the defendants for the purpose of ascertaining the cost of constructing a macaroni factory; and, to more thoroughly and satisfactorily effect that purpose, the defendants sent their plans to the San Francisco house to make such estimate and return the result to them, where by some accident the plans were mislaid or lost, or "were missed, and could not be found" when demanded. Do these facts constitute conversion? At the argument it was said that if one person hires a horse to drive to one place, and he voluntarily drives to another, it is a technical conversion of the horse; and so, too, it was claimed that when the defendants sent the plans to their San Francisco house to estimate the cost, instead of making the estimate at their Portland house, or at least without the consent of the plaintiff, that it amounted to a technical conversion of the plans, for which an action in trover could be maintained. This argument assumes more than the facts warrant; for the contract did not stipulate where the estimate of costs was to be made,—whether at the Portland or San Francisco house,—and could not involve the consent of the plaintiff to any change in that regard. But, granting all this, there is no analogy between the cases, for the reason that the horse was bailed for one purpose and it was used for another, which constituted the conversion, while the plans were sent to the San Francisco house, not for another, but the identical, purpose for which they were intrusted to the defendants, namely, to estimate the cost. The use made of the plans by the defendants was not of a different kind from that contemplated by the contract between the parties, but was done in pursuance of its purpose, and to effect the object of its bailment. To constitute conversion, there must be some act of dominion exerted over one's property in denial of his right, or inconsistent with it. When one hires a horse to drive to one place and he drives it to another, he unlawfully intermeddles with the property of another for his own benefit, and appropriates the horse to a use inconsistent with the terms of the bailment. In sending the plans to the San Francisco house the defendants neither claimed nor exercised any right of property or dominion over them inconsistent with, or in denial of, the plaintiff's right as the lawful owner; but the con-

ceded facts show that the plans were sent there to better effect the purpose of the bailment, and without any intention of appropriating the property to their own use, or to destroy them, or to deprive the plaintiff of them as a rightful owner.

"Conversion," said FIELD, J., "is based upon the idea of an assumption by the defendant of a right of property or a right of dominion over the thing converted, which casts upon him all the risks of an owner; and it is, therefore, not every wrongful intermeddling with, or wrongful asportation or wrongful detention of, personal property, that amounts to a conversion. Acts which themselves imply an assertion of title or of a right of dominion over personal property, such as a sale, letting, or destruction of it, amount to a conversion, even although the defendant may have honestly mistaken his rights; but acts which do not in themselves imply an assertion of title, or of a right of dominion over such property, will not sustain an action of trover unless done with the intention to deprive the owner of it permanently or temporarily, or unless there has been a demand for the property, and a neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendant, in withholding it, claims the right to withhold it, which is a claim of a right of dominion over it." *Spooner v. Manchester*, 133 Mass. 270.

What are the acts which, by any possible construction, can be considered as an assumption by the defendants of a right of property or dominion over the plans which casts upon them the risks of an owner? They claimed no right to the plans, nor denied the right of the plaintiff to them, nor did they refuse, on demand, to deliver them; but, by the evidence of the plaintiff, the plans were mislaid, and could not be found, or perhaps were lost. It is the withholding of the thing in his possession or under his control, when demanded, that makes a *prima facie* case of conversion, but not when the evidence shows that at the time of the demand the thing or property was not under his control, or was mislaid or lost. In such case the property is not withheld because the defendant claims the right to withhold it, which is a claim of right of dominion over it, but because the property at the time is not under his control, and capable of delivery. The authorities are numerous to the point that demand and refusal will not be sufficient evidence of conversion when it appears that the property demanded was not at the time in the possession or under the control of the defendant on whom the demand was made, but that it had been previously lost or stolen or misdelivered. Said APPLETON, C. J.: "In trover, a demand and refusal make out a *prima facie* case; but this is rebutted by proof that the property demanded was not at the time of the demand in the defendant's possession, nor under his control. *Boobier v. Boobier*, 39 Me. 407. Trover will not lie against a bailee when the

goods have been lost or stolen. *Hawkins v. Hoffman*, 6 Hill, 586. There must be some wrongful act on the part of the defendant. A loss by mere nonfeasance will not sustain this form of action. *Bowlin v. Nye*, 10 Cush. 416. Trover cannot be maintained against a common carrier for not delivering goods intrusted to him for transportation if the goods are not in his possession at the time of the demand, and have been either lost or stolen. *Packard v. Getman*, 4 Wend. 613. Indeed, there seems an entire concurrence of authorities that, in case of a loss of goods by a bailee, or of a larceny from him, he is not liable in trover." *Dearbourn v. Bank*, 58 Me. 274.

In the case at bar the evidence for the plaintiff is specific to the point that the reason why the plans were not restored to him when demanded was that they had been mislaid, and could not be found, or were lost, and therefore not capable of delivery. The conduct of the defendants may have been negligent or careless, and for which they may be liable in some form of action; but in no legal sense does it constitute acts which imply an assertion of title, or a right of dominion over the property, that will sustain an action of trover. I think the plaintiff failed to establish a case sufficient to be submitted to the jury, and the court committed no error in granting the nonsuit.

(19 Or. 153)

HALL v. STEVENSON *et al.*

(Supreme Court of Oregon. April 21, 1890.)

ATTACHMENT—SERVICE—RETURN—AMENDMENT—PRIORITIES.

1. A sheriff's return upon a writ of attachment is insufficient which fails to show that a defendant, to whom a certified copy of such writ was delivered, was an occupant of the premises sought to be attached, and which failed to show that there was no occupant of said premises, and that a certified copy of the writ which was posted on the front of the defendant's dwelling-house was posted in a conspicuous place on said premises.

2. Several separate and distinct tracts of land cannot be attached by posting a certified copy of the writ in a conspicuous place on one only of such tracts.

3. Where a sheriff made a defective return on a writ of attachment, and the cause was then regularly removed into the circuit court of the United States for the district of Oregon, the state court had no jurisdiction or authority to permit the sheriff to amend his return to said writ.

4. When the cause was removed, the jurisdiction of the state court over it ceased.

5. Where plaintiff had a first lien by mortgage on the lands of S. and S. & G., and C. & W. had a lien by judgment on the lands of S. only, held, that the lands of S. & G. should be first sold, and the proceeds applied on plaintiff's mortgage, and that S.'s land should then be sold, and the proceeds applied to pay anything remaining due on plaintiff's mortgage, and the balance, or so much as might be necessary, be applied to the payment of C. & W.'s judgment, and the residue, if any, be deposited in court for whoever may appear to be entitled to same, and so much of said decree as allowed the sheriff to amend his return on the writ of attachment must be reversed.

(Syllabus by the Court.)

Appeal from circuit court, Douglas county; R. S. BEAN, Judge.

The plaintiff sues as guardian of Charles and Henry Bingham, and the object of the suit is to foreclose a mortgage made by G. H. Stevenson and wife and F. M. Gabbert and wife, on October 4, 1886, and made to secure the payment of a promissory note for \$2,313.21, and \$125 as reasonable attorney's fees. The defendants Christy & Wise are alleged to have some interest in the mortgaged premises subsequent and subject to the plaintiff's mortgage. The defendants Christy & Wise deny that their claim is subsequent or subject to plaintiff's mortgage, and alleged that they commenced an action in the circuit court of the state of Oregon for Douglas county against G. H. Stevenson and others, partners doing business under the name of the "Grange Business Association of Douglas County, Or.," to recover the sum of \$7,736.80, with attorney's fees, interest, and costs; that an attachment was duly issued, and executed by the sheriff on the 4th day of October, 1886, at 1:30 o'clock P. M., by attaching all the right, title, and interest of the defendant G. H. Stevenson in the real property described in the complaint; that said writ was duly returned into court by the sheriff, with a certificate of all his doings indorsed thereon; that by said attachment Christy & Wise acquired and now have a valid lien upon defendant Stevenson's interest in said lands; that thereafter said cause was duly removed from the state court to the circuit court of the United States for the district of Oregon; that on the 17th day of November, 1887, Christy & Wise recovered a judgment against the defendant Stevenson and others for \$6,565.88, \$500 attorney's fees, and \$518.97 costs, and that said attached property be sold to satisfy said judgment; that on the 19th day of November, 1887, this judgment was duly docketed in said circuit court of the United States. There are some other matters alleged in the answer, not necessary to be noticed here. The reply denied the new matter in the answer. The circuit court heard the cause, and took the same under advisement at the May term, 1889, of said court, and the decree was filed with the clerk, and entered on the 17th day of July, 1889. The appellant has appealed from certain parts only of said decree, namely, from that part of said decree allowing the sheriff of Douglas county to amend his return on the writ of attachment, from so much of it as directs the order in which the mortgaged premises should be sold, and from so much of it as decides that Christy & Wise's attachment is prior to the plaintiff's mortgage. The other facts are stated in the opinion.

J. W. Hamilton and W. R. Willis, for appellant. S. B. Linthicum, for respondents Christy & Wise.

STRAHAN, J., (after stating the facts as above.) There are two tracts of land involved in this suit: *First*, a tract containing 1,553.87 acres; *second*, a tract containing 680 acres. The defendant Stevenson owned

an equal undivided one-half of each of these tracts, and Mr. F. M. Gabbert owned the remaining moiety. There is still another tract of about 500 acres described in the complaint, which was owned mainly by the defendant Stevenson, though he seems to imply from his evidence that one Lydia Dascomb owned a small undivided interest therein, but that he had bargained for it in some way, the particulars of which do not appear. The mortgage sought to be foreclosed was executed some time about 2 or 3 o'clock P. M. on the 4th day of October, 1886, and after the attachment papers were delivered to the defendant Stevenson. He received these papers from the sheriff, in the lane, in the southern part of the town of Roseburg. The mortgaged premises were situated about 13 miles from this point. The individual land of Stevenson joins the 1,500-acre tract owned in common with Gabbert, and the distance between the 640-acre tract and the 1,500-acre tract is about one-fourth of a mile. The sheriff, by his return on the writ of attachment, certifies as follows: "And I further certify that I did on the said 4th day of October, 1886, by virtue of said annexed writ of attachment above described, attach the following described real property of George Stevenson, one of the defendants named in said annexed writ of attachment, subject to the former attachment of Koshland Bros., hereinbefore mentioned. I did, in pursuance of said annexed writ of attachment, on the said 4th day of October, 1886, at 8:30 A. M. of said day, attach the following described real property, by delivering to said George Stevenson in person a copy of the annexed writ of attachment, duly certified to by me as sheriff aforesaid; and thereafter, to-wit, at 1:30 o'clock P. M. of said 4th day of October, 1886, I duly posted a copy of said annexed writ of attachment, duly certified to by me as sheriff, upon the front of the dwelling-house of said George Stevenson, within said county and state, as no person could be found at the place of residence of said defendant George Stevenson of suitable age and discretion with whom to leave said copy of said writ of attachment as aforesaid." No other fact appears in the return showing the manner of service. On the 9th day of October, 1886, the sheriff made out a certificate certifying, in effect, that he had attached all the real property described in the complaint as the property of the defendant George H. Stevenson, which certificate was filed with the county clerk on that day, and by him recorded. The only questions we deem necessary to consider are whether the return was sufficient to show the property in controversy had been attached, or, if the same be deemed insufficient, whether the attempted amendment thereof in this case can be sustained.

1. Section 149, Hill's Code, provides: "The sheriff to whom the writ is directed and delivered shall execute the same without delay, as follows: (1) Real property shall be attached by leaving with the occupant there-

of, or, if there be no occupant, in a conspicuous place thereon, a copy of the writ, certified by the sheriff." The return of the sheriff fails to show that George H. Stevenson was an occupant of the premises sought to be attached, and it does not appear that the copy of the writ was posted in a conspicuous place on said premises. The sheriff returns that it was posted "upon the front of the dwelling-house of said George H. Stevenson, within said county and state;" but it does not appear that said dwelling-house was the property sought to be attached, or that the front of said dwelling-house was "a conspicuous place." The sufficiency of a return much like this came before the circuit court of the United States for this state in *Mickey v. Stratton*, 5 Sawy. 475, and was held insufficient. The learned and distinguished judge of said court, after citing *Trullinger v. Todd*, 5 Or. 39, said: "Now, the analogy between these cases and the one at bar is complete. The service of an attachment, in case of real property, is required to be made by leaving a copy of the writ with the occupant thereof, but, 'if there be no occupant,' then, and in that case only, by leaving such copy 'in a conspicuous place thereon.' The law is framed upon the reasonable assumption that the occupant represents the absent owner, and therefore it requires the service to be made upon him; and no substituted service, by leaving a copy of the writ on the premises, is permissible, unless there is no one in the occupation of the premises upon whom service can be made, and that fact must appear from the return, or else the service upon its face is unauthorized and invalid." Further: "The return must state what was done, and the presumption that an officer has done his duty is not sufficient to supply a material fact or circumstance which does not appear in his return. For the law having made 'it his duty to indorse his proceedings under the writ thereon,' the presumption that he did his duty applies as well to the making of the return as to the service of the writ, and therefore there is no room to presume that he did his duty in making the service more fully or otherwise than he has stated in his return." If this is the correct construction of this statute,—and there is no reason to doubt it,—it is decisive of this question. But there are other authorities to the same effect. *Bryan v. Trout*, 90 Pa. St. 492; *Page v. Genesee*, 6 La. Ann. 549; *Ezelle v. Simpson*, 42 Miss. 515; *Tucker v. Byars*, 46 Miss. 549. It was also argued that, if the court should be of the opinion that this return was sufficient to make a valid attachment of Stevenson's individual land, it was not good as to those tracts in which he owned only an undivided interest, and particularly the tract that did not join the others, or have any connection whatever therewith, and this contention of the appellant, I think, would have to be sustained, but its consideration is unnecessary. Several separate and distinct parcels of land could

not be attached by posting up a copy of the writ on one only of them. *Henry v. Mitchell*, 32 Mo. 512. The sheriff's return was therefore insufficient to show that the lands in controversy had been attached at the suit of Christy & Wise.

2. The remaining question is, was such return amendable, and were the proper proceedings taken in the court below to amend the same? If the cause in which the defective return was made had not been removed into the circuit court of the United States for the district of Oregon, and the rights of other parties had not intervened, then, if the facts existed which would have enabled the sheriff to make a good return on the writ of attachment, the court might have permitted him to do so. But by what authority did the circuit court of Douglas county proceed to amend a process in a cause which had been lawfully removed into the federal court? "If the record discloses a movable cause, and the other conditions have been complied with, the jurisdiction of the state court ceases, and that of the federal court attaches, without any further proceedings, and for all subsequent purposes." *Dill. Rem. Causes*, § 77c. The power of the state court had therefore ceased over the case of *Christy & Wise v. G. H. Stevenson et al.* long before this attempted amendment of this return in that case, and it had no power whatever over said cause, or any process issued therein. After the removal it belonged to the federal court to exercise the power of amendment, if it thought proper to do so, to the same extent and as fully as if said cause had been originally commenced in that court. This view of the subject renders it unnecessary to discuss the question whether, as against these plaintiffs, the return was amendable, and whether or not the order of amendment could be made in this case; but I think proper to add that the mode of procuring an amendment of a return of process is generally to proceed upon notice in the cause where such defect occurs.

3. One other question remains to be considered, and that is the order in which the mortgaged premises shall be sold. *Christy & Wise* have a judgment which, so far as appears, is a second lien on Stevenson's land, and upon the undivided half of the tracts which he holds as tenants in common with *Gabbert*, and they have no lien upon *Gabbert's* interest therein. In such case, it is equitable that the lands upon which *Christy & Wise* have no lien should be first sold, and the proceeds arising therefrom be applied to the payment of the plaintiff's mortgage, interest, and costs, and the residue of the proceeds of Stevenson's interest, if any, be applied upon the judgment of *Christy & Wise*, and that the remainder of said real estate be also sold, and the proceeds be applied, first, to the payment of any balance that may be due the plaintiff on said mortgage, if any, and the residue to the payment of the judgment of *Christy & Wise* mentioned in the

pleadings, and the remainder, if any, to be deposited in the circuit court of Douglas county, to be paid out to whoever may be entitled to receive the same, and that the mortgage described in the complaint be foreclosed, etc., and the decree of the court below will be modified as herein indicated.

(19 Or. 112)

SAVAGE v. SAVAGE *et al.*

(Supreme Court of Oregon. April 14, 1890.)

PARTITION—PARTIES—REVERSIONER OR REMAINDER-MAN—SEISIN.

1. The right to partition lands is regulated by statute in this state.

2. Prior to the enactment of section 423, Hill's Code, a partition suit could not be maintained by a reversioner or remainder-man, and the rule is unchanged by the Code.

3. They may be made defendants in a suit for partition, but there is no statute in this state which enables them to sue as plaintiffs.

4. The right is only given to one having actual or constructive possession of lands sought to be partitioned. A remainder-man or reversioner has neither, but simply an estate to vest *in futuro*.

5. Seisin and possession, as now understood, mean substantially the same thing. To constitute seisin in fact, there must be an actual possession of the land; to constitute seisin in law there must be a right of immediate possession, according to the nature of the interest.

6. Where the life-tenant is in possession, and there is no present right of entry in the remainder-man or reversioner, they are not constructively seised.

(Syllabus by the Court.)

Appeal from circuit court, Marion county; R. P. BOISE, Judge.

This is a suit for partition. The complaint alleges that the plaintiff and the defendants, with the exception of the defendant Ellen Savage, are the owners in fee-simple and tenants in common and hold and are in possession of the lands sought to be partitioned, and which are particularly described in the complaint. It is then alleged that the said defendant Ellen Savage has a life-estate in and to said lands, which constitute her entire interest in and to the same. John Savage, one of the defendants, demurred to the complaint for the reason the same does not state facts sufficient to constitute a cause of suit, which was sustained by the court below, and a final decree entered dismissing the suit, from which the plaintiff has appealed.

W. H. Holmes, for appellant. J. J. Murphy, for respondent.

STRAHAN, J. It was conceded upon the argument of this cause that the defendant Ellen Savage has a life-estate, with all of its incidents, in the land sought to be partitioned, and that the plaintiff with the defendants, except Ellen Savage, have either the remainder or reversionary interest therein; and the question presented and argued was whether or not, under such state of facts, the plaintiff could maintain this suit. The right to the partition of lands is regulated by statute in this state, and consequently an examination of the sources of jurisdiction, and whether it was originally at law or in equity, or

was exercised concurrently by both jurisdictions, would be unprofitable. Section 423, Hill's Code, provides: "When several persons hold and are in possession of real property as tenants in common, in which one or more of them have an estate of inheritance, or for life or years, a suit may be maintained by one or more of such persons for a partition thereof, according to the respective rights of the persons interested therein, and for a sale of such property, or a part of it, if it appear that a partition cannot be made without great prejudice to the owners." This provision has been the law here ever since the 22d of December, 1853, at which time it was enacted by the territorial legislature, and by its terms took effect on the 1st day of May, 1854, (Laws Or. 1854-55, pp. 152-159.) It was copied almost literally from the Code of Civil Procedure of the state of New York, (Ann. Code N. Y. § 1532.) Before proceeding to an examination of the provision of the Code, it may be well to see what was the rule prior to its enactment. In *Evans v. Bagshaw*, 5 L. R. Ch. 340, the court said: "The case, therefore, falls within the ordinary rule that the court will not allow a partition suit to be maintained by a reversioner. This rule is not merely technical, but is founded on good sense, in not allowing the reversioner to disturb the existing state of things. There might be a tenant for life of the whole, and several tenants in common in reversion, in which case the inconvenience would be obviously very great. At all events, the rule is unquestionably settled." This was affirmed on appeal. L. R. 8 Eq. 469. The very case supposed by the court is actually presented by this record. So in *Striker v. Mott*, 2 Paige, 387, it was held that a party who had a future contingent interest in an undivided share of real estate could not sustain a suit for partition of the property. This case was decided in 1831. *Brownell v. Brownell*, 19 Wend. 367, involved the same question, and arose under the statute rendering possession necessary to the maintenance of the suit; and, while holding that an actual *pedis possessio* was not necessary, still the plaintiff must then have been entitled to the possession, and that she would not be entitled until after the termination of the estate for lives, and that a partition made at that time might be a very unequal one at the termination of such lives. The distinct question here presented came finally before the court of appeals in *Sullivan v. Sullivan*, 66 N. Y. 37, and the decision was adverse to the views of the appellant in this case.

The distinction drawn by most of the authorities in relation to remainder-men and reversioners as plaintiffs and defendants must not be overlooked. It is the gist of the present controversy. It is conceded by all the authorities, and I think plainly provided for in the statute, that they may be made defendants, and the effect of a decree against them, as well as others, is declared by section 432, Hill's Code; but in this state there is no provision of law which enables them to come

into court as plaintiffs, and compel the tenant for life to submit to a partition. In *Sullivan v. Sullivan*, supra, it was held that, although remainder-men and reversioners might be made parties defendant to an action, they could not institute the action, at least as against others not seised of a like estate in common with them. The right is only given to one having actual or constructive possession of the lands sought to be partitioned. A remainder-man has neither, but simply an estate to vest in possession *in futuro*. And the court said: "There was no tenancy in common by the plaintiff with either of the defendants, and the plaintiff did not hold and was not in possession, either actually or constructively, of any part of the lands sought to be partitioned. We think it too well settled by authority, as well as upon principle, that a remainder-man cannot, as against others not seised of a like estate in common with him, maintain the action, to disturb the rule. If the action should be extended, and the benefit given to other parties, it must be done by legislation."

No doubt, acting upon the suggestion of the court in this case, the legislature of the state of New York thereafter amended section 1533 of the Code of Civil Procedure, whereby it was provided: "Where two or more persons hold as joint tenants, or as tenants in common, a vested remainder or reversion, any one or more of them may maintain an action for the partition of real property to which it attaches, according to their respective shares therein, subject to the interest of the person holding the particular estate therein, but no sale of the premises in such action shall be made except by and with the consent in writing, to be acknowledged or proved and certified in like manner as a deed to be recorded by the person or persons holding such particular estate or estates; and, if in such action it shall appear in any stage thereof that partition or sale cannot be made without great prejudice to the owners, the complaint must be dismissed." Now, if the rule contended for so ably by appellant's counsel had prevailed in New York prior to the enactment of this statute, its enactment was superfluous, and wholly unnecessary. It was passed, not to settle a disputed question of law, but to confer a new right on remainder-men and reversioners after it had been solemnly adjudged by the court of last resort that they did not possess such right under the then existing law, and the recognition of such right here by the court would be nothing less than plain judicial legislation. It would amount to the introduction of the rule here by the court, which required an express act of the legislature in the state of New York to introduce there. "Seisin" and 'possession,' as now understood, mean the same thing. To constitute seisin in fact, there must be an actual possession of the land; for a seisin in law, there must be a right of immediate possession, according to the nature of the interest, whether corporeal or in-

corporeal." 1 Washb. Real Prop. 62. Under this view, there can be no seisin in law where there is not a present right of entry. And where the life-tenant is in possession, and there is no present right of entry in the remainder-man or reversioner, they are not constructively seised, and neither can maintain a suit as plaintiff for partition. The authorities generally sustain this view. *Bonner v. Proprietors*, 7 Mass. 475; *Rickard v. Rickard*, 13 Pick. 251; *O'Dougherty v. Aldrich*, 5 Denio, 385; *Burhans v. Burhans*, 2 Barb. Ch. 398; *Whitten v. Whitten*, 36 N. H. 326; *Stevens v. Enders*, 13 N. J. Law, 271; *Tabler v. Wiseman*, 2 Ohio St. 207; 8 Pom. Eq. Jur. § 1387, note 1.

Counsel for appellant claims that, because persons owning interests in remainder or reversion are mentioned in section 432, Hill's Code, as defendants who are bound by the decree, that, therefore, the same persons may be plaintiffs; but the conclusion does not follow. One conclusive answer to this argument is that the legislature has not seen proper to open the door wide enough to let them into court as plaintiffs, but has by the section referred to, and other sections in the same connection, authorized such persons to be made defendants. Counsel for appellants also referred to the opinion of DENIO, C. J., in *Blakeley v. Calder*, 15 N. Y. 617, with much confidence. That opinion, if law, does sustain the appellant's contention; and while it was delivered by a very eminent jurist, and was concurred in by others equally distinguished, it was not then adopted as law by the court, and has never received the sanction of the court in which it was pronounced. We think the decree appealed from is correct, and must be affirmed.

(18 Or. 506)

STATE v. CODY.

(Supreme Court of Oregon. Feb. 11, 1890.)

MAYHEM—EVIDENCE—WAIVER OF ERRORS.

1. In order to justify a conviction under section 1735, Code Or., of "Crimes and their Punishments," which provides, among other things, that, "if any person shall purposely and maliciously, or in the commission or attempt to commit a felony, * * * cut or slit or mutilate the nose or lip * * * of another, such person shall * * * be punished by imprisonment in the penitentiary not less than one, nor more than twenty, years," the evidence must show beyond a reasonable doubt that the accused did the cutting, slitting, or mutilation purposely, deliberately, and designedly, unless done in the commission or attempt to commit a felony.

2. Where the accused in a criminal prosecution was charged with having purposely and maliciously cut, slit, and mutilated the lip of M., contrary to the provisions of the section of the Code above referred to, and it appeared from the evidence given at the trial that in a fight between the accused and M., which arose out of a sudden heat of passion, the tissue of the inner lining of M's lower lip was lacerated, and a piece thereof taken out, leaving a wound, testified to as being about three-fourths of an inch long and a half an inch wide and a fourth of an inch deep, which M. testified was done by the accused biting the lip during the fight; that the wound at the time of the trial had healed over, leaving, however, a visible scar; that the fight was a hand to hand affair, in

which no weapons were employed; but it did not appear from the evidence that the injury to the lip was specially intended, or inflicted otherwise than as incidental to the fight,—*held*, that the evidence was not sufficient to authorize the conviction of the accused of the crime as charged in the indictment.

3. It is the duty of a trial court to instruct the jury, in a criminal prosecution, where the offense charged necessarily includes a lesser offense, that they have a right to find the accused guilty of the latter, where there is a doubt as to his guilt of the former; and where it appears from the record that the instruction was not given in such case, *held*, that it was error which the accused could take advantage of upon appeal, without having interposed any exception.

4. *Held*, further, that the accused in a criminal prosecution does not waive an error committed by a trial court in neglecting the performance of a duty enjoined upon it by law, and which it is required to perform of its own motion, by his failing to call the attention of the court to the fact, or by his not excepting to the matter of neglect.

(*Syllabus by the Court.*)

Appeal from a judgment of conviction of the appellant rendered by the circuit court for the county of Multnomah, for an alleged crime. The appellant was indicted in said court for feloniously cutting, slitting, and mutilating the lip of one Joseph Morin. He pleaded not guilty to the indictment; was tried thereon by jury; found guilty as charged; and sentenced to imprisonment in the penitentiary of the state for one year; from which sentence this appeal was taken.

A. F. Sears and F. D. Winton, for appellant. Henry E. McGinn, Dist. Atty., for respondent.

THAYER, C. J., (*after stating the facts as above.*) The appellant was indicted under section 1785, Code Or., of "Crimes and their Punishments," which reads as follows: "If any person shall purposely and maliciously, or in the commission or attempt to commit a felony, cut or tear out or disable the tongue, put out or destroy the eye, cut or slit or tear off an ear, cut or slit or mutilate the nose or lip, or cut off or disable the limb or member, of another, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary for not less than one, nor more than twenty, years." A demurrer was interposed to the indictment, which the circuit court overruled, and the appellant thereupon pleaded not guilty. A trial was then had, which resulted in the appellant's conviction of the crime as charged; and from which he has appealed to this court, and assigned several grounds of error upon which he relies on the appeal.

One of the ground is that the evidence in the case was not sufficient in law to authorize the conviction. This raises an important question for our consideration, involving a construction of said statute. It appears that, after the evidence was closed, the appellant's counsel moved the court that, upon all the testimony in the case, it direct a verdict for the appellant, and that he be discharged; or that the court instruct the jury that the appellant could not be convicted of the crime of mayhem, for that the evidence was insuffi-

cient to justify the same, and that the indictment failed to charge any facts constituting such offense; that the court refused to allow said motion, and to make said order or any part thereof, and to which the appellant's counsel excepted; that the court in its instructions to the jury, among others, charged that if a person with the teeth should cut, slit, or mutilate the lip of another, that would make it mayhem under said section of the statute; that that was a question of fact for the jury to determine under the law and the evidence, as it had been submitted to them, as to whether or not the appellant was guilty of the crime. To the charge of the court the appellant's counsel excepted, upon the ground that the court failed to instruct the jury that the evidence was insufficient to justify a conviction of the crime of mayhem attempted to be charged in the indictment, and that the facts therein stated failed to constitute such crime.

The bill of exceptions purports to contain all the evidence in the case, and hence the point of the said exception is fairly presented. The evidence shows that the alleged cutting, slitting, and mutilation occurred in a fight between the appellant and the said Joseph Morin, which took place at the Holton House, in Portland, on the 16th day of March, 1889, the time charged in the indictment as the time of the commission of the offense. It appears that said parties at said time were employed at the Holton House; that the appellant had been employed there for more than three years as runner, and that Morin had been employed there about six months as porter; that upon the occasion referred to the appellant accused Morin with having slapped the bell boy, and that the parties immediately engaged in the fight. The evidence is conflicting as to which of them began it, each claiming that the other struck the first blow. Morin testified that he came into the office, and was sitting by the elevator talking to some one, when the appellant called him to the desk, where he was writing a message, and said to him: "The next time you raise your hand on that boy I'll break your neck." He replied that he did not raise his hand on the boy; whereupon the appellant called him a liar, and struck him. The appellant, on the other hand, testified that he was writing a telegram at the desk in the office of the hotel when the boy came to him crying, and said that Morin had been beating him again; that, upon seeing Morin, appellant asked him why he could not let that boy alone,—why he wanted to be whipping him all the time; told him that he was not the boy's boss, and had no more right to beat him than he (appellant) had a right to beat him, (Morin); to which the latter replied that it was none of his business, and that he would fight appellant, and thereupon struck appellant. Other witnesses testified in regard to the commencement of the affair, and the most of them corroborated the appellant's testimony upon that point.

But, whatever the truth may be in regard to that fact, it is evident that the parties very hastily engaged in the contest on both sides; that they clinched and struggled among the baggage and tables; and finally separated, after Morin said he had enough of it. Morin claimed in his testimony that during the *mêlée* his lip was lacerated, his thumb and one of his fingers injured, and one cheek bruised, and that it was caused by the appellant biting him. It seems that he was very much excited and exasperated at the time; so much so that, immediately after their separation, he went and got his pistol, and fired five shots at the appellant, had a tussle with other parties who were attempting to wrest the pistol from him, and ran off towards the bluffs back of the city; but he finally became more composed, and returned, and gave himself up to the police. The wound on Morin's lip is the only one necessary to be considered, and its importance is not in consequence of its severity, but of its locality.

Under the construction of said section of the Code claimed by the counsel for the state, and which seems to have been given to it by the circuit court, in this case, a wound inflicted upon the tongue, lip, or nose of a person, by whatever means occasioned, would, if it resulted in a "cutting" of one of those organs, render the party who inflicted it guilty of a felony, which, if made upon some other part of the person, although it were far more severe, would only amount to assault and battery. The counsel for appellant strongly insisted that the injury to the lip was not caused by biting, but that it evidently resulted from the blow shown by the testimony to have been struck by appellant upon Morin's mouth after he was released from appellant's hold; claiming that the lip was thereby necessarily forced against his own teeth, and that it produced the laceration. But if the injury had been caused in that way, and it thereby caused a cutting of the lip, within the meaning of said provision of the statute, the same liability, so far as I can see, would attach. The question, therefore, to be determined, relating to the point under consideration, is whether the injury to the lip was such a "cutting" of it as would render the appellant amenable to the said provision. I cannot understand how one man engaged in a scuffle with another, such as took place between the appellant and Morin, could manage to bite the other's lip; but the jury must have so found, and we are obliged to accept their finding as conclusive of the fact. We are not, however, precluded from an inquiry as to the character and extent of the wound in order to ascertain whether or not it constituted mayhem under the statute, nor from determining the construction which the statute should receive. So far as I can discover from the evidence in the case, the wound involved the lower lip, and the appellant's counsel stated at the hearing—which was not denied, as I remember, by the counsel for the

state—that it was on the inside of the lip. But I have not been able to ascertain from the testimony, to my satisfaction, whether such is the fact or not, though it might perhaps be so inferred from the testimony of Max. M. Shillock, a reporter on the Oregonian, who was present when the wound was dressed. He testified that he received a message to come to the jail; that Morin had given himself up; that Morin was standing in the police office; that his hat was off, and his face was covered with blood, and collar and necktie and shirt pretty much saturated, and his hands were bloody, and his lip; there was a clot of blood on his lower lip, and a scar on his left cheek, and some scars on his fingers; did not examine the cut in the cheek very closely; watched Dr. Rand when he dressed the wound on the lip afterwards; it was about half an inch long; came very nearly to the lower edge of the upper part of the lip, and the outer skin was taken off, and exposed the flesh for about a quarter of an inch, he should think. It was pretty much covered with blood when he first saw him; it was all clotting blood on his lip. Dr. Rand, in his testimony as a witness, testified that the wound was in the center of the lip; thought it was about three-quarters of an inch long, about half an inch wide, and about a quarter of an inch thick, "just by estimation of it." It was a raw cut or raw laceration, and bleeding quite profusely; bled on his clothes, necktie, and shirt; and there were a few scratches on his face and fingers; should think that there was a piece gone out of the lip of the size he before mentioned. Morin, in his testimony in regard to the affair, stated that he (appellant) got hold of his lip with his teeth, and bit it, and bit a piece off of it, "so when I managed to push him away from me he caught hold of my right finger. He took a part of my lip away. The piece was taken off from here. It has been healed up again with medicine. The lip is drawn up again, but it shows disfiguration." Henry Griffin, a policeman, testified that he examined the lip when the doctor was dressing it; that it was swollen, and all blood and cut across the bottom of it; that there was a piece out of the lip missing. James Barry, another policeman, testified that when Morin came to the door at the station that night he was bloody on his face, mouth, shirt, and hands; very bloody; that "his lip looked like as though it was bit; looked like a piece of raw beefsteak."

It is difficult to obtain from this testimony an intelligent idea of the nature and extent of Morin's wounds, but it is obvious that they were not serious, though the grotesque sight which in his unwashed condition he presented no doubt greatly intensified the enormity of their appearance. There was no testimony in the case showing that the appellant inflicted the injury through a malicious design, or for the purpose of disfiguring Morin's features. The affair evidently arose out of a sudden outburst of passion on the part of the appellant against Morin, in-

cited by the latter's supposed mistreatment of the bell boy, and of his prompt resentment in return. It was a contest for mastery, in which each of the combatants relied upon his own courage, skill, and prowess. It was not conducted in accordance with conventional rules recognized by the popular pugilists of the day, but in a primitive style,—a manner which western people vulgarly term a "ground squabble,"—wherein the parties do not stand upon any nice points of honor as to the mode of hurting each other. Such occurrences are not respectable, but are disgraceful and demoralizing, yet it is better that they be indulged in occasionally than that men lose their grit, and become dudes and poltroons. Where parties unfortunately become involved in such broils, and one of them receives an injury to some of the organs enumerated in said section of the Code, I do not think that it renders the party inflicting it liable to the penalty which that section imposes, although the injury be technically of the character therein mentioned. I do not believe that the legislature intended said provision to include cases arising under such circumstances. It evidently had in view a class of cases in which the conduct of parties was wanton, deliberate, and cruel. The language of the section, "If any person shall purposely and maliciously, or in the commission or attempt to commit a felony," etc., implies something more than a wounding incidental to a fight. The statute extends the law of mayhem, as it existed at common law to other subjects, although it does not use the term except in the title to the chapter of the Code enacted by the legislature. *State v. Vowels*, 4 Or. 324. In that case the court by Mr. MCARTHUR, J., said: "It may not be amiss to state that this section (referring to said section 1735) is based upon the English statute of 22 & 23 Car. II. c. 1, commonly known as the 'Coventry Act'; the circumstances which led to the passage of which are recounted by Lord Macaulay. *Hist. Eng.* vol. 1, 8vo Ed., p. 77." The "Coventry Act" to which the learned judge referred was enacted in consequence of an assault on Sir John Coventry in the street, and slitting his nose, in revenge, as was supposed, for some obnoxious words uttered by him in parliament. It enacted "that if any person shall, of malice aforethought and by a laying in wait, unlawfully cut or disable the tongue, put out an eye, slit the nose, cut off the nose or lip, or cut off or disable any limb or member, of any other person, with intent to maim or disfigure him, such person," etc., "shall be guilty of felony," etc. The circumstances which led to the passage of the act, and its language, show conclusively the reason and purpose of its adoption, and the nature and character of offense which it was intended to declare a felony and punish as such; and if the section of the Code was based upon that act, as suggested in *State v. Vowels*, as it undoubtedly was, or upon a similar act of parliament passed subsequently thereto, then

our conclusion, that it was intended to apply to a class of cases in which the conduct of the parties was wanton, deliberate, and cruel, must be correct. Again, the word "cut" was used in the same connection, in said Coventry act, and in English Statutes upon the subject passed subsequently, as it is used in said section of the Code, and had received a legal construction long prior to the adoption of the section by the legislature of this state. It meant a wound made with a sharp instrument. Bishop, in his work on *Statutory Crimes*, (2d Ed.) § 315, says: "Where the words 'cut or stab' are used as in the before-mentioned English statute, they 'relate only to such wounds as are made by an instrument capable of stabbing or cutting,—stabbing being properly a wounding with a pointed instrument, and cutting being a wounding with an instrument having a sharp edge. And if the indictment be for cutting, evidence of a stab will not support the charge; for, as the statute uses the words in the alternate 'stab or cut,' so as to distinguish them, the distinction must be attended to in the indictment.' Yet cutting or stabbing need not have been the purpose for which the instrument was manufactured. For example, a blow from the sharp claw of a hammer, or the the sharpened point of an iron crow, may inflict a cut; but not from the blunt end of a hammer, or from a square iron bar, producing a contused or lacerated gash, or from the scabbard of a sword, or from the handle of a windlass. It was held in New Jersey that if the nose is bitten off it is cut off,—a conclusion not in accord with the English doctrine. Under 1 Jac. 1, c. 8, § 2, employing the words, 'stab or thrust any person,' HAWKINS, J., says: 'The killing of a man with a hammer or such like instrument, which cannot come properly under the words "thrust" or "stab," is not a killing, within the statute.'"

I refer to the latter matter, not so much for the purpose of claiming that the construction by the English courts of the word "cut," as used in the English statutes referred to, should be adopted in the construction of the said provision of our Code, but to show that such statutes are only intended to include cases where the act was done deliberately and intentionally. Using a sharp instrument to effect the cutting would imply intention and deliberation, which must be shown in some manner in order to authorize a conviction. This question was fully discussed in *Godfrey v. People*, 63 N. Y. 207. That case arose under the statute of that state upon the subject of mayhem, which is perhaps more pronounced, in requiring deliberation, than our Code, though much of the reasoning of the learned court applies to it with the same force that it does to the New York statute. The evidence there tended to show that the accused and the complainant had been playing cards together, and got into a quarrel over the game, which resulted in a fight. The parties closed, and during the struggle the ac-

cused bit off a piece of complainant's ear. MILLER, J., in delivering the opinion of the court, at page 211 of the case, says: "If the offense was committed within the meaning of the statute, it must have been done 'on purpose,' as well as with a 'premeditated design.' There is no real ground for claiming that there was premeditation and a purpose existing at any time during the progress of the conflict when the passions of both parties were aroused, and there was no time or opportunity for reflection or deliberation. Such an assumption would be contrary to the natural inferences to be drawn from the circumstances and the situation of the parties at the time, and, looking at them, it cannot be fairly claimed that the prisoner intended to commit the offense of which he was convicted. An argument is made by the learned counsel for the prosecution to the effect that the doctrine of instantaneous malice, under the old law of murder, is applicable, and that the definition of premeditation, as applied to such a case, may be invoked. I cannot concur in this view. In cases of homicide, where the offense is committed by means of weapons, or by the use of violence sufficient to produce death, such a rule might well be applied, because every circumstance tends to show that the result was intended. But this differs widely from a case of simple assault and battery, where there was a hand to hand fight, without any weapon which could be used to maim or disable, and every intentment is against any such purpose. Another answer to this position is that the statute of mayhem in England, as well as in this state, was evidently intended to provide for cases where there was an antecedent and secret purpose to commit the act, and not for casual and sudden affrays, where the act was done in the heat of the strife, and with no direct evidence of any such intention."

In *Tully v. People*, 67 N. Y. 15, a case of mayhem by biting the complainant's thumb so as to permanently disable it, the court held that the evidence was sufficient to authorize the submission of the case to the jury. But there the evidence tended to show that the complainant was riding in a street-car; that the accused got into the car, and was put off by the conductor for not paying his fare; that he got on again, and forced his way into the car, exclaiming as he did so: "Let me in, till I eatsomebody." After getting in, he caught hold of the conductor, and bit his thumb. Complainant requested him to be quiet, as there were ladies in the car, and they both sat down. After a few moments, the accused sprang up and struck complainant, and, as the latter arose, seized his nose with his teeth. Complainant put up his hand to protect his face, when the accused caught his thumb in his mouth, and began to chew it, and continued so to do until he was forced from the car by other passengers, hanging on to the thumb until he reached the platform: In the latter case the jury were justified in finding, not only that the act was done "purposely and maliciously," but by "premeditated design,"

as there was direct testimony tending to prove both facts. It devolved upon the prosecution, in the case under consideration, to prove beyond a reasonable doubt, that the appellant purposely and maliciously, or in the commission or attempt to commit a felony, cut the lip of said Morin. It is not pretended that the wounding of the lip was done under any such circumstances, nor does the proof show that it constituted an offense, within the meaning of said section of the Code, if done by biting, as the jury seem to have found, any more than if it had been done by gouging with the thumb-nail or by a blow of the fist. The hurt, so far as I can discover from the testimony, was a laceration of the tissue which lines the inner side of the lower lip, and of a nature liable to have been caused by various means. According to the testimony of Morin, himself, it has since healed over; and to adjudge it mayhem, in view of all the surroundings, would be making a felony out of a comparatively trifling matter. The punishment which the law attaches to that character of crimes negatives the idea that the legislature intended that a scratch or gouge of that kind, received in a fight in which no artificial weapons were employed, should constitute so grave an offense. The appellant may have been guilty of an aggravated assault and battery; but to sentence him to the penitentiary for an act which was done, as said in *Godfrey v. People*, supra, where there was a hand to hand fight, without any weapon which could be used to maim or disable, and every intentment was against any such purpose, would be inflicting punishment disproportionate to the offense.

I do not mean to be understood as holding that the crime of mayhem, under the statute, cannot be committed without the use of a knife or some similar weapon. The employment of any direct means in the accomplishment of either of the results mentioned in said section of the Code, if made use of for that purpose, would be sufficient. The use of a weapon might not render the wound inflicted any more serious or painful to the party than if it were inflicted by the use of some of the physical organs. But a resort to a weapon, under such circumstances, would afford grounds for an inference that the act was done purposely and designedly.

The appellant's counsel assigned as another ground of error the failure of the circuit court to instruct the jury that they were authorized to find the appellant guilty of any other offense than that charged in the indictment, the commission of which was included in the one so charged. The counsel for the state insists that the court did not err in that respect, as the appellant's counsel neglected to request such an instruction. The circuit court instructed the jury generally upon the law of the case, so far as it related to their finding the appellant guilty or not guilty of the crime charged. After having instructed them what would constitute mayhem, as before mentioned, the court further instructed

that it was necessary that the state should make out the proof beyond a reasonable doubt; that it was necessary, also, in order to constitute the crime, that the act should have been done purposely and maliciously, with the teeth, and that the lip of Joseph Morin should have been cut, slit, or mutilated by the appellant in order to make out the crime; that if they found that his lip had been cut or injured, but were in doubt as to how it was done, or if they should find that it was done by accident, or by merely striking him with his fist, or with some instrument than his teeth, then the appellant would not be guilty of the crime with which he was charged in the indictment; that the state must establish satisfactorily that the appellant with his teeth purposely and maliciously cut, slit, and mutilated the lip of the prosecuting witness, Joseph Morin; that that was the charge in the indictment; that if they were not satisfied beyond a reasonable doubt that the appellant committed the crime by doing the acts alleged in the indictment, as has been explained to them under the law, then they could not find the appellant guilty, etc.; that, on the other hand, if they were satisfied beyond a reasonable doubt that the appellant with his teeth purposely and maliciously did the act charged, with the intent to maim and disfigure the said Morin, then they should find the appellant guilty as charged in the indictment. This instruction was not authorized by the evidence in the case, as there was no proof whatever that the appellant slit or mutilated Morin's lip, and not sufficient evidence that he cut it purposely and maliciously. To "slit," according to Webster, is to cut lengthwise; to cut into long pieces or strips; to cut or make a long fissure; to cut in general; to rend; to split. And to "mutilate" is to cut off a limb or essential part of the body; and the latter term, in criminal law, is, according to Bouvier, to deprive a man of the use of any of those limbs which may be useful to him in fight. There is no pretense that the lip in question was cut into long pieces or strips, or rended or split, or cut off; and the instruction, as given, presented to the jury only one of two alternatives, either to find the appellant guilty or not guilty of the crime charged in the indictment. The jury had the right under section 1383, Hill's Crim. Code, to find him guilty of any crime the commission of which was necessarily included in that with which he was charged, or an attempt to commit such crime; and section 1359, Hill's Crim. Code, provides that "when it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of the two or more degrees he is guilty, he can be convicted of the lowest of those degrees only."

The jury in this case may have understood that they had the right to find the appellant guilty of a lesser offense than that charged in the indictment, though I think it exceedingly doubtful whether they did so understand. It was therefore highly important to the proper

administration of justice that the court inform them in regard to that matter. But whether it was error of the court in failing to give such an instruction when the appellant's counsel neglected to request it is the particular point for determination. Trial courts, in many matters, have a duty to perform of their own motion. For instance, it would be error on the part of such court to permit a petit jury to return a verdict in a case of felony, in the absence of the accused, and it would also be error for the court to pass sentence upon him after a conviction, without putting the formal question as to whether he had anything to say why the sentence of the law should not be pronounced against him; and in *People v. Murray*, 40 N. W. Rep. 29, the supreme court of Michigan, in a late decision, held that, without any request from counsel, it was the duty of the judge of the circuit court to see that a case was fairly submitted to the jury. The court, by SHERWOOD, C. J., there said: "While this court cannot reverse a judgment or set aside the verdict upon a review of the facts, when such facts have been properly submitted to a jury, and will not ordinarily depart from such rules of practice as have been adopted as the results of the longest experience, yet, under the general superintending power and control over all inferior courts and their proceedings given under the appellate jurisdiction of this court, I have no doubt in a criminal case, upon a review of all the proceedings had which have resulted in the conviction of a respondent, if a court can see that a fair trial has not been had, and it is made manifest that injustice has been done, it then becomes the imperative duty of the court, with or without objections and exceptions by the respondent's counsel, to set aside such proceedings, and order a new trial; and we all think the present presents such a case. * * * The respondent was sworn, and some of his testimony contradicted the people's witnesses, yet no charge was made stating what weight the jury might give to his testimony. Without any requests from counsel, it is the duty of the circuit judge to see to it that the case goes to the jury in a clear and intelligent manner, so that they may have a clear and correct understanding of what it is they are to decide, and he shall state to them fully the law applicable to the facts. Especially is this his duty in a criminal case. * * * Too much reliance is often placed upon counsel by the court in this respect for requests, but this should not be done. The court must do its duty in a criminal case, whether counsel do so or not. It is to the court that the accused has a right to look to see that he has a fair trial."

This view accords entirely with my own idea regarding the duties of courts of justice charged with the administration of criminal law. The constitution guaranties to the accused in criminal prosecutions the right to a fair and impartial trial, and the duty of enforcing that guaranty is committed to the ju-

dicial branch of the government, and no department of the government has power to deprive the accused of such right. Nor can the latter alienate or waive it. In *Cancemi v. People*, 18 N. Y. 128, in a trial for murder, one of the jurors was withdrawn, under a stipulation of the prisoner, consenting thereto, and also that by the record the cause should appear to have been tried by 12 jurors. It was held by the court of appeals that a conviction by the remaining 11 was erroneous. The court there says: "Criminal prosecutions involve public wrongs, 'a breach of public rights and duties,' which affect 'the whole community, considered as a community, in its social and aggregate capacity.' 3 Bl. Comm. 2; *Id.* 4, 5. The end they have in view is the prevention of similar offenses, not atonement or expiation for crime committed. *Id.* 11. The penalties or punishments for the enforcement of which they are a means to the end are not within the discretion or control of the parties accused; for no one has a right, by his own voluntary act, to surrender his liberty or part with his life." Pages 136, 137. The constitution of this state provides that, "in all criminal cases whatever, the jury shall have the right to determine the law and the facts, under the direction of the court as to the law, and the right of a new trial as in civil cases," (article 1, § 16;) and it requires the judge of every court, before entering upon the discharge of the duties of his office, that he will support that fundamental law upon which all the institutions of the government are built. How can a trial court neglect to direct a jury as to the law applicable in such cases consistently with the discharge of its duty. The jury must take as their guide in their deliberations the law as laid down by the court, which is an important means for securing to the accused a fair trial and just decision. In *Lang v. State*, 1 S. W. Rep. 319, a Tennessee case, the court says: "In all criminal prosecutions, the accused is entitled to a full, fair, and plain statement, by the court to the jury, of the law applicable to his case;" and in *State v. Banks*, 73 Mo. 592, the majority of the court held that it was the duty of the trial court, in criminal cases, to give correct instructions covering the whole law arising on the facts, whether such instructions were asked or not; and such has been the uniform rule of decision of the courts of that state for the past half century. In the latter case Mr. Justice NORTON dissented, stating as the grounds thereof the following: "Whether error was or not committed by the trial court in not instructing the jury as to some lower grade of homicide than murder in the first degree (which was the point the trial court had failed to instruct upon) was a matter of exception, and as the attention of the trial court was not pointedly and specifically called to the alleged error, either in the motion for a new trial or in arrest of judgment, it cannot be raised in this court for the first time; and we have no power to reverse a judgment

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in a matter of alleged error not excepted to in the trial court, and to which the attention of said court was not called."

According to this view of the question, the learned judge would seem to attach more importance to technical rules of practice than to the obligations imposed by the fundamental law. The reason for his dissent was, in effect, that the accused should be precluded from alleging error, on account of the neglect of the trial court to give proper instructions to the jury, because he failed to point out its neglect in that particular. If the reason were a valid one, it must be upon the ground that the accused, by his failure to point out such neglect of the court, waived the error; at least, I cannot discover any other ground upon which it can be based. The waiver of a legal right in the trial of a civil action may properly be maintained. The doctrine of waiver depends upon the maxim, *consensus tollit errorem*, and it may consistently be resorted to and enforced in civil cases; as the parties in such cases are free to act and their consent only affects individual rights. But in criminal prosecutions the accused is proceeded against on behalf of the state, to be dealt by in accordance with the law, which is the only warrant for the proceeding. His attendance in court in that case is enforced. He is there by compulsion, to do and exercise whatever the court may deem proper, under the rules of law, to inflict upon him. He is entitled to the benefit of certain reserved rights, but is not authorized to consent to anything beyond formal matters, or which subserve his interest. Nor is the court justified in acting upon the consent of the accused in any matter affecting his right to a fair and impartial trial. The law marks out the line which the court is required to pursue, and, if it deviate therefrom in any particular which might operate prejudicially to the accused, it is no excuse to claim that he consented thereto or waived his right to challenge the irregularity. I do not see how it can be maintained that the appellant in this case or the accused in *State v. Banks*, supra, was required to except to the omission of the trial court to instruct the jury fully upon the law applicable to the case, in order to enable him to take advantage of such omission upon appeal, if the accused in *Cancemi v. People*, supra, were entitled to claim error on account of being tried by a jury composed of only 11 jurymen when he expressly consented to it. If a party charged with a public offense may consent to a waiver of one of the immunities which the constitution of the government throws around him to insure a fair and impartial trial of the case, I do not see why he could not dispense with them all. Of course, there are a number of rights the accused is entitled to, which must be demanded by him before the court can know that he desires the benefit of them. The right to have compulsory process for obtaining witnesses in his favor belongs to that class. The accused must show in such case that the demand was

made to the court before he can claim that the right has been denied him. But where the court fails to discharge a specific duty of its own which it is required to perform of its own motion, and which may operate to the prejudice of the accused, I do not think it can be claimed that the latter waived its performance by neglecting to interpose an objection or to call the attention of the court "pointedly and specifically" to the fact. The accused could not give his consent in advance that the court might neglect the duty, and I do not see, therefore, any reason for claiming that he could thereafter ratify it. The weight of authority, estimated by the number of decisions, may be against the view here indicated, but I think it is correct in principle. Where the offense charged includes a lesser offense, and there is any question as to the accused being guilty of the greater, it is highly essential that the trial court instruct the jury in regard to their right to find him guilty of the lesser one, in order that he may have the benefit of any reasonable doubt in the premises. The importance of such an instruction was exemplified in this case. The jury evidently believed that the appellant was guilty of an act for which he should be punished; but, as I would infer from their recommending him to the mercy of the court, they were reluctant to find him guilty of the crime as charged in the indictment. He could very properly have been convicted under the evidence of assault and battery, which, according to my view, was the highest grade of offense he committed; and I think it highly probable that, if the trial court had given the jury the instructions suggested, they would have found him guilty of that offense, instead of finding him guilty of one of the degrees of felony. There is no good purpose to be served in attempting to rush men into the penitentiary on account of matters growing out of ordinary broils which are liable to occur between good citizens. Such affairs are to be deplored, but community will never become free from them, so long as men possess temper and combativeness, and are in such juxtaposition that their interests and passions collide. Several other questions are presented in the bill of exceptions, but it is not necessary to consider them. The judgment appealed from should be reversed, and the case remanded to the circuit court for a new trial.

(19 Or. 163)

FISK v. NORTHERN PAC. R. CO.

(Supreme Court of Oregon. April 23, 1890.)

Appeal from circuit court, Columbia county.

Dolph Bellinger, Mallory & Simon, for appellant. *R. & E. B. Williams and Sears & Beach*, for respondent.

PER CURIAM. The court below held in this case that the railway company was required, under the statute, to fence its depot.

In a recent case, ante, 498, we held otherwise; and the reasons therein stated render it unnecessary to further consider that question. The judgment must be reversed, and a new trial ordered.

(19 Or. 172)

SCHEIFFELIN *et al.* v. WEATHERED.

(Supreme Court of Oregon. May 1, 1890.)

EQUITY—CROSS-BILL—REMEDY AT LAW—DEMURRER—APPEAL.

1. A defendant, in an action at law, has no right to file a complaint in equity, in the nature of a cross-bill, unless the complaint shows that he "is entitled to relief, arising out of facts requiring the interposition of a court of equity, and material for his defense;" and where it appeared from the complaint filed in such a case that the facts alleged, if true, would be available as a defense in the action at law, *held*, that a general demurrer to the complaint was properly sustainable.

2. *Held, also*, that a decree dismissing such a complaint after a demurrer to it had been sustained, and the plaintiff had not answered over, was a final decision, from which an appeal would lie to the supreme court.

(Syllabus by the Court.)

Appeal from a decree of the circuit court for the county of Washington, sustaining a demurrer to a cross-complaint in equity. The respondent commenced an action at law in the said circuit court against the appellants upon two promissory notes executed by them to the respondent, and bearing date February 14, 1887, one of which was due in six months, and the other eighteen months, from date; each bearing interest at the rate of 10 per cent. per annum; and upon which he claimed to be due the principal sum and interest, and the sum of \$110 attorney's fees. The appellant filed an answer to the said complaint, denying the amount claimed to be due upon the notes as claimed therein; denied that the sum of \$110 was a reasonable attorney's fee therein; denied that no part of the said notes had been paid; but alleged that the appellant E. L. Schieffelin had paid the respondent \$100, of which \$31 was to be applied upon account, and that the balance, \$69, was to be credited upon the notes; also the sum of \$42. The said appellants, for a further answer, alleged that on the 15th day of November, 1886, the respondent was associated with one C. W. Ransom in the drug business; that said Ransom owned an undivided interest in a large number of accounts and notes, of the probable value of \$2,000, which were due and to become due to said Ransom and respondent; that on said 15th day of November, 1886, the said E. L. Schieffelin, with the knowledge of respondent, purchased of said Ransom his undivided half interest in said accounts and notes, and at the time of the execution of the notes in suit it was agreed between respondent and said Schieffelin that the former was to retain possession of said accounts and notes, collect the same, and apply the one-half so collected as credits upon the notes in suit; that he had collected thereon divers large sums, the amount of which was unknown to appellants, but he had failed to credit the same as

agreed; and the appellants set out in the answer a long list of the names of persons, and amounts which the respondent had collected from each. The appellants further alleged that they had requested from respondent an accounting and settlement of the matter, but that he had neglected to render any account whatever thereof. And they further alleged that the crediting the notes in suit with one-half of all the sums collected by respondent upon said accounts and notes, and with the sums paid thereon, the same would be almost, if not fully, paid and discharged; that they had always been willing to pay respondent any balance that might be found due him upon an accounting between them; and they demanded, as relief, that the action be stayed, and the respondent be compelled to account to appellants for all sums collected by him upon the said accounts and notes. The respondent filed a reply to the said answer, denying the new matter therein alleged; whereupon the appellants filed a cross-complaint in equity, in which they alleged the purchase from the respondent of his stock in trade, consisting of all the goods, drugs, and fixtures in a certain drug-store which was the consideration for the two promissory notes sued upon in the action at law; also another note executed by them to respondent, and which they had since taken up. They further alleged in the cross-complaint that the said respondent falsely represented to them that he had invoiced said stock of goods, and that the invoice price or value thereof was \$1,400, which he knew to be false, and that it did not exceed \$800; that they were induced to purchase the same through said false representation. Said appellants further allege, substantially, the said matters set forth in their answer to the complaint in the action at law, and demand that the respondent be compelled to account for all of said matters, and that the said notes sued upon be surrendered up. The respondent filed a demurrer to the said cross-complaint, demurring to certain portions thereof, and to the whole of the same, upon the grounds that the allegations contained therein did not constitute a cause of suit. The circuit court sustained the demurrer, and decreed that the said complaint be dismissed; which is the decree appealed from herein.

S. B. Huston, for appellants. *Thos. H. Tongue*, for respondent.

THAYER, C. J. The respondent's counsel insisted at the hearing that the appeal herein would not lie; that the cross-complaint was merely ancillary to the defense in the action at law; and that the decision upon the demurrer was only interlocutory; but it will be observed, from an inspection of the language of the Code upon the subject, that the filing of a complaint in the nature of a cross-bill stays the proceedings at law, and the case therefore proceeds as a suit in equity. The suit in such a case is really as independent

of the action at law as though it were commenced by original summons. The object of the provisions of the Code regulating the proceeding was to avoid the necessity of waiting until the action at law was determined before equity jurisdiction was invoked, and it saved the necessity of procuring the issuance of an injunction to restrain the execution of the judgment at law. But whether the complaint contains facts sufficient to entitle the appellants to the relief claimed is a much more difficult question to solve in their favor. The Code provides that in an action at law, where the defendant is entitled to relief, arising out of facts requiring the interposition of a court of equity, and material for his defense, he may, upon filing his answer therein, also as plaintiff file a complaint in equity, etc. Unless, therefore, the relief sought does arise out of facts requiring the interposition of a court of equity, and material to the defense, the defendant is not entitled to file such complaint. I was strongly impressed at the hearing with the belief that the appellants had not shown in their complaint such a state of facts as required the aid of a court of equity to render them available as a defense to the action upon the notes, and a further consideration of the case has confirmed me in that belief. The matter of the alleged fraudulent representations claimed to have been made by the respondent to the appellants upon the sale by him to them of the drugs and other articles for the payment of which the notes were executed, and the matter of the alleged partial payments upon the said notes are matters clearly cognizable at law, and the appellants are entitled to the benefit of them as a defense in said action. Partial payments upon a note may, under the Code, be pleaded as payment *pro tanto* thereof. And a fraud or warranty in the sale of goods could, before the Code, be set up as a recoupment of the plaintiff's claim in an action to recover the consideration price of the goods, and since then may be interposed as a defense by way of counter-claim, notwithstanding a promissory note was given for such price, where it had not been transferred to an innocent holder. Nor do I see any difficulty in the appellant's availing themselves of the matter of the alleged agreement of the respondent to collect the said accounts and notes belonging to him and said E. L. Schieffelin, and to apply one-half of the amounts collected as credits upon the notes sued upon as a defense to the action upon said notes. The appellant's counsel contended that it was necessary that the appellants have the aid of a court of equity in that matter in order to obtain a discovery; but that is no longer an essential ground of equitable jurisdiction, although courts of equity may still retain jurisdiction for such purposes. The provisions of the Code are sufficiently broad to admit of as full a discovery at law in such a case as can be obtained in a court of equity. The appellants do not, in my opinion, show

by their complaint a case requiring the interposition of a court of equity, and material for their defense in the action at law. The circuit court, therefore, properly sustained the demurrer, and the decree appealed from will be affirmed.

(19 Or. 181)

ROSTEL v. MORAT.

(Supreme Court of Oregon. May 1, 1890.)

ADMINISTRATORS' ACCOUNTS—ALLOWANCE—APPEAL.

1. It is the duty of every executor or administrator, within six months after notice of his appointment, and every six months thereafter until the estate is settled, to file a semi-annual account; and the county court must, at the first term after any such account is filed, ascertain and determine if the estate be sufficient to satisfy the claims presented and allowed within the first six months, or any succeeding six months thereafter, after paying the funeral charges and expenses of administration, and, if so, it shall so order and direct; but, if the estate be insufficient for that purpose, it shall ascertain what per centum it is sufficient to satisfy, and direct accordingly.

2. By paying claims in advance of an order by the court, an executor or administrator takes the risk of securing the approval of his acts by the court when his accounts and vouchers shall be presented.

3. If the final account of an executor or administrator be disapproved by the court, he may either appeal from the decree disallowing the same, or file another account, which shall meet the objections of the court.

4. A decree for the payment of money in probate proceedings cannot be enforced as for a contempt. The proper process is an execution.

(Syllabus by the Court.)

Appeal from circuit court, Jackson county; L. R. WEBSTER, Judge.

This controversy has arisen in the course of the settlement of the estate of Julius Raspot, deceased. The defendant, Raphael Morat, is the executor of the last will of said deceased, and the plaintiff is endeavoring to secure the payment of a claim in the form of a judgment which he obtained before a justice of the peace in Jackson county against said Julius Raspot in his life-time. The cause was transferred from the county court of Jackson county to the circuit court of that county, for the reason that the newly-elected judge of that county was directly interested as counsel for one of the litigants. Raspot died on the 7th of March, 1884. On the 23d day of August, 1884, the will was duly proven and admitted to probate, and the defendant qualified as executor, and entered upon the duties of his trust. The inventory was not filed until the 23d day of October, 1884, by which it appears the appraised value of the property of the estate was \$222.92. On the 4th of March, 1885, the executor filed a final account. On March 21, 1886, he filed another final account; and on the 5th day of July, 1887, he made "a full and final statement of his proceedings." To each of these accounts the respondent filed objections, and said accounts were disallowed by the court; but each account showed disbursements enough to absorb the estate, if the claims paid were such as the executor had

the right to pay in the order in which they were paid. On the 7th day of September the court made an order adjudging that the executor pay Rostel's claim forthwith, or that he show cause at the next term of court why he failed or refused to pay it. On the 5th day of October, 1886, the executor served and filed a notice of appeal from said order; but no undertaking on appeal was executed, and the same was not prosecuted. Afterwards, on the 2d day of May, 1887, C. B. Rostel filed in said court a petition for a citation requiring the executor to appear and show cause why he did not pay petitioner's claim theretofore allowed and ordered paid. The executor, in answer to this citation, undertook to show cause by filing one of his final settlements. There was a hearing on this account on the 6th day of July, 1887, at which the court refused to set aside its order of September 7, 1886, and directed the executor forthwith to comply with the same. Finally, on the 30th of June, 1888, the executor still failing to comply with said order by paying Rostel's claim, the court awarded a warrant for his arrest, and committed him to the jail of Jackson county, to be "there kept in close confinement and custody until he submits, and obeys the orders of this court." It was admitted on the argument, though it does not appear from this record, that Morat was afterwards discharged from said confinement, by the circuit judge of the first district, on *habeas corpus*. When this cause reached the circuit court, it appears to have been tried by the court as to whether the executor should pay Rostel's claim, being the same, precisely, which had been previously tried and determined by the county court; and said circuit court ordered him to pay it within 15 days. It is from this order or judgment that this appeal is taken.

C. W. Kahler, for appellant. H. K. Hanna, for respondent.

STRAHAN, J. The proceedings in this cause seem to be so irregular, as well as prolix, that it is difficult to determine just what the rights of the parties really are. There have been an unnecessary number of papers filed—many of which were copied into the journal—in the county court, when there was no occasion for it; and where the record ought to be full and explicit, it is frequently wanting in particularity. The appellant's contention is that the county court is a court of record, (article 7, § 1, Const.,) and that whatever judgment or decrees it may enter ought to be justified by the record in the particular case; that probate jurisdiction is conferred on the court by the constitution, art. 7, § 12, and by the Code, § 895, and the manner in which it shall be exercised is fixed by the various provisions of the law applicable to the particular subject; that section 1170, Hill's Code, makes it the duty of an executor or administrator, within six months from the date of the notice of his appointment, and every six months thereafter until the administra-

tion is completed, and he is discharged from his trust, to render a verified account, and file the same with the clerk, showing the enumerated particulars in said section mentioned; and that section 1172 makes it the duty of the court, at the first term after the filing of the first semi-annual account, thereafter to ascertain and determine if the estate be sufficient to satisfy the claims presented and allowed by the executor or administrator within the first six months, or any succeeding six months thereafter, after paying the funeral charges and expenses of administration, and, if so, shall so order and direct; but, if the estate be insufficient for that purpose, it shall ascertain what per centum of such claims it is sufficient to satisfy, and order and direct accordingly. These sections prescribe the duty of the executor or administrator, and the court as well. The executor, in this case, filed no semi-annual accounts. Each was a final account. He also took it upon himself to pay claims without any order or directions from the court whatever; and, while it is believed that this is and has been the usual custom among executors and administrators in this state, it is not the course prescribed by law. By paying claims in advance of an order by the court, the executor or administrator simply takes the risk of securing the court's approval of his action when his accounts and vouchers shall be presented; and this Morat, the defendant, failed to do. On the contrary, the court disapproved of every account filed by him, and made an order requiring him to pay Rostel's claim in full. The executor published two notices of the hearing of each of two of his final accounts, one of which notices was given by order of the court. On each of these occasions when his accounts were disallowed by the court, I think the executor might either have appealed from the order of the county court, or he might have filed another account, by way of amendment, which would have met the views of the court. He saw proper to adopt the latter course, but was unable to obtain the court's sanction to his proceedings.

Having said this much in reference to the proceedings in the county court, we come to an examination of the action of the circuit court which resulted adversely to the executor. Among other things the circuit court found that the said executor was chargeable, on account of the assets of said estate which came into his hands, with the sum of \$109.83, which is properly applicable to the payment of said claim, and should be applied in pursuance of the judgment of the county court heretofore rendered and entered in this behalf. Whether this finding is correct, it is impossible for us to determine in the present state of this record. Its correctness depends altogether on whether or not the defendant was properly charged by the court with the par value of the bank-stock, or the amount for which he reported he sold it, and whether or not the credit side of the account is cor-

rect; and that depends on whether or not the credits which he claims ought to have been allowed. There is a dispute, and considerable uncertainty, about it. The court below might have heard evidence on this subject which we are not permitted to hear, nor have we any satisfactory way of determining the reasonableness of many of these charges. While we are not entirely satisfied that the judgment appealed from is right, we are unable to say affirmatively that it is wrong; and, inasmuch as the defendant, by failing to observe the proper course of procedure in the county court, has contributed very much to produce this uncertainty, we do not think we are called on to interfere. If the defendant had promptly filed his semi-annual account at the end of six months from the date of the notice of his appointment, and each six months thereafter, and had paid no claims until the court determined the order of their priority, and then paid them upon the order of the court, its orders would have fully and completely protected him against any claim not thus ordered to be paid.

Though not strictly necessary, I think this case ought not to be dismissed without a word respecting the manner in which the order or decree may be enforced against the defendant. Section 1078, Hill's Code, in defining the methods of procedure in probate proceedings, provides: "The mode of proceeding is in the nature of that in a suit in equity, as distinguished from an action at law." And section 406 provides: "The court, or judge thereof, may enforce an order or decree in a suit other than for the payment of money by punishing the party refusing or neglecting to comply therewith as for a contempt." These two sections, taken together, limit the power of both the circuit and county courts, where a decree is for the payment of money, to an execution for its enforcement, and render subdivision 5, § 650, inapplicable in such case. The decree of the circuit court must be affirmed.

(19 Or. 188)

ALLEN *et al.* v. ROWE *et al.*

(Supreme Court of Oregon. May 1, 1890.)

MECHANICS' LIENS—NOTICE—KNOWLEDGE OF OWNER.

1. A notice of lien sufficiently gives the name of the owner of the land where the building or erection was placed, which says: "Said real estate reputed to be owned by one E. R. H., and said building reputed to be owned by one G. M. R."

2. In case some person other than the owner of the land employs a material-man or laborer to furnish material or to perform labor upon a building or erection on such other's land, something more is necessary to reach the title of such owner than to insert his name as owner in the notice filed with the county clerk, or to say that he is such owner or reputed owner. It must be made to appear somewhere in the record that such building or improvement was placed on his lands with his knowledge; and then the lien can only be defeated by such owner making it appear that, within three days after he obtained knowledge of the construction, alteration, or repair of such building or other improvement, he posted notice in writing that he would not be responsible for the

same, which notice must be posted in a conspicuous place upon said land, or upon the building or other improvement situate thereon.

(*Syllabus by the Court.*)

Appeal from circuit court, Clatsop county; F. J. TAYLOR, Judge.

This is a suit to foreclose a lien for labor performed and material furnished at the request of the defendant Rowe on the premises described in the complaint, being a parcel of ground situate in the city of Astoria. Hawes owns the lot in fee, but leased the same to Rowe for the period of five years from the 1st day of November, 1888. Rowe employed the plaintiffs to erect the building, who on the 23d day of January, 1889, and within 30 days from the time of the furnishing of the materials and the performance of said labor, filed with the county clerk of Clatsop county, Or., notice of their lien. The defendant Loeb was made a defendant because he held a mortgage made by the defendant Rowe on his interest in the premises to secure the payment of a note for \$1,000, which note and mortgage were dated on the 27th day of November, 1888, which was duly recorded in the office of the county clerk of Clatsop county, Or., on the 28th day of November, 1888, and after the plaintiffs had commenced to furnish said materials and to perform the labor for which they claim a lien. The following is the notice of lien filed by the plaintiffs of their intention to hold a lien on said premises, except the itemized statement for materials and labor, to-wit: "State of Oregon, county of Clatsop—ss: To whom it may concern: Be it known that we, the undersigned, B. F. Allen and Fred. Krosel, as partners under the name and style of Allen & Krosel, painters and contractors, hereby give notice that we claim a mechanics' and artisans' lien upon the following real estate, to-wit: Beginning at a point 2 feet east of the north-west corner of lot 2, block 58; thence easterly, and parallel to the center of Chenamus street, 23 feet; thence southerly, and at right angles to center of Chenamus street, 60 feet; thence westerly 23 feet; thence north 60 feet, to place of beginning,—in the town (now city) of Astoria, as laid out and recorded by John McClure, in Clatsop county, Oregon, and upon the building constructed thereon known and called the 'Tillamook Light Saloon,'—said real estate reputed to be owned by one E. R. Hawes, and said building reputed to be owned by one Geo. M. Rowe,—for the following labor performed and materials furnished by us in the construction and completion of said building, to-wit: * * *

The cause was referred to Charles E. Runyon to take the evidence, and report the same to the court. Upon the evidence thus taken, the cause was tried before the court, and the following findings of fact and law were made: "First, that the claim of lien made by the plaintiffs herein does not contain the name of the owner, nor reputed owner, of the property attempted to be charged with the said lien at the time the said labor was performed, and

the materials were alleged to have been furnished. Conclusions of law: *First*, that said alleged claim of lien is insufficient and void; *second*, that said suit should be dismissed." Then followed a decree in accordance with the findings.

W. M. Kaiser, for appellant. C. W. Fulton, for respondent.

STRAHAN, J. The right to a lien on a building for material and labor is conferred by statute, and the party claiming such lien must show a substantial compliance with the requirements of the statute, or the lien must fail. In *Kezartee v. Marks*, 15 Or. 529, 16 Pac. Rep. 407, we had occasion to consider to some extent the question raised by the respondent Hawes, and we there held that, to affect the land with the lien, the name of the owner or reputed owner must be given in the notice; that such requirement in the statute was one of substance, and could not be dispensed with. And, further, that when the title to the house or structure and title to the land were in different persons, and the notice specifies the name of the owner of the building or structure, but not the name of the owner of the land, the lien might attach to such building, but not to the land. The only real question that the court below seems to have considered was the sufficiency of the plaintiffs' notice. On that question I think there can be no doubt. After describing the building and the real property sought to be charged with the lien, the notice proceeds: "Said real estate reputed to be owned by one E. R. Hawes, and said building reputed to be owned by one Geo. M. Rowe." On the point of objection ruled against the appellants by the court below the notice is sufficient.

But a further question seems also to demand attention. One object of this suit is to reach the title of the owner of the land upon which the building is erected, and to subject it to the lien. In case some person other than the owner employs a materialman or laborer to furnish material or to do labor upon such land, something more is necessary to reach the title of such owner than to insert his name in the notice filed with the county clerk, and to say that he is such owner or reputed owner. Section 3672, Hill's Code, was evidently designed by the legislature to meet such case. It provides: "Every building or other improvement mentioned in section 3669, constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein; and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this act, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration, or repair, give notice that he will not

be responsible for the same by posting a notice in writing to that effect in some conspicuous place upon said land, or upon the building or other improvement situated thereon." Under this section, when the owner of the land did not employ the laborer or materialman to furnish the materials, but the same was done by some other person, it must have been done with the knowledge of the owner or person having or claiming an interest in the land. In such case knowledge of the owner or person having or claiming an interest must exist and be shown as a fact. When this fact does appear, the lien reaches and binds his interest, unless he relieved himself in the manner provided in the section, by posting the notice within three days after he obtained such knowledge. I have looked carefully through the pleadings and evidence to see if the fact in any manner appeared, but am unable to discover it. There will therefore be a decree foreclosing the lien of the plaintiffs against the building described, and the leasehold interest of George M. Rowe in the land described, the building to be sold separately from the land if the plaintiff so elect; otherwise the building and the interest of the defendant Rowe in the land may be sold together, and the proceeds of the sale shall be applied, first, to the payment of the lien of the plaintiff, and next to the mortgage of the defendant Loeb, which is hereby directed to be foreclosed. The decree of the court below will be reversed, and a decree entered here in accordance with this opinion.

(14 Colo. 571)

CROSS v. KISTLER.

(Supreme Court of Colorado. May 9, 1890.)

STATUTE OF FRAUDS—PROMISE TO ANSWER FOR ANOTHER'S DEBT—EVIDENCE.

1. A party accepting a note and chattel mortgage, in his own name, to secure his own debt as well as the individual debt of another, as a matter of accommodation to the latter, and without compensation, is only bound to exercise ordinary diligence, and is not liable for a failure to realize on the securities without proof of negligence.

2. A special promise to answer for the debt of another, not in writing, is void under the statute of frauds.

3. Extrinsic facts and circumstances relating to the parties and their actual dealings with each other in reference to matters referred to in writings may be shown by oral evidence; but mere naked contemporaneous declarations, and the unauthorized statements of third parties, are not admissible.

4. Letters, signed by the parties, tending to explain the transaction in litigation, are admissible in evidence.

5. The previous conduct of a party, inconsistent with the claim upon which he relied at the trial, is admissible in evidence against him.

6. Where the evidence does not tend to support the finding, the judgment will be reversed as being against the evidence.

(Syllabus by the Court.)

Appeal from Arapahoe county court.
Coe & Freeman, for appellants.

ELLIOTT, J. Jacob Kistler was plaintiff and D. K. Cross was defendant below. The principal facts, as shown by the evidence on

the trial, are as follows: In the summer of 1886, one E. J. Leighton was indebted to the plaintiff, Kistler, in the sum of about \$200,—perhaps a little more,—and also to the defendant, Cross, in something over \$200. Cross and Kistler, residing in Denver, Colo., made a united effort to secure their respective claims, which resulted in Leighton's executing a note and chattel mortgage payable to Cross for the sum of \$450. The mortgaged property was located in the territory of Wyoming. By agreement between Cross and Kistler, they placed the mortgage securities in the State National Bank of Denver for collection, the proceeds to be credited to their joint account, though their respective claims against Leighton were several, and entirely independent. Before the mortgage note matured, Cross went East. Before going, it was arranged between himself and Kistler that he should endeavor to secure payment of the mortgage note from Leighton, whom he expected to meet in Boston. He met Leighton, who represented that he had no money, and could not pay the mortgage note, but proposed to renew it. He finally gave Cross a power of attorney and bill of sale of everything he had in Wyoming, including the mortgaged property, as further security. The following letters written by Cross, while east, to his nephew in Denver, were read or shown to Kistler as soon as received:

"September 27, 1886. Leighton will make new note and new mortgage, so you need not feel worried about that matter. I shall see that Kistler's interests are secured the same as before. The property will be sold by me, but I am to have plenty of time to dispose of it."

"October 1, 1886. I have just received from Leighton full power of attorney to sell all of his property in Wyoming, signed by himself and Mrs. L. Everything he owns is in my keeping to sell. You can withdraw that note from the bank, and tell Mr. Kistler that I shall do nothing until I see him, and I will protect his interests the same as under the former agreement. I have seen a lawyer, who assures me that our account, and that of Mr. Kistler, is amply secured."

It further appears that only a very small sum was realized from the mortgaged property by Cross, but all that he did receive was placed in the State National Bank, according to agreement. There was some conflict in the evidence on unimportant points, which need not now be noticed. The court found in favor of the plaintiff, in the sum of \$200, and rendered judgment therefor against the defendant, who brings the case to this court by appeal. Numerous errors are assigned.

The case was originally brought in a justice's court, so there are no written pleadings. The principal assignments of error question the sufficiency of the evidence, under the law, to warrant the finding and judgment. It would seem that the trial court must have held that the defendant had in some way become liable to pay Leighton's indebted-

ness to Kistler, or else that he had been negligent in acting as trustee under the mortgage or power of attorney, whereby Kistler lost the benefit of his security upon the mortgaged property. The finding of the court cannot be maintained on the latter ground, for several reasons: *First*. There was no evidence of the value of the mortgaged property, nor even of its existence, except so far as Cross got returns from the disposition that was made of it. Hence there was no proper measure of damages upon which to base such finding. *Secondly*. Cross was acting as trustee for Kistler, without consideration, and as an act of accommodation, merely, and the evidence did not tend to show that Cross could have secured more than he did out of the mortgaged property by the exercise of greater care; and he was only bound to the exercise of ordinary diligence, under the circumstances. There was no evidence of negligence on the part of Cross.

The next question to be considered is, did the evidence tend to show a binding promise, contract, or undertaking on the part of Cross to pay Leighton's indebtedness to Kistler, or to see that the same should be paid? It is to be observed that Cross had nothing whatever to do in procuring the credit to be given by Kistler to Leighton. The indebtedness was the individual and several liability of Leighton. It does not appear that Cross ever heard of it until about the time he and Kistler united their efforts to secure each his own claim. The execution of the first note and mortgage in the name of Cross was not done at his suggestion. They were made out and sent to him in that form by Leighton; and, with the concurrence of Kistler, he accepted them, and agreed, without compensation, to divide the proceeds so that Kistler should have equal benefit of the security. There was evidence tending to show that Kistler had begun an attachment suit in Wyoming to secure his debt against Leighton prior to the reception of the first mortgage, and that he was induced by Cross to dismiss this suit, and rely upon the note and mortgage. The evidence does not, however, show, nor tend to show, as a consideration for the dismissal of the attachment, that Cross promised to pay Leighton's debt to Kistler, or guaranteed that the note and mortgage should prove effective to secure such debt. It does not appear that Cross used anything more than mere persuasion or expression of opinion as to what would be the best course to be pursued for their mutual benefit. There is no pretense that Cross made any misrepresentation, or acted in bad faith, in the transaction. Cross was the only party who took any particular pains or trouble to secure anything out of the mortgaged property, and what he did get was left with the bank to be divided as agreed. This action is not brought to compel an accounting concerning said proceeds, so the finding cannot be sustained on that ground.

There was considerable conflict in the testimony as to what was said by the nephew of

Cross to Kistler when the letters were exhibited; Kistler claiming that the nephew then and there promised unconditionally that Cross would pay Kistler's claim against Leighton, or see that it was paid. The nephew denied this. It is unnecessary to settle this conflict. The testimony was objected to, and was not competent for the purpose for which it was offered. At most, it showed only a special promise to answer for the debt of another, not in writing, and hence void under the statute of frauds. The letters showed for themselves what Cross promised; and it does not appear that the nephew was authorized in any way to bind his uncle by any other or different undertaking. Extrinsic facts and circumstances relating to the parties, and their actual dealings with each other, in reference to the matters referred to in the letters, might be shown by oral evidence, but certainly not the mere naked contemporaneous oral declarations of an unauthorized third party. The first letter showed that Leighton had promised to give a new note and mortgage, but there is no evidence that they were ever given. The second letter showed that Cross had received a full power of attorney to dispose of Leighton's property, and would protect Kistler's interests under the new security the same as under the former agreement; but it did not assume to give him any greater protection. The original security was taken in the name of Cross, and immediately deposited in the bank for the mutual protection of himself and Kistler. The new security was also taken in the name of Cross, and the letter was simply an acknowledgment by him that Kistler was entitled to be protected under the new the same as under the original security, and no further. Viewed in the light of extrinsic circumstances, and the dealings of the parties, there was no ambiguity as to the meaning of the letters.

The defendant offered to produce in evidence the letter sent by Cross and Kistler to Leighton, demanding security for their respective claims. The letter, in connection with other testimony, tended to explain how the first note and chattel mortgage came to be executed and sent as they were, and was admissible, though perhaps merely cumulative.

Testimony as to the alleged unconditional promise of Cross to pay Leighton's debt having been admitted, the defendant should have been permitted to show that Kistler was trying to negotiate a settlement with Leighton after the time he claimed Cross had made such unconditional promise; such conduct being inconsistent with the claim that he relied upon the alleged promise.

It is unnecessary to consider further the assignments of error. Under the law applicable to such cases, we are constrained to say that the finding of the court was against the evidence. Cross and Kistler were undoubtedly both innocent sufferers by the failure of Leighton to pay or adequately secure their respective claims: but, under the evidence, we can see no legal or moral reason why Cross

should pay Kistler's claim, in addition to losing his own. The judgment must be reversed, and the cause remanded.

(14 Colo. 429)

SMITH v. GRIFFIN *et al.*

(Supreme Court of Colorado. April 25, 1890.)

EASEMENTS—CREATION—WAYS—NECESSITY—TAX-DEED.

1. Where the owner of a block in a city divides it into lots, with an alley in the rear, but files no plat, as required by the statutes of Colorado in the case of a dedication, and the city does not accept the new arrangement, the purchaser of the alley-way at a sale for taxes takes it free from easement, and may close it.

2. The purchaser of a city lot 75 feet deep, with a frontage of 25 feet on a street, is not entitled to a way by necessity to the rear of his lot over the adjacent land of his grantor.

3. A mere clerical mistake in preparing a tax-deed may be corrected.

Appeal from superior court of Denver.

W. S. Decker, for appellant. Markham & Dillon and E. A. Clark, for appellees.

HELM, C. J. Appellant Smith and one Campau, being the owners of a certain portion of block 64, in the west division of the city of Denver, divided the same into seven lots. Five of these lots fronted on Champa street, the remaining two, on Eighth street. No plat was filed, however, as provided by statute, and no acceptance of the new arrangement took place by the city. Upon the front of each of the five lots first mentioned, they constructed a dwelling-house, and upon the rear a coal-house and ash-pit. For convenience in reaching these coal-houses and ash-pits, they left an alley-way 9.82 feet in width, extending from Eighth street to the main alley running through the center of the block. Four of the five lots abutting on Champa street were disposed of. The remaining lot was retained and occupied by appellant. Subsequently the alley-way in question was assessed and sold for taxes. Defendant Lillian Griffin, who in the mean time had purchased the lot adjacent thereto, fronting on Eighth street and extending back to the main alley, became the owner at such tax-sale. No redemption having taken place, in due time she received her tax-deed, whereupon she closed the private alley by extending a fence across each end. Appellant brought the present suit upon the ground that the closing of the alley constituted a nuisance which he was entitled to have abated. The court below rendered a decree in favor of appellee. From this decree the present appeal was taken.

Since Smith and Campau neither made a statutory dedication to the city for public purposes of the strip of land in question, nor conveyed the same by deed, the title remained in them; and, although used as a private way, it continued liable to taxation. The title passed to Mrs. Griffin under her tax-deed; and, unless subject to an easement, she acquired the right to fence and use it in accordance with the dictates of her private

interest. The attitude of Smith, being that of an original owner, and not a purchaser after the subdivision, should be borne in mind. If he and Campau were attempting to close this private alley, and one of their grantees was objecting, a different case would be presented. Having subdivided the ground, reserving the alley, and having sold lots with reference to this subdivision, they might be estopped from afterwards interfering with the use of the alley by their vendees; or, if they had wholly severed their title to the entire premises, including the alley, by deeds specifically recognizing this right as an easement, their grantees might be estopped from interfering therewith. But Mrs. Griffin's title is not thus embarrassed. Her ownership is not in privity with Smith and Campau. She claims through a sale for taxes, and is not estopped as they or their grantees might be in the cases supposed. These considerations show the inapplicability of the authorities upon which appellant relies. None of the cases cited are parallel, either in facts or in principle, with the one at bar. It is hardly necessary to observe that the public neither possess nor seek to assert a right of user in the premises, and hence are not interested in the present controversy.

There being no easement by express grant, and no right existing by estoppel *in pais*, the claim of appellant to the easement in question must rest upon prescription or necessity. It cannot be argued that he has a prescriptive right entitled to recognition in law, as such a right must be founded upon at least 20 years of private use. Our inquiry is therefore narrowed to the question, has he a way of necessity? We do not stop to ascertain whether this doctrine could in any event be invoked where title to the servient estate has been, as in the present case, involuntarily parted with by the claimant of the easement. Appellant's lot, which is 75 feet in depth, has an unobstructed frontage of 25 feet upon Champa, a public street. By this means access may be had to all parts of his premises. It is true the word "necessity," as used in this connection, has been held not to mean that there must exist an absolute physical impossibility of otherwise reaching the alleged dominant estate. When a way exists, but the expenses to be incurred in utilizing it are grossly in excess of the total value of the estate itself, an easement of necessity is sometimes recognized, as, for instance, (to use the illustration employed in *Pettingill v. Porter*, 8 Allen, 6, cited by appellant,) where the value of the property conveyed is \$1,000, the vendee might have a right of way over an adjoining tract, owned by his grantor, even though he might, at an expense of \$100,000, reach his premises by some other means. But it is needless to prolong discussion upon this subject. The pleadings and evidence show that the grievance of plaintiff is based upon inconvenience, rather than necessity. There is, therefore, no room for the application of the doctrine in question.

It appears that the tax-deed, as given to appellee, was defective in omitting the date of the tax-sale. Subsequently, appellee procured the execution of a new tax-deed, curing the defect in question. Both deeds were received in evidence at the trial. No claim is made of non-compliance with law, or of bad faith or error in advertising and conducting the sale; and, where a mere clerical mistake has occurred in preparing the deed, the purchaser has a right to have it corrected. This is especially true when, as in the present case, no prejudice is shown to have arisen from the mistake.

The description of the strip of land in question employed by the assessor, and included in the advertisement of the tax-sale and in the tax-deed, differs somewhat from that given thereto by the original owners. Upon this ground it is claimed that the deed is void. Ample proof was received showing that this description is in accordance with custom and usage in describing tracts in that portion of the city of Denver. Besides, it cannot be claimed that the description is not sufficient to fully identify the property. It could hardly have deceived or misled the owner; and, merely because it is not accurate with reference to the cardinal points of the compass, it should not be held so defective as to vitiate the sale. The judgment of the superior court is affirmed.

(14 Colo. 483)

COOK v. DOUD.

(*Supreme Court of Colorado*. April 25, 1890.)

REMARKS OF COUNSEL—NEW TRIAL.

Where, in action for assault, evidence as to the relations of the parties prior to the assault has been excluded, it is within the discretion of the court to grant a new trial on account of remarks of defendant's counsel commenting on the absence of such evidence, and intended to prejudice the jury against plaintiff by producing the impression that there was great provocation to the assault.

Appeal from district court, Arapahoe county.

Defendant, Cook, sent word to plaintiff, Doud, that a party wished to speak with him at a certain hotel in the city. Plaintiff repaired to the place appointed, and was immediately assaulted by defendant, in the presence of several by-standers, with a raw-hide riding whip, receiving blows upon the head, shoulders, face, and back. Plaintiff clinched with defendant. A short struggle ensued, when plaintiff was thrown to the floor, and there held by defendant until others interfered, and put an end to the affray. It is unnecessary to embody anything further in the statement of facts, save the following extracts, which form the basis of the opinion, from the argument of Mr. Patterson, counsel for defendant in the court below: "Gentlemen of the jury. As I suggested in the opening statement, no man of ordinary, common experience in the affairs of this world will hesitate to conclude but that there was an antecedent to that affair; and, although it is the law in this state that we should not be

permitted to show what that antecedent was, I will always believe that it should be the law, and, if it is not, then a law should be made. * * * It seems to me, gentlemen, that, if counsel for plaintiff in this case desired to secure for him a large roll of greenbacks, as a poultice to his wounded feelings, out of the pocket of Mr. Cook, that these men would have said, when we offered to show what transpired upon the part of the man towards Cook before the happening of this affair,—they would have said: 'Yes, if there is anything.' * * * And, therefore, gentlemen of the jury, I have a right to say, as I do say, that it would have been more manly if, instead of these gentlemen constantly saying, 'I object, I object, I object,' when we offered to prove the relation that existed between the parties before the morning of the 10th of May, if they had said: 'Yes, we feel that Mr. Doud was without fault in this matter, and we have no objection to having his conduct investigated, and everything in connection with this transaction laid bare.' But, gentlemen of the jury, they did not see fit to do it, and, presenting Mr. Doud before you in this way, they say to you that they expect you to commence on the morning of May 10th; that they do not propose to have you investigate for a single moment any act or course of conduct on the part of Mr. Doud towards Mr. Cook before that time. * * * I say, gentlemen of the jury, that, when they come into court in this light, they come into court under false pretenses. They attempt to make the jury believe that their client was without fault; that it was, in the language of the attorney who addressed you, a brutal and unprovoked assault. Yet at the same time, when we offered to lift the veil for the purpose of showing what preceded it, they object, and the court sustained them; and, in the face of this record, they say you must go on the theory that Doud was blameless, as guiltless as an infant, and has done nothing whatever to warrant this assault upon him. I say that sort of an argument and that sort of procedure is a fraud upon the jury, and a fraud upon the court, and should have no influence upon the jury except to induce them to turn their faces against a proposition that is as bald and unwarrantable as this. * * * No, gentlemen of the jury. To my mind, this is as evident and plain a transaction as ever passed before my mental vision,—the conduct of this man, goading Mr. Cook on to the step that he took. * * * How are you to determine how this man's feelings were injured? How do you know anything about them? They would not let us prove anything about them. * * * He does not come before you honestly. He did not present his case to you in a friendly way. He does not lift the curtain, and let you see his inside. He does nothing but smuggle himself in. He says: 'I claim the protection of the law, and will not let the jury see anything that antedated this affair on the 10th.' * * * Talking about the indignities that

have been heaped upon a member of the legal profession, I do not believe that a scheme of this sort could win. In view of the fact, gentlemen, that they themselves closed the door to investigation, that they themselves put a bar across the entrance, that they themselves refused to allow this jury to know what the course of conduct of this man Doud towards Cook has been; to say whether or not this was a case in which he was driven by persecution to show his displeasure, and to give this man to understand that a better course of conduct would be better for him in the future. One of the witnesses said that Cook said to him: 'If you promise to behave in the future, I will let you up.' Another said he declared this man had cheated him out of five hundred dollars. Another of them said that Mr. Cook said he would not be hounded by any cur of a lawyer, and scarcely a word of protest out of the mouth of this man Doud. It shows that there is something behind it and around it that these people are closing out, and they want to get a verdict upon a mere technicality; and that would be a disgrace to justice, if the true relation of these men could be made to appear. * * *

The court says that you, gentlemen of the jury, are the sole judges of what this amount should be; and I have no hesitation in saying, from what has crept out,—the declarations of Cook at the time, charging this man with pursuing and persecuting him, the fact that they must shut the door, and put a bar across the entrance so that you could not see what the real matter was,—all go to justify me in asserting that one cent would be ample damages, because it carries with it the heavy expense of this trial."

Patterson & Thomas, for appellant. A. L. Doud, pro se.

HELM, C. J., (*after stating the facts as above.*) The present action is for damages growing out of an assault and battery. The case was tried to a jury, and a verdict was returned in favor of plaintiff for the sum of \$200. Upon motion for a new trial this verdict was set aside, and thereupon defendant prosecuted the present appeal under the statute of 1885, no longer in force. At the trial the court below excluded all evidence offered to show antecedent business transactions between plaintiff and defendant. Notwithstanding this ruling, however, counsel for defendant, in his address, repeatedly referred to these transactions, and endeavored to impress upon the jurors' minds the idea that defendant acted under such strong provocation as to justify a verdict for one cent only. In vacating the verdict returned the following language was employed by the court: "I think that the opinion of the supreme court should be had on this method of addressing the jury; and I grant a new trial in this case freely, without any hesitation, on the sole ground that counsel, in addressing the jury, should confine themselves to the testimony, and not by innuendo or indirection seek to

place before them matters which the court has expressly, by its rulings on the introduction of testimony, said were not proper." We cannot say that the court's action in granting a new trial should be sustained upon either of the remaining grounds stated in the motion. Our examination will, therefore, extend only to the matter above specified as the basis of the ruling made. If counsel for defendant was guilty of misconduct in argument, whereby the jury may have been induced to consider circumstances not before them, and thus to reduce the damages they would otherwise have given, unless some technical objection forbids, the order under consideration should be sustained.

It is impossible to give in advance special directions for the guidance of attorneys in the discussion of evidence. An attempt to do so would unwisely limit the attorney's privilege on one hand, or embarrass the due administration of justice on the other. This is a matter that must of necessity be left largely to the reasonable discretion of trial courts, and to a certain extent be governed by the circumstances attending the particular proceedings in progress. The general rule, however, that counsel may not comment upon matters of fact that have not been admitted in evidence, and that their arguments must in this respect be confined to the record, has received universal approval. But great embarrassment is often encountered in determining just where the line exists between those inferences that counsel may draw from evidence before the jury, and the suggestion of substantive matters that are wholly outside the record. The disposition of courts has been, as it doubtless should be, to recognize a generous license in the premises, and to resolve serious doubts in favor of the freest and fullest discussion. Counsel in the present case refrained from naming expressly any facts or circumstances not in the record, but he accomplished the same result by adroitly insinuating the existence of such facts and circumstances. He labored throughout his argument to impress upon the minds of the jurors the belief that back of the affray there existed a state of affairs which justly enraged defendant, and led him to make the assault. Without declaring that the court committed error in excluding evidence of the antecedent business relationship of the parties, he skillfully directed the attention of the jurors to this relationship, and persistently insisted that the conduct of plaintiff, whatever it may have been, was such as to excuse in large measure, if not to justify, defendant's assault. It is impossible to read this argument without being impressed with the belief that counsel may have obtained for his client even a greater advantage than the admission of the excluded testimony would have produced. It is not contended that the court's ruling rejecting this testimony was error, and we do not perceive any legal excuse for making its absence a subject of repeated

reference and comment. If it was not proper for the jurors to have before them the prior acts of the parties, it was certainly not competent for counsel to persistently urge that the verdict should be influenced thereby. If the jury were not entitled to judge of the assault in the light of the facts constituting the alleged provocation, counsel was not entitled to constantly remind them of such provocation, and insist upon its supposed aggravated nature, in reduction of damages. This is not analogous to the cases cited, where comment was permitted, and damaging inferences were allowed to be drawn from the failure of the adverse party to produce competent evidence, of importance, apparently within his reach. The epithets employed by defendant, and mentioned by witnesses in describing the assault, furnished no legal foundation for counsel's remarks. They were uttered in the heat of passion, and, had punitive damages been allowable, would have been pertinent to augment the recovery. As it was, however, they could perform no office save possibly to aggravate the public contumely of the assault, and thus increase the measure of plaintiff's compensatory indemnity. The jurors were expressly forbidden by the charge from considering any "circumstances previous to the preparation for the assault." The utterances of defendant at the time were almost necessarily detailed as a part of the *res gestæ*; but, in so far as they might be supposed to point to a possible provocation arising out of past business transactions, they could have no effect upon the verdict. Counsel had no more right to employ the epithets in question as a basis for his innuendo of provocation than to insist, as he did, that the mere fact of the assault being made conclusively implied the existence of such provocation, and warranted the jury in considering the same upon the apportionment of damages.

The proposition is urged, however, that, since no exception was preserved during the progress of the argument, the court's action in granting a new trial was a fatal error. The attention of both court and counsel should undoubtedly be drawn to such objectionable conduct by immediate protest. Under the impulse of exciting cases, attorneys sometimes inadvertently pass beyond the pale of legitimate argument; but, attention being at once called to the matter, proper amends are made, and harmful results avoided. Occasionally opposing counsel intentionally refrain from objection, hoping to secure some unfair advantage, either in closing the case or in the court of review, through the misconduct in this respect of opponents. It is obvious that when, under such circumstances, this purpose is not accomplished, the tardy objection by motion for a new trial should be regarded with no special favor. Hence it is that reviewing tribunals have sometimes applied to such cases, when the trial court refused relief, a rule analogous to that of estoppel. Powers

v. Mitchell, 77 Me. 361; Knight v. Hough-talling; 85 N. C. 17; Davis v. State, 33 Ga. 98. But, as already suggested, *nisi prius* courts are necessarily vested with a large discretion in passing upon motions for a new trial. This discretion must not be arbitrarily or illegally exercised, but discretion, however limited, involves some independence of judgment; and, in determining whether or not certain alleged misconduct could have prejudiced the opposite party, those courts have advantages not possessed by reviewing tribunals. For these reasons, unless there be an illegal exercise of discretion, or a clear abuse thereof, appellate courts decline to interfere. Moreover, trial courts themselves are not entirely free from responsibility under circumstances like those here presented. Improper conduct before them, however manifested, should be rebuked and repressed. And no case has been cited which holds that the mere silence of opposing counsel estops the court from granting relief by a new trial when the rights of litigants have been prejudiced through misconduct in argument. It is a fact worthy of notice that in the present case objection was interposed during the argument, though no ruling was obtained, and no exception was taken. It is, therefore, not true that counsel, owing to enthusiasm or excitement, remained unconscious of the impropriety he was committing. We cannot say that the district court abused, or illegally exercised, its discretion in the case at bar, and its action will be treated as controlling. The order appealed from is affirmed.

(14 Colo. 90)

GREAT WEST MIN. CO. v. WOODMAS OF ALSTON MIN. CO. *et al.*

(Supreme Court of Colorado. Jan. 20, 1890.)

DEED TO MINING LANDS—CANCELLATION—LACHES—JUDGMENT.

1. Courts of equity will only grant relief in case the application therefor is made without unreasonable delay. The strongest equity may be forfeited by laches, or abandoned by acquiescence.

2. Where the subject-matter of a controversy is the right to unpatented mining property, the uncertain and fluctuating character of the property will be considered in determining the question of laches.

3. The statute of limitations fixes a limitation beyond which the courts cannot extend the time, but within this limit the peculiar doctrine of courts of equity will prevail.

4. As a rule, a judgment of a court of general jurisdiction is void in no case except when it appears from the record itself that the court, in pronouncing it, acted without jurisdiction.

(Syllabus by the Court.)

Appeal from district court, Arapahoe county.

L. S. Dixon and H. B. Johnson, for appellant. Hugh Butler, for appellees.

HAYT, J. The facts in this case, as they appeared previous to the last trial, are sufficiently set forth in the former opinions filed herein, and will not be again repeated. See 12 Colo. 46, 20 Pac. Rep. 771. The judgment

of the district court of El Paso county in favor of appellees was then reversed, and the case remanded to that court, leaving counsel and the court below to pursue such course in relation to additional parties and further proceedings as they should be advised. Thereafter, by consent of parties, a change of venue was taken to the district court of Arapahoe county, and a new trial had. Upon this trial a large amount of additional evidence was introduced, upon which evidence, considered with that previously taken, the court below found the issues for the defendants, and dismissed the bill. To review this action of the court the case is brought here by appeal. In the district court the judge presiding at the trial, Hon. O. B. LIDDELL, filed a written opinion, with a copy of which we have been favored by counsel. In it the learned judge reviews the case at length, in connection with the authorities, and arrives at the conclusion that the appellant had been guilty of such unreasonable delay in asserting its rights that it ought not to be heard now.

An examination of the new evidence introduced discloses that it was largely directed to the question of laches. Upon the case as made upon the former appeal, this court was of the opinion that laches sufficient to defeat a recovery did not appear. Mr. Justice GERRY, delivering the opinion of the court, then said, in reference to Purmort, and the service of process upon him, that he "concealed, or neglected to inform the company of, the fact of such service." And again, upon rehearing, it was said: "The appellant was not informed of the false return, or of the unauthorized appearances of Gwynn, in time to proceed by motion to correct the same in the court where the attachment suits were pending, and had no notice of the sale of its real property until the time for redemption had expired, but, as soon as it did obtain information of the fraud perpetrated upon it, it was diligent in employing counsel and commencing this suit; and, as this suit was brought within less than three years from the time of the perpetration of the fraud complained of, and within less than eighteen months from the time of the execution of the sheriff's deeds, and promptly upon the discovery of the fraud that had been practiced upon it, we think the appellant was chargeable with no such laches as should bar it from maintaining this action." The additional evidence occupies over 200 hundred pages of the type-written transcript, and was deemed sufficient by the trial judge, after giving due weight to the evidence taken upon the first trial, and also to the former opinions of this court, to radically change the result then announced. With this new evidence the case is now before the court in a different aspect from that in which it appeared upon the first appeal. It is now shown that A. W. Kellogg was not only general agent of the appellant company, but that he had the entire management of the corporate business. The then secretary of the compa-

ny, Mr. A. S. Whitaker, who has at all times been active in prosecuting this action, swears in reference to the Great West enterprise: "It was a pet scheme of Mr. Kellogg, and he attended to everything." Again he refers to Kellogg as "having the supreme management." The nature and scope of Mr. Kellogg's authority in the premises becomes important, in view of the fact that he, in the interest of the Great West Company, arranged for the institution of the Perkins suit in advance of Monahan, who was threatening suit, in order that the working of the mine should not be interfered with. It appears that, in accordance with an arrangement previously entered into between Kellogg and the workmen at the mine, upon ascertaining from Monahan, at Denver, that he was about to institute suit, Kellogg, by telegraph, directed the Perkins suit to be brought. These telegrams, two in number, were directed to Frank D. Howe, who describes himself as Kellogg's "closest friend." The originals were not produced upon the trial; but, their loss having been shown, Mr. Howe testified as to their contents as follows: "The first telegram—the body of the message—was, 'Have Grogan commence suit in Perkins' name.' Then—there was a cipher used for Monahan's name—'Monyhan means to make us trouble.' Then there was something followed, in the way of 'See Purmort,' or something of that kind." Again: "I was a little mystified by the expression 'Grogan,' and I telegraphed Mr. Kellogg. 'Does Grogan mean Gwynn, and also the amount due the men?'" To this telegram the witness testifies that he received an immediate answer, in substance, as follows: "Yes, at once; followed with the amounts due the men." The witness further testifies that the Gwynn referred to was George R. Gwynn, an attorney resident at Alma.

That an attachment was to be issued in such suit is admitted, but it is claimed by the appellants that it was understood that such attachment would only be levied upon the personal property, while the witnesses for appellee testify that no such understanding was had. We attach little importance to this conflict, however; it now clearly appearing that the proceedings set on foot by Kellogg, acting for the company, actually resulted in the attachment and sale of its real property. The appellants' claim that such proceedings were carried to a greater extent than anticipated by it cannot have much weight in a court of equity as against the rights of *bona fide* purchasers deriving title through the sale made under the judgment rendered in such action. The evidence now also strongly tends to show that the three principal officers of the plaintiff company—Kellogg, Pomeroy, and Whitaker—had notice as early as 1883 that its real estate had been attached and sold in the Purmort and Monahan suits. That Kellogg had such notice is shown beyond dispute; and here it may be said that it is a significant fact that plaintiff failed to

call Kellogg as a witness in its behalf, although he was present, sitting by, at the trial. Kellogg's bias in favor of plaintiff is shown by his letters introduced in evidence. He was certainly well informed in reference to these matters; and his silence, under the circumstances, tends to create the belief that his knowledge was not of such a character as would benefit the plaintiff.

Upon the former appeal, it was not shown that the company had notice of the sale of its real estate in time to avail itself of the statutory right of redemption. It is now apparent, however, that it had such notice in ample time. It is in evidence that the company was trying to raise money with which to redeem before the time for redemption should expire. Appellant not only failed to redeem, but allowed the years 1884 and 1885 to pass without making any effort to do the annual assessment work upon any of these claims, although such work was required by the mining laws under which they were claiming the property. From the time the sheriff's deeds were executed and delivered, in 1884, until this suit was commenced, in 1886, they permitted these defendants and their grantors to remain in the undisturbed possession of the property without protest, permitting them to develop the same under the belief that they had acquired a good title thereto. No fraud is imputed to the defendants. By the silence of plaintiffs, they were lulled into purchasing and making expenditures upon this property that they otherwise might not have made, although it is true they ultimately made a profit as the result of the hazard incurred. Under these circumstances, we are to determine whether the court erred in dismissing the bill on account of the laches of the plaintiff. It is a familiar principle that courts of equity will only grant relief in cases in which the application therefor is made promptly, and without unreasonable delay, whatever may be the merits of the controversy. The necessity for the application of this rule to cases in which the subject-matter of the litigation is the right to unpatented mining property, the only value of which arises from the precious metals contained therein, is apparent. The value of such properties is always uncertain, and usually purely speculative. This case furnishes an illustration of the uncertainty of such values. At the time the attachments were levied the properties were considered of little or no value. The ore extracted would not pay the expenses of taking it out. In fact the suits were instituted for labor performed and supplies furnished in working the mine; the indebtedness arising on account of the necessary expenses exceeding the amounts realized from the sales of all ores extracted. Afterwards, by the labor and expenditure of these defendants and their grantors, the property was shown to be of great value; the ore extracted yielding a large net profit to those in possession and working the same. Although the original

proceedings were irregular, should this plaintiff, after years of delay, be now allowed to reap the benefit of the expenditure and hazard incurred by others, and which plaintiff was unwilling or unable to take? becomes a pertinent inquiry in this connection. Upon this question the authorities are certainly with the defendants. Thus, in *Peebles v. Reading*, 8 Serg. & R. 493, it is said: "Laches and neglect ought forever to be discouraged. There is in chancery always a limitation. Nothing will bring a court of equity into action but a pure equity, and a reasonable diligence. The strongest equity may be forfeited by laches, or abandoned by acquiescence." In *Sullivan v. Railroad Co.*, 94 U. S. 811, the following is quoted with approval, and credited to *Smith v. Clay*, 2 Amb. 645: "Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court." In the case of *Attwood v. Small*, 6 Clark & F. 356, the lord chancellor was of the opinion that relief should be refused in reference to mining property for the reason that a delay of six months had intervened between the time at which the complainants acquired knowledge of the alleged frauds, and the bringing of the motion. In the case of *Ernest v. Vivian*, 33 Law J. Ch. 517, upon the subject of laches, the vice-chancellor says: "The subject-matter of this suit is the right to mines. Mining operations are of a particular character. They are an uncertain and speculative and hazardous adventure. * * * There is also a continual and increasing risk; for a mine profitable to-day may to-morrow become worthless. Similar observations have repeatedly been made by other judges. Now, if a person has a just right to mines of which he is not in possession, as against those who are in possession of and working them, and if he claims to be the rightful owner, (the person in possession being aware of his rights or supposed rights,) if such owner, not being prevented by fraud or concealment, stands by for a long period of time whilst those in possession are working the mines, this court will not lend him any assistance. * * * It is not equitable to allow him to wait till it is ascertained that the persons in possession have succeeded or may have been ruined, and if the subject result in profits, to ask to put that in his pocket; if in loss, to repudiate the loss. It is not necessary, even if possible, to prove whether he acted from premeditated design or carelessness." In the case of *Pollard v. Clayton*, 1 Kay & J. 480, relief was refused for the reason that complainant had delayed 11 months after suit might have been brought, and the court also refused to allow an amendment setting up an excuse for such delay. The court says: "Instead

of that, the plaintiff waits eleven months, and then, at last, the bill is filed. I do not look out of the bill, as the case made has not done so; but it is enough for me to say that coal, like all other articles of constant use and constant sale, is a commodity fluctuating from day to day in its market price, and, during the interval which has elapsed, there may have been every possible variety of price, of rise or decline, and the parties are not now in the same position. * * * It is not equitable—and in this court, especially, it would be improper—to give relief of that description after such a period of delay as in this case has been allowed to occur between the time when the plaintiff was first in a position to file a bill, and the time when he took upon himself to file it. Having regard to the circumstances of delay alone, the court ought not to give relief after laches of this description." In *Oil Co. v. Marbury*, 91 U. S. 592, Mr. Justice MILLER, speaking for the court says: "The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands to-day is worth nothing to-morrow; and that which would to-day sell for a thousand dollars as its fair value may, by the natural changes of a week, or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit. While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent, and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option whether they will share its risks, or stand clear of them." Further quotations from the authorities are unnecessary, but the following cases will be found in support of the views quoted: *Hart v. Clarke*, 19 Beav. 363; *Jennings v. Broughton*, 5 De Gex, M. & G. 139; *Kinney v. Mining Co.*, 4 Sawy. 447; *Williams v. Rhodes*, 81 Ill. 588.

Under our statute, bills for relief on the ground of fraud must be filed within three years after the discovery by the aggrieved party of the facts constituting such fraud, and not afterwards. We cannot, however, give this statute such a construction as will permit a party in all cases to stand idly by until the limitation of the statute has nearly run, and then claim that, by virtue of the statute, he is excused from the laches. The statute fixes a limitation beyond which the courts cannot extend the time, but within this limit the peculiar doctrine of courts of equity should prevail. We shall not extend

this opinion. If points have been discussed by counsel that have not been passed upon in some one or more of the opinions in this case, it must not be thought that for that reason, they have been overlooked. A careful consideration of the whole case convinces the court that the judgment of the court below should be sustained. Affirmed.

ON REHEARING.

(May 16, 1890.)

PER CURIAM. The petition for a rehearing in this case is so ably and exhaustively urged in the printed brief, and argument filed in support thereof, that it has been thought due to counsel to file this additional opinion in overruling the same. Counsel in this argument say: "It is as true now as it was upon the first appeal that notice of the judgment and sales is not brought home to the company." Let us see as to this. An examination of the new evidence discloses that the witness Duffy mailed early in September, 1883, the following letter, duly addressed, to Kellogg, at Denver, postage prepaid: "Sept. 5th. A. W. Kellogg, Esq.—My Dear Sir: The personal property of the Great W. M. Co. was sold yesterday by the sheriff. Prices were pretty good for a sale of that kind. The real estate was bought in for just enough to cover the judgments. A party wished me to ascertain who owns the Shamrock on Mt. Cameron. He wants to do the assessment work. You attended to this last year. All well. Yours truly, THOMAS W. DUFFY." In the absence of evidence to the contrary, we must assume that this letter was received by Kellogg, in due course of mail, within a few days after it was posted; and, by the evidence of Bartley, it is shown that Kellogg was fully informed by him of such sale upon the 21st day of the month of November following. William H. Hammond testifies: "I saw A. W. Kellogg in the office of the Great West Mining Company, in Denver, on May 31, 1883. Mr. Whitaker, who was also connected with the Great West Mining Company, was present. A. W. Kellogg was general manager of the Great West Mining Company at the time. I had a talk with them at that time, telling them, if they could raise \$5,000 to lift those judgments, they would have a good thing. Kellogg replied that they could raise no money. The judgments referred to were those claims assigned to John T. Perkins, and the Monahan claims. Kellogg also said that Pomeroy also tried to raise the money, but could not. I asked them for money due me at that time, which was due me for work on the mine from January 18, 1883, up to May 29, 1883. What money was due me prior to January 18, 1883, was included in the Perkins suit." In considering this evidence, it is to be borne in mind that Kellogg and Whitaker were two out of the three directors of the defendant company,—the one general manager, and the other secretary and treasurer,—occupying the same offices, with

constant communication with each other. Can it be said that the trial judge was not warranted in finding that Whitaker, at least, as well as Kellogg, had notice of the sales of real estate, notwithstanding the denial of Mr. Whitaker? Pomeroy is also shown to have had knowledge of these attachment suits as early as the fall of 1883. The evidence shows that the personal property brought less than \$500 at the sheriff's sale. That this was a fair price, under the circumstances, must be presumed. The Perkins and Monahan judgments, with costs, aggregated something over \$3,000. Is it reasonable to believe that the officers of the company could have expected these judgments to have been paid from the proceeds of the personal property alone? Kellogg, in all his acts, appears to have been governed by a desire to advance the interests of the Great West Mining Company; and we can find no foundation in the record for the charge made by counsel that he "leagued himself with the creditors of the company, and aided them, either actively or passively, in the work of fraud, concealment, and spoliation." It was only after he had failed to secure funds with which to pay the creditors of the company, and when Monahan was on the eve of commencing suit by attachment for his claim, that he arranged for the laborers to attach the company's property as security for the amount due them in the development of the mines. By pursuing this course, it appears that Kellogg entertained the idea that the men would continue this work; and, as long as the work of development continued, there was a chance for the discovery of richer mineral, in which event the company might be benefited by such new discoveries, if made before the sale, or even before the expiration of the time for redemption. Under the circumstances, we cannot say that his course was not prompted by a desire to benefit the company of which he was the general manager.

It is also said in support of the petition for a rehearing: "There is not a syllable of testimony to show that any officer of the company had any knowledge, notice, or suspicion that these judgments were either fraudulently procured, or rendered without jurisdiction, until just about the time suits were brought." It does appear, however, that Kellogg, the general manager of the company, caused the Perkins suit to be instituted; and we think the testimony was sufficient to warrant the trial court in finding that both he and Whitaker knew the attachments had been levied upon the property; that the property has been sold as the result of such attachment proceedings; and that the purchasers were in possession, claiming and exercising the rights of owners. Here was certainly sufficient notice to demand further inquiry, and such inquiry would undoubtedly have disclosed all the facts in reference to the service upon Purmort, and the appearance of Gwynn. If such inquiry was not in fact made, it is quite im-

material whether the failure to make it resulted from negligence or design, or was rendered unnecessary by reason of the officers having full knowledge. They must be taken to have had notice of such facts as they would readily have ascertained, had they used ordinary diligence.

In the opinion recently filed in this case the following language is to be found: "They [defendants] were lulled into purchasing and making expenditures upon this property which they otherwise might not have made." And counsel say: "We fear some one must have dreamed all this, for there is absolutely nothing in the record to justify such statement." In this statement, counsel is certainly in error. Although it may be proper, for some purposes, to separate the new from the old evidence, it is also proper to consider the whole; and, doing this, we find it to be practically conceded that the Wilsons paid \$2,000 as the first installment upon the purchase price of this property, and they certainly had taken nothing out at that time. In addition to this, we have the uncontradicted testimony of Alfred H. Wilson to the effect that they (the Wilsons) had paid out about \$13,000 in working the mine since Gwynn turned it over to them, in addition to paying \$8,194, the original purchase price of the property; and it was agreed between counsel that, if Randall W. Wilson was on the witness stand, and the same questions were propounded to him that have been propounded to his brother Alfred H. Wilson, his answers would be substantially the same. In view of the testimony, and the manner of working the mine,—its remoteness from the ore market,—is not the court warranted in concluding that at least a portion of the \$13,000 was expended upon the property before any sum could have been received from the sale of the ore extracted, although such ore netted them a profit of about \$3,000? And there can be no doubt, under the evidence, that whatever sum was in fact so expended was expended upon the faith the Wilsons had in the title procured by them from the purchasers at the sheriff's sale. Counsel say that this court "has given effect to evidence that was overwhelmingly contradicted by other evidence, which is not alluded to, and to have assumed conditions of fact against all the evidence bearing upon the questions." We have endeavored to demonstrate by the record that there is sufficient evidence to support the findings of the trial court in favor of the defendant, and to this end have, it is true, more particularly alluded to evidence tending to warrant the judgment. It was the peculiar province of that court to judge of the credibility of the witnesses appearing before it, and determine the weight to be attached to the testimony of each. Its opportunities for so doing were far better than ours, and, in obedience to well-settled rules, we must accept its conclusions where the evidence is conflicting; it not appearing that the court misunderstood the evidence, or

misconceived either its scope or effect, or that it acted unreasonably in determining its weight. There are upwards of 1,000 folios in this record, and we cannot undertake to discuss in detail all the evidence contained therein.

It is maintained that the general subject-matter of this cause is of legal as well as equitable cognizance, and that, therefore, the court must be governed by the statute of limitations that would bar an action at law, instead of by the equitable doctrine of laches; the argument being that plaintiff could attack these judgments in an action of ejectment at any time within five years, and that it cannot be cut off from relief in this equitable action in a shorter time on account of its laches. To permit the plaintiff to attack these records, regular upon their face, in an action for possession of the property, under the Code, in the nature of ejectment, would be to allow the judgment of a court of record to be destroyed in an action in which the pleadings would give no notice of any claim that the judgments were invalid. We cannot concede that this may done. Public policy, as well as the spirit of the Code, require that the opposite party shall be apprised by the pleadings of the nature of the defect relied upon to defeat such judgments. As a rule, a judgment of a court of general jurisdiction is not void unless it appears from the record itself that the court in pronouncing it acted without jurisdiction. A judgment rendered without bringing the defendants into court is not for this reason void, but voidable only, unless the failure to obtain jurisdiction over them appears in the record. *Allen v. Huntington*, 16 Amer. Dec. 702; *Freem. Judgm.* § 116; *Owens v. Ranstead*, 22 Ill. 161; *Ridgeway v. Bank*, 11 Humph. 523; *Hahn v. Kelly*, 34 Cal. 391. That this distinction has been kept constantly in mind by the court is quite apparent from the qualification expressed in each instance in which the judgments are alluded to in the former opinions of this court as being "absolute nullities" under certain conditions.

The proceedings being regular upon the record, the judgments can only be avoided upon extraneous evidence. For the reasons given in the opinion recently filed, in our judgment, appellant, by its laches, is now shown to be precluded by well-settled rules from showing the invalidity of the judgments. The petition for a rehearing must be denied.

(14 Colo. 311)

CORRIGAN *et al.* v. JONES.

(*Supreme Court of Colorado.* March 28, 1890.)

WILLS—PROBATE IN ANOTHER STATE.

1. A will should be first admitted to probate in the jurisdiction of the testator's last domicile; but in admitting a will to probate the court must be presumed *prima facie* to base its adjudication respecting the last domicile upon sufficient evidence, and, under such circumstances, the probate and record thereof can only be questioned by some appellate or direct proceeding.

2. The general rule is that letters testamentary v. 23p. no. 15—58

or of administration have no extraterritorial force. When such letters have been duly granted in the jurisdiction of deceased's last domicile, they are the principal letters of authority, and those granted in other jurisdictions are ancillary.

3. A will admitted to probate in the court of another state having jurisdiction of such matters is, on the presentation of the duly-certified record thereof, entitled to be admitted to probate and record in this state, and letters testamentary or of administration may issue thereon as in other cases. The probate and record, under such circumstances, would seem to be mandatory; but the court is invested with discretion in the matter of issuing letters, but the discretion is not arbitrary. It must be sound and reasonable,—such as will secure the administration of the estate according to the will of the deceased, as well as with due regard to local creditors.

(*Syllabus by the Court.*)

Error to Bent county court.

Stallcup & Shafroth, for plaintiffs in error. *George Q. Richmond*, for defendant in error.

ELLIOTT, J. In October, 1884, the last will and testament of Owen Doherty, deceased, was admitted to probate and record in the probate court of Jackson county, state of Missouri, and thereupon letters testamentary were issued by said court to Bernard Corrigan, who was appointed executor in and by said will. The executor, Corrigan, is one of the plaintiffs in error in this proceeding. The property of the testator, as described in the will, consisted of "cattle and cattle ranches in Bent and Las Animas counties, in the state of Colorado." Corrigan having procured a transcript of the record of the Jackson county probate court in the matter of the probate of said will, duly certified in the manner required by the act of congress in such cases, presented the same to the Bent county court, and asked that said will be admitted to probate and record in that court as provided by the statute of this state in such cases. The judge of the Bent county court thereupon issued a citation to the defendant in error, James C. Jones, who had theretofore been appointed administrator of said Owen Doherty by said Bent county court, notifying said Jones to appear and show cause, if any he had, why said will should not be admitted to probate in said Bent county court, and letters testamentary be granted to said Corrigan, and the letters of administration heretofore granted to said Jones be revoked. Jones appeared, and by his attorney protested against the probate of said will, and against the granting of letters testamentary to said Corrigan. The grounds of protest may be considered under two principal heads: *First*, that the probate of the will by the Missouri court was invalid, inasmuch as the domicile of Doherty at the time of his death was in Bent county, Colo., and not in Jackson county, Mo.; *second*, that letters testamentary could not lawfully issue to said Corrigan, he being a non-resident of the state of Colorado. Corrigan, by his attorney, filed a written brief and argument in response to the protest of Jones. The court, having considered the argument of counsel, without taking any evi-

dence as appears by the record, rendered judgment refusing to admit said will to probate, and refusing to grant letters testamentary to said Corrigan until the will of said Doherty should be proved to the court in a satisfactory manner. To reverse this adjudication the case is brought to this court by writ of error. Plaintiffs in error rely upon section 27 of the statute of wills, (chapter 115, Gen. St. Colo.,) in support of their claim to have the will of Doherty admitted to probate in this state upon the certified record of its probate in the Missouri court. In support of his protest on the ground of domicile, appellee relies upon the recital at the beginning of the will, as follows: "I, Owen Doherty, of the county of Bent, in the state of Colorado, temporarily residing in Kansas City, Missouri." The will bears date February 7, 1884. It was offered for probate in the Missouri court on July 8th of the same year. The precise date of Doherty's death does not appear, but it may have been five months after the execution of the will; so that, whatever weight the recital in the will may have as evidence of the testator's domicile at the time of its execution, it is not conclusive of that question, and is but a circumstance indicating his domicile at the time of his decease. Besides, the record of the probate of the will declares the same to be "the last will and testament of Owen Doherty, deceased, late of Jackson county."

In admitting the will to probate, the Missouri court must be presumed *prima facie* to have based its adjudication respecting the domicile of Doherty at the time of his decease upon sufficient evidence. Under such circumstances, the probate of the will, and the record thereof, can only be questioned by some appellate or direct proceeding. Const. Mo. art. 6, § 34; 1 Rev. St. Mo. 1879, §§ 1176, 3974; Wells, Juris. § 274; 2 Greenl. Ev. § 672; Woodruff v. Schultz, 49 Iowa, 430; Bostwick v. Skinner, 80 Ill. 147; Monell v. Dennison, 17 How. Pr. 422; Irwin v. Scriber, 18 Cal. 500; Thompson v. Tolmie, 2 Pet. 157; Inhabitants of Ward v. Oxford, 8 Pick. 476. The will, having been duly admitted to probate in Missouri, should, on the presentation of the duly-certified record thereof, have been admitted to probate and record in this state, and letters testamentary should have issued thereon to the executor named in the will, or letters of administration with the will annexed should have been granted thereon as in other cases, according to the provisions of Gen. St. Colo. c. 115. Our statutes in this respect are based upon principles of comity. The general rule is that letters testamentary or of administration have no extraterritorial force. When such letters have been duly granted in the jurisdiction where the deceased had his last domicile, they are regarded as the principal letters of authority, and those which may be required in other jurisdictions, where property of the deceased requiring administration may be located, are considered as ancillary merely. Schouler,

Ex'rs, c. 7; Shephard v. Rhodes, 60 Ill. 301; Davis v. Estey, 8 Pick. 475; 1 Redf. Wills, 397.

In support of his second ground of protest, appellee cites section 36, c. 22, Gen. St., which provides, in substance, that any executor or administrator appointed in this state who shall remove without the limits of the state shall, under certain circumstances, be removed from his office as such executor or administrator. This section falls short, however, of sustaining the position of appellee that a non-resident executor, deriving his authority under a will, may not receive in this state letters testamentary, ancillary to those granted to him upon an authorized probate of the will in the state of the testator's last domicile. The case of Child v. Gratiot, 41 Ill. 357, is also cited by appellee as sustaining the doctrine that a non-resident cannot, under any circumstances, be permitted to exercise the office of executor or administrator in this state. The opinion in that case is based upon a statute somewhat different from ours. Laws Ill. 1847, p. 63; 1 Starr & C. Ann. St. c. 3, par. 31. Besides, the facts of that case are not analogous to those under consideration. That was a case of a non-resident administrator. The statute of Illinois above cited, as construed in Child v. Gratiot, makes removal from the state a cause for the removal of any executor or administrator from his office. Section 21, Rev. St. Colo. 1868, p. 525, was similar to the Illinois statute; but, as amended, (section 24, Gen. Laws 1877, p. 260,) removal from the state is a ground of removal from office only when the executor or administrator is "appointed in this state." In the case of executors the change is significant. Executors, though receiving their letters from the court, derive their appointment as well as their authority primarily from the will itself, while administrators derive their authority and appointment directly from the court. A non-resident executor deriving his authority and appointment from a will executed abroad, and admitted to probate in the jurisdiction of the testator's last domicile, may come to this state, and, upon presenting a record of the probate of such will, duly certified, is entitled to have the same admitted to probate and record in this state, and thereupon letters testamentary or of administration may issue thereon as in other cases. Gen. St. 1883, c. 115, § 27. The probate and record of the will, under such circumstances, would seem to be mandatory; but the court is doubtless invested with some discretion in the matter of the issuance of letters testamentary or of administration. But the discretion is not an arbitrary one. It must be sound and reasonable,—such as will secure the administration of the estate according to the will of the deceased, as well as with due regard to local creditors. Such would seem to be the proper construction of our statutes of wills and administration, and such is the doctrine of the standard authorities heretofore cited up-

on the subject. Our conclusion is that it was error to refuse to admit the will of Doherty to probate and record in this state; and that, the will being probated, letters testamentary should issue thereon to the executor named therein, unless it be made to appear to the court that such executor is in some manner disqualified, or incapable of administering upon the estate of the non-resident in this jurisdiction, with due regard to the rights, interests, and convenience of local creditors; in which case letters of administration with the will annexed should be granted, as provided by section 31 of the statute. The judgment of the county court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

(2 Idaho [Hash.] 719)

DULANEY v. BURKE.

(*Supreme Court of Idaho.* March 5, 1890.)

PAROL EVIDENCE—PROMISSORY NOTE.

In an action on a promissory note, it appeared that plaintiff wished defendant to manage a mine which he was about to purchase, and that defendant was unwilling to do so without an interest in it; that plaintiff paid for the mine, and had it conveyed to them jointly, and took defendant's note for half the purchase price,—*held*, that parol evidence of a contemporaneous agreement that defendant might examine the mine, and, if dissatisfied, convey his interest to plaintiff, and the note should be canceled, was inadmissible, as varying the terms of the note. *BERRY, J.*, dissenting.

Appeal from district court, Shoshone county.

Woods & Heyburn, for appellant. *Albert Hagan and Frank Ganahl*, for respondent.

SWEET, J. On August 10, 1883, at Salt Lake City, Utah, John M. Burke executed and delivered a certain promissory note in the sum of \$4,308.80, with interest at the rate of 6 per cent. per annum until paid, due one year after date, and payable to H. Grafton Dulaney, or order. Before the maturity of said note defendant, Burke, became a resident of Idaho territory, and on the 7th day of October, 1887, plaintiff commenced an action in the district court of Idaho territory, first judicial district, in and for Shoshone county, for the collection of said note. Defendant sets up as a defense in said action an oral agreement made at the time of, or prior to the execution of, said note, the substance of which is as follows: "That plaintiff was about to consummate the purchase of two mining claims, and desired the defendant to become the superintendent or manager thereof. To this proposition defendant replied that he did not care to enter into such an arrangement, unless there was something in it for him. Plaintiff thereupon offered to purchase the property, giving to defendant a one-half interest therein, the defendant to execute to plaintiff his promissory note for one-half the purchase price of said property, at the same time giving to defendant an opportunity to examine and test said mining property; and further agreeing that if, after such examina-

tion, defendant did not desire to pay the note, and retain his interest in the property, he might surrender said interest to plaintiff, and that, upon surrendering this interest, plaintiff would cancel defendant's note given therefor. That, in accordance with this agreement, plaintiff purchased the property, taking a deed therefor in the names of plaintiff and defendant. That afterwards defendant did examine and test the mines thus purchased, and concluded that he did not care to retain his interest in the same, and notified plaintiff that he was ready to execute a deed in favor of plaintiff to his interest in said mines whenever plaintiff would cancel said note. Wherefore, he prays judgment against plaintiff for the cancellation of said note, and for his costs," etc.

At the trial defendant offered to prove said agreement, at the same time tendering a deed to the property, and plaintiff objected to the introduction of evidence to such effect, on the ground that it was an attempt to vary the terms of a written contract by parol evidence. The offer thus made was tendered in various forms, and always met by the same objection; and this objection, for the reason above set forth, was sustained by the court. The case was tried without a jury, and the court gave judgment for plaintiff in the sum of \$5,692.80. Defendant excepted to the ruling of the court in excluding the evidence by which it was proposed to prove the agreement before mentioned; and the ruling thus made is the error assigned upon which defendant and appellant relies to reverse the order of the court below, overruling defendant's motion for a new trial. Defendant cites *Schindler v. Muhlheiser*, 45 Conn. 153, as an authority in support of his interpretation of the law. Several other authorities are cited by appellant, more or less in line with the case just referred to; but unquestionably *Schindler v. Muhlheiser* is the strongest case presented by the appellant as tending to support his claim in the issue at bar. After stating the facts in this case, the court reaches three separate and distinct conclusions. They are as follows: "(1) The note was given pursuant to, and in fulfillment of, an antecedent agreement between the parties. (2) That agreement shows that it was not given as evidence of any existing indebtedness, but as a means of accomplishing an ulterior object wholly in the interest and for the benefit of the plaintiff. (3) Consequently the note was an accommodation note, the collection of which would operate as a fraud upon the defendant." We need not quote authorities to establish the principle that fraud vitiates any contract. The quotation of authorities upon this proposition is wholly unnecessary; and we repeat what has already been decided over and over by every court that ever considered the question, and what has been declared to be the law by every text-writer discussing it, that any contract may be assailed upon the charge of fraud, mistake, or failure of consideration.

We will now consider whether the case at bar comes within any of these rules, or whether it comes within the rule laid down in the case first cited. Defendant offered to prove that the agreement was made prior to the execution of the note. To this extent, it bears some resemblance to the first conclusion reached by the court in *Schindler v. Muhlheiser*. But after all, no contract can be executed before it is discussed in all of its forms and phases, and thoroughly understood and agreed on between the parties; and the execution of a written agreement or contract, in accordance with such a discussion, would not be a fulfilling of an antecedent agreement. It is simply placing the agreement in writing, and thereafter the contents of the written agreement are to bear witness as to the intent of the parties. Beyond this first conclusion, however, the facts ascertained by the court in the case cited do not apply to the matter at bar. It was there found that the note was executed "wholly in the interest and for the benefit of the plaintiff." The note having been executed for the benefit of the plaintiff, it was further found to be an accommodation note, and that its collection would operate as a fraud upon the defendant. There is nothing in this case to indicate such a condition of affairs. Defendant desired "a show to make something for himself." By what course of reasoning are we to conclude that it was to the benefit of plaintiff to pay defendant's half of the purchase price of the property, and accept defendant's note therefor? How did that become an accommodation to the plaintiff? How could plaintiff perpetrate a fraud upon the defendant by advancing the latter's half of the purchase price of this property, and carrying it for him during the time specified in the note? If we were to speculate outside the written conditions of the agreement, we might say that there was more danger of plaintiff giving defendant an opportunity to watch the development of the mine for a year, and then, if the progress of the work was such as to discourage its owners, permit him to repudiate the contract, then there would be danger of fraud upon the defendant by generously advancing the money to carry his portion of the purchase price.

Now let us consider the conditions under which parol evidence may be admitted to vary the terms of a promissory note. In *Schurmeier v. Johnson*, 10 Minn. 319, (Gil. 252,) the court, in discussing this question says: "It is a rule well settled that in the absence of fraud or mistake parol evidence is inadmissible at law or in equity to vary a written contract. Such a contract cannot be varied, explained away, or rendered ineffectual by parol proof of any conversation or stipulation prior to or contemporaneous with its execution. It is conclusively presumed to set forth the whole agreement of the parties, and the extent and manner of their agreement." Does defendant allege fraud as a reason why the plain terms and conditions of this note should not be executed? Does he aver a failure of con-

sideration? Does he allege a mistake? These are the only grounds upon which the plain and specific utterances of a written agreement may be assailed and set aside. Not one of them comes within the proof tendered by defendant at the trial. He admits the execution, admits the consideration, admits the execution of the deed in his own name, admits that the note calls for the sum agreed to be paid for the property. Clearly, then, he is not within the rule which authorizes a court to set aside the provisions of a written contract upon the ground of fraud, mistake, or failure of consideration. What, then, does he plead? He sets up, in effect, that the agreement is not all in writing, and asks permission to add to the contract signed by him on August 10, 1883, by inserting a condition concerning which the contract is absolutely silent. It is vain to say that these offers do not tend to vary the terms of the written agreement. An agreement for an option to purchase this half interest would have been as different in substance and in effect from the agreement actually before us as it is possible to make one contract different from another. Contracts cannot be added to or taken from in this manner. In *Brown v. Spofford*, 95 U. S. 480, this question is directly passed upon by the court. We quote from the decision: "Negotiable notes are written instruments, and as such they cannot be contradicted, nor can their terms be varied by parol evidence. And that proposition is universally true where a promissory note is in the hands of an innocent holder. Where a bill of exchange was drawn in the usual form, and was protested for non-payment, the court held twenty years ago that parol evidence of an understanding between the drawer and the party in whose favor the bill was drawn was inadmissible to vary the terms of the instrument." The court then states the issue involved in *Brown v. Wiley*, 20 How. 442, and approves the same. Further on, in the same case, (481,) the court says: "Attempt was made in a leading case to prove that the payee agreed with the indorser that if he would indorse the note he should incur no responsibility, as the payment was secured by collaterals, and when offered in the circuit court the evidence was admitted; but the court, when the case was brought here on a writ of error, reversed the judgment, holding that the evidence should have been excluded;" citing *Banks v. Dunn*, 6 Pet. 51. Continuing, and on the same page: "Decided cases of the most authoritative character have determined that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsement of a bill or note, cannot be admitted to vary, qualify, contradict, add to, or subtract from, the absolute terms of a written contract." *Specht v. Howard*, 16 Wall. 564. In the same case the court indorses the quotation already made from 10 Minn., in the following language: "In the absence of fraud, accident, or mistake, the rule is the same in equity as at law, that parol evidence of an oral agreement al-

leged to have been made at the time of the drawing, making, or indorsing a bill or note cannot be permitted to vary, qualify, contradict, add to, or subtract from, the absolute terms of a written contract;" citing Forsyth v. Kimball, 91 U. S. 291.

Defendant contends that the payment of this note was dependent upon a condition, or that its delivery was dependent upon a condition, it matters not which. There is nothing conditional about the written agreement. It states clearly and specifically what the maker of the note promises to do. There is no condition about it; and if there was an agreement entered into at the time that defendant might do something else at his option, it would be a plain contradiction of the terms of the instrument itself. Quoting further from *Brown v. Spofford*, (482,) we find a declaration directly upon this point: "Parol evidence of an agreement made contemporaneously with a promissory note, which contains an absolute promise to pay at a specified time, is not admissible in order to extend the time for payment, or to provide for the payment out of any particular fund, or in any other way than that specified in the instrument, or to make the payment depend upon condition." Authorities in support of this principle might be continued indefinitely. Those cited have been referred to, not so much to establish the principle, because it is conceded by both parties in the matter at bar, as to show, from the similarity of questions involved in the cases referred to, the erroneous position taken by defendant. Therefore, as the evidence rejected by the court below tended to establish an oral agreement different in form, different in purpose, and different in effect from the written contract in issue, and as the effort to change those conditions is not based upon either a failure of consideration, fraud, or mistake, we hold that the court below did not err in refusing to admit the testimony, and that the judgment must be affirmed.

BEATTY, C. J., concurs.

BERRY, J., (*dissenting*.) This is an action upon a promissory note, made by the defendant to this plaintiff at Salt Lake City, Utah, August 10, 1883, payable one year after date. The action is between the original parties to the note. The complaint is in the usual form. The amended answer sets up that "the note mentioned and set forth in the complaint was given for the consideration and under the conditions following, to-wit: On the 10th day of August, 1883, the plaintiff had negotiated the purchase of the two mining properties at, etc., territory of Utah, being the undivided half of the properties known as the 'Live Yankee' lode claim, and the 'Mary Ellen' lode claim, of M. Cullen and Dennis Ryan, and orally agreed with this defendant that he would purchase the said properties, and give this defendant the option of becoming the owner of the un-

divided one-sixth of each of said claims, for the same price which plaintiff paid for said interests, to be paid by the defendant to the plaintiff one year after date, in the event the defendant should desire to become the owner and purchaser of said interests. The defendant thereupon agreed to accept such option of purchase, and the plaintiff thereupon bought the said property." That in the consummation of the purchase of said properties, at the instance solely of plaintiff, the conveyance therefor was taken in the joint names of plaintiff and defendant, and plaintiff requested defendant to give his note for his share of the purchase price, the same being the sum of \$4,308.80, as set forth in the note declared to be payable one year after date, and then and there agreed with defendant that defendant could explore, work, and develop said mining claim; and if at any time before the maturity of said note defendant desired to do so, he could relinquish said option of purchase, and the plaintiff would cancel said note, and accept a reconveyance of the interests so deeded to defendant in said mining claims in full discharge of said note, and cancellation thereof, and defendant accepted the conveyance of said claims, and executed said note upon the agreement aforesaid, and the consideration of said note was none other or different. That the defendant, pursuant to said agreement, entered upon and explored the property, and within the year notified the plaintiff that he was dissatisfied with, and declined to take, the property, relinquished his said option, and in March, 1884, notified the plaintiff of these facts, "and proffered his readiness and willingness to convey the interest so appearing in his name upon demand, at his own expense, and thereupon vacated the property to the plaintiff, who entered upon and worked the same." The defendant avers readiness to convey the interest to the plaintiff, and tenders a deed thereof.

Upon these issues the case was brought to trial before the court, without a jury, December 18, 1888, and judgment was rendered for the plaintiff in the sum of \$5,692.80. Statement of a case for new trial was duly made, the motion was denied, and defendant appeals from both the judgment and order denying a new trial.

The assignments of error are, in substance: (1) The findings of fact made by the court are contrary to the evidence. (2) Errors of law arising on the trial, duly excepted to.

It is only necessary to consider this second ground of error, for, if this charge is sustained, the former follows of course. As stated above, this case is between the original parties to the transaction, stripped of all questions of the right of innocent holders of commercial paper. The agreement on which the defendant relies, aside from the note itself, is alleged in the answer to have been entirely by parol. This alleged parol contract is that, prior to the making of the note, the plaintiff was negotiating for certain min-

ing property, and that the plaintiff agreed to purchase the property, and give to the defendant a year's option of becoming the owner of an undivided part of the same, at the same price the plaintiff was to pay for it; the defendant to have one year to explore and work the property, to determine whether he would become such owner; that in consummating the purchase the plaintiff, of his own motion solely, took the title in the name of both of these parties; that the defendant, with knowledge that the property had been so deeded, at the request of the plaintiff, gave the note in suit, but that, as a part of the transaction, it was further agreed that if at any time within the year the defendant chose to relinquish his option of purchase, the plaintiff would cancel the note, and accept a conveyance of the interest of the property so deeded to defendant, in full discharge of said note and cancellation thereof. The defendant accepted the conveyance, and made the note upon such agreement only.

The allegations of the answer must be taken together, and, if shown as stated, the plaintiff never became the owner of this note, and entitled to enforce the same against the defendant. The full consideration of it never passed to the defendant. He had not purchased the property, and some months before the expiration of the time which he had to explore and work the mine, and make up his mind whether he would take it, he determined not to take it; so notified the plaintiff, left the mine, and the plaintiff enjoyed possession of it. The contract of purchase was never consummated. As to that, the minds of the parties never met. This case results from the peculiar mode adopted by the plaintiff in giving an option upon this property. From the evidence it seems that the plaintiff had his own way in the peculiar manner in which the option was given. Instead of taking the title in his own name, the plaintiff, in taking it, of his own choice, took it to each of the parties jointly. It appears in the evidence that the motive of the plaintiff in desiring to associate the defendant with him in the mine was to have his services in its management and working. Even if he insisted on the note as security that the defendant, if he refused to buy, would reconvey the title, of which there is no pretense, that makes the plaintiff's position no better. The note would be only as security on the defendant's refusal to reconvey. It was still but the sale of an option. The note was not given for the land; the maker had not then agreed to take the land. But it was given for another, and a merely temporary, purpose. The simple and only question is, may the fact be shown that the note was only an incident to an incomplete contract by parol?

It is contended by the plaintiff that to allow such showing would be a violation of the rule that parol proof cannot be given to contradict or vary the terms of a written agreement. There is some conflict in the authorities as to what shall be deemed to

change the terms of an instrument; but the plain words of the rule itself are as near an expression of its meaning as we can hope to have. Chancellor Kent (2 Kent, Comm. 556) says that "it is an inflexible rule that parol evidence is not admissible to supply or contradict, enlarge or vary, the words of a contract in writing. That would be the substitution of parol for written evidence, under the hand of the party; and it would lead to uncertainty, error, and fraud. Parol evidence is received when it goes, not to contradict the terms of the writing, but to defeat the whole contract, as being fraudulent or illegal, for it then shows that the instrument never had any valid operation; and this rule is supported on grounds of policy and necessity." The contention is, in the case at bar, that the writing purporting to be a contract was in fact not a contract at all; that it was not made as a contract, but only as an incidental part of a transaction, mostly by parol, which might or might not become a contract; that, as it stood, it was without consideration; that the conditions on which it might become a contract never occurred. The defendant disavows any intention in any manner to vary the terms or words of this instrument. Many cases are cited, but none of them make the rule any plainer than it is as here stated. Few, if any, of these cases go the extent of denying that the consideration of a note in the hands of the original payee can be inquired into. In the hands of *bona fide* holders without notice, the case may be different; but that depends on other considerations. In *Kennedy v. Goodman*, 14 Neb. 588, 16 N. W. Rep. 834, the court say: "The law is now well settled that in an action against a party to a negotiable instrument, by his immediate promise, a want or failure of consideration is a good defense. It is unnecessary to cite authorities on this point, because there seems to be no conflict." We are especially cited to decisions of the supreme court of the United States, because of their controlling authority over this court; but on examination all of those cases presuppose a valid contract foundation for the instruments there in question. In *Brown v. Wiley*, 20 How. 444, the action was upon a bill of exchange, payable one year after its date; but by the laws of the state where it was made, and where it was sought to be enforced, it became due at once on its acceptance being refused. It was regularly presented, according to law, and, being dishonored, suit was at once begun. Defendants set up a different agreement as to the time of presentment than that prescribed by law, and deducible from the terms of the bill; and the court held that such parol agreement was inconsistent with those terms. In its decision the court say in reaching its conclusion: "It is admitted the bill was given for full value," and the question is presented, "whether parol evidence should have been received to vary, alter, or contradict that which appears on the face of the bill of exchange." The contract was

perfect, the obligation to pay at some time conceded, and its own terms, construed by the law, fixed the time. This holding is consistent with the argument of this defendant, or at least it does not preclude his claim. To like effect *Banks v. Dunn*, 6 Pet. 56; also *Specht v. Howard*, 16 Wall. 564. So in *Brown v. Spofford*, 95 U. S. 474. So in *Isaacs v. Elkins*, 11 Vt. 679. The latter case was upon a note regular upon its face for money, but in defense to which the defendant offered to prove that it was in reality given as a chattel note, and not for money; and the court very properly held the evidence inadmissible. The reason is obvious, and the rule in that and in all similar cases must be conceded. Numerous authorities are cited from state courts, some of which would entirely exclude the defense in this case; but we do not find that the United States supreme court intended to go beyond the cases cited from it.

On the other hand, in many of the leading states of the Union, a doctrine admitting this defense is the settled law. The question involved is not one to be affected by mere numbers of adherents to either view. That side that has the more cogent reasons, which is most in harmony with natural right and justice, must ultimately prevail. Temporary or local considerations, founded on the nature of business transactions, in any particular time and place, cannot affect it. It is said that to admit this defense will open the door to false swearing and fraud. That may be a ground for legislative action, but we cannot indulge the presumption that to prevent perjury the laws must be so construed as to deny men the opportunity to commit it. If men will avail themselves of an opportunity to perjure themselves, opened by a rule of law for the necessary purpose of protecting the unwary and unsuspecting from impositions and frauds, the criminal laws will correct them. The civil law is not made to favor any class of contract breakers, but it is made to shield the honest, the unwary, and the oppressed in their enjoyment of right and justice. The case of *Schindler v. Muhlheiser*, 45 Conn. 153, was in many respects like the case at bar, and nearly identical in principle. The note on which that action was brought was claimed by the defendant to be made for the accommodation of the plaintiff, and hence that it was not a debt of defendant to plaintiff. In the decision of that case the court say: "The note was given pursuant to, and in fulfillment of, an antecedent agreement between the parties. * * * The plaintiff invokes the familiar rule of law that parol evidence is not admissible to contradict or vary a written instrument. * * * It has for its object the prevention of fraud and perjury, in those cases where the parties have put their contracts in writing, by excluding any other evidence of the terms of the contract than the writing itself. But that is not this case. The contract was not reduced to writing. It was a parol agreement, and provided for the

use of the note in suit, and also of the deed, [to the defendant,] for a special purpose. * * * So far the contract has been performed. But this is not all of it. A further provision in it was that the defendant should reconvey the lands to the plaintiff, and the plaintiff should give up to the defendant his note. This part the plaintiff refuses to perform. He insists that the defendant, contrary to the intention and understanding of both parties, shall retain the land and pay the note. That makes the transaction simply a sale of real estate, when there was no sale in fact. It compels the defendant against his will to become the purchaser of this land. Instead of preventing fraud, such an application of the rule would perpetrate a fraud of the grossest character, and bring reproach upon the law, and the administration of justice;" citing *Brush v. Scribner*, 11 Conn. 388; *Case v. Spaulding*, 24 Conn. 578; *Daggett v. Whiting*, 35 Conn. 366; *Downer v. Chesebrough*, 36 Conn. 39; *Dale v. Gear*, 39 Conn. 89.

With slight change in verbiage, the words of the court in *Schindler v. Muhlheiser* would apply as well to the case at bar. So in *Maltz v. Fletcher*, 52 Mich. 484, 18 N. W. Rep. 228, Chief Justice COOLEY says: "It is always competent to show that a contract sued upon is without consideration; and no rule or policy of the law is violated by allowing proof to be made of the purpose for which negotiable paper was given; or that the purpose does not require that payment should be enforced." This case is parallel with one phase of the present case. Maltz sued Fletcher on promissory note, and Fletcher pleaded that it was understood when the notes were given that they were only to be paid if the logs for which they were given should be adjudged, in a certain action then proceeding to test the title to the logs, not to belong to Fletcher. So, in *Dicken v. Morgan*, 54 Iowa, 684, 7 N. W. Rep. 145, which was on a promissory note and mortgage, the answer alleged that a part of the consideration of the note was an agreement by parol that the plaintiff should procure a highway to be constructed, etc., which he had failed to do. This was demurred to, on the ground that it sets up a verbal agreement, by which defendant attempts to add to or change the terms of the note and mortgage. The court say: "The agreement alleged in the answer did not add to or change the terms of the contract contained in the note, which was to pay the sum expressed therein. That contract is that defendants will pay plaintiff the sum of money named in the notes at the time fixed, with interest. The contract pleaded by the defendants is a distinct and independent contract, which was a partial consideration for the note. It in no sense changes, or adds to the terms of the note, and was not intended so to do. Contracts of this kind, where one is the consideration of another, are common business transactions. It has never been thought by those who made them that the contract, which is the consideration, adds to or changes the

other; surely the courts never so held." Citing *Trayer v. Reeder*, 45 Iowa, 272; *Putman v. Halley*, 24 Iowa, 425. Such a plea goes to the consideration of the note, and behind the cases cited by the plaintiff. So, also, in *Benton v. Martin*, 52 N. Y. 570, which was an action on a duplicate draft by defendant to plaintiff, Judge FOLGER, in delivering the opinion, says: "Clearly, it was competent to show the terms upon which the duplicate was delivered, and for the defendant to restrict and limit his liability thereby, and to protect himself by them against any liability; * * * and the annexing of such conditions to the delivery is not an oral contradiction of the written obligations, though negotiable, as between the parties to it, or others having notice." In speaking of this rule excluding oral evidence to vary the terms of a written agreement, Chancellor KENT, further says: "It is to be observed that the rule is directed only against the admission of any other evidence of the language employed by the parties in making the contract than that which is furnished in the writing itself." In the case at bar there is no question as to the language used in the note. The question is only as to the conditions on which it was put in the plaintiff's hands. That the consideration of negotiable promissory notes, the same being concurrent parol agreements, may be inquired into, in an action on the notes, by the promisor against the maker, the authorities are numerous, and sustain the view that any other rule, or any other application of the rule, excluding evidence to vary the language of the contract, would, in the words of the court in *Schindler v. Muhlheiser*, supra, perpetrate a fraud of the grossest character, and bring reproach upon the law and the administration of justice;" at least, such result would be likely to follow.

I conclude (1) that the agreement set up in the answer in this case, and sought to be proved by the defendant upon the trial, was proper to be shown; and (2) that parol evidence was competent to show the same; that such evidence was admissible under the pleadings; and that the several rulings of the court below in excluding the same were erroneous. *Kennedy v. Goodman*, 14 Neb. 585, 16 N. W. Rep. 834; *Haynes v. Thom*, 28 N. H. 386. This judgment should be reversed, and a new trial ordered.

(2 Idaho [Hass.] 734)

LEWISTON NAT. BANK v. MARTIN.

(*Supreme Court of Idaho*. March 5, 1890.)

CHATTEL MORTGAGE—RETAIL BUSINESS—ATTACHING CREDITORS.

Rev. St. Idaho, § 3386, provides that, where the mortgagor retains possession of mortgaged chattels, the recording of the mortgage shall protect the mortgagee against attaching creditors. *Held* that, in the absence of further statutory enactment, a chattel mortgage providing that the mortgagor shall continue in possession, doing a retail business, is invalid as against attaching creditors, in the absence of a provision that the proceeds of the business shall be applied on the mortgagee's debt.

Appeal from district court, Kootenai county.

Albert Hagan, for appellant. *Philip Tillingshast and Hawley & Reeves*, for respondent.

SWEET, J. On the 31st day of December, 1887, James McGrail executed and delivered to S. R. Smith a chattel mortgage, as security for three promissory notes, one note for \$319.71, and two for \$717.95 each,—the first note payable 60 days after date, and the two latter payable 7 months after date,—said notes bearing even date with the mortgage above mentioned. The mortgaged property consisted of the contents of a drug-store, including the fixtures thereof, and an apparatus for bottling soda. Among other provisions in said mortgage contained we find the following: "Until default be made in the payment of said sums of money, the said party of the first part, his administrators or assigns, may remain and continue in the quiet and peaceable possession of the said goods and chattels, and in the free and full use and enjoyment of the same." On January 15, 1888, the mortgagee, Smith, transferred said notes and mortgage to plaintiff herein, the Lewiston National Bank. On March 2, 1888, McGrail sold the entire stock of goods then on hand to the mortgagee, S. R. Smith, who immediately took possession of the same, and carried on a retail drug business from said stock of goods, together with such additional purchases as he may from time to time have added thereto, until the 26th day of May, 1888, when, in an action wherein Porter & Co. were plaintiffs and said mortgagor and mortgagee, McGrail and Smith, were defendants, a writ of attachment was issued, under and by virtue of which defendant and appellant, William Martin, as sheriff of Kootenai county, took possession of the goods, wares, and merchandise in said store. The action brought by Porter & Co. was prosecuted to a judgment in the probate court of said county; and thereupon an execution was issued under and by virtue of which, on the 20th day of August, 1888, defendant, as sheriff aforesaid, proceeded to sell the contents of said store seized by him under the said writ of attachment at the time said action was commenced. On the 11th of September, 1888, the Lewiston National Bank, in an action against said McGrail, obtained a judgment in the sum of \$1,623, and an order for the sale of the goods, wares, and merchandise described in said mortgage, adding, as a further description thereto, as follows: "Being the property that was in said store on December 31, 1887." Defendant returned said execution, with an indorsement thereon to the effect that, after due and diligent search, he was unable to find the goods and chattels described therein, save and except the said bottling apparatus, which he had seized and sold for the benefit of plaintiff. Thereupon plaintiff brought an action against the defendant herein, the said sheriff, for the

sum of \$1,623.31, the alleged value of the goods described in said mortgage. In its complaint plaintiff avers that, by reason of defendant's failure to seize and sell said goods, or, in other words, that by reason of defendant's seizure and sale of said goods under and by virtue of the attachment and judgment above set forth, the plaintiff was damaged in the amount specified, and asked judgment therefor. Defendant, answering the complaint, sets forth the facts already detailed herein, and asks that plaintiff's action be dismissed. Plaintiff obtained judgment in the lower court for the sum above set forth, and defendant forthwith appealed to this court.

The question presented to this court is as follows: Is a mortgage on the goods, wares, and merchandise of a store, under the terms of which the mortgagor continues in possession of said goods, doing a retail business from day to day, valid, as against the attaching creditors of the mortgagor, in the absence of a provision in said mortgage to the effect that the proceeds of said business shall be applied to the payment of the debt due from the mortgagor to the mortgagee? The appellant contends that such a mortgage is not valid as against attaching creditors, and that, in the absence of a statutory provision on the subject, it is fraudulent *per se*. Under the common law, a chattel mortgage of personal property was void, unless the possession of said property was retained by the mortgagee. In many instances, this provision of the law served to prevent the use of many kinds of personal property as security; hence it was that the recording statutes were enacted, and under those provisions the mortgagor was enabled to pledge personal property as security for a debt, and retain possession thereof, provided the mortgage thereon be duly recorded. In common with very many of the states, the legislature of Idaho adopted the recording statute; and under its provisions the mortgagor may give a chattel mortgage upon his property and retain possession thereof, and said mortgage will protect the mortgagee against the attaching creditors of the mortgagor, in the event it is executed in accordance with the provisions of that statute, and recorded as by said act provided. Rev. St. Idaho, § 3386. If, under our own statute, however, the mortgagor removes the property mortgaged from the county wherein the mortgage is recorded, or destroys, conceals, sells, or in any manner disposes of the property mortgaged, or any part thereof, without the consent of the holder of said mortgage, he is guilty of larceny, and such sale or transfer is void. Id. § 3397.

It is fair to infer that, while our statute contemplates the act of recording the mortgage as a substitute for the possession of the property by the mortgagee, it also contemplates that the mortgagor shall retain that property in his possession, except the mortgagee permit him to remove or sell the same. That is as far as our statute goes, and to this extent only do the laws of our territory cover

the case at bar. By the decisions of various states, and by a large majority of them, whenever the mortgagee agrees with the mortgagor that the latter may sell and dispose of the goods mortgaged, without a further agreement to the effect that the proceeds of the sale shall be applied to the payment of the debt due from the mortgagor to the mortgagee, then the recording of said mortgage ceases to protect the mortgagee from the attaching creditors of the mortgagor. In some of the states, a provision in the mortgage to the effect that the mortgagor may dispose of the goods in the usual course of trade is held to be *prima facie* evidence of fraud. In this state the fraudulent intent must be proven. In the absence of a statute of that character, the best authorities are to the effect that such a mortgage is utterly void with respect to the creditors of the mortgagor. The recording act was simply intended to serve as a substitute for possession on the part of the mortgagee. It was formulated in response to the necessities of the commercial world, and to extend and multiply the sources of security for business purposes. Being simply a substitute for possession, (and it was never claimed to be anything more,) it will not cover any stipulation that might, and doubtless would, in many instances, be resorted to as a shield to protect fraudulent transactions or defeat honest creditors. In *Robinson v. Elliott*, 22 Wall. 524, the court, in discussing precisely the question now at bar, and under a statute very much the same as our own,—practically the same,—uses the following language: "We are not prepared to say that a mortgage, under the Indiana statute, would not be sustained, which allows a stock of goods to be retained by the mortgagor and sold by him at retail for the express purpose of applying the proceeds to the payment of the mortgage debt. Indeed, it would seem that such an arrangement, if honestly carried out, would be for the mutual advantage of the mortgagee and the unpreferred creditors; but there are features ingrafted on this mortgage which are not only to the prejudice of creditors, but which show that other considerations than the security of the mortgagees, or their accommodation even, entered into the contract. Both the possession and right of disposition remain with the mortgagors. They are to deal with the property as their own, sell it at retail, and use the money thus obtained to replenish their stock. There is no covenant to account with the mortgagees, nor any recognition that the property is sold for their benefit. Instead of the mortgage being directed solely to the *bona fide* security of the debts then existing, and their payment at maturity, it is based on the idea that they may be indefinitely prolonged." This case is directly in point.

Dr. McGrail was a witness in this case, and, without objection, explained what was meant by the free use of the goods, given him by the terms of the mortgage. That use was to carry on a retail drug business, and,

no doubt, his position with the bank, or the position of Smith with the bank, would have been secure so long as the business seemed to be well conducted, and interest on the notes was promptly paid. In *Lyon v. Bank*, 29 Fed. Rep. 578, after an exhaustive review of the question now under consideration, the court held that the inference of fraud is an inference of law. The decision from 22 Wall., before referred to, is binding upon this court, and has, we think, been followed by a majority of the United States courts, although the United States courts have been very largely influenced by the practice prevailing in the state wherein the question happened to arise. In the absence of a statute on the subject, we are heartily in sympathy with the line of authorities holding that possession of a stock of merchandise by the mortgagor, with power to sell and retail the same, without requiring that the profits shall be applied to the payment of the debt due to the mortgagee, is absolutely void as to the attaching creditors of the mortgagor. The rule laid down in *Robinson v. Elliott*, which we follow in this case, is a healthful doctrine for any state engaged in rapidly developing its resources, and necessarily establishing its credit. It closes one of the most dangerous avenues to fraudulent practices, and, what follows, injurious effects upon the business character of the state and the honest efforts of *bona fide* business men. The judgment of the lower court is reversed and vacated, and a new trial ordered.

(2 Idaho [Hasb.] 740)

BARNETT V. KINNEY.

(Supreme Court of Idaho. March 5, 1890.)

CONFLICT OF LAWS—ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. An assignment by a non-resident, made in accordance with the laws of his domicile, and providing for preferences, is invalid, as to property situate in Idaho, as against attaching creditors, under Rev. St. Idaho, §§ 5875-5932.

2. It is immaterial that the attaching creditor is also a non-resident.

Appeal from district court, Alturas county. *Angel & Sullivan*, for appellant. *Kingsbury & McGowan* and *C. S. Varian*, for respondent.

SWEET, J. On the 23d day of November, 1887, M. H. Lipman, a citizen of Utah, doing business at Salt Lake City, made an assignment to plaintiff herein in trust for all his creditors. The deed of assignment carried with it certain personal property situated in Hailey, Alturas county, Idaho territory, to-wit, a stock of goods and merchandise. It is admitted that at the time the assignment was made said Lipman was insolvent; that in all respects the assignment was made in conformity with the laws of Utah territory; and that, undersaid deed of assignment, the creditors of said assignor were divided into classes, certain classes being designated as preferred creditors, and said assignee being

instructed by said deed of assignment to observe said preferences in settling the liabilities of the assignor as fast as the sale of said merchandise enabled him to do so. On the 25th day of November, 1887, plaintiff, as said assignee, took possession of the said stock of goods situated in Hailey, in said Alturas county and Idaho territory, having first caused to be duly recorded in said county the said deed of assignment. On the following day, to-wit, the 26th day of November, 1887, defendant herein, then the duly qualified and acting sheriff of said Alturas county, levied upon and took possession of said goods under and by virtue of a writ of attachment issued out of the district court of the second judicial district of Idaho territory, in and for said Alturas county, in an action wherein the St. Paul Knitting-Works Company, a corporation, was plaintiff, and the said M. H. Lipman was defendant. On the 12th day of December, 1889, plaintiff commenced an action in said court against the defendant herein for the recovery of the possession of said goods and chattels, or for the sum of \$5,000, the value thereof, in case a delivery of the same could not be had. Plaintiff obtained judgment in the lower court, took possession of said goods, and thereupon proceeded to sell the same, realizing therefrom the sum of \$4,000. Defendant appealed from said judgment, and the assignee now holds said sum of money subject to the final determination of this litigation. By a careful examination of the findings of the lower court, we find that the issues here presented are clearly and distinctly set forth. They are, in brief, to recapitulate, as follows: The assignor, at the time of making said assignment, was a non-resident of this territory. The assignment was made in strict conformity with the laws of Utah territory, of which he was a citizen. The attaching creditor was also a non-resident of Idaho, and it is conceded that said Lipman was justly indebted to said corporation in the sum of \$1,992; that at the time the writ of attachment was levied the assignee was in possession of the goods; and that the deed of assignment had been duly recorded in said county; also that the defendant was the duly qualified and acting sheriff of said Alturas county.

The legal questions involved are as follows: May a non-resident make an assignment, with preferences, of personal property situated in this territory, that will be valid as against a non-resident attaching creditor. And this question further involves the effect—*First*, of possession by the assignee when the attachment is levied; *second*, the rule of comity between the states; and, *third*, the effect of the attaching creditor being a resident or a non-resident of the territory. We premise a discussion of these questions with the remark that a decision by the United States supreme court is binding upon us, and that whenever any issue presented here has been clearly and distinctly settled by said court, we need look no further.

We will first take up the question of citizenship, and we submit it in this form: Will the courts of this territory concede to any of its citizens any rights or privileges under its attachment laws not extended to any citizen of the United States who is a non-resident of the territory? The attachment laws of this territory give no preferences as between resident and non-resident attaching creditors. Therefore, under the rule laid down in *Green v. Van Buskirk*, 7 Wall. 151, we must consider the matter settled. It is there held that the rights of the attaching creditor are not at all affected by the question of citizenship. In *Sheldon v. Blanvelt*, a case recently decided by the supreme court of South Carolina, reported in 7 S. E. Rep. 593, the same conclusion is reached. The statute of South Carolina with reference to assignments by insolvent debtors is the same, in effect, as are the provisions of our own statute, and the facts involved in the case just cited are precisely the same as those presented in the case at bar. Section 2, art. 4, of the constitution reads as follows: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." We think that the decision before alluded to, in 7 Wall., in which this article is construed as affecting the rights of non-resident citizens in cases similar to this, applies to the facts as they are here presented; and under that decision, as well as under *Sheldon v. Blanvelt* and the authorities therein cited, we must conclude that the non-residence of the attaching creditor in this case could not in any manner prejudice his rights, and that he was entitled to the same privileges that, under the same circumstances, would be accorded to any citizen of Idaho.

In reaching this conclusion we are following what we conceive to be the rule laid down by the supreme court of the United States; and the wisdom of the principle thus enunciated by our highest court is as unquestionable as its authority. When once a citizen has been accepted by any court of the United States as a suitor, it does not seem to be in accordance either with the principles of justice, or with common fairness, or with common honesty between man and man, to question him as to the particular state in which he may reside, and then give or refuse him what the court would deem to be justice if the suitor were a citizen of our own state, but deny him this supreme right if the fact is developed that he is a citizen of another state. In *Atherton v. Ives*, 20 Fed. Rep. 897, the court follows this doctrine, and concludes a vigorous indorsement of the principle in these words: "We think such a distinction should never be drawn by a court, unless compelled to do so by legislative will clearly expressed. It may be that the legislature of a state has the power to exercise such a 'patriarchal and provident sovereignty,' but this court will not assume such as the legislative will." In concluding our discussion of this principle, we will say that the pointed decla-

ration just quoted meets with the hearty approval of this court, and in the absence of a positive statutory enactment, we do not think the court justified in asking the citizen who seeks the beneficial protection of its laws whence he came, with a view of administering the law accordingly.

The principle of comity between states, or to what extent laws governing the transfer of property in one state will be respected by a sister state, is the next question to be considered. The courts of the country have differed very much on this proposition. Nevertheless it is conceded by all that one state is not bound to accept the transfer laws of another state affecting property located within its borders. It is useless for us to discuss the question. The rule is laid down for our guidance by the supreme court of the United States in *Green v. Van Buskirk*, 7 Wall. 151. The language of the court is as follows: "And this principle of comity always yields when the laws and policy of the state where the property is located has prescribed a different rule of transfer with that of the state where the owner lives." In *Atherton Co. v. Ives*, 20 Fed. Rep. 895, 896, the court also indorses this rule.

The only question remaining in this connection is, was the assignment made by Lipman, under the laws of Utah territory, contrary to a clearly expressed statute or to the settled policy of this territory? We think it was contrary to both. Commencing with section 5875, the statute designates how an insolvent debtor may proceed in this territory in proving his insolvency, and the necessary steps to be taken to complete the transfer and sale of his property for the benefit of his creditors. Under this act, an assignee, chosen by the creditors, (and let us remark that these creditors may be residents or non-residents,) is appointed by the court. The assignee thus appointed must dispose of the property of the insolvent for the benefit of all the creditors, share and share alike, preferences or priority being strictly forbidden. Section 5932 is as follows: "No assignment of any insolvent debtor otherwise than as provided in this title is legal or binding on creditors." The assignment made by Lipman was in direct conflict with the provisions of this statute, and one of its most important provisions, to-wit, that which prohibits preferences. It was urged by the respondent that, if this rule were applied to the case at bar, a non-resident of Idaho doing business in the territory could not make an assignment of property within the jurisdiction of the territory. This may be true, but the resident insolvent is not permitted under this law to prefer any creditor in this territory over any creditor out of the territory; and we do not think a non-resident insolvent, doing business in Idaho, ought to be permitted to make an assignment giving preferences to non-residents of the territory over residents of the territory in which he is doing business, and the laws of which he invokes to protect his property, and

maintain for him the same rights and privileges that are extended to any citizen of the territory. A non-resident, being entitled to the same right under our law as a citizen of the territory, may invoke the same principles. While this point was urged by the respondent, we think it was carried a little too far. The courts of this territory would, we believe, respect the assignment of a non-resident doing business in Idaho, if made in accordance with its laws. In other words, if Mr. Lipman's assignment had been made for the benefit of all his creditors, share and share alike, we believe, under the principle of comity, it would have been respected, as it would not have been contrary to the laws or the policy of this territory. In holding that this assignment was invalid as against attaching creditors, we are following the rule already quoted, and feel bound so to do; yet we do not hesitate to say that the rule meets with our approval. Persons doing business with residents of this territory should know what laws govern the transfer of property. By having one uniform principle applicable alike to all property situated in this territory, whether of residents or non-residents, every person doing business within the territory, and every non-resident doing business with persons residing in the territory, may know, before extending credit or locating property within the jurisdiction of our laws, what laws will govern the transfer of that property, whose rights may attach, and how they may attach; and it gives to our business community a stability and character that we believe to be not only desirable, but almost necessary, to free and advantageous commercial intercourse with distant states lying to the east and to the west of us.

Before passing to a consideration of the next principle involved, we add the further suggestion that sheriffs and other officers of like character in the territory have a right to understand whether or not, in proceeding under our laws, and in accordance therewith, they are protected by them. In this case the sheriff proceeded regularly and in accordance with the laws of Idaho; yet he is subjected to a suit for damages, because he did not understand and proceed in accordance with the laws of Utah, or in pursuance of transactions executed in harmony with those laws, but in direct violation of our own.

Counsel for respondent urged with a great deal of strength and persistency the fact that plaintiff was in possession of the goods at the time of the seizure by defendant under the writ of attachment. It is also averred by counsel for respondent that defendant had actual notice of the contents of the deed of assignment, and the possession thereunder by plaintiff. This point was urged with a great deal of ability, and numerous authorities cited relating, perhaps indirectly, thereto. It does not seem to be a serious question. It is entirely regulated by the statute. If we do not recognize the principle of comity, for the reasons before stated, we must

proceed under our own statute. This statute declares in the most positive terms that any assignment made with preferences shall not be legal or binding as against creditors. This being true, of what effect was this possession under and by virtue of an assignment that was clearly invalid? The attaching creditor was under no obligations to respect it. Indeed, the law distinctly declares that it was not valid as to him, and hence the mere fact of his possession under an invalid instrument is not material. May a person violate the positive mandates of a statute, and then claim protection as against the complainant, because the latter knew of the former's violation of the law? Nor do we see that the question of a voluntary or an involuntary assignment is entitled to consideration in passing upon the merits of the issue involved. No general assignment can be made in this territory, voluntary or otherwise, giving preferences. Therefore we do not see that the fact of this assignment having been voluntary on the part of Lipman has any bearing whatever on this case. We must conclude, therefore, that the court below erred in holding such assignment to be valid as against attaching creditors of the assignor, and the possession of the defendant under said writ of attachment to have been unlawful. Let the judgment be reversed, and the cause remanded to the lower court, with instructions to enter judgment for the defendant in accordance herewith.

BEATTY, C. J., (*concurring.*) Having been of counsel between the same above-named parties in a cause, in the same lower court, but with a different attaching creditor, I desired to take no part herein further than to sit at the hearing. I have not participated with my associates in the discussion, but, they having reached opposite conclusions, the disagreeable duty rests upon me of breaking the dead-lock, which, in following my convictions and what seems to me the weight of authority, I do, by concurring in the able opinion of Mr. Justice SWEET.

(1 Wash. St. 127)

KING v. ILWACO RY. & NAV. CO.

(Supreme Court of Washington. Feb. 24, 1890.)

ANSWER—OBJECTIONS CURED BY JUDGMENT—
CORPORATE NAME.

1. In a suit by a railway company to recover a subscription payable when certain conditions as to the location of the line and its termini were fulfilled, plaintiff alleged performance of the conditions. Defendant, after alleging the conditions as representations made to him by plaintiff's agent, avers that the agent "well knew, before and at the time defendant signed said contract, that said line and termini was not so located, or definitely located." *Held* no allegation that the road was not built in accordance with the conditions, and no issue was made.

2. Where an incorporated company attempted to change its name, but failed through non-compliance with the method prescribed by statute, and afterwards obtained a judgment in the new name, it is sufficient, on objection made after judgment, if the complaint states facts which identify the company.

8. Defendant conceded that plaintiff, a corporation, might, of its own motion, change its name, under Code Wash. T. § 2422, by filing supplemental articles. Held that, after judgment, it will be inferred that such articles were filed when the complaint alleges that said company was incorporated as the "Ilwaco Steam Navigation Company," and on the 6th day of August, 1888, by order of, and pursuant to a vote of, its stockholders, at a meeting called for that purpose, said name was changed to the "Ilwaco Railway & Navigation Company."

Error to district court, Pacific county.

Ira Jones and B. F. Dennison, for plaintiff in error. *Fulton Bros.*, for defendant in error.

SCOTT, J. The question presented in this case is a construction of the pleadings. The complaint (omitting the formal parts) is as follows: "The above-named plaintiff, complaining of the above-named defendant, for its cause of action alleges: That plaintiff is, and during all the time herein alleged was, a corporation duly formed, incorporated, organized, and existing under and by virtue of the laws of the territory of Washington, for the purpose, among other things, of building, equipping, operating, and maintaining a railroad from the town of Ilwaco, in Pacific county, Washington Territory, to a point on Shoalwater bay, in said county. (2) That said corporation was, prior to the 6th day of August, 1888, incorporated as and known as and named 'The Ilwaco Steam Navigation Company,' and on the 6th day of August, 1888, by order of, and pursuant to a vote of, its stockholders, at a meeting called for that purpose, said name was changed to the 'Ilwaco Railway & Navigation Company,' and it has ever since been known and gone by that name, and that is its present name. (3) That heretofore, in the year 1887, the defendant, being a resident of, and property owner in, said county, with other persons entered into, with one I. W. Case, and signed, a certain subscription paper or agreement, in words and figures as follows, to-wit: 'This agreement witnesseth that, in consideration of I. W. Case or his assigns constructing and equipping a narrow-gauge railroad from Ilwaco, W. T., through Ocean Park, to a point on Shoalwater bay, in said territory, by the first day of June, 1889, each of the undersigned agrees to pay to said I. W. Case or his assigns the amount set opposite his name, by him subscribed, and agrees to pay the same on the day, within the period, that the first steam-engine, with passenger coach attached, passes over said road from Ilwaco to Shoalwater bay.' (Name of subscriber. Amount subscribed.) That among others the said defendant subscribed his name to said agreement, and set opposite his name, so subscribed, the sum of \$150, and delivered said contract to said Case, and thereby agreed to pay said Case or his assigns the said sum of money on the conditions in said agreement set forth and contained. (4) That thereafter, on the 17th day of July, 1888, the plaintiff proposed to said Case to construct said road for said subscription, and, B. A. Seaborg and

L. A. Loomis being trustees for said plaintiff, said Case assigned said subscription and said agreement, and all his rights thereunder, to them; and thereafter, on the 21st day of July, 1888, said Seaborg and Loomis assigned and set over and transferred to plaintiff said subscription and agreement, together with all their rights thereunder, to plaintiff; that at that time there was no railroad between said points, and on the faith of said contract and subscription, and relying thereon, and for the purpose of accepting the same, complying with the terms thereof, and earning said sum of \$150, and all other sums subscribed thereto, plaintiff did, prior to said 1st day of June, 1888, construct and equip a narrow-gauge railroad from Ilwaco, Washington Territory, through Ocean Park, to a point on Shoalwater bay, in said county and territory, and expended large sums of money in so doing, and plaintiff did so construct and equip said road, and ran a passenger train, that is to say, a steam-engine with a passenger coach attached thereto, over said road from Ilwaco aforesaid to a point on Shoalwater bay aforesaid, prior to the first day of June, 1889, to-wit, on the — day of May, 1889. (5) That, though often demanded, defendant has paid no part of said sum of \$150, but the whole thereof is now due and owing and unpaid from defendant to plaintiff; and plaintiff demands judgment against the defendant for said sum, with its costs and disbursements of this action."

The defendant's answer (omitting the formal parts) is as follows: "Now comes the above-named defendant, E. A. King, and for answer to the plaintiff's complaint alleges that, before and at the time defendant signed the agreement mentioned in the complaint, one I. W. Case, by his agent, L. A. Loomis, falsely and fraudulently represented to the defendant that he intended to build, construct, and equip a narrow-gauge railway from Ilwaco to Shoalwater bay, passing through Ocean Park from one end to the other, and through Clark's addition thereto, on a straight line, and that the terminus was located on the land of Charles Sengren, and that said line and terminus was definitely and permanently located, as aforesaid, on said line and land; and then and there plaintiff requested the defendant to subscribe said written contract mentioned in the complaint, and the said I. W. Case well knew, before and at the time defendant signed said contract, that said line and terminus was not so located or definitely located; and that said false and fraudulent representations were made with intent to cheat and defraud the defendant; that defendant relied upon said false and fraudulent representations, and signed said contract, and agreed, on the face of the same, to pay said sum of \$150, and not otherwise. Wherefore defendant asks judgment for his costs and disbursements against the plaintiff."

The plaintiff replied, denying the allegations of the answer, and afterwards filed his

motion for judgment on the pleadings for the amount asked in the complaint. The court granted the motion, and the defendant appealed. He alleges that the complaint does not show a cause of action in the plaintiff named; that there was no such corporation as the "Ilwaco Railway & Navigation Company;" and that otherwise the defendant was entitled to a trial upon the merits.

It is conceded by appellant that a private corporation may by its own act, under Code, § 2422, change its corporate name by filing supplemental articles. The claim is made, however, that the plaintiff did not comply with the law in attempting to change its name; that the complaint shows that the change was sought to be made simply by a vote of the stockholders; that such action was illegal, and consequently that the complaint fails to show a cause of action in the plaintiff. We do not deem it necessary to decide whether, under the law, a private corporation can change its name at will, by its own act. As this point is conceded by appellant, we adopt his view for the purposes of this case, but we do not agree with the view he takes of the complaint. After judgment, a different and more liberal rule obtains in the construction of a pleading from that recognized before judgment. All reasonable intendments will be taken in favor of the pleading to support a judgment; and we think that from the complaint, viewed in the light of this liberal rule, a fair inference may be drawn that a change of name was made in the manner conceded by appellant to be authorized by law, viz., by filing supplementary articles; and that the same was so done on August 6, 1888, by order of, and pursuant to a vote of, its stockholders previously had. Upon the other hand, if the attempt to change the corporate name was futile, either because there was no law authorizing it, or because the law was not complied with, if it does authorize it, it follows that the plaintiff's name was, at the time the action was prosecuted, the "Ilwaco Steam Navigation Company," and not the "Ilwaco Railway & Navigation Company," appearing as plaintiff in the entitling of the case. However this may be, enough appears in the complaint to identify the plaintiff. It was the same corporation, under one name or the other. If the plaintiff's name in the entitling of the action was wrong, this was an irregularity which should have been taken advantage of in the court below. There is enough in the complaint to identify the plaintiff under one of two names. We do not think, if the plaintiff did undertake to prosecute the suit under an illegal name in the entitling of the cause, that it is such a defect as will be fatal to the case against the objection urged here that the complaint fails to show a cause of action in the plaintiff, especially when viewed in the liberal light it is entitled to be viewed in after judgment.

As to the further allegation, that the court erred in rendering judgment for the plaintiff

on the pleadings, we think the action of the court was proper, as the answer did not raise any issue. No material allegation of the complaint was controverted by it. The affirmative matter pleaded totally failed to constitute any defense. There is no allegation in the answer, nor does it anywhere appear, that the road was not constructed and terminated in accordance with the statements therein set forth as made by the agent, and within the time prescribed. The answer simply alleges that it was not located, or definitely located, as represented by said agent, at the time the defendant signed the subscription. It appears to us that this question as to the time of locating was an immaterial matter, if the road was subsequently constructed and terminus located according to the representations alleged to have been made. The defendant makes no claim that this was not done. In no way does he attempt to show or claim that he was injured by the fact that the line of road and the terminus at Shoalwater bay were not located, or definitely located, at the time he subscribed the amount specified; and whatever defense the matters set up might have constituted had these other matters been pleaded, they had no effect, and raised no issue, in the present case. The judgment of the lower court is therefore affirmed.

ANDERS, C. J., and DUNBAR, HOYT, and STILES, JJ., concur.

(1 Wash. St. 63)

KING COUNTY v. HILL et al.

(Supreme Court of Washington. Jan. 30, 1890.)

APPEAL—CERTIFICATE OF FACTS—PRACTICE.

1. The written opinion of the trial judge, not purporting to be a statement of facts, will, on motion, be stricken from the transcript, under Laws Wash. T. 1883, p. 59, "Appeal Act," § 8, which provides that the statement of facts settled by the parties or made by the judge shall be certified by him to contain all the material facts in the cause.

2. A certificate by the judge that the statement contains all the material facts relative to the execution of the bond in suit, and the decision on the question of its execution, is not good, under section 4 of above act, as it does not state that "the material facts of the cause" are contained therein.

3. It is provided by section 3 of same act that notice of a settlement of a statement of facts shall be given by appellant within 30 days after rendition of judgment, and section 5 provides that notice of appeal may be given within six months after judgment rendered. *Held*, notice of settlement of facts may precede notice of appeal.

4. By Code Wash. T. § 2187, the judge of one district may sit in any other, when requested by the judge of the latter. *Held*, the judge can make a settlement of statement of facts for appeal after removing from the district where he tried the case.

5. Appellees are not estopped to move to strike out the statement of facts for the insufficiency of the judge's certificate, because they were present when the statement was settled, and offered no other.

6. Where there are several assignments of error, a motion to affirm the judgment will not be sustained though the statement of facts has been stricken out.

Error to district court, King county.

Laws Wash. T. 1883, p. 53, § 3, pro-

vides that appellant may have the facts, or any portion of them, transmitted to the supreme court, with a transcript of the cause, on giving notice to appellee, and getting the statement of facts certified by the judge. Code Wash. T. § 2137, provides that a judge of a district court may hold court in any other district, when requested to do so by the judge of such other district.

Ronald & Piles and W. S. Bush, for plaintiff in error. *C. H. Handford, Thomas Burke, Eben Smith, and Strune, Haines & McMicken*, for defendants in error.

STILES, J. This was a motion to strike from the transcript the written opinion of the judge who tried the cause in the court below, and the statement of facts, and to affirm the judgment. The suit was brought upon the bond of defendants in error, Hill and others, executed to the county of King, of which Hill was treasurer. The issues, when made up, were referred to a referee, under chapter 18 of the Code. The referee heard the cause, and reported his findings of fact and conclusions of law, with the testimony taken by him. The judge of the third district court was disqualified, and the judge of the fourth district sat to hear the cause, at Seattle, upon the report of the referee. The report of the referee recommended a judgment against the defendants for a certain sum, which the plaintiff deemed too small, and did not cover a period within which it was claimed a liability upon the bond had accrued. Plaintiff, therefore, moved to correct the report in these particulars, and for an enlarged judgment accordingly. Defendants, on the other hand, moved to entirely set aside the findings of fact and conclusions of law of the referee, and for a judgment of dismissal. The hearing of these motions seems to have involved a hearing of the whole case, and the judge rendered an elaborate opinion in writing, giving his reasons for his action, which was filed with the other papers in the case. There were three cases brought by the same plaintiff against the same defendants, and all were heard together; therefore the opinion includes all three. We think the motion to strike the opinion from the transcript is well taken, as it does not purport to be a finding of facts, or anything but the views of the judge on various points and authorities cited, and is not properly a part of the transcript.

The court overruled the exceptions of the plaintiff to the referee's report, and denied its motion; and, on the other hand, sustained the exceptions of the defendant, set aside the findings and conclusions of the referee, and rendered judgment of dismissal, with costs. The order and judgment was as follows: "It is ordered by the court that the findings and conclusions of said referee be, and the same are, set aside; and it is the decision of the court that there is not sufficient evidence to support the allegations of the plaintiff's complaint in this action, and that the defend-

ant's allegations are true, and the judgment should be rendered in favor of the defendants for their costs and disbursements herein. Judgment that plaintiff take nothing by the action, and that defendants have judgment for costs;" and there were no findings of fact or conclusions of law, except as they may be found in the order. The plaintiff, intending to appeal to this court, sought to have a statement of facts settled, under the appeal act of 1883; but the judge who tried the cause had returned to his own district, and was then at Ellensburg, Kittitas county. Notice of the settlement of a proposed statement before him at that place was given to defendants, and a copy of the proposed statement was delivered with the notice. No notice of appeal had at that time been given. At the hearing at Ellensburg the defendants were present, and objected to the statement, calling attention to the fact that there was testimony of witnesses which was not included in the statement, which consisted only of the testimony of witnesses, and a copy of the bond sued on. The testimony related only to the execution and delivery of the bond. But defendants did not offer themselves to furnish any matter for the statement. The judge certified the statement as proposed, as follows: "That the same [the statement] contains all the material facts in the above-entitled cause relating to the execution of the bond in suit, (except the original bond itself,) and the ruling and decision on the question of the execution thereof, and the dismissal of said cause as aforesaid." The certificate further requested the clerk to send the original bond to the clerk of this court.

It is alleged that no statement of facts could be settled until after notice of appeal; that only the judge of the third district court could certify to any statement; that the judge could not certify out of the district; and that the statement is not a statement of all the facts, or all the material facts, and is not so certified by the judge and therefore it is moved that the statement be stricken out. We cannot sustain either of the first three objections.

The statute allows 6 months for notice of an appeal, and only 30 days in which to give notice of a settlement of the statement. In our judgment, it is immaterial which of the notices precedes the other.

Where judges are allowed by statute to exchange courts, we must hold that the mere return of the judge who tries a cause in another district, by request, cannot cut off the rights of parties under other provisions of the statutes to have the facts of the trial stated; and from this it follows that in this case the judge of the fourth district could settle and certify the statement at Ellensburg. The case of *Ex parte Parker*, 131 U. S. 225, 9 Sup. Ct. Rep. 708, is applicable to the last point.

But we think the fourth of defendant's objections to the statement is without answer,

and must prevail. The statute of 1883, § 4, p. 59, makes a liberal provision in this regard. All that it exacts is that the statement shall contain "the material facts in the cause," by which means large masses of testimony can be eliminated, and the record greatly diminished. But "the material facts" must be there, and the judge must certify that they are there. The certificate here does not at all fulfill the requirement, although a word or two would have sufficed. The reason for the failure was that both the judge and parties were conscious that many other matters were material in the cause besides the execution of the bond. We gather this from the briefs and arguments of counsel on this motion. Plaintiff urges that as defendants had a copy of the statement proposed, and were present, and proposed no amendments, they are estopped; but we think not, under our practice. The intention of the statute is that a fair statement shall be presented by either party, or both, to the judge, and his decision controls.

There remains the motion to affirm the judgment. This we shall deny, upon the authority of *Swift v. Stine*, 3 Wash. T. 519, 19 Pac. Rep. 63. The appeal is from the judgment upon several assignments of error, and should be heard upon its merits. The opinion of the judge and the statement will be stricken from the transcript; the motion to affirm the judgment is denied.

ANDERS, C. J., and SCOTT and DUNBAR, JJ., concur. HOYT, J., did not sit at the hearing.

(1 Wash. St. 133)

**BELLINGHAM BAY & B. C. RY. CO. v.
STRAND.**

(*Supreme Court of Washington*. Feb. 24, 1890.)

**PLEADINGS IN JUSTICE'S COURT—FORCIBLE ENTRY
AND DETAINER—EVIDENCE.**

1. Code Wash. § 1836, on forcible entry and detainer, provides that "one year's quiet possession of the premises immediately preceding the filing of the complaint * * * may be pleaded by any defendant in bar of the plaintiff's demand of possession, unless the estate therein be ended." *Held*, an allegation by defendant that, for more than a year before the filing of the complaint, it had been in the quiet possession of the premises, is no defense, since it fails to aver that its estate therein is not ended.

2. The fact that plaintiff did not by a reply deny the allegation of quiet possession is not to be taken as a confession of its truth, since, in a justice's court, all new matter in the answer is presumed to be denied except, as required by Code Wash. § 1757, subd. 3, in cases where a set-off is claimed by way of defense.

3. No question of title being involved, evidence that defendant had paid taxes on the property for two years was properly excluded.

4. It was not error to exclude evidence that defendant "during two years last past had been in the actual, open, and notorious possession of large portions of said tract, of several hundred acres, of land, which originally included the said land in controversy."

5. Where plaintiff showed peaceable possession for a long time prior and up to the forcible entry complained of, and defendant admitted by answer its possession at the commencement of the suit, but produced no evidence of its right to posses-

sion, and none to controvert plaintiff's evidence, a verdict for plaintiff was justified.

Appeal from district court, Whatcom county; THOMAS BURKE, Judge.

C. W. Dorr, for plaintiff in error. H. A. Fairchild, for defendant in error.

DUNBAR, J. This is an action for forcible entry and detainer, brought in the justice's court of Whatcom precinct, Whatcom county, Wash. T., under the provisions of chapter 123 of the Code of Washington, by H. B. Strand, plaintiff, against the Bellingham Bay & British Columbia Railroad Company, a corporation defendant, to recover possession of a certain lot or parcel of land upon which defendant was alleged to have unlawfully entered on the 28th day of January, 1889, and since then to have remained in the possession thereof up to the time of the commencement of this suit. Plaintiff alleges that he was on the said 28th day of January, and for a long time prior thereto had been, in the quiet, lawful, and peaceable possession of, and entitled to the possession of, the said described tract of land. There was a general denial on the part of the defendant of all the allegations of the complaint, excepting that defendant was in possession of said premises, which was admitted by the answer and averred to be lawful. The defendant further answered that it had been in the quiet possession of said premises for more than one year immediately preceding the filing of the complaint in this action. On the 9th day of March, 1889, there was a trial by jury in the justice's court; and a verdict of not guilty was returned, and judgment entered thereon in favor of defendant. Plaintiff appealed to the district court of Washington Territory, holding terms at Whatcom, where said cause came on for trial at the March term of said court; and upon the trial of said cause by a jury a verdict was rendered for plaintiff, and judgment entered thereon. From said judgment plaintiff appealed to this court.

It is contended by the defendant, plaintiff in error, that the affirmative declaration of defendant that it had been in the quiet possession of the premises for more than one year immediately preceding the filing of the complaint is not only a material allegation in the answer, but, if sustained, is a complete defense to the action of forcible entry and detainer, and that, as it stands uncontroverted by any reply of plaintiff, it is an absolute bar to judgment for plaintiff in this suit. Even had this allegation not been controverted, it did not go far enough to constitute a bar under the statute. The language of the statute is: "One year's quiet possession of the premises, immediately preceding the filing of the complaint, by the party complained of, or those under whom he holds, may be pleaded by any defendant in bar of the plaintiff's demand of possession, unless the estate therein be ended." Code Wash. § 1836. The last clause in the statute is very important. The

defendant may have had a leasehold interest in the premises, and under such lease have been in the quiet and rightful possession of them for the time alleged in the answer; and yet, if his lease had expired within the year, the alleged quiet possession would manifestly not be a defense to the action. To bring itself within the protection of the statute, the defendant, in addition to the allegation of quiet possession, should also have alleged that its estate in said premises had not ended. But we cannot agree with the defendant that the allegation on which it relies is not controverted. Section 86 of the Code, cited by defendant, is not applicable to pleadings in a justice's court. The only provision made by the law for a reply in a justice's court is in subdivision 3 of section 1757 of the Code; that is, when the answer sets up a set-off by way of defense, all other new matters in the answer constituting a defense are presumed to be denied.

Defendant complains that the court erred in sustaining plaintiff's objection to its offer to prove that it had for two years last past paid taxes upon said premises. Whatever may be the effect, if any, of the payment of taxes, as tending to prove right of possession, when coupled with the proof of other circumstances, we are not called upon to decide; for the statement of facts shows that no other proofs of possession, or right of possession, to the particular premises in controversy, was offered by the defendant. No question of ownership or title is involved here. It is simply a question of possession forcibly detained. A. may own land, and lease it to B., and, in the absence of any stipulation to the contrary, A. must pay the taxes on said property; and, in an action of forcible entry and detainer brought by either one against the other, the proof of such payment of taxes by A., unsupported by any other circumstances, could not possibly affect B.'s right to the possession of the premises. Hence, there was no error in sustaining the objection to the introduction of this testimony.

The fourth assignment is "that the court erred in refusing to allow defendant to prove that, during the two years last past, it had been in the actual, open, and notorious possession of large portions of the said tract, of several hundred acres of land, which originally included the said land in controversy;" and the fifth assignment is "that the court erred in refusing to allow defendant to prove that, before the said tract was originally surveyed, platted, and laid off into lots, blocks, streets, and alleys, defendant's grantors were in the actual, notorious, and open possession of a large portion of the said entire tract, of several hundred acres, which possession had been continued by defendant up to the time of the commencement of this suit." We must confess that we are unable to conceive what possible relevancy such testimony could have to the questions in issue in this case. If the proof offered had been admitted to be true, it could in no wise have enlightened the jury on

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the vital question as to who was entitled to the possession of the particular piece of land described in the complaint at the time of the commencement of this action. It will be observed that defendant nowhere offered to prove that either it or its grantors, at the time of the alleged forcible entry, or at any time prior thereto, was in possession, or entitled to the possession, of the particular land described in the complaint, or any portion thereof, and that there is nothing to indicate that the "large portions" spoken of were even contiguous to the land in question. There was no error in excluding such testimony.

But there is another feature in this case which, in our judgment, is fatal to appellant's interests. Plaintiff alleges the quiet, lawful, and peaceable possession of the property in controversy at the time of the alleged forcible entry and detainer. The defendant denies this possession in plaintiff, and alleges that it was in possession. The statement of facts, however, shows that, while the plaintiff introduced testimony tending to show his quiet and lawful possession for a long time prior to and up to the time of the alleged forcible entry and detainer, which, in view of the subsequent proceedings, must be presumed to have been *prima facie* proof of quiet possession, the defendant offered no proof whatever of the right of possession to said premises, and no testimony in contravention of plaintiff's proof, while at the same time it admitted that it was in possession of said premises at the commencement of the action. We cannot, therefore, escape the conclusion that defendant forcibly took possession of said premises, and that it unlawfully holds the same by force.

We think the evidence sustains the verdict, and that there was no error committed by the court. The judgment of the court below is affirmed, with costs for appellee.

ANDERS, C. J., and SCOTT, J., concur.
STILES and HOYT, JJ., concur in the result.

(1 Wash. St. 12)

TACOMA LUMBER & MANUF'G CO. v. CITY OF TACOMA.

(Supreme Court of Washington. Jan. 28, 1890.)

CONTRIBUTORY NEGLIGENCE.

Where plaintiff sued for damages for the burning of its logs caused by the negligence of defendant city in kindling fires while opening a street, there was no evidence of contributory negligence in the fact that plaintiff cut the logs in February, and allowed them to remain where cut until the following August, when they were destroyed, and that they were lying in the midst of thick brush and weeds which extended to the borders of the street.

Error to district court, Pierce county.

Judson, Sharpstein & Sullivan, for plaintiff in error. Thos. Carroll, for defendant in error.

HOYT, J. Plaintiff in error sued the defendant in error to recover the sum of \$700

as damages for burning of saw-logs alleged to have been caused by the negligence of defendant in kindling fires in the opening of Pacific avenue, a street in the said city of Tacoma. Issues were joined, trial had, and verdict and judgment for defendant. The court instructed the jury upon the subject of contributory negligence by plaintiff, and the only question presented by the record, and argued here, is as to the propriety of such instructions. The only evidence upon that subject was to the effect that plaintiff had cut the logs in question upon lands adjoining said street in the month of February, and had left them on the ground where cut until they were destroyed, in August following; that the logs were in the midst of thick brush and weeds, which extended to the limits of the street in question. Did this testimony tend to show such negligence on the part of the plaintiff as could be held to have contributed to the destruction of said logs by the fire set by the defendant in the opening of said street? If it did, the action of the court below was correct, as it is the province of the jury to pass upon the sufficiency of the evidence; but if it did not, then the action of such court was wrong, as it is error to submit to a jury an issue in regard to which no evidence has been introduced. We are of the opinion that the latter proposition is true, and that the testimony did not, in the least degree, show such negligence on the part of the plaintiff as, under the law, could be held to have contributed to the loss. In fact, it seems to us that the plaintiff was guilty of no negligence whatever, as we think he had a perfect right to cut the logs, and leave them upon the premises as he did, and was entitled at any and all times to have them protected from the wrongful or negligent acts of any and all persons. In this view of the undisputed evidence in the case, it follows that there was no question of the negligence of the plaintiff having contributed to the loss for the jury to decide, and that the giving of the instruction complained of was error for which the judgment must be reversed, and the cause remanded for a new trial, and it is so ordered.

ANDERS, C. J., and DUNBAR, SCOTT, and STILES, JJ., concur.

(6 Utah, 389)

In re WALKER'S ESTATE.

(Supreme Court of Utah. April 28, 1890.)

EXECUTORS—SALES UNDER POWER—NOTICE.

Comp. Laws Utah 1888, § 4145 et seq., provides that no sale of the estate of a decedent shall be valid unless made under an order of court, with certain exceptions, with due notice of the sale, and subsequent confirmation by the court. Section 4181 provides that, when authority is given by the will to sell, the executor may sell without an order of court, and "with or without notice, as the testator may have directed." *Held*, that where the will gives the executor a mere naked power of sale, without direction as to notice, a sale without the statutory notice is invalid.

Appeal from district court, third district; HENDERSON, Judge.

Marshall & Royle and W. H. Dickinson, for appellants. *P. L. Williams, amicus curiæ*.

ANDERSON, J. This is an appeal from a judgment of the third district court refusing to confirm certain sales of real estate made by the executors of Samuel S. Walker, deceased. The deceased died September 10, 1887, in Salt Lake county, in this territory, seised of a large amount of real estate. He left a widow and six children. He left a will, made in 1882, by which he devised to his widow, during her natural life, one-third of all his estate, and the balance of his estate to his children. He also directed in his will that his executors pay to each of his children, on attaining the age of majority, the sum of \$5,000. The seventh clause of the will is as follows: "*Seventh*. The executors of this will shall have power to sell, either at public or private sale, in their discretion, any portion of my estate for the purpose of effectuating the intentions and commands hereof." The last clause of the will is as follows: "*Lastly*, I hereby appoint my brothers, Joseph R. Walker and Mathew H. Walker, (or, in case of the death of either of them, the survivor,) the executors of this, my last will and testament; and neither of them shall be required to give bonds for the faithful performance of their duties hereunder." The will was duly admitted to probate, and the executors named entered upon their duties, and in their capacity as such executors made various contracts for the sale of portions of the real estate for the purpose of paying off the indebtedness of the estate. These contracts were reported by the executors to the probate court, and an order was asked confirming the sales, and notice was given pursuant to the statute that a hearing would be had. Upon the hearing the probate court refused to confirm the sales because no notice of such sales had been given by the executors, and the executors appealed from that order to the district court. Upon the hearing in the district court it was shown that the several parcels of real estate had been sold by the executors at private sale, without notice. The widow and some of the children testified that the sales were fair; that they were in the interest of the estate; and that no one was opposing the confirmation. The court found that the executors had acted in good faith, and that the sales had been fairly made, but denied the motion of the executors to confirm the sale, because no notice had been given. From this order the executors have appealed to this court, and the sole question presented for our determination is whether the executors had the authority, under the will, to make the sales without advertising, before the sales were made.

At common law, the power and authority given under a will was exercised the same as any other authority, and the will was to be

looked to and consulted on the question of power, the same as where a party acted under a power of attorney, and it was unnecessary to have the aid of the probate court in executing it; but in this territory, while the right to dispose of property by will is not limited by statute, the statutes regulate the exercise of the right, and prescribe the manner in which, in certain cases, the authority conferred by the will may be executed by the executors. The statutes of this territory in regard to the settlement of the estates of decedents provides that "no sale of any property of an estate of a decedent is valid unless made under order of the probate court, except as otherwise provided in this chapter. All sales must be reported under oath to and confirmed by the court before the title of the property sold passes." Comp. Laws 1888, § 4145. Other sections of the statute prescribe what the order of sale shall contain, the notice of sale that shall be given, the return of the sale to the court, the manner in which the sales may be confirmed, and the notice that shall be given of the application for the order of the confirmation. The statute provides with much particularity the mode of procedure in all cases of sale of the real estate of decedents, where there is no will, or where the will fails to direct how sales shall be made. The exceptions to the mode of sale prescribed in the statute, referred to in section 4145, are found in section 4181, and are as follows: "When property is directed by the will to be sold, or authority is given by the will to sell property, the executor may sell any property of the estate without order of the court, and at either public or private sale, and with or without notice, as the testator may have directed, but the executor must make return of such sales, as in other cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case, no title passes unless the sale be confirmed by the court."

Where a will confers upon an executor a power coupled with an interest, or the fee in the estate is devised to the executor in trust for the benefit of other persons, and the intention of the testator to take the management of his estate out of the probate act is clear, the interest vested in the executor, and the power and authority given him by the will, authorize him, after the will has been probated, to proceed to sell real estate in the manner directed by the will without obtaining an order of sale from the probate court, and without giving the statutory notice of such sale, and without asking the court for an order of confirmation. *Estate of Delaney*, 49 Cal. 76; *Payne v. Payne*, 18 Cal. 292; *Norris v. Harris*, 15 Cal. 255, 256; *Larco v. Casaneuava*, 30 Cal. 568; *Estate of Durham*, 49 Cal. 495.

But a different rule prevails where the will confers upon the executor a mere naked power, not coupled with any interest. In such a case, if authority to sell is given by

the will, or the will directs a sale of property, an order of sale by the court is unnecessary, and the executor may sell without such order, in the manner directed by the testator. But if the testator has given no direction in the will, the case comes within the provisions of the probate act, and the sale must be conducted under the orders of the probate court, and in accordance with the statute. *Estate of Durham*, supra. In this case it is not contended that the will confers anything more than a mere power. The executors have so treated it, and have in all respects complied with the statute, except that no notice was given of the sale. But counsel for appellants contend the will authorized the executors to sell without notice if in the exercise of their discretion they determined to sell in that way; that the language of the will, authorizing them to sell "either at public or private sale, in their discretion," left the question of notice as much in their discretion as the question as to whether the sale should be public or private. At the time this will was made the statutes of this territory provided that an executor should give notice of the sale of property, the same as an administrator, unless there were special directions given in the will, in which case he was to be governed by such directions. The present statute provides that the sale may be either "with or without notice, as the testator may have directed;" and that if "directions are given as to the mode of selling, or the particular property to be sold, such directions must be observed." We think, as to the question of notice, there is no material difference in the two statutes. The earlier Utah statute was an exact copy of the California statute in force prior to July, 1874, and the present Utah statute is substantially the same as the California statute which was adopted in that year. Counsel for appellants refer us to *Larco v. Casaneuava*, 30 Cal. 561, and insist that, as we adopted the California statute, the rule there laid down should control the decision in this case. In that case the will contained the following clause: "I hereby appoint my brother, Francisco Casaneuava, my executor of this my last will, with power to sell, dispose of, and convey all my said property, both real and personal, for the benefit of my said sister, without obtaining any order of any court therefor. And I hereby dispense with the necessity of his giving the bonds required by law for the faithful execution of the trust hereby created." In that case it will be seen that the power conferred was upon the person named; that he was authorized to convert the entire estate into money, and reduce it to his possession. The court in that case substantially held that it was a power coupled with an interest, and that, taking it altogether, it was apparent that he intended to take the execution of his will wholly out of the possession of the probate act, and that it was unnecessary for him to apply to the court for authority to sell, or ask the court

to confirm the sale after it had been made. If the will in this case should be construed the same as the will in that case, then the order of confirmation now sought to be obtained would be unnecessary, as the executors could proceed wholly independent of the probate court. But in the later case of *Estate of Durham*, 49 Cal. 495, which arose under the former statute of California, which was identical with our earlier statute, and substantially the same as our present probate act, the court say: "When, therefore, the will creates a naked power,—a power not coupled with an interest,—the executors must give notice of the sale, return accounts thereof, and, unless there are special directions in the will, must conduct the sale in all respects as if made under the order of the court."

In this case we must presume the testator made his will in view of the provisions of the statute in force at the time he wrote it. He devised his property in fee to his children, and conferred upon his executors the mere power to sell as much of his property as might be necessary to carry out the provisions of the will, and authorized them to sell at either public or private sale, in their discretion, but gave them no other discretion in the conduct of the sale, and gave no discretion as to how the sale should be conducted. He did nothing indicating an intention to take the execution of his will out of the probate act. The power to sell his property is conferred upon his executors, whoever they may be, and is not conferred upon the executors in this will by name. The appointment of the executors is in a separate and independent provision. He must have made it with the understanding that whoever executed the will would be required to comply with the provisions of the probate act, and that it would be under the supervision of the probate court. It is reasonable to conclude, when he authorized the executors to sell at public or private sale, he meant the kind of private sale provided for in the statute, and which required that notice should be given. If he had intended that these sales might be made without notice, it is reasonable to conclude he would have so stated. We are of the opinion that the will in this case confers a mere naked power upon the executors; that it authorizes them to determine whether sales of property shall be at public or private sale; but that, in whichever way they proceed, the sale must be conducted pursuant to the statute, and, the statutory notice not having been given of the sales in controversy, they are invalid. The judgment of the district court is affirmed.

ZANE, C. J., and BLACKBURN, J., concur.

(6 Utah, 376)

SMITH *et al.* v. PHILLIPS.

(Supreme Court of Utah. April 12, 1890.)

IRRIGATION—APPORTIONMENT—DECREE—UNCERTAINTY.

In an action to apportion the waters of a stream, where it is agreed between the parties

that defendant has an interest therein, but there is a controversy as to the extent of his interest, a decree that defendant have the use of "one good irrigation stream of water" for a certain length of time is fatally defective, for uncertainty in the quantity of water to which defendant is entitled.

Appeal from first district court; J. W. JUDD, Judge.

Booth & Wilson and *J. G. Sutherland*, for appellant. *Sutherland, Thurman & King*, for respondents.

HENDERSON, J. This action was brought in the first district court to obtain a decree defining the rights of the parties in and to the waters of Dry creek, and to apportion said waters among the several owners thereof. The complaint is filed by the plaintiff in his own behalf, and in behalf of other parties interested in, and entitled to the use of, waters from said creek. The defendant answered. The cause was brought to trial, and a decree entered. A finding of facts was expressly waived by both parties. No motion was made for a new trial, or bill of exceptions settled. The defendant appeals from the decree, and asks this court to set it aside upon two grounds, viz.: *First*, that the complaint does not state a cause of action; *second*, that the decree is erroneous for uncertainty.

As to the first claim, that the complaint does not state a cause of action, the defendant answered the complaint without objection, and we think it is sufficient to give the court jurisdiction. We do not deem it necessary to further notice this objection, as the case must go back to the district court, where amendments may be allowed.

As to the second claim, that the decree is erroneous for uncertainty, the decree provides for the defendant's rights as follows: "It is therefore ordered, adjudged, and decreed, and the court does hereby adjudge and decree, that defendant shall have the use of one good irrigation stream of water of said Dry creek sixty hours out of every sixteen days, to be measured out, distributed to him, and his use thereof regulated, by the water master. * * *" The decree gives the balance of the water in the creek to the parties interested other than defendant. A judgment or decree should be in plain and intelligible language, and the property which is the subject of judgment should be described with sufficient certainty to leave its identity free from doubt. *Jones v. Belt*, 2 Gill, 106; *Freem. Judgm.* § 50. We think this decree is fatally defective for want of certainty. Looking to the complaint and answer, we see that the parties agreed that the defendant had an interest in the waters of Dry creek. They only disagreed as to the extent of that right, and the court was asked to decree with certainty their respective rights. Respecting the time of use, it has done so, but as to quantity it is still uncertain. What one person might consider a "good irrigation stream" might by another be considered a very poor one. The statute (Comp. Laws 1888, p. 135,

§ 2782) provides as follow: "A right to the use of water may be measured by fractional parts of the whole source of supply, or by such fractional parts with a limitation as to periods of time when used, or intended to be used; or it may be measured by cubic inches, with a limitation as to periods of time when used, or intended to be used; or it may be measured by cubic inches, with a limitation specifying the depth, width, and declination of the water at point of measurement, and, if necessary, with a further limitation as to periods of time when used, or intended to be used." The statute does not affix to the term "irrigation stream" a definite and certain meaning; and we have not been referred to anything, of which this court can take judicial knowledge, that does. The decree should be reversed, with costs, and the cause remanded to the district court.

ZANE, C. J., and BLACKBURN and ANDERSON, J.J., concurring.

(6 Utah, 378)

CITY OF SPRINGVILLE v. HOLLEY.

(Supreme Court of Utah. April 12, 1890.)

Appeal from first district court; J. W. JUDD, Judge.

Booth & Wilson and J. G. Sutherland, for appellant. Sutherland, Thurman & King, for respondents.

HENDERSON, J. The opinion of the court just handed down in the case of Smith v. Phillips, ante, 932, is decisive of this case; and for the reason set forth in that opinion the judgment and decree of the district court in this cause should be reversed, and the cause remanded.

ZANE, C. J., and BLACKBURN and ANDERSON, J.J., concur.

(9 Mont. 381)

In re THOMPSON.

(Supreme Court of Montana. March 27, 1890.)

HABEAS CORPUS—JUDGMENT—CONDUCT OF TRIAL.

1. On a trial for rape, defendant's counsel, at the close of the evidence for the state, asked for an instruction to acquit. This was denied, but the court said that, the state having failed to make out their case, "you may find a verdict of not guilty." The jury, however, returned a verdict of guilty. Defendant's counsel was then asked if he had any objection to the discharge of the jury. He asserts that he answered, "I have," but the court understood him to say, "I have none," and thereupon discharged the jury. Defendant's counsel then demanded that he be allowed to introduce his evidence, which was refused, and sentence pronounced. *Held*, that these proceedings were not such that defendant can claim he had no trial, and that whatever irregularities and errors occurred at the trial cannot be inquired into on *habeas corpus*.

2. An objection that the verdict was opposed to the charge that the state had not made out its case is equivalent to claiming that the verdict was not sustained by the evidence, in which case the remedy is by writ of error, and not by *habeas corpus*.

3. In case of misunderstanding between the court and counsel as to what occurred at the trial, the reviewing court is bound by the bill of exceptions.

On petition for a writ of *habeas corpus*.

The defendant was indicted in the fifth judicial district for rape. He was placed upon

trial before a jury. After the state had produced all the testimony at its command, the defendant asked the court to peremptorily instruct the jury to acquit. The court declined to give the instruction, in terms, as requested, but gave the following: "The state having failed to make out their case, gentlemen of the jury, you may find a verdict of not guilty." The jury then retired to consider their verdict. At no time before their retirement did defendant produce or offer any evidence in his defense. The jury returned the following verdict: "We, the jury, do find from the evidence produced by the state that the defendant, Thompson, is guilty of the crime charged in the indictment, notwithstanding the instructions of the court." After the rendition of this verdict the court asked counsel if they had any objections why the jury should not be discharged. Counsel for defendant asserts that he replied "I have." The court understood him to say, "I have none," and discharged the jury. Then defendant's counsel demanded that the trial proceed, and that he be allowed to introduce testimony in his behalf. This the court denied, and sentenced the defendant to imprisonment in the penitentiary. The defendant, the petitioner herein, seeks a writ of *habeas corpus*, and asks for his discharge from the imprisonment, the result of such sentence. By the petition, and from the bill of exceptions used upon the hearing, the above facts were presented to this court.

R. B. Smith, for petitioner. Henri J. Haskell, Atty. Gen., for the State.

DE WITT, J., (after stating the facts as above.) The petitioner purports not to contend that the writ of *habeas corpus* is a writ of error. He announces his position to be that the judgment of the district court, by virtue of which he is confined, is null and void. If this be correct, the writ lies. The fifth district court was a court of competent criminal jurisdiction. It had jurisdiction of the person of the defendant, and of the offense. It had jurisdiction to pronounce the judgment in question. The petitioner is in custody upon a final judgment of a competent court. The statute of the state upon the subject of *habeas corpus* has the following provisions: Comp. St. div. 5: "Sec. 1182. It shall be the duty of such judge, [or court before which the petitioner is brought,] if the time during which such party may be legally detained in custody has not expired, to remand such party, if it shall appear that he is detained in custody by virtue of the final judgment or decree of any competent court of criminal jurisdiction, or upon any process issued upon such judgment, or decree or in cases of contempt of court. Sec. 1183. If it appear upon the return of the writ of *habeas corpus*, that the prisoner is in custody by virtue of the process from any court in the territory, [state,] or judge or officer thereof, such prisoner may be discharged in [any] of the following cases, subject to the restrictions of the last preceding section."

* * * *fourth*, when the process, though proper in form, has been in a case not allowed by law; * * * *sixth*, where the imprisonment is not authorized by any judgment, order, or decree of any court, nor by any provision of law." The petitioner relies upon the above laws. His argument may be stated in two points: *First*, the judgment is void because there never was any trial; *second*, the court having decided that the evidence was legally insufficient, the verdict of the jury contrary to such decision is void, and consequently the judgment.

We will examine the first proposition. The statute declares the common law, and defines what a trial is. Criminal Practice Act: "Sec. 307. The jury being impaneled and sworn, the trial shall proceed in the following order: *First*, the attorney prosecuting must state the case, and offer the evidence in support of the prosecution; *second*, the defendant or his counsel may then state his defense, and offer evidence in support thereof." Other provisions follow, which are not here material. The petitioner contends that the proceedings in the district court which resulted in the judgment lacked a vital element of a trial, in that defendant was deprived of testifying or producing witnesses in his own behalf, and that therefore there was no trial as contemplated by law, and consequently no verdict or judgment. The defendant was not precluded by the court from making his defense. At the close of the case for the state, defendant offered no evidence, as allowed by subdivision 2, § 307, *supra*. He was not obliged to testify or offer witnesses. He submitted his case, as he had the right, upon what he may have considered the weakness or the failure of the prosecution. The practical result of the defendant's asking the court to instruct the jury to acquit, and the final action of the jury, was that the defendant lost his opportunity to testify and offer witnesses in his behalf.

Again, the petitioner urges that he was precluded from offering evidence, upon his demand so to do, after the jury had rendered their verdict. There seems, from the bill of exceptions, to have been some misunderstanding between the judge and the defendant's counsel as to the discharge of the jury,—a misunderstanding which, we take occasion to say, was thoroughly honest on each side. The judge understood counsel to consent to the discharge. Counsel claims that he objected, however, in these words: "I have." This is not a good objection. See *City of Helena v. Albertose*, 8 Mont. 499, 20 Pac. Rep. 817. This court, however, is bound by the recollection of the judge below, who certifies the bill of exceptions, unless the same be amended as provided by section 328, Crim. Prac. Act, and section 291, Code Civil Proc. *Hale v. Ditch Co.*, 2 Mont. 498. It is clear that defendant's demand to introduce his tes-

timony was subsequent to the discharge of the jury. When the verdict is rendered and recorded, and the jury discharged, the jury is *functus officio*. Prior to that time the verdict is within the control of the jury, in some respects. After those events the province of the jury is exhausted. The verdict cannot then be changed in substance. This view does not conflict with the power of the court to amend a verdict as to informalities. *Walters v. Junkins*, 16 Serg. & R. 414; *McConnell v. Linton*, 4 Watts, 357; *Bishop v. Mugler*, 38 Kan. 145, 5 Pac. Rep. 756; *Root v. Sherwood*, 6 Johns. 68; *Settle v. Alison*, 8 Ga. 201; *State v. Waterman*, 1 Nev. 551; *Snell v. Navigation Co.*, 30 Me. 337. If the verdict, when once the record of the court, cannot be changed in substance or materiality, then, *a fortiori*, a verdict cannot be ignored, and the jury allowed to reopen the case, and hear further testimony, which a party did not choose to present on the trial, at the time when he had opportunity so to do. To countenance such a practice would be to allow every party in an action, criminal or civil, to submit his case on what he might deem his chances of success, and, if the verdict was not to his liking, come back with further evidence. We are of opinion that petitioner did have a trial. We cannot on this hearing inquire what irregularities or errors occurred thereat.

As to petitioner's second point, that the verdict is null and void because contrary to the decision of the trial court that the evidence was insufficient, it is tantamount to the assertion that the verdict and the consequent judgment are void because the verdict is contrary to the evidence and instructions of the court. The remedy for such alleged error is a motion for a new trial. This court, on *habeas corpus*, cannot inquire into such matters. If it could, the writ of *habeas corpus* would perform all the functions of appeal, writ of error, motion for a new trial, and *certiorari*. Such is not the practice.

The propositions presented in this application are by no means new. There is a rich and abundant legal literature upon the subject. We refer to a few of the cases sustaining our views: *Ex parte Toney*, 11 Mo. 662; *Ex parte Winston*, 9 Nev. 71; *Ex parte Lange*, 18 Wall. 163; *Ex parte Reed*, 100 U. S. 13; *Ex parte Siebold*, Id. 371; *Ex parte Gibson*, 31 Cal. 620; *Petition of Semler*, 41 Wis. 517; *Ex parte Watkins*, 3 Pet. 193; *Ex parte Parks*, 93 U. S. 18; *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. Rep. 935; *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. Rep. 152; *Ex parte Fuller*, 19 Tex. App. 241; *Ex parte Granice*, 51 Cal. 375; *Ex parte Fisher*, 6 Neb. 309; *State v. Glenn*, 54 Md. 572; *Church, Hab. Corp. c. 25*. The petitioner is remanded.

BLAKE, C. J., and HARWOOD, J., concur.

(21 Nev. 19)

STATE *ex rel.* LOVE v. COUNTY COM'RS OF ELKO COUNTY.

(Supreme Court of Nevada. May 13, 1890.)

STATUTES — AMENDMENT — CONSTITUTIONAL LAW.

Act Nev. Feb. 23, 1887, "relating to and consolidating certain county offices," provides that after the first Monday in January, 1889, district attorneys shall be *ex officio* superintendents of schools in their counties without additional compensation. Act March 11, 1885, fixing the compensation of officers of Elko county, was amended by Act March 5, 1887, so far as it fixed the compensation of sheriff, so as to give him a salary of \$4,000, and the provision giving the district attorney \$2,000, and the superintendent of schools \$600, was re-enacted. *Held*, that the act of March 5, 1887, being passed for the sole purpose of changing the compensation of the sheriff, did not repeal Act Feb. 23, 1887, as Const. Nev. art. 4, § 17, provides that no act can be "amended by reference to its title only, but in such case the act as revised or section as amended shall be re-enacted and published at length."

Mandamus.

R. M. Clarke and W. C. Love, for relator.
J. A. Plummer, for respondents.

HAWLEY, C. J. This is an application for *mandamus* to compel respondents to act upon relator's claim for \$50 for one month's compensation as county superintendent of schools. In 1885 the legislature passed "An act regulating the compensations of county officers in the several counties of this state, and other matters relating thereto," approved March 11, 1885. Section 5 of this act fixed the compensation of all the county officers of Elko county, and, among other things, provided that the sheriff "shall receive such fees as are allowed under the provisions of an act * * * approved February 27, 1883." (St. 1883, p. 56;) that "the district attorney shall receive two thousand dollars per annum," and that "the superintendent of schools shall receive six hundred dollars per annum," (St. 1885, p. 86.) In 1887 the legislature passed "An act relating to and consolidating certain county offices in the state of Nevada," approved February 23, 1887. This act reads as follows: "Section 1. On and after the first Monday in January, A. D. 1889, the district attorneys, in addition to their respective duties, shall be *ex officio* superintendent of schools within their respective counties, without additional compensation. Sec. 2. There shall be no county superintendent of schools elected in this state, except as provided in section one of this act. Sec. 3. All acts and parts of acts in conflict with the provisions of this act are hereby repealed." St. 1887, p. 73. At the same session the legislature, to-wit, March 5, 1887, amended section 5 of the act approved March 11, 1885, in so far as it fixed the compensation of sheriff, so as to read that "the sheriff of Elko county shall receive four thousand (\$4,000) dollars per annum, which sum shall be compensation in full for all services rendered," and re-enacted the original clauses relating to the offices of district attorney, superintendent of schools, and other offices. St. 1887, p. 125. Relator was elected district attorney at the

general election held in 1888. His term of office commenced on the first Monday in January, 1889, and he then became, under the provisions of the act approved February 23, 1887, *ex officio* superintendent of schools of Elko county. He claims that under the provisions of the amendatory act approved March 5, 1887, he is entitled, in addition to his compensation as district attorney, to a salary of \$600 per annum as superintendent of schools.

At the time of the passage of the original act of March 11, 1885, the office of superintendent of schools was an elective office, independent, separate, and distinct from the office of district attorney. There is no conflict between the two statutes passed in 1887. The act approved February 23d consolidated the offices of district attorney and superintendent of schools. It provided that they should, after the first Monday in January, 1889, be held by one person to be elected as district attorney, and to receive the compensation allowed by law to that office, and, in addition to his duties as district attorney, to perform the additional duties of superintendent of schools, "without additional compensation." The subsequent amendatory act, approved March 5th, has no reference whatever to the subject-matter of the prior act of February 23d, but relates exclusively to the act approved March 11, 1885, and was passed for the sole purpose of changing the compensation of the sheriff from fees to a salary. Under the constitution of this state, no act of the legislature could be "amended by reference to its title only, but in such case the act as revised, or section as amended, shall be re-enacted and published at length." Article 4, § 17. In order to make the desired change in the compensation of the sheriff, the legislature, in pursuance of this constitutional provision, re-enacted all the other provisions contained in section 5 of the act of March 11, 1885. The object and purpose of the act of March 5, 1887, being entirely foreign and distinct from that of the act of February 23, 1887, it necessarily follows that the claim of relator that the amendatory act of March 5th, being the later act, repealed the former act of February 23d, requiring the district attorney to perform the duties of superintendent of schools without compensation, by implication, is utterly devoid of any merit whatever. The intention of the legislature in the passage of these acts is so clear, plain, positive, and certain that a reference to the statutes is all that is needed to decide the question.

Mandamus denied.

MIX v. SAN DIEGO & C. RY. CO. *et al.*
(No. 13,629.)

(Supreme Court of California. March 15, 1890.)

In bank. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

S. C. McCormick, Cassius Carter, and Leovy & Humes, for appellant. Hunsaker & Britt, for respondents.

PER CURIAM. Motion to dismiss appeal because the transcript was not filed in time. The transcript was not filed in time, and no sufficient excuse for the failure to file it in time is given. Appeal dismissed, but without prejudice to the right of appellant to take a new appeal from the judgment, if he shall be so advised.

(83 Cal. 563)

MILLER v. RICHARDS. (No. 13,771.)

(*Supreme Court of California.* April 17, 1890.)

APPEAL—NOTICE.

Plaintiff purchased land under a decree of foreclosure, and assigned the certificate of sale to L. Before expiration of the time for redemption, the court, on motion of plaintiff, vacated the decree and sale, and allowed an amendment of the complaint, to bring in another party. L. filed his complaint in intervention, and afterwards defendant appealed from the order vacating the decree and sale without serving notice of the appeal on L. *Held*, that the appellate court acquired no jurisdiction, since L. was an adverse party, within the meaning of Code Civil Proc. Cal. § 940, requiring notice of appeal to be served on the adverse party.

In bank. Motion to dismiss appeal.

Scarborough & Waterman and C. C. Stephens, for appellant. *Miller, Richards, Dooner & Burdell*, for respondent.

BEATTY, C. J. This is a motion by intervenor to dismiss the defendant's appeal upon the ground that the notice of appeal was not served upon him. The facts are that plaintiff obtained a decree of foreclosure upon a mortgage made by defendant, and the mortgaged premises were sold under the decree, plaintiff being the purchaser. The certificate of sale was assigned by plaintiff to the intervenor. Before expiration of the time for redemption, it was discovered that the decree of foreclosure was ineffectual by reason of the fact that a grantee of the mortgagor had not been made party to the suit. Thereupon the court, on motion of plaintiff, vacated the decree and sale for the purpose of allowing an amendment to the complaint, making the grantee of the mortgagor a party defendant. After this order was made the intervenor was allowed to file his complaint in intervention. After notice of the intervention, defendant attempted to appeal from the order vacating the decree and sale, but he served his notice on the plaintiff only, omitting to serve the intervenor.

We think the motion to dismiss should be granted. From the time of filing his complaint the intervenor became a party to the action, and his interests would be directly and adversely affected by a reversal of the order appealed from. It was, therefore, necessary to serve the notice of appeal on him in order to give this court jurisdiction. Code Civil Proc. §§ 938, 940,¹ and notes to Deering's Edition. Appeal dismissed.

We concur: **FOX, J.; SHARFSTEIN, J.; MOFARLAND, J.**

¹Section 940 requires notice of an appeal to be served on the adverse party.

DICKERSON v. BURLINGTON & M. R. R. Co.
IN NEBRASKA.

(*Supreme Court of Kansas.* May 10, 1890.)

SERVICE OF SUMMONS ON RAILROAD COMPANY—RETURN.

A return upon a summons against a railroad company that it was "served by delivering a copy thereof, with the indorsements thereon duly certified, to Mr. Fish, agent of the within railroad company," is of itself no sufficient evidence of service, as it contains no description or hint of the character of his agency. The case of *Railroad Co. v. Pillsbury*, 29 Kan. 652, cited and followed.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Atchison county; **D. MARTIN**, Judge.

S. H. Glenn, for plaintiff in error. **W. W. & W. F. Guthrie**, for defendant in error.

SIMPSON, C. This action was originally commenced by Dickerson against the Burlington & Missouri River Railroad Company in Nebraska, to recover damages for killing stock on its line through the plaintiff's farm in Atchison county. It was commenced before a justice of the peace in the city of Atchison. A summons was issued and returned. The service, as shown by the return, is as follows: "Received this writ July 20, 1887. July 20, 1887, served the same by delivering a copy thereof, with the indorsements thereon, duly certified, to Mr. Fish, agent of the within railroad company." The railroad appeared by its attorney only for the purpose of the motion, and moved to set aside and quash the summons for the reason, among others, that the return of said summons is informal, defective, and insufficient in law. This motion was overruled, the case tried, and a judgment rendered in favor of Dickerson. The case was then taken on error to the district court, and the judgment of the justice reversed, for the reason, among others, that there was no legal service of summons. From this judgment of reversal by the district court Dickerson brings the case here.

1. The important question is, was there a legal service of the summons? We regard the case of *Railway Co. v. Pillsbury*, 29 Kan. 652, as conclusive on this question. The court say: "The return on the summons shows that it was served by delivering a copy thereof 'to D. W. March, agent of said U. P. R. R. Co., Manhattan, Kansas.' Where this was served, or what kind of an agent of said defendant said D. W. March was, is not shown. Such service is insufficient. It does not show that said March was president or chairman of the board of directors, or other chief officer, cashier, treasurer, secretary, clerk, or managing agent, and is therefore not good, either under section 68, c. 80, Comp. Laws 1879, or section 13, c. 81, Id. Neither does it show service upon any person named as the service agent of a railroad corporation under sections 68, 68a, 68b, and 68c, c. 80, Id., or upon any person authorized to receive service in case of a failure by a corporation to

name such service agent, or at a place designated in such sections. For aught that appears, said March may have been an agent to purchase coal, or to transact any temporary business on behalf of the company, with no office or residence in the county. The sections above referred to provide ample and easy means for service upon a railroad corporation. * * * The record must affirmatively show that, in some of the ways named in the statute, service has been made." We can add nothing to the force of this decision. It controls this case. Here the return shows service upon Mr. Fish, agent, without any description or hint of the character of his agency.

2. It is claimed that, because the attorneys of the railroad company subsequently took part at the trial of the case, they made a general appearance, and cured all defects in the service of the summons. They first made a special appearance for the purpose of testing the validity of the service, and, their motion to set aside the service and to quash the summons being overruled, they took part at the trial under protest. This was not such an appearance as would give the justice jurisdiction over the person of the railroad company. *Bentz v. Eubanks*, 32 Kan. 321, 4 Pac. Rep. 269. It is recommended that the judgment of the district court of Atchison county be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 151)

HARDESTY v. BALL.

(Supreme Court of Kansas. May 10, 1890.)

WATER-RIGHTS — MILL-DAMS — ACTION BY UPPER PROPRIETOR.

Section 14, c. 66, Comp. Laws 1885, does not apply to actions for the recovery of damages where the upper proprietor, who has actually built, and has in operation, a mill and mill-dam, seeks to have the dam of the defendant abated or lowered on account of being an obstruction or nuisance, and has commenced, within two years after the completion of the dam of the defendant, an action to abate or lower it.

(Syllabus by the Court.)

On rehearing. For former opinion, see 22 Pac. Rep. 1095.

Garver & Bond, A. G. Hardesty, and D. Ritchie, for plaintiff in error. *Thompson & Midgley and Ellis & Ellis*, for defendant in error.

HORTON, C. J. Upon the rehearing of this case, our attention has been particularly called to the petition, which shows that, in the action commenced on the 5th of December, 1883, Hardesty considered the obstruction of the mill-dam erected by Ball to be a temporary obstruction or injury only, and prayed for an injunction to restrain the maintenance of the dam at such height as to back-flow the water upon his mill. In the action commenced on the 8th of April, 1887, Hardesty also considered the obstruction of

the mill-dam as a temporary injury only, and subject to abatement. If the plaintiff had chosen to consider the obstruction of the mill-dam as a permanent injury to the property, section 14, c. 36, Comp. Laws 1885, would have had full application. As, however, he commenced his action to abate the dam on the 5th of December, 1883, less than two months from the time the dam was completed, it is not fair or just to say he ever considered the dam a permanent or lasting obstruction. If he shall succeed in having the dam abated or reduced in height so as not to back-flow water upon his own mill, of course, the obstruction complained of cannot be called permanent. In this view of the case, said section 14, has no application. That section applies to such dams as are constructed under the statute, and to such dams as are considered permanent and lasting; not to those dams in which proceedings are brought within the two years after their completion for abatement or removal. The plaintiff had the privilege to consider the dam a temporary injury only, and in both actions he has sued for the special or temporary damages which have occurred as a temporary obstruction or nuisance. In the first action he recovered damages to the date of the trial of the case, in 1885. His last action is for the special or temporary damages which have occurred since that date. *Railroad Co. v. Andrews*, 26 Kan. 702; *Akin v. Davis*, 11 Kan. 580; *Hendricks v. Johnson*, 6 Port. (Ala.) 472; *Trust Co. v. Cuppy*, 26 Kan. 754; *McCoy v. Danley*, 20 Pa. St. 85; *Stadler v. Grieben*, 61 Wis. 500, 21 N. W. Rep. 629; *Railway Co. v. Muhlman*, 17 Kan. 231; *Railway Co. v. Schaffer*, (Ill.) 16 N. E. Rep. 239. It would be unfair to the plaintiff, when he has treated in both his actions the dam as a temporary injury only, and as he has an action now pending to abate or remove a part of it, to say he has chosen to consider the dam a permanent and lasting injury to his mill. The prior decision of this court was rendered with the view that the dam was a permanent obstruction, and therefore within the statute of limitations of said section 14, c. 36. In *Railway Co. v. Muhlman*, supra, this court ruled that, "where one creates a nuisance, and permits it to remain, so long as it remains it is treated as a continuing wrong, and giving rise, over and over again, to causes of action. But the principle upon which one is charged as a continuing wrongdoer is that he has a legal right, and is under a legal duty, to terminate the cause of the injury." In *Trust Co. v. Cuppy*, supra, Mr. Justice VALENTINE, speaking for this court, said: "The wrong committed by the defendants * * * was in the nature of a nuisance, and a continued nuisance; and while, possibly, the plaintiff might at any time have had an action to abate the nuisance, yet he nevertheless had the right to sue at any time after any particular damage was done him for the amount of such damage. It is possible, also, that the plaintiff might have

waived his right at any time to consider the obstruction of the stream as a nuisance, and might have considered it as giving to the defendants a permanent right,—a permanent easement on his land,—and might then have sued the railroad company for the permanent injury to his land, and recovered for the injury * * * as in a condemnation proceeding; but he was not bound to treat the obstruction as an easement, or to waive his right to treat it as a nuisance." As to the right of Hardesty to recovery if the defendant has committed the wrongful acts complained of, see *Akin v. Davis*, 11 Kan. 580; *Hendricks v. Johnson*, 6 Port. (Ala.) 472; *Bigelow v. Newell*, 10 Pick. 348-356; *Cary v. Daniels*, 8 Metc. 466; *Ten Eyck v. Canal Co.*, 18 N. J. Law, 200.

The law as declared in the original opinion filed is fully affirmed; but, on account of the allegations in the petition that, as an action is pending by Hardesty to abate or lower the dam, a portion of the language in the original opinion is misleading, and therefore must be qualified and corrected. The district court, in its discretion, will have ample power to delay the trial of this case until the injunction proceedings recited in the petition are disposed of. The judgment heretofore rendered in this case in this court will be vacated, and the judgment of the district court will be reversed, and cause remanded for further proceedings. All the justices concurring.

(43 Kan. 709)

BERGMAN v. BULLITT et al.

(Supreme Court of Kansas. May 10, 1890.)

TAX-SALES—VALIDITY—REDEMPTION NOTICE.

1. The redemption notice required to be given prior to the execution of the tax-deed, and the proof of publishing and posting the same, should be filed and preserved in the office of the county clerk; and a copy of such notice, certified to by the county treasurer, who has not the official custody of the same, is not receivable in evidence with the same effect as the original, under section 372 of the Civil Code.

2. Presumably, public officers perform their duties as the law requires; and where it is shown that a levy for taxes was made by the board of county commissioners, which under some circumstances would be legal, and under others would be excessive and illegal, it will be presumed, in the absence of evidence showing the existence of conditions that would make it excessive, that the board acted within the law in making the levy, and that it is legal.

(Syllabus by the Court.)

Error from district court, Butler county;
A. L. REDDEN, Judge.

Hallowell & Hume, for plaintiff in error.
J. V. Daugherty, for defendant in error.

JOHNSTON, J. The heirs of H. M. Bullitt, deceased, instituted an action in ejectment against George W. Bergman to recover possession of a part of a lot in Wichita. In an answer and cross-petition, Bergman denied the plaintiffs' right of recovery, and alleged title in himself, which he asked to have quiet-

ed. The cause was tried by the court without the intervention of a jury, and a judgment was given in favor of the plaintiffs, which the defendant alleges is erroneous, and should be reversed. The plaintiffs below relied on a title derived from the general government through various mesne conveyances to H. M. Bullitt, deceased, and to support their action they offered in evidence duly-certified copies of the United States patent and other conveyances in the chain of title. These were certified to be correct copies of the originals that were recorded in the office of the register of deeds. It is contended that there was error in the admission of the copies, for the reason that sufficient proof had not been offered of the loss or destruction of the originals to warrant the admission of secondary evidence of such instruments. These being copies of instruments authorized to be recorded in a public office, and which were recorded in the office of the register of deeds, were admissible in evidence upon proof that the original instruments were not in the possession and control of the party desiring to use the same. Proof that the originals were lost or destroyed was not essential to the admission of the copies. Civil Code, § 372; Gen. St. 1889, par. 1136; *Williams v. Hill*, 16 Kan. 23; *Pfefferle v. State*, 39 Kan. 128, 17 Pac. Rep. 828. There was evidence tending to show that the originals were not in the possession or under the control of the plaintiffs, and it showed beyond controversy that they were not under the control of Julia Bullitt, one of the plaintiffs. She testified that she and her mother had the custody of all the papers of her deceased father, Dr. Bullitt, and that the instruments of which record copies were offered were not among his papers or effects. She stated that she had control of them equally with her mother, and had frequently examined them, but that the originals could not be found; and, further, that she was in a position to know that the other plaintiffs did not have them in their control or possession. There was certainly sufficient proof to show that the originals were not under the control of this plaintiff, and hence they were admissible as to her. Even if it should be conceded that no sufficient showing had been made that the other plaintiffs did not have the control of the originals, there would still be no available error, as no sufficient objection was made to the testimony, nor any request to limit the application of the testimony to the party for whom it was unquestionably competent. It has been decided that a general objection to testimony, as to one of several joint parties, but not as to another, is not sufficient. *Taylor v. Deverell*, ante, 628.

Bergman claimed title under a tax-deed, which was assailed by the opposing parties upon the grounds—*First*, that there was no sufficient redemption notice; and, *second*, that the levy of taxes for which the property in dispute was sold, was in excess of that allowed by law. It was conceded that no copy

of any redemption notice for the property in question was then on file in the office of the county clerk; and, for the purpose of showing that no such notice was given, there was offered in evidence a copy of a redemption notice, dated November 21, 1876, certified to by the county treasurer, reciting that certain tracts of land situated in Sedgwick county, which were sold in May, 1874, for the delinquent taxes and charges for the year 1873, would be conveyed on and after May 5, 1877, unless previously redeemed. The lot in question should have been embraced in the notice given at this time, but it did not appear in this certified copy. There was no publisher's affidavit attached to the certified copy, nor any statement showing that it had been published. The notice purports to have been given in 1876, and the treasurer, who was in office in October, 1887, certifies it to be a true and correct copy of a list and notice which was then in his office, and a part of the files thereof. The plaintiffs below produced a witness, whose testimony was received over the objection of the defendant, who stated that he had examined the files of the Wichita Weekly Eagle, which had a contract for all the county printing for the year 1876, and that the certified copy was a true and exact copy of a notice found in the files of that paper, and that he found no other or different redemption notice of lands for tax-sales was published by the Wichita Weekly Eagle for that year; and he further gave a statement, made by one of the publishers to the witness, in regard to why a part of the affidavit attached to the notice had been erased. Neither the certified copy, nor the testimony of this witness in relation to the same, was competent evidence. To justify the admission of the certified copy of the treasurer, it is contended that, as the statute makes it his duty to give the notice, it is also his duty to keep a record of the notice, and the affidavits or proof that such notice was published and posted; and, being a part of the record of his office, a certified copy of the same is competent evidence, under the provisions of section 372 of the Civil Code. If the law required a notice and affidavit to be deposited and preserved in the office of the county treasurer, their contention would be good. The statute, however, provides that all notices and affidavits with reference to the sale of lands for taxes shall be filed by the county treasurer in the office of the county clerk. Tax Law, § 121. The county clerk is therefore the official custodian of all such papers and proofs, and certified copies of the same made by him are receivable in evidence. The county treasurer, however, not having the official custody of these records, is not authorized to certify, and the copy of the notice which he chanced to find in his office, and which was offered in evidence, should have been rejected. The parties, however, are not foreclosed by the absence of such record evidence in the office of the county clerk. The facts with reference to this redemption

notice may be obtained from the files of the official paper, and from the testimony of the publisher of the same, and they may be shown by still other competent evidence.

To establish that the levy made by the county commissioners for the year 1873 was excessive, and therefore illegal, the plaintiffs below offered the certified copy of the proceedings of the county board, showing that a county levy of 2 per cent. was made for the year 1873. This testimony, standing alone, is insufficient to overthrow the tax-deed. On its face, the deed is regular and valid, and it is *prima facie* evidence that all the steps and proceedings necessary to its validity were duly taken. More than that, it will always be presumed, in the absence of contrary evidence, that public officers have performed their duty as required by law. If the board of county commissioners could not in any event have legally levied 2 per cent. for county revenue, the proof offered might be held sufficient to overcome the *prima facie* character of the deed, and the presumption mentioned that the officers duly performed their duty. The taxable property of Sedgwick county was less than \$5,000,000, and hence the board could not levy a tax for the current expenses of any one year of over 1 per cent. on the dollar of such valuation, unless by a direct vote of the electors of the county. Gen. St. 1868, c. 25, § 181. The language of the resolution of the county commissioners is: "The county levy of taxes for the year A. D. 1873 was placed at 2 per cent. on each \$1.00 valuation." There is nothing in this resolution, nor in the record, showing that the board had not been authorized by a vote of the electors to increase the levy for county purposes; nor is there anything to show that the levy was made for the current expenses of the year 1873 alone; nor that the 2 per cent. levy did not include deficits in the county fund for preceding years, such as are referred to in *Osborne Co. v. Blake*, 19 Kan. 299. The plaintiffs were assailing the validity of the deed on the ground that the property was sold for excessive taxes, and it therefore devolved on them to prove the same. The proof offered by them shows a levy which, under some circumstances, would be legal, and under others would be excessive and illegal; and now they ask the court to place such a construction on the resolution as would make the levy invalid. In construing the acts of public officers, we must give force to the presumption that such officers do their duty, and act within the law; and, unless the acts themselves preclude a favorable construction, they should be so construed as to sustain rather than to strike them down. If the conditions under which a levy of 2 per cent. might be made do not exist, that may be easily shown, but the mere proof that the board levied 2 per cent. on each one dollar valuation is not of itself sufficient to establish that the levy was illegal and excessive. The errors mentioned compel a reversal of the judgment, and the cause

will therefore be remanded to the district court for a new trial. All the justices concurring.

(43 Kan. 746)

EARLYWINE v. TOPEKA, S. & W. RY. CO.
et al.

(Supreme Court of Kansas. May 10, 1890.)

TRESPASS BY RAILWAY COMPANY—DEMURRER—REVIEW.

1. When the demurrer to a petition is sustained, and the plaintiff elects to stand upon his petition and the facts stated therein, and judgment is rendered against him for costs, no motion for a new trial is necessary to have the question of the sufficiency of the petition reviewed in this court.

2. The title to land appropriated by a railway company under the provisions of article 9, c. 23, of the Compiled Laws of 1885, remains in the owner of the soil; and the railway company has the right to remove only so much thereof as may be necessary for the construction and repair of its road.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Morris county; M. B. NICHOLSON, Judge.

B. A. Seaver, W. D. Webb, and J. K. Owens, for plaintiff in error. Waggener, Martin & Orr, and W. A. Johnson, for defendants in error.

GREEN, C. Plaintiff below sued the defendants in error, in the district court of Morris county, for trespass alleged to have been committed upon the line of the right of way of the defendants, and on the land of the plaintiff. The material allegations of the petition are that the defendants own and operate a line of railroad from Council Grove, in Morris county, to Salina; that said road was built in 1882 through the land of the plaintiff; that on or about the 1st of April, 1886, and at divers times since, along and upon the right of way of said railroad, and on plaintiff's land, the defendants dug up and moved large quantities of dirt and soil, and then and there dug, blasted, and quarried large quantities of stone,—2,000 perch,—of the value of \$1,000, and took and carried the same away and from said land, and converted the same to its own use. The claim is made that the defendants are liable for earth and rock taken from the right of way where the defendants have constructed a railroad. A demurrer was interposed to the petition in the court below, which was sustained, and the plaintiff elected to stand on the petition and the facts stated therein; and the court gave judgment for costs against the plaintiff. No motion for a new trial was made.

1. The defendants in error claim that the question of the sufficiency of the petition cannot be reviewed here, because no motion for a new trial was made; that practically there was a trial as upon an agreed statement of facts. We do not think this position is correct. The record is before this court, and we can pass upon the sufficiency of the petition just as well as though a motion for a new trial had been made; and we do not see the reason or object of a motion for a new trial in this case. But one question was

raised by the demurrer. The court decided that question on the petition alone. The plaintiff elected to stand upon his petition, and the facts as therein stated; and the court gave judgment, accordingly, against him. This was a final determination of the case. This court held in the case of Coburn v. Weed, 12 Kan. 182, that an error in a final judgment of the district court was reviewable in this court although no motion to correct the error had been made in that court. Koehler v. Ball, 2 Kan. 160; Lender v. Caldwell, 4 Kan. 290. We think the case is subject to review here.

2. Did the court err in sustaining the demurrer to plaintiff's petition? Whatever rights the defendants below had upon the land of the plaintiff on the right of way were under paragraphs 1890 and 1893 of the General Statutes of 1889, which provide: "Any duly chartered and organized railway corporation may apply to the board of county commissioners of any county through which such corporation proposes to construct its road to lay off along the line of such proposed railroad, as located by such company, a route for such proposed railroad not exceeding one hundred feet in width,—except, for the purposes of cuttings and embankments, it shall be necessary to take more, for the proper construction and security of the road,—through as much of said county as may be desired by such company; and also such land as may be deemed necessary for side tracks, depots, and workshops, and water stations, materials for construction, except timber, a right of way over adjacent lands sufficient to enable such company to construct and repair its roads and stations, and a right to conduct water by aqueducts, and a right of making proper drains. If such company shall cause the copy of the report so certified to be, within ten days after such certifying, filed and recorded in the office of the register of deeds for such county, it shall have the right to occupy the land so embraced within such route for the purposes necessary to the construction and use of its road; and to such portions of such road over which a railroad shall be actually constructed within such time the perpetual use of such lands shall vest in such company, its successors and assigns; for the use of the railroad, as soon as so much of such railroad shall have been constructed fit for use." It would seem from this authority the railway company acquired such an easement with the right of way as would give it the use of such material as would be necessary to construct and repair its road. This court has said in the case of Railway Co. v. Allen, 22 Kan. 285: "An easement merely gives to a railroad company a right of way in the land; that is, the right to use the land for its purposes. This includes the right to employ the land taken for the purposes of constructing, maintaining, and operating a railroad thereon. Under this right the company has the free and perfect use of the surface of the land as far as necessary for all its purposes, and the

right to use as much above and below the surface as may be needed." The doctrine has been stated by Rorer in his work on Railroads, (page 325:) "Though a railroad company may acquire no interest in the fee of the land itself, the use of which is taken for a right of way for its railroad, yet it acquires, with the right of way or easement, the right to so much of the earth, gravel, and stone, trees and timber, within their lines of location, as the company may need for the construction and maintenance of their road, and also to be used in carrying from point to point to supply deficiencies and diminish excesses of each of such material on the road." Now, the petition in this case nowhere alleges that the material the defendants were charged with removing was not necessary in the construction or repair of the road. If it were necessary for the railway company to remove this dirt and stone in the construction or repair of its road-bed, we do not think it would be liable; and, inasmuch as the petition does not allege that it was not necessary, we think it was defective, and the demurrer was properly sustained. It is not necessary for us to decide whether the company would have the right to remove material from one point on its right of way to another, as that question is not properly in this case. The demurrer, we think, was properly sustained; and we, therefore, recommend an affirmance of the judgment of the court below.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 696)

SWEET et al. v. WARD et al.

(Supreme Court of Kansas. May 10, 1890.)

APPEAL—TIME OF TAKING—REVIEW.

1. Where a court of general and superior jurisdiction has jurisdiction both of the subject-matter of the action and also of the parties, no merely irregular or erroneous exercise of its jurisdiction will render its final judgment void; and *held*, that the judgment of the lower court in the present case is not void.

2. After a trial in the district court and judgment in favor of the plaintiff, the plaintiff's petition should be construed liberally, for the purpose of holding that it stated facts sufficient to constitute a cause of action.

3. Where a motion to set aside and vacate a judgment is overruled by the district court, and afterwards the case is taken to the supreme court within one year after the overruling of the motion, but not within one year after the rendering of the judgment, the supreme court may consider the ruling of the district court upon the motion, but not its rulings with reference to the judgment, except so far as such rulings are involved in the ruling upon the motion.

(Syllabus by the Court.)

Error from district court, Rice county; **ANSEL R. CLARK**, Judge.

Rossington, Smith & Dallas, for plaintiffs in error. *M. A. Thompson and J. H. Bailey*, for defendants in error.

VALENTINE, J. This was an action brought in the district court of Rice county on July 8, 1886, by T. J. Ward and James Henderson

against Timothy B. Sweet and the Kansas Loan & Trust Company, to recover the penalty provided for by section 8 of the act relating to mortgages, Gen. St. 1889, par. 3892. On July 24, 1886, the defendants answered, virtually denying and disclaiming having any interest in the mortgage, and alleging that another party had. On July 27, 1886, the plaintiffs filed a motion to require the defendants to amend their answer so as to make it more specific and certain in a certain particular. On September 10, 1886, this motion was sustained by the court, and the defendants required to make the amendments suggested by the plaintiffs, on or before September 14, 1886. This order was not entered upon the journal, however, until February 17, 1887, when it was entered *nunc pro tunc*, and the required amendment to the answer was never made. On January 25, 1887, the case was regularly called for trial. The plaintiff appeared, but the defendants did not at that time make any appearance. A trial was had before the court without a jury, and upon such trial the court made the following special findings of fact, to-wit: "The court finds that the plaintiffs are the owners of the real estate in the petition described, to-wit, Lot No. three of block No. one, in the original town of Lyons, in Rice county, state of Kansas. That the defendants held a mortgage on said real estate as described in plaintiffs' petition, made by W. J. Fuller and Belle C. Fuller, his wife, to the defendant Timothy B. Sweet, dated April 1, 1881, for the sum of seven hundred dollars, and that the same is recorded in the office of the register of deeds of Rice county, state of Kansas, on pages 205, 206, 207, 208, and 209 of volume eight of records of mortgages, and that the plaintiffs had fully paid said mortgage, principal and interest, and had duly demanded of the defendants the cancellation of said mortgage before the commencement of this action, and that the defendants had failed, and still fail and refuse, so to do, and that the record of said mortgage still remains uncanceled of record." Upon these findings judgment was rendered in favor of the plaintiffs and against the defendants, as prayed for in the plaintiffs' petition. On February 1, 1887, the defendants filed a motion, which, omitting title and signature, reads as follows: "Now come said defendants, Timothy B. Sweet and the Kansas Loan and Trust Company, and move the court to set aside the verdict herein, and to arrest and set aside the judgment, because the said petition filed by said plaintiffs in this cause does not state facts sufficient to constitute a cause of action against said defendants, Sweet and the Kansas Loan and Trust Company. (2) For the reason that said defendants filed a disclaimer in said cause of any mortgage interest in this property, and no evidence was introduced on the trial, or could have been introduced, showing that they were mortgagees, or had any interest whatever in or to the property set forth in said plaintiffs' petition. (8) Because

the said plaintiffs do not claim or allege in their petition that the said Timothy B. Sweet or the Kansas Loan and Trust Company had any such mortgage interest or estate whatever; and for other good and sufficient reasons said defendants, Timothy B. Sweet and the Kansas Loan and Trust Company, allege that said verdict was improperly granted, and judgment improvidently rendered in this cause." On May 19, 1887, this motion was heard and overruled by the court, and on February 27, 1888, the defendants, as plaintiffs in error, brought the case to this court for review, making the plaintiffs below defendants in error.

For the purposes of this case, it may be admitted that the judgment of the court below was erroneous and irregular, and that it might have been reversed, vacated, or modified in any proper proceeding commenced and prosecuted within proper time; but no such proceeding was commenced or prosecuted. No motion for a new trial, under section 306 of the Civil Code, was ever made. No proceeding, under section 568 of the Civil Code, to reverse, vacate, or modify the judgment, or any order in the case, was ever instituted. No proceeding, even under section 575 of the Civil Code, to vacate the judgment, for the reason that it was an absolutely void judgment, can fairly be said to have ever been instituted; and no proceeding in error, under section 542 of the Civil Code, was, at any time within one year after the judgment was rendered, instituted in the supreme court, as is required for proceedings in error in the supreme court under section 556 of the Civil Code, and the judgment that was in fact rendered is certainly not a void judgment. The district court had jurisdiction both of the subject-matter of the action and also of the parties, and, while the judgment may have been erroneous or irregular, yet it certainly was not and is not void. In favor of courts of general and superior jurisdiction, it must always be presumed, in the absence of anything to the contrary, that everything that ought to have been done was not only done, but rightly done. Mr. Freeman, in his work on Judgments, § 142, says that "jurisdiction over a party being obtained, continues until judgment, and he must therefore take notice of all the proceedings until that time;" and the same author, in section 135 of the same work, says that "jurisdiction being obtained over the person and over the subject-matter, no error in its exercise can make the judgment void." The motion filed in the present case by the defendants, on February 1, 1887, was not a motion for a new trial, nor was it filed within time for that purpose, but, at most, it can be considered only as a motion to set aside or vacate a judgment claimed to be void. It seems to be claimed by the motion that the petition of the plaintiffs does not state facts sufficient to constitute a cause of action. We think it does, at least if liberally construed, and it must be so construed after trial and judgment. What was defect-

ively stated in the petition, if anything was so stated, must be construed as having been made good by the evidence, finding, and judgment. It must be considered that the evidence cured all the defects of the petition, and supplied all its omissions. The petition, however, stated in detail that the plaintiffs were the owners of the land; that the mortgage had been paid to the Kansas Loan & Trust Company; that such company had full authority to receive the payment, and to release and discharge the mortgage; that Sweet was the president of the company, and was cognizant of and responsible for the action of the company, and that his interests were identical with those of the company; that the plaintiffs demanded of the defendants that the mortgage should be discharged of record, but that they refused to do so. The defendants in their answer deny much of this, and disclaim having any interest in the mortgage, but, after judgment, these denials and disclaimers can amount to nothing. The defendants brought this case to this court within less than one year after their motion was overruled, though not within one year after the judgment was rendered. Hence we can consider the ruling of the court below upon the motion, but not its rulings with reference to the judgment, except so far as such rulings are involved in the ruling upon the motion. We do not think that the court below erred in overruling the motion. The judgment of the court below will be affirmed.

All the justices concurring.

(43 Kan. 714)

UNDERWOOD v. SCOTT.

(Supreme Court of Kansas. May 10, 1890.)

PHYSICIANS—LICENSE—COMPENSATION—PLEADING.

1. A bill of particulars for medical services, which sets out the items of each visit, and a general allegation that the plaintiff is a practicing physician engaged in the practice of medicine, and has been so engaged for 10 years last past, is sufficient.

2. Under chapter 68 of the Session Laws of 1870, an act to protect the people of Kansas from empiricism, and to elevate the standing of the medical profession, it is unlawful for a person to furnish medicine as a practicing physician unless authorized to practice medicine in accordance with the provisions of the statute, and a person so furnishing medicine cannot recover in a civil action for medicine so prescribed as a physician.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Crawford county; GEORGE CHANDLER, Judge.

Van Syckle & Van Syckle, for plaintiff in error. *Fuller & Widby*, for defendant in error.

GREEN, C. This action was commenced in October, 1886, before a justice of the peace of Crawford county, by the plaintiff below, to recover \$25.50 for medical services and medicine furnished. The bill of particulars alleged that the plaintiff was a regular practicing physician engaged in the practice of medicine, and had been so engaged for 10

years. A trial was had before the justice of the peace, and the case was appealed to the district court, where a general demurrer was interposed to the bill of particulars, which was overruled by the court, and excepted to by the defendant. The case was afterwards tried by the court and jury, and a verdict rendered for the sum of \$10. A motion was made for a new trial, which was overruled by the court upon the plaintiff consenting that the verdict of the jury should be remitted to the sum of six dollars. Judgment was accordingly entered for the plaintiff for six dollars and costs. The plaintiff in error brings the case here for review.

The first contention of the plaintiff in error is the overruling of his demurrer to the bill of particulars of the plaintiff, claiming that the bill of particulars alleged only 10 years' practice at the time of the filing of the same, which was on October 23, 1886, while the services claimed to have been rendered by the plaintiff for the defendant were rendered in 1883, and a small portion in 1884; that the plaintiff's pleading showed upon its face that the services for which suit was brought were rendered in violation of law. It does not appear from the record that any question was raised in the justice's court as to the sufficiency of the bill of particulars, and we are inclined to the opinion that it stated facts sufficient to entitle the plaintiff to recover. We think, under the rule laid down by this court for the construction of pleadings in justices' courts, the bill of particulars was good. *Lobenstein v. McGraw*, 11 Kan. 645; *Kaub v. Mitchell*, 12 Kan. 57; *Railway Co. v. Brown*, 14 Kan. 560.

We pass to the principal question in this case, whether the plaintiff was entitled to recover anything for the medicine furnished. This seems to be the vital question in this case, and the discussion of this question involves the construction of the statute passed in 1870 to prevent empiricism, which provides "that it shall be unlawful for any person within the limits of the state of Kansas; who has not attended two full courses of instruction, and graduated in some respectable school of medicine, either of the United States or of some foreign country, or who cannot produce a certificate of qualification from some state or county medical society, and is not a person of good moral character, to practice medicine, in any of its departments, for reward or compensation, for any sick person within the state of Kansas: provided, that in all cases, when any person has been continuously engaged in the practice of medicine for a period of ten years or more, he shall be considered to have complied with the provisions of this act, and that, where persons have been in continuous practice of medicine for five years or more, they shall be allowed two years in which to comply with such provisions." Gen. St. 1889, par. 2450. The fact that the trial court required the plaintiff below to remit a part of the verdict of the jury was evidently done upon the

theory that the plaintiff was only entitled to recover for the medicine furnished, and upon this theory the court instructed the jury: "I may say to you, if you find from the evidence that the plaintiff in this action was not entitled to practice medicine, and that he has offered evidence for the purpose of showing that one-third of his bill, to which your attention has been directed, was for medicine, exclusive of the two-thirds for his services, then he may recover for the medicine, although you find he should not recover for his services." Was this error? Was the furnishing of medicine alone the practice of medicine in any of its departments, within the meaning of the statute cited above? The charge is made in the account, which is a part of the plaintiff's bill of particulars, "for visit and mileage," and also, upon two different occasions, for medicine alone; and the evidence shows that about one-third of the charge was for medicine which the plaintiff below had actually furnished. Can the plaintiff recover for the medicine alone, having furnished it as an attending physician? The statute in question forbids any one from practicing medicine for reward or compensation without having the qualifications prescribed therein. The object of this law, doubtless, was to prevent unauthorized and unqualified persons from practicing medicine in any of its branches. The right to practice the calling of a physician is by this statute taken from certain unqualified persons, and the statute should not be so construed as to give a person the privilege of exercising a right which is in violation of any of its provisions. To hold that a person who furnished medicine as a physician could recover compensation for the medicine so furnished or prescribed would, in our judgment, render the statute nugatory; and any unauthorized person might prescribe for a patient, and simply charge for his medicine, and thus defeat the very object of the law. The practice of medicine may be said to consist in three things: *First*, in judging the nature, character, and symptoms of the disease; *second*, in determining the proper remedy for the disease; *third*, in giving or prescribing the application of the remedy to the disease. If the person who makes a diagnosis of a case also gives the medicine to the patient, he is, in our judgment, practicing medicine, within the provisions of the statute in question; and if unauthorized to practice, or if acting in violation of the provisions of the statute, he is not entitled to compensation for the medicine which he furnishes at the time as a physician. And the instructions of the court which said to the jury that the plaintiff below would recover for the medicine furnished, though he might not have been entitled to practice medicine, was erroneous; and for this reason the judgment of the court below should be reversed. As this construction of the law is decisive of this case, it is unnecessary to consider the other errors assigned by counsel in their brief. We therefore recom-

mend that the judgment of the court below be reversed, and the cause remanded for a new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 699)

MILLS v. MILLS.

(*Supreme Court of Kansas.* May 10, 1890.)

VENDOR AND VENDEE—ACTION FOR PRICE—LIMITATION.

1. As the conflict in the testimony has been settled by the jury, the approval of the verdict by the district court ends the controversy on the facts.

2. Where a cause of action upon an agreement does not accrue until after the death of one of the parties, the statute of limitations will not begin to run on the claim of the estate of the deceased upon such agreement until an administrator or executor authorized to collect or enforce the payment of the claim has been appointed. *Carney v. Havens*, 28 Kan. 82.

(*Syllabus by the Court.*)

Error from district court, Sumner county; J. T. HERRICK, Judge.

Murray & Elliott, for plaintiff in error.
Tom George and Charles Willste, for defendant in error.

JOHNSTON, J. This is an action brought by Lydia R. Mills, as administratrix of the estate of Thomas C. Mills, deceased, against Robert Mills, for the recovery of a part of the purchase price of 40 acres of land situate in Cowley county. On August 3, 1883, Thomas C. Mills, who was then living, and Lydia R. Mills, his wife, executed a deed conveying the land to Robert Mills, the expressed consideration being \$500; but it was sold subject to a mortgage thereon given to secure the sum of \$425, with interest on the amount for about a year at the rate of 8 per cent. per annum. The real controversy between the parties is in regard to the amount of consideration that was to be paid for the land. The deed was executed shortly before the death of Thomas C. Mills, and during his last sickness, and when executed was placed in the hands of a third person to be effective in case Thomas died; but in case of his recovery it was to be returned to the grantors.

Robert Mills claims that, in addition to assuming the mortgage debt, he only was to pay the physician's charges for attending on Thomas, and his funeral expenses, which amounted to about \$145. On the other side it is claimed that Robert Mills was to assume the mortgage, and in addition pay the sum of \$500, less the physician's and funeral expenses, which was the consideration stated in the deed. The expenses of the last sickness and death of Thomas C. Mills were paid by Robert Mills shortly after the death occurred; and the deed which had been placed in the hands of a third party prior to the death was obtained by Robert Mills, and placed on record. There is a sharp conflict in the testimony of the parties in regard to

the consideration agreed to be paid for the land, but the jury has settled this conflict by the award of a verdict in favor of Lydia R. Mills for \$397.71. This result, having been approved by the district court, cannot be rightly interfered with by this court, and must end the controversy on the facts.

The plaintiff in error attempts to raise a question under the evidence as to the delivery of the deed, but this is wholly inconsistent with his own testimony and conduct. All the parties proceeded in the court below upon the theory that the deed had been duly and legally delivered, and that the only question in dispute was the amount of the consideration to be paid. The plaintiff in error obtained the deed from the depository, placed it on record, and under that claims title to the land. There is testimony tending to show a valid delivery, and hence there is nothing substantial in this objection.

The point that the claim was barred by the statute of limitations must also be overruled. While the deed was executed, in 1883, it was placed in the hands of the depository, and was not to be effectual if Thomas C. Mills recovered from his sickness; and therefore the consideration was not due until after his death, nor could any cause of action accrue until administration on his estate was taken out, which was not done until March 23, 1885. The action was brought February 7, 1887, and hence the claim was not barred. *Carney v. Havens*, 28 Kan. 82; Civil Code, § 18. The judgment of the district court will be affirmed. All the justices concurring.

(43 Kan. 704)

GRAY v. CITY OF EMPORIA et al.

(*Supreme Court of Kansas.* May 10, 1890.)

APPEAL—ERRORS NOT APPARENT ON RECORD—INSTRUCTIONS.

1. Where instructions are requested upon the part of the plaintiff, and it appears from the record that the court below instructed the jury in the general charge, upon the issues made by the pleadings, and the evidence is not brought up in the record, this court cannot say it was material error, upon the part of the trial court, to refuse certain special instructions asked for by the plaintiff.

2. Where the testimony is not preserved, this court cannot say that it was error for the trial court to refuse to permit the plaintiff to read certain sections of an ordinance to the jury.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Lyon county; CHARLES B. GRAVES, Judge.

Kellogg & Sedgwick, for plaintiff in error.
J. Jay Buck and E. W. Cunningham, for defendants in error.

GREEN, C. William A. Gray sued the city of Emporia and H. G. Bonham for an injury received on the 28th of April, 1886, while standing on the sidewalk in front of a store, on one of the principal streets of the city, by the falling of a sign owned by the defendant Bonham, which had been suspended over the sidewalk. Negligence was alleged upon the

part of the city and Bonham. The city answered by a general denial, and that it had no knowledge that the sign was unsafe; and, further, that the falling of the sign was caused by an extraordinary wind-storm. The defendant Bonham filed a general denial. Trial was had, and a verdict rendered for both defendants, and the plaintiff brings the case here for review. The contention of the plaintiff is that the court refused to give certain instructions requested by the plaintiff, with reference to the liability of the city as well as Bonham; and, further, that the court refused to permit the plaintiff to read in evidence certain sections of an ordinance of the city of Emporia. The evidence is not preserved in the record. The statement of the case made is that evidence was offered upon the part of the plaintiff to prove the allegations of his petition; and that the defendants upon the trial introduced evidence tending to rebut the evidence introduced by the plaintiff, and tending to prove that the city had no knowledge or notice that the sign in question was in any wise unsafe, and also tending to prove that the falling of the sign was caused by an extraordinary wind-storm, against which no sign could have stood or remained in place. The instructions requested are preserved, as well as the instructions given by the court.

The first instruction asked by the plaintiff, and which was refused by the court, reads: "If the jury believe from the evidence that the sign in question was in a dangerous and unsafe condition at the time of the accident, and had been in such condition for several months prior thereto, and that such condition could have been ascertained by a reasonable examination and inspection thereof, and that no inspection or examination thereof had been made by the city marshal or street commissioner or other officer or agent of the city, then, and in such a case, the city was guilty of negligence in permitting it to so remain suspended over the sidewalk in such unsafe and dangerous condition." We are inclined to the opinion that this states the rule too strongly against the city. The adoption of this principle would make it the duty of the officers of the city to make an inspection of all signs in the city, to see whether they were securely fastened or not; and if no examination was made, and a party was injured, the city would be chargeable with negligence. Before the court would be warranted in giving such an instruction, it should first appear that the placing of the sign in position over the sidewalk was authorized by the city. We cannot say that it was error for the court to refuse the instruction, for the reason that we do not know that it was applicable to the evidence as presented to the jury.

The next error complained of was in refusing to give the following instruction: "Cities, having the powers ordinarily conferred upon them respecting streets and sidewalks within their limits, owe to the public the duty of keeping them in a safe condition

for use, in the usual mode, of travelers, and are liable in a civil action for injuries resulting from the neglect to perform this duty." While this general statement of the duty of the city may be correct in the abstract, we think the court, in the second instruction given, stated the law as fully as embodied in the instruction requested by the plaintiff, and may have been more applicable to the fact as presented to the jury. That instruction is as follows: "It is the duty of every city of the second class, and of the city of Emporia, to use ordinary care to prevent the construction or maintenance of signs which overhang the sidewalks, unless the same are constructed and suspended with ordinary care and skill, considering the dangers of such structures to the public who travel thereunder upon the sidewalks. A failure of the city to exercise this degree of diligence and care would be such negligence as would make them liable for damages which might result therefrom." We cannot see why this does not state the law as correctly as the instruction requested by the plaintiff, and the court was under no obligations to repeat an instruction applicable to any given phase of the case. *Deitz v. Regnier*, 27 Kan. 96.

The next error complained of is in the refusal of the court below to give the following instruction: "If the jury believe from the evidence that the sign in question was in a dangerous and unsafe condition at the time of the accident, and had been in such condition for several months prior thereto, and that such condition could have been ascertained by a reasonable examination and inspection thereof, and that no inspection or examination thereof had been made by the city marshal or street commissioner or other officer or agent of the city, then, and in such case, the city was guilty of negligence in permitting it to so remain suspended over the sidewalk in such unsafe and dangerous condition." Again, we think that the court fully instructed upon this feature of the case in the eighth instruction given, in which the court said to the jury: "If you believe from the evidence that the sign in question was in a dangerous and unsafe condition at the time of and previous to the injury complained of, and had been in such condition for several months prior thereto, and that such dangerous condition was such as would be apparent upon an ordinary examination and inspection thereof, then it was the duty of the city to have known of such condition, and it is chargeable with negligence in permitting it to remain where it was in such unsafe condition, the same as if the city or its officers had actual knowledge of such condition." The court is under no obligations to give special instructions in the language asked for. *Deitz v. Regnier*, supra.

We pass to the last complaint made by the plaintiff in error, and that is in the refusal of the court to permit the plaintiff to read sections 1 and 6 of one of the ordinances of the city. The record discloses the fact that the

court did permit the reading of section seven of an ordinance with reference to signs. That portion of section 6 which is complained of makes it a misdemeanor for "any person to suspend any obstruction over or across any sidewalk or thoroughfare, so as in any manner to interfere with the free passage over the same." There is no evidence to show whether this ordinance was passed before or after the erection of this sign. The section admitted referred to signs. These sections referred to other obstructions. To have made these sections competent, the evidence should have shown that this sign in question was an obstruction, and there is nothing in the record to show that fact. It would hardly be safe to assume that this sign was an obstruction upon the sidewalk. Sections 1 and 6 referred to other things than signs as obstructions, and we see no error in the court refusing to permit the reading of these sections.

We have carefully examined the record in this case, the instructions asked by the plaintiff and refused by the court, and the instructions given by the court, and see no error in the record as presented to us. The evidence not being preserved, we assume that the instructions that the court did give were applicable to the issues joined and to the evidence as introduced at the trial of the case. There being no error apparent in the record, we recommend that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered. HORTON, G. J., and JOHNSTON, J., concurring.

VALENTINE, J. I concur in the decision in this case, but not wishing to be misunderstood, I would say that as the absolute title to all the streets of cities in the state of Kansas is in the public, and no title to such streets is in the abutting lot owners, and as streets are dedicated or created by condemnation proceedings to be used only as streets, I do not think that any city has the legal right or power to grant to any person any privilege to use the streets for any purpose except as streets; that is to use them only for the purpose of travel and transportation and matters incident thereto, including all the ordinary modes of travel and transportation, ordinary railways, street railways, water, gas, electricity, and perhaps some other things.

(44 Kan. 12)

CALDWELL v. MILLER *et al.*

(Supreme Court of Kansas. May 10, 1890.)

PUBLIC LANDS—PATENT—ILLEGITIMATE CHILDREN.

1. Where a party entitled to the benefits of the pre-emption laws of the United States makes a pre-emption filing in this state, but dies before consummating his claim, and his administrator files the necessary papers to complete the same, and upon payment for the land obtains from the United States a patent granting the land unto the "heirs of the deceased pre-emptor," the word "heirs" in the patent is to be construed with reference to the laws of this state; and whoever, under the laws of this state, would have inherited from the de-

ceased pre-emptor, are the persons to whose benefit the land granted by the patent inures.

2. Under the statutes of Kansas, illegitimate children inherit from the father, the same as the legitimate children, when such illegitimate children have been generally and notoriously recognized by him as his own.

3. On the 10th of July, 1871, T. made a pre-emption settlement upon a quarter section of land in Reno county. He died before consummating his claim to the pre-emption. The administrator of his estate completed the pre-emption, and on the 20th of April, 1874, obtained a patent from the United States to the land. The patent granted unto the said heirs of T., deceased, (the dead pre-emptor,) and to their heirs, the tract pre-empted. T., at the time of his death, had living a legitimate child, and also illegitimate children whom he had generally and notoriously recognized as his own. *Held*, that the word "heirs" in the patent included the illegitimate children as well as the legitimate child.

(Syllabus by the Court.)

Error from district court, Reno county; L. HOUK, Judge.

On the 30th day of June, 1885, John Caldwell brought his action to have his title established to, and to recover possession of, the N. E. $\frac{1}{4}$ of section 12, township 28 S., range 6 W., in Reno county. On January 24, 1887, the case was submitted to the court: a jury being waived. The court was requested by both parties to find separately the facts and law. After hearing all the testimony the court took the case under advisement until the 6th of April, 1887. At that time the court made and filed the following findings of fact:

"*First*. That on January 1, 1809, one Robert Titus, mentioned in plaintiff's petition, was lawfully married at Sudbury, in Rutland county, Vt., to one Phoebe Thomas, and that in October, A. D. 1810, there was born as the issue of that marriage a son, Alden Wheeler Titus, who was the only issue of that marriage. *Second*. That, after the birth of said son, Alden Wheeler Titus, the said Robert Titus abandoned his said wife and son, and went into the war of 1812, and never lived with them any more. *Third*. That said Robert Titus went from said war to East Bloomfield, in Ontario county, in the state of New York, and on July 14, A. D. 1818, without having been divorced from said Phoebe, married Miriam Lee, by whom he had five children thereafter born, viz.: Benjamin; Ason; Betsey, a daughter; Rachel, a daughter; Delight, a daughter; Lois, a daughter. *Fourth*. That said Robert Titus thereafter, about the year A. D. 1832, removed from Ontario county, N. Y., to Lenox, Macomb county, Mich. *Fifth*. That defendant Lois Miller is the wife of the defendant D. B. Miller, and is the youngest daughter of said Robert Titus and Miriam Lee. *Sixth*. That said Robert Titus, in the year A. D. 1850, came to live with said D. B. Miller and Lois Miller, his wife, and continued to live with them from that date until his death, in 1871. *Seventh*. That said D. B. Miller and his wife, Lois, and said Robert Titus, came to Reno county, Kan., from Will county, in the state of Illinois, and settled there, in the year A. D. 1871.

Eighth. That said Robert Titus, on July 10, 1871, made a pre-emption settlement upon the land in controversy in this suit, viz., N. E. $\frac{1}{4}$ section 12, township 23, range 6 west, Reno county, Kan., and thereafter, on September 8, 1871, died, not having completed his pre-emption as required by act of congress of March 3, 1843, (section 2269, Rev. St. U. S. 1878.) *Ninth.* Said Robert Titus died intestate and utterly without any money or property whatever. Upon his death said D. B. Miller was by the probate court of Reno county, Kan., appointed administrator of said Robert Titus, deceased, and with his own money caused said pre-emption to be completed, paying the double minimum price for said land to the government, viz., \$400. This was done in the year 1871. *Tenth.* That, on the completing of said pre-emption by said D. B. Miller as administrator, 'a patent for said land was issued by the United States under and in accordance with section 2269, Rev. St. U. S., a copy of which is hereto annexed, marked 'Exhibit A,' and made a part of these findings. *Eleventh.* That said Robert Titus died in Reno county, Kan., intestate, on September 8, 1871. *Twelfth.* That said Miriam Lee died intestate in the year A. D. 1853. *Thirteenth.* That his said wife, Phoebe Thomas Titus, died in Rutland county, Vt., in the year A. D. 1860. *Fourteenth.* That said Alden W. Titus, son of Robert and Phoebe Titus, died in Charlestown, Mass., in the year A. D. 1876, intestate, leaving heirs. *Fifteenth.* That said defendant D. B. Miller has purchased from said heirs of Alden W. Titus, and, under proper conveyances from them, is the owner of, all the rights, title, and interest in said land which inured to the said Alden W. Titus' benefit as the heir of said Robert Titus under said patent. *Sixteenth.* That plaintiff has conveyances from the following aforesaid named children of said Robert Titus and Miriam Lee, viz., Delight, intermarried with one Caldwell, the father of plaintiff, and Rachel, intermarried with Crandall, conveying to him whatever title they had in said land in controversy. *Seventeenth.* That said Betsey, intermarried with Nathan Hicks, died, to-wit, on the — day of —, and left her surviving, and who are still living, Nathan Hicks, her husband, her son, Volney Hicks, her daughter Melissa West, her daughter Ada Wade, and her daughter Arabel Snyder. *Eighteenth.* That said plaintiff has procured and has from said Volney, Melissa, Ada, Arabel, deeds of conveyance, conveying to him all their several interests in the land in controversy, and from James and Joseph Miller. *Nineteenth.* Said D. B. Miller has procured from said Nathan Hicks, and has a deed of conveyance conveying to him, all the right, title, and interest which said Nathan Hicks had in said premises as the surviving husband of said daughter Betsey. *Twentieth.* That said Benjamin Titus died in the year A. D. 1852, and left his widow, who is still living, and three

daughters, two of whom are still living. The other daughter, Elmira, married Amos Miller, and had seven children. Said Elmira died in the year A. D. 1885, leaving, surviving her, her said husband and the said seven children, all of whom are still living. *Twenty-first.* That the said defendant D. B. Miller has proper conveyance of the land in controversy from said Amos Miller, and from three of the said sons of Elmira, viz., William conveying to him all the right, title, and interest in said land of which they were respectfully entitled to as heirs of said Benjamin Titus, deceased. *Twenty-second.* That said children of Robert Titus and Miriam Lee were notoriously recognized by Robert Titus as his own, and no question ever raised as to their legitimacy until in this suit. *Twenty-third.* Plaintiff demanded to be let into possession March 4, 1885. *Twenty-fourth.* If the Miriam Lee children of Robert Titus are heirs within the meaning of the act of congress, (section 2269, Rev. St. U. S. 1878,) then the plaintiff is entitled to receive an undivided $\frac{13}{28}$ of the said land, and damages for its detention since that time at the rate of \$41.67 per year.

"The said D. B. Miller claims all of the said land under the said act of congress, and under the said conveyances of said legitimate heirs of said Robert Titus to him; and, if legitimate children only are heirs under said act of congress, then said defendants are entitled to recover."

Exhibit A. "The United States of America, to all to whom these presents shall come, greeting: Certificate No. 593. Whereas, D. B. Miller, administrator for the heirs of Robert Titus, deceased, of Reno county, Kansas, has deposited in the general land-office of the United States a certificate of the register of the land-office at Wichita, Kansas, whereby it appears that full payment has been made by the said D. B. Miller, administrator, according to the provisions of the act of congress of the 24th day of April, 1820, entitled 'An act making further provisions for the sale of the public lands' for the north-east quarter of section twelve, township twenty-three, range six west, in the district of lands subject to sale at Wichita, Kansas, containing one hundred and sixty acres according to the official plat of the survey of the said lands returned to the general land-office by the surveyor general, which said tract has been purchased by the said D. B. Miller, administrator: Now know ye that the United States of America, in consideration of the premises, and in conformity with the several acts of congress in such cases made and provided, have given and granted, and by these presents do give and grant, unto the said heirs of Robert Titus, deceased, and to their heirs, the above tract above described, to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto the said heirs of Robert Titus, deceased, and to their heirs and assigns forever. In testimony

whereof, I, Ulysses S. Grant, president of the United States of America, have caused the letters to be made patent and the seal of the general land-office to be hereunto affixed. Given under my hand, at the city of Washington, the 20th day of April, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-eighth. By the President. U. S. GRANT, by A. WILLIAMSON, Secretary. L. K. LIPPENCOTT, Recorder of the General Land-Office. Recorded in volume 1, page 386. [Seal.] General Land-Office U. S."

And thereon the court made the following conclusion of law: "From the foregoing findings of fact, the court finds for the defendants, to all of which plaintiff excepts." The court then rendered judgment for D. B. Miller, adjudging him the owner in fee-simple of the N. E. $\frac{1}{4}$ of section 12, township 23 S., range 6, in Reno county, and entitled to the lawful possession of the same, and further rendered judgment that he and L. B. Miller were in the lawful possession of the property at the commencement of the action. The plaintiff filed a motion for a new trial, which was overruled. He excepted, and brings the case to this court.

Brown & Kline, for plaintiff in error. *Vandever & Martin* and *A. Gillett*, for defendants in error.

HORTON, C. J., (*after stating the facts as above.*) On the 10th day of July, 1871, Robert Titus made a pre-emption settlement upon the land in controversy, being a quarter section of land in Reno county, in this state. He died before consummating his claim of pre-emption. After his death, D. B. Miller, administrator of his estate, filed the necessary papers to complete the pre-emption, paying the price thereof, \$400, from his own money to the United States. On the 20th day of April, 1874, a patent to the land was issued by the United States. The patent, among other things, recited that "The United States of America, in consideration of the premises, and in conformity with the several acts of congress in such cases made and provided, have given and granted, and by these presents do give and grant, unto the said heirs of Robert Titus, deceased, and to their heirs, the above tract described, to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said heirs of Robert Titus, deceased, and to their heirs and assigns forever." Robert Titus, who made the pre-emption settlement, was married to Phoebe Thomas, in Vermont, in 1809. The only issue of this marriage was Alden W. Titus, born in October, 1810. After the birth of his son, Robert Titus abandoned both his wife and child. Without having a divorce, he had a marriage ceremony performed between him and Miriam Lee, in the state of New York, on July 14, 1818. By Miriam Lee he had five children.

The youngest was the daughter Lois. Lois married D. B. Miller, one of the defendants. In 1871, D. B. Miller, his wife, and Robert Titus came to this state from Illinois, and settled in Reno county. Soon after Titus pre-empted the land now claimed by Miller. Miriam Lee died in 1853. Mrs. Phoebe T. Titus died in Vermont in 1860. Alden W. Titus, the son by Mrs. Phoebe T. Titus, died in 1876, intestate, leaving heirs. D. B. Miller purchased from the heirs of Alden W. Titus, deceased, all their right and title to the land in dispute, and claims the fee-simple title thereof, by conveyances from them, as the only heirs of Robert Titus, deceased. John Caldwell, the plaintiff, is a son of Delight, a daughter of Robert Titus by Miriam Lee, and claims a portion of the land from her and through conveyances from several of the children and heirs of the children of Miriam Lee.

The pivotal question is the interpretation of section 2269, Rev. St. U. S. 1878. This question is one which may ultimately be decided by the supreme court of the United States. Therefore the final decision does not rest with us. The section reads: "Where a party entitled to claim the benefits of the pre-emption laws dies before consummating his claim, by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to file the necessary papers to complete the same; but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs as if their names had been specially mentioned." The plaintiff contends that the words "the heirs of the deceased pre-emptor" include legitimate and illegitimate children, if the illegitimate children were generally and notoriously recognized by Robert Titus in his lifetime as his own. Under this rule the heirs of Alden W. Titus, deceased, and the children of Miriam Lee, or their heirs, are all heirs of Robert Titus, deceased. This would give John Caldwell an undivided 13-28 of the land, and damages for its detention. On the other hand, the defendants claim the word "heirs" must be determined by the common law of England. Therefore, it is contended by them that the heirs of Alden W. Titus, deceased, had the sole right to the land prior to their conveyances to D. B. Miller. This would give all the land to Miller.

In interpreting the United States statutes, the question is not what congress has the power to do, but what congress has actually done. Congress has not defined the term "heirs." The land is situate in this state. Robert Titus died in this state. Therefore, to determine who are meant by the words in the patent, "heirs of Robert Titus, deceased," we think, we must look to the statutes of this state. "It seems to us scarcely necessary to say that this is purely a question of statutory law." *McKinney v. Stewart*, 5 Kan.

391. An heir is one who by statute is capable of inheriting from another, or one who succeeds to the estate of a deceased. *Id.*; *Delashmutt v. Parrent*, 40 Kan. 641, 20 Pac. Rep. 504. In the act concerning descents and distributions are the following provisions, which are now in force, and were also in force at and before the death of Robert Titus: "Sec. 22. Illegitimate children inherit from the mother, and the mother from the children. Sec. 23. They shall also inherit from the father whenever they have been recognized by him as his children; but such recognition must have been general and notorious, or else in writing." Chapter 33, Gen. St. 1889, pp. 780-787. Under this statute, as the children of Miriam Lee were generally and notoriously recognized by Robert Titus as his own, they inherited from their father with Alden W. Titus, the legitimate child. The conclusion of law of the district court in favor of the defendants is therefore erroneous. That the statute of this state must determine who are heirs is in accord with the prior decisions of this court. In *Brown v. Belmarde*, 3 Kan. 41, the syllabus reads: "Prior to the treaty of June 3, 1825, with the Kansas Indians, they had the 'Indian title,' *i. e.*, a life interest, in the usufruct of a body of land in eastern Kansas, including that in controversy; the United States holding the ultimate title, charged with the interest of the Indian nation, so long as they should remain a nation. This Indian title was by the sixth article of that treaty vested in certain individuals,"—that to the land in question in Lavonture. From the death of Lavonture, in 1847 or '48, to the passage of Act Cong. May 26, 1860, the whole title to the land in question was in the government, and that act operated as an original grant to certain reservees, and the "heirs of deceased reservees" mentioned therein. "Heirs of deceased reservees," used therein, is *descriptio personarum*, and is to be construed with reference to, and determined by, the law at the time the estate passed; and whoever, under the law of this state, would have inherited had L. died May 26, 1860, [the date of the approval of the act of congress,] are the persons to whose benefit the grant inured." In *Clark v. Lord*, 20 Kan. 390, it is said: "The patent was not issued to Eleanor Richardson, but to 'the heirs of Eliza Richardson;' and said Eleanor Richardson obtained her interest, not as an allottee, nor as the patentee, but by virtue of the laws of the state of Kansas, which authorized her, as an heir of Eliza Richardson, to inherit the estate of her sister. If Eliza had lived, the lands would have been allotted and patented to her. After her death they were patented to her heirs, without naming them, and the law of the state determined who these were. Eleanor simply inherited the lands granted to Eliza during her life, and the patent is evidence of the partition of the lands, and the division made in pursuance of the treaty. The death of Eliza Richardson

did not change the terms and conditions of the treaty, nor annul the grant to her; but, as the patent could not issue to a dead person, it was necessarily issued to the heirs of Eliza. But such heirs were not controlled by the restrictions applicable to the allottees and patentees. If the patent had been issued to Eliza in her life-time, her death would have abrogated the restrictions on the alienation of the land; and, having been issued after her decease, it placed the heirs in the same condition, as to their rights in the property, as if issued before." See, also, *Cutting v. Cutting*, 6 Sawy. 396-406, 6 Fed. Rep. 259; 21 Myer's Fed. Dec. 370, 371, 399; *Lamb v. Starr*, 1 Dealy, 358.

Defendants cite *McCool v. Smith*, 1 Black, 459. We do not think that decision is authority for them. "Next of kin" is construed in that case by the common-law definition, for the reason that the common law of England was in force, by express statute, in the state of Illinois, at the death of the party referred to in the opinion. If we were required to go outside of the statutes of this state, and to the common law of England, to determine what is mean by the term "heirs," we would have insuperable difficulties to encounter. If we are not to construe "heirs" in this case by the statute of this state, it is impossible to determine, as congress has not adopted the common law of England, what part or portion of the common law of that country is applicable. Among the canons of descent, as enumerated by Blackstone, are two which are wholly inapplicable to this country, and which could never have been within the intention of congress to apply in this state, or any other state of the Union. One of these common-law canons is "that, where there are two or more males in equal degree, the eldest only shall inherit, but the females all together. As, if a man hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies, Matthew, his eldest son, shall alone succeed to his estate, in exclusion of Gilbert, the second son, and both the daughters; but, if both the sons die without issue before the father, the daughters, Margaret and Charlotte, shall both inherit the estate as coparceners." The other canon is "that the male issue shall be admitted before the female. Thus, sons shall be admitted before daughters; or, as our male law-givers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred. As, if John Stiles hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies, first Matthew, and, in case of his death without issue, then Gilbert, shall be admitted to the succession, in preference to both the daughters." 2 Wend. Bl. Comm. 212, 213.

We do not think it necessary to comment upon the attempted removal of this case to the United States circuit court. After the application for removal was denied by the district court, the parties filed new pleadings and entered into various stipulations, and

wholly disregarded any attempted removal. The judgment of the district court must be reversed, and the cause remanded, with direction to the court below to enter judgment upon the findings of fact in favor of John Caldwell, and against the defendants, for the undivided 13-28 of the land, and damages for its detention from March 4, 1885, at the rate of \$41.67 per year. All the justices concurring.

(44 Kan. 32)

MISSOURI PAC. RY. CO. v. CITY OF WYANDOTTE *et al.*

(Supreme Court of Kansas. May 10, 1890.)

MUNICIPAL ORDINANCES—VALIDITY—MULTIFARI-
OUSNESS.

1. Section 9 of the act to incorporate cities of the second class, providing "that no ordinance shall contain more than one subject, which shall be clearly expressed in its title," is mandatory upon the city council. The case of *Stebbins v. Mayer*, 38 Kan. 573, 16 Pac. Rep. 745, cited and followed.

2. An ordinance of a city of the second class, the title to which clearly indicates and the ordinance actually contains two separate and distinct subjects, having no necessary connection with each other, is void *in toto* from that fact, and without reference to any other or further questions.

3. When it manifestly appears, both from the title and body of such an ordinance, that it contains two separate, independent, and distinct subjects of legislation, this court will not inquire whether one is without and the other within the power of the city council, nor will it investigate whether or not one subject was used to induce the passage of the other, but it will give to section 9 of the act, to incorporate cities of the second class, its clearly expressed meaning, that no city ordinance shall contain more than one subject, and, if it does, it violates this provision, and is void for that reason alone.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Wyandotte county; O. L. MILLER, Judge.

Waggener, Martin & Orr, for plaintiff in error. *W. S. Carroll*, for defendant in error.

SIMPSON, C. The Missouri Pacific Railway Company commenced this action in the district court of Wyandotte county, to restrain the public authorities of the city of Wyandotte from the collection of taxes levied upon a certain tract of land owned by the railway company that it is claimed is not within the limits of the city. In the year 1885 the mayor and council of the city of Wyandotte, on the theory that this land was within its corporate limits, levied thereon certain city taxes, as follows: General revenue fund, \$140; general improvement tax, \$45; bond interest tax, \$84; bond sinking fund tax, \$28. During this same year special assessment to build sidewalks was made amounting to \$341. The railway company paid the other taxes assessed against this land, and in due time commenced this action. The tract of land so assessed contains about 48.93 acres. It lies east of the Wyandotte town-site with its additions, and west of the Kansas river. It is commonly known as the "Cypress Yards." On May 16, 1881, an or-

dinance was passed by the mayor and council of Wyandotte, then a city of the second class, extending the city limits so as to embrace the Cypress Yards and some other outlying territory. The validity of this ordinance is the controlling question in the case. If that is valid, the judgment below refusing to restrain the collection of taxes is right; but, if the ordinance is not valid, then the Cypress Yards were not subject to this taxation for the year 1885.

The ordinance is as follows: "An ordinance extending the limits of the city of Wyandotte, Kansas, and appropriating funds to aid in building Riverview bridge. Be it ordained by the mayor and councilmen of the city of Wyandotte: Section 1. On account of the benefits to be derived by extending the limits of the city of Wyandotte, Kansas, it is hereby declared necessary and expedient to extend the limits of the city, and annex the following territory, under the rights and privileges guaranteed to cities of the second class by the laws of the state of Kansas, approved March 13, 1872, regarding annexation: Commencing at a point in Summuduwoot street, Wyandotte county, Kansas, where the same is intersected by the section line running north and south between section 9 and 10, in township 11, range 25; thence due south, to the south-west corner of the north-west quarter of section 15, township 11, range 25; thence easterly, along the north line of Kansas avenue, in Armstrong, to a point due south of the east line of Highland Park addition to the village of Armstrong; thence due north, to and along the east line of said Highland Park addition, to the north-east corner of said addition; thence due east, to the east line of the right of way of the Union Pacific Railway, Kansas Division; thence south, along the east side of the right of way of the Union Pacific Railway, Kansas Division, to the quarter section line running east and west to the center of section 15, township 11, range 25; thence east, on said quarter section line, to the center of the Kansas river; thence northerly, along the center of said river, to a point due east of the present east line of the southern limits of Summuduwoot street; thence along the southern line of said street to the point of beginning. Sec. 2. That the sum of three thousand dollars (\$3,000) is hereby appropriated to aid in building the Riverview bridge, said money to be issued in orders, bonds, or either, and to be deposited with the mayor of said city, to be paid out only upon the completion of said bridge, when accepted by the city engineer. Sec. 3. This ordinance shall take effect and be in force from and after its publication in the Kawsmouth Pilot. Passed in council May 16th, 1881. A true copy. ED. N. SAGER, City Clerk. Approved May 16th, 1881. R. E. CABLE, Mayor."

The trial court found as conclusions of law: "(1) The ordinance mentioned, so far as it relates to the extension of the city limits, is legal, valid, and binding, but is void

as to that portion in which an attempt is made to appropriate \$3,000 to the building of the Riverview bridge. The council might legally pass the first part of the ordinance, and extend the city limits, but it had no power to appropriate that amount of money by ordinance without a vote of the people. Had both subjects been equally within the power of the council to legislate upon, then the whole ordinance must have been held void, because no court could determine which subject was intended. But one subject being clearly within the power of the legislative body, and the other just as clearly *ultra vires*, the legislature will be presumed to have done only what they had the power to do, and especially where there is no difficulty in separating the subjects, as in this case. (2) The dedication of the strip of land called 'Bridge Street,' by the owner of the land, was an absolute dedication, both present and future, for all the burdens and uses to which said land might be put for the purposes of a public way, and would embrace the uses and burdens incident to a city street, when the same might be legally embraced within an incorporated city, and in contemplation of law the owner gave it out of his adjacent lands with a view to subjecting those lands to all the burdens which might follow from such a dedication. The sidewalk tax was properly chargeable against the land of the plaintiff. I have not reached this latter conclusion without much hesitation and doubt; but from all the authorities examined, and I have examined many,—very few, however, directly upon the point,—I think the better reason, as well as the weight of authority, sustains this conclusion of law. The other city taxes were legally chargeable against the property of the plaintiff. While I do not place my findings in any sense upon the want of equity in the bill, I am by no means sure that a court of equity ought not to be governed in a case of this kind by the fact that it does not anywhere appear that the plaintiff is being injured. The bill will be dismissed."

Section 9 of the act to incorporate cities of the second class provides "that no ordinance shall contain more than one subject, which shall be clearly expressed in its title." In the case of *Stebbins v. Mayer*, 38 Kan. 576, 16 Pac. Rep. 745, this court say, with reference to this provision: "The language of section 9 * * * is an exact copy of the constitution of the state in relation to bills, with the exception that the word 'ordinance' is used where the constitution uses the word 'bill.' This provision of the constitution is universally recognized as being mandatory upon the legislature. * * * This provision of the statute is as binding upon cities as that of the constitution is upon the legislature in relation to its acts, and by its terms the statute has said that the title of an ordinance must be an index of what it contains."

This much can be said about this particular city ordinance, beyond criticism or doubt. Both the title to and the body of the ordi-

nance contains two separate, distinct, and independent subjects, having no connection with each other, and as easily distinguishable from each other as is a stack of wheat from the Argentine smelter. While this court has many times determined that the title of an act of the legislature was not broad enough to embrace all that was contained in the body of the act, and held that part not indicated by the title to be void, (see cases of *Bowman v. Cockrill*, 6 Kan. 311; *Commissioners v. Bailey*, 13 Kan. 600; *Division of Howard Co.*, 15 Kan. 194; *Prescott v. Beebe*, 17 Kan. 320; *Swayze v. Britton*, Id. 625; *City of Eureka v. Davis*, 21 Kan. 578; *Woodruff v. Baldwin*, 23 Kan. 491; *State v. Association*, Id. 499; *Shepherd v. Helmers*, Id. 504; *Werner v. Edmiston*, 24 Kan. 147; *Philpin v. McCarty*, Id. 393; *State v. Barrett*, 27 Kan. 213,) the exact question here presented has not been passed upon directly, and yet there are some indications of light upon the question found in the following cases: In *Philpin v. McCarty*, 24 Kan. 393, Justice BREWER says: "But two measures entirely foreign to each other cannot now be joined in one act. They must be presented separately, and a separate vote had upon each. * * * An assent to two independent matters jointly will make neither of them a law. * * * This constitutional requirement * * * was introduced to prevent a certain abuse, and it should be construed so as to guard against that abuse. * * * That abuse was this: Ofttimes a matter of merit and commanding general confidence was yoked to something unworthy, and by this union the latter was carried through on the strength of the former. This provision was designed to prevent this; to make every measure stand upon its own merits; and to cut off omnibus legislation. * * * These views are well supported by authority. The constitution of New Jersey thus states the reason for this rule: 'To avoid improper influences, which may result from intermixing in one and the same act such things as have no proper relation to each other.' The supreme court of Michigan say, (*People v. Mahaney*, 13 Mich. 494:) 'The practice of bringing together in one bill subjects diverse in their nature, and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislature and dangerous to this state.' The supreme court of Iowa express the same idea thus, (*State v. County Judge*, 2 Iowa, 282:) 'The intent of this provision of the constitution was to prevent the union, in the same act, of incongruous matters, and of objects having no connection,—no relation.' Cooley, in his work on *Constitutional Limitations*, p. 143, uses this language: 'It may, therefore, be assured as settled that the purpose of these provisions was, first, to prevent hodge-podge or "log-rolling" legislation.' In the case of *State v.*

Barrett, 27 Kan. 213, Justice VALENTINE, stating legal propositions, says: "Where an act contains two separate and independent subjects, having no connection with each other, and the title to the act is broad enough to cover both, whether such an act or any portion of it has any validity has not yet been settled or determined by this court, but we think that probably, and as a general rule, it has not."

The peculiarity of this ordinance is that its title distinctly contains two separate and independent subjects, which are clearly expressed, as in its various sections. It is as square a case as can be imagined under section 9 of the act incorporating cities of the second class, and the whole ordinance must be held void, without the first section is saved by the want of power to pass the second. It is claimed, and so far as we are concerned frankly admitted, that the city council had no power to pass the second section of the ordinance without a proposition to grant aid to the construction of the Riverview bridge was first submitted to a vote of the electors of the city, and the council authorized by an affirmative vote to do so. Accepting this to its fullest extent, we then have a city ordinance whose title indicates, and its various parts contain, two separate and distinct subjects of legislation,—one subject within the power of the council to legislate upon; the other subject wholly without the power of the council. As we have seen by our own Reports that the express object of this constitutional provision and of section 9 of the act organizing cities of the second class is to prevent log-rolling legislation and a combination of subjects, by requiring that every legislative bill or city ordinance "shall not contain more than one subject, which shall be clearly expressed in its title," it would be the plain and natural meaning and import of the words used that, whenever it is manifest that such bill or ordinance does indicate by its title and contain in its sections two subjects entirely different and independent, the constitution is violated without reference to anything else. If one of the subjects indicated by title and contained in the ordinance is not within the power of the city council, yet the very abuse that was attempted to be prevented by the law is used to secure the passage of section 1, the advocates of section 2 believing, perhaps, that they accomplished their purpose by supporting section 1. In other words, before the court can reach the question as to whether or not one of the subjects is without the grant of power to the city council to be regulated or legislated upon, the manifest violation of the constitution in another respect is apparent. And if such an ordinance is void *in toto* because two subjects are grouped in one title and act, what practical good is to be accomplished by a further inquiry as to these two separate and distinct subjects? Two subjects shall not be embodied in one act, to prevent certain evils of legislation, so that one cannot be an induce-

ment to the passage of the other. Now, if it should manifestly appear that a subject without the power was used as an inducement to pass one within the power, the two being embodied in one act, no court would hesitate to declare both void, even at the end of an investigation into the motives that induced favorable action by a majority of the legislature. How is a court of last resort to determine what influenced members of the legislature to vote for certain measures? Shall the determination of the very grave and important questions of the constitutionality of legislation be determined solely by evidence as to the motives of members of the legislature? We hesitate to announce any such conclusion.

It is said that the case of *State v. Caldwell*, decided by the supreme court of Nebraska, and reported in 22 N. W. Rep. 228, is a very strong authority in favor of the validity of this ordinance. This is unquestionably true. If the Nebraska case is to be accepted as a proper interpretation of the constitutional provision, then it should control this case. The facts in that case were that in 1883 the Nebraska legislature passed an act entitled "An act to provide for the registry, sale, leasing, and general management of all lands and funds set apart for educational purposes, and for the investment of funds arising from the sale of such lands, being article 1 of chapter 80 of the Compiled Statutes; also to repeal article 3 of said chapter 80." The court say: "The whole purpose and tenor of the act relate to the sale and leasing of school lands, and the disposition of the funds arising therefrom. Article 3 of chapter 80 is no part of the act amended, nor does it relate to subjects embraced either in the original act, or as amended." This is a clear statement that the body and title of the act embraced two separate and distinct subjects, having no necessary connection with each other, and in this respect is as strong as the case at bar. The court also say: "The attorneys for the relator claim that the house journals show that the house of representatives, in 1883, refused to repeal article 3 of chapter 80 as an independent measure, the vote being 56 against 42 in favor of such repeal. This is not denied by the defendants, and may be considered as admitted. It is pretty clear, therefore, that the legislature was imposed upon, and article 3 of chapter 80, included in the repealing clause of the amendment, referred to as though it had been a part of the statute amended. It had no connection with it, however." The court then further state: "The rule is well settled that where the title to an act actually indicates, and the act itself actually includes, two distinct objects, where the constitution declares it shall embrace but one, the whole act must be treated as void from the manifest impossibility of choosing between the two, and holding the act valid as to one and void as to the other." Citing *Cooley*, Const. Lim. 147.

The rule stated is the requirement of a plain

mandatory provision of the constitution of this state. That provision forbids the legislature to embrace two subjects in one enactment, and the universal expression of various constitutions and of the supreme courts of the states whose organic law embraces this provision is that certain evils of legislation are prevented by it; and hence the true reason why an act, whose title indicates and provisions include two distinct objects, is void, is because this is expressly forbidden by the constitution, and not from a manifest impossibility in the court choosing between the two. The court has no right to choose between the two. Whenever it manifestly appears that two separate and distinct subjects are embraced in the title and included in the body of an enactment, the whole force of a mandatory constitutional provision is weakened, broken, and frittered away, when courts begin to inquire and undertake to determine whether one of the subjects is without the power of the legislature, or whether one is used as an inducement to the passage of the title, and consequently to the other. Take this Nebraska case, and it is an admitted fact that, at the same session of the legislature at which the act in question was passed, the house of representatives had refused to repeal article 3 of chapter 80 as an independent measure. They had the constitutional right to repeal it, but refused to do so on the merits. The repeal was then combined with the other measure, and the invalidity of the repeal thus effected is not placed upon what appears to us to be its most evident and controlling reason, to-wit, that the whole act is void for embracing in the title and body two distinct subjects, but is based upon the principle that a law not connected with the subject of the act amended cannot be repealed by a provision in the nature of a rider upon an independent act. This is a wholesome rule in itself, and might apply in other cases, and we make no criticism upon it, but decline to accept it as controlling the other subject discussed. It is further said in the Nebraska case that the constitutional provision applies only in cases in which it is impossible from an inspection of the act itself to determine which act, or rather which part of the act, is void, and which is valid. Where this can be done, the rule is that the constitutional provision does not apply, unless it shall appear that the invalid portion was designed as an inducement to pass the valid. Now, if the invalid portion of a statute can be used as an inducement to pass the valid, then the legislature is practicing the very evil that this organic command intended to prevent. The case seemingly assumes that this could not be done, because, as we suppose, those members of the house who favored the repeal of article 3 of chapter 80 are conclusively presumed to know the invalidity of the repeal. Why not apply this presumption to all members of both houses in all cases in which the title and sections of a proposed act indicate and embrace two separate subjects? The Nebraska

case differs from the one at bar in this essential particular: In that case there is no question but that the legislature of the state had power and control over both subjects, but here it is contended, and it is probably true, that the city council had no power to make an appropriation, to aid in the construction of the bridge, without the question having been submitted to a vote of the electors of the city, and they were authorized by an affirmative vote to do so. In one case the legislative power was not rightfully exercised; in the other there was no original legislative power. We are not disposed to indulge in many refined distinctions about the effect and operation of this constitutional provision. We think the better and safer way to apply it is that, when it manifestly appears from the perusal of an act of the legislature, or an ordinance of a city of the second class, that the title indicates, and the body of the act embraces, two distinct and separate subjects, that this fact of itself, and by its own force, and without reference to any other or further considerations, renders the whole act or ordinance unconstitutional and void. This seems to better accord with the aim and purpose of the constitution and the act organizing cities of the second class than to adopt the theory of the Nebraska decision, and proceed under it to first determine whether or not the title indicates and the act contains two separate and distinct subjects, and, if it does, to then require whether one or both is within the power of the body to legislate upon, and then to endeavor to ascertain whether or not one was used as an inducement to the passage of the other. We think the ordinance of the city of Wyandotte attempting to extend the city limits so as to include this land, and making an appropriation to aid in the building of Riverview bridge, is void *in toto*, and hence the land in question was not included within the limits of the city of Wyandotte by the force of that ordinance, and was not subject to taxation by the city. In this view it is not necessary to consider the questions raised as to the dedication by Splitlog of a public road through this land to Riverview bridge, and whether by such dedication this road became a city street, and as to the legality of the sidewalk tax, because it will not be contended that if no part of the tract was within the city limits, and it had never been subdivided into lots and blocks or platted, a sidewalk tax could be levied thereon. It is recommended that the judgment of the district court of Wyandotte county be reversed, and the cause remanded, with instructions to render a judgment on the facts agreed upon and found in favor of the plaintiff in error.

PER CURIAM. It is so ordered. HOERTON, C. J., and JOHNSTON, J., concurring.

VALENTINE, J. I concur in the decision of this case, but I do so with the understanding that the decision does not limit or affect

the former decisions of this court holding that, where the subject of an act is clearly expressed, both in the body of the act and in its title, but something foreign to this subject is contained in the body of the act, and not in its title, the foreign matter is necessarily void, and the remainder of the act may be valid. The decisions referred to are the following: *Division of Howard Co.*, 15 Kan. 215; *Swayze v. Britton*, 17 Kan. 625; *State v. Association*, 23 Kan. 499; *Shepherd v. Helmers*, Id. 504; *State v. Barrett*, 27 Kan. 215; *Railroad Co. v. Long*, Id. 684; *In re Wood*, 34 Kan. 645, 9 Pac. Rep. 758.

(43 Kan. 678)

GIFFEN v. JOHNSON et al.

(*Supreme Court of Kansas. May 10, 1890.*)

EVIDENCE—FINDINGS BY COURT—REVIEW.

Where alleged errors rest upon matters of fact passed upon by the trial court in making its findings of fact, and there is some proper evidence to support all of said findings, there is no error.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Johnson county; J. P. HINDMAN, Judge.

A. Smith Devenney, for plaintiff in error.
F. R. Ogy and *S. T. Seaton*, for defendants in error.

STRANG, C. Action for the recovery of the possession of certain lots in the city of Olathe, and for rents and profits. Answer, general denial, coupled with special matter alleging that the defendant below and his wife executed to H. C. Johnson, father of Nora Johnson and John M. Johnson, a deed conveying to him the legal title to the lots described in plaintiff's petition, and delivered the same to one William Maxwell in escrow, to be delivered to said H. C. Johnson on his compliance with the conditions of a contemporaneous written contract between the parties to said deed, which contract was placed in the custody of said Maxwell for safe-keeping until the conditions thereof were performed; that the conditions of said contract were never performed by said H. C. Johnson, but that the said deed was delivered by said Maxwell to said Johnson the same day it was executed, in violation of the said agreement, for him to hold it until the conditions of the accompanying contract were performed; and that the name of the grantee in said deed had been changed from H. C. Johnson to M. J. Johnson. For a *third* defense, defendant alleges that more than three years had elapsed since a right of action accrued to the several ancestors of the plaintiffs for rent and profits, and before the commencement of this suit; *fourth*, that more than three years have elapsed since the right of action accrued unto the plaintiffs for rents and profits before the commencement of this action; *fifth*, that more than 15 years have elapsed since a right of action accrued unto the several ancestors of the plaintiffs, as well as the plaintiffs, and

before the commencement of this action; to which answer plaintiff replied by general denial, and by specially denying the execution of the contract set up in defendant's answer. Trial by the court, which made the following findings of fact and of law, upon which the court entered judgment for the plaintiff for the recovery of the possession of the lots, and for \$21 rents, and for costs. Motion to set aside the findings of fact and of law, and for a new trial. Motion overruled, and the ruling excepted to.

Findings of fact: "(1) Plaintiffs are children and sole surviving heirs of H. C. Johnson and his wife, Martha J. Johnson, now deceased. (2) That H. C. Johnson died about the last of October, 1884, and Martha J. Johnson, his wife, died about five years before her husband. (3) That the plaintiffs are minors; the plaintiff Nora Johnson being 16 years of age, and John M. Johnson 14 years of age. (4) That S. H. Ayers was duly appointed guardian of the estate of said minors by the probate court of Johnson county, Kan., on the 14th day of November, 1884, and is still acting as such guardian. (5) That on the 18th day of March, 1870, John M. Giffen and Kate P. Giffen, his wife, of the first part, and said H. C. Johnson, entered into a written contract, the terms of which were in substance as set out in defendant's answer, and that said Giffen and wife then executed a deed to H. C. Johnson to said lots 1, 2, 3, 4, 5, 6, 7, 9, and 10, in block 25, in the city of Olathe, Johnson county, Kan., and acknowledged the same before F. E. Henderson, which contract and deed were delivered to W. E. Maxwell, of said county, to be held in escrow until said Johnson should comply with the conditions of said contract; that said Johnson never complied with the conditions of said contract of sale, and said deed was never delivered to him, and no title passed by said conveyance to said Johnson. (6) That afterwards, and on said 18th day of March, 1870, said John M. Giffen and Kate P. Giffen, his wife, executed the warranty deed to said Martha J. Johnson, offered in evidence, which deed was duly acknowledged on the same date by said grantors before one A. Smith Devenney, a notary public of said Johnson county, duly delivered, and at 6 P. M. of said 18th day of March, 1870, placed upon record in the office of the register of deeds of said Johnson county. (7) The defendant is in the possession of said premises above described, and has detained said premises from the possession of plaintiffs for the three years last past, and that said premises are of the annual rental value of \$7." Conclusions of law: "(1) That the plaintiffs are the owners in fee of the premises in controversy, and entitled to the immediate possession of the same. (2) That defendant unlawfully detains said premises from the possession of plaintiffs, and has so detained the same for the three years last past, to the damage of plaintiffs in the sum of \$21."

The plaintiff, by his counsel, assigned nu-

merous errors, but relies in his brief upon but two classes of errors: *First*, and principally, that the evidence does not support the findings of fact and law; *second*, that error occurred at the trial, through the admission of improper evidence, prejudicial to the rights of the defendant below. The trial court, in its sixth finding of fact, finds that the deed offered in evidence by the plaintiffs below, and on which they relied to establish their title to the lots in controversy, was executed by the defendant below and his wife, and delivered by them to H. C. Johnson, on the same day, but later in the day, on which the deed and contract left in escrow with William Maxwell were executed, and that the deed to Martha J. Johnson conveyed the absolute title to said lots in fee-simple to Martha J. Johnson. The principal question, then, in the case, is whether the above finding of fact is so supported by the evidence that this court may not disturb it. We think it is. It is the law of this court, as appears by a long line of its decisions, that where the verdict of a jury has received the approval of the trial court, and there is any proper evidence to support such verdict, this court will not disturb it, nor a judgment resting thereon. So, where a case is tried by the court without a jury, and the trial court has made findings of fact, and rendered judgment thereon, if there is any proper evidence to support such findings of fact this court will not set such findings and the judgment rendered thereon aside. We believe the court was right on the evidence in finding that two deeds were made. We do not see how the theory of the defendant below, that there was but one deed made, and that one to H. C. Johnson as grantee, can be reconciled with the fact that the deed produced in evidence had the name of Martha J. Johnson written therein in three different places, and no allegation that any change had been made in the name of the grantee in said deed, except in one place,—the place where it was first written in said deed. If but one deed was made, and we concede that the name of the grantee had been changed from H. C. Johnson to Martha J. Johnson, where the deed showed the name Martha J. Johnson written over other words, how can the fact that in both the other places where the name of the grantee appears in said deed it is written Martha J. Johnson be explained consistently with the allegation that said deed was made to H. C. Johnson? If but one deed was made, and that was made to H. C. Johnson as grantee, how can it be explained that wherever in said deed the pronoun is used to represent the grantee it is in the feminine, instead of the masculine, gender.

Miss Giffen, sister of the plaintiff, and Davis, his hired man, both testify that the deed made at the house in the morning, and which was delivered to Maxwell at the gate together with the contract, was acknowledged before F. E. Henderson, while the deed offered in evidence by the plaintiffs be-

low was acknowledged before A. Smith Devenney. If Miss Giffen and Davis are correct about the deed delivered to Maxwell being acknowledged before Henderson, of course there were two deeds. Whether they are correct or not, their evidence is in the case, and directly supports the finding of the court that there were two deeds, and is sufficient of itself to uphold such finding. But we believe there were two deeds, for other reasons. One deed was executed at Giffen's house in the morning, and witnessed at the gate in front of Giffen's house. It was then, together with the contract set up in defendant's answer, placed in escrow with William Maxwell. Then, as Miss Giffen testified, Giffen, Johnson, and Maxwell all went up town together. We believe that afterwards, while the parties were still together, the same day, some new agreement was entered into between Giffen and Johnson, and a new deed was made, and the deed and contract in the hands of Maxwell were withdrawn and destroyed. This theory is supported by the fact that, though diligent search was made by Maxwell's son, into whose hands his father's private papers fell after his death, he never found the deed or contract left with his father in escrow. Nor did the administrator of the estate of Johnson, or the guardian of his minor children, ever find either the deed or contract among the papers of Johnson.

Again, the law presumes men are honest and faithful to their trusts, and therefore the presumption is that Maxwell acted honestly with reference to the trust reposed in him by the parties when they left the deed and contract with him in escrow; that he did not surrender the deed left with him to Johnson, to be put on record in violation of the condition of the accompanying contract, and in violation of his trust. This presumption, and the fact that the contract was never found among the papers of Maxwell, and the further fact that its condition was never performed by Johnson, and therefore the deed could never have been honestly delivered by Maxwell, unless withdrawn by the joint action of the parties, taken in connection with the other proof that there were two deeds, satisfies us that the finding of the court is not only supported by the proof, but that such finding is right. But, however this may be, there is certainly sufficient evidence to uphold the finding of the court under the well-settled rule of this court in relation thereto.

It is contended by the plaintiff in error that the deed introduced in evidence by the plaintiffs below had been mutilated; that the name of the grantee in one place had been changed from H. C. Johnson to Martha J. Johnson. On the other hand, the plaintiffs below deny that such change had been made in said deed, and allege that, at the place in said deed where the defendant below claims the deed had been altered, the deed showed that the words "party of the second part"

had been written in the deed to represent the grantee, and that afterwards the words "Martha J. Johnson" were written over the words "party of the second part" without any erasure at all, and for the purpose of naming the grantee. The fact that in both the other parts of the deed where the name of the grantee occurs it is written Martha J. Johnson, seems to sustain the allegation of the plaintiffs below upon this point. That being the case, and the trial judge who had the deed before him for examination having resolved the question in favor of the admission of the deed, we will not undertake to say the court erred in so doing.

There is nothing in the so-called "expert testimony," of Little that is prejudicial to the rights of the defendant below, when we take into consideration that the body of the deed offered was in Giffen's handwriting, and that the balance of the deed and other proof showed the deed had not been altered, but was made to Martha J. Johnson. We do not think there is anything in the defenses involving the statute of limitation, and, indeed, they are not referred to in plaintiff's brief. We are satisfied there is no reversible error in this case, and therefore recommend that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 692)

CLARK *et al.* v. DEKKER *et al.*

(*Supreme Court of Kansas. May 10, 1890.*)

CONTINUANCE—STIPULATIONS—ABSENCE OF WITNESS—DISMISSAL.

1. The district court is not bound by the oral agreements of counsel not made in open court, and this is especially true where the counsel differ as to what the oral agreements in fact were.

2. The district court has some discretion in refusing, as well as much discretion in granting, continuances; and, where it does not appear that a party has exercised due diligence in attempting to procure the testimony of his witnesses, the court may, without abusing its discretion or committing error, overrule an application for a continuance made by such party on the ground of the absence of his witnesses.

3. Where a case is regularly called for trial, and the plaintiff refuses to proceed with the trial, the court may, without committing error, dismiss the plaintiff's action without prejudice.

(*Syllabus by the Court.*)

Error from district court, Atchison county; W. D. GILBERT, Judge.

Bird & Woodward, for plaintiffs in error. *Elliston & Heath*, for defendant in error.

VALENTINE, J. The only questions involved in this case are whether the court below erred or not in refusing to grant to the plaintiffs a continuance as to the defendant Nicholas Dekker, and in afterwards dismissing their action without prejudice as to him. It appears that the action was commenced on October 25, 1887, by the plaintiffs, James Clark, Daniel B. Clark, Frank L. Clark, and

Cyrus E. Clark, partners as James Clark & Co., against Nicholas Dekker and George W. Dekker, alleged to be partners doing business under the firm name of George W. Dekker & Co. On November 24, 1887, Nicholas Dekker filed a verified answer, denying all the allegations of the plaintiffs' petition except that the plaintiffs were partners. On January 28, 1888, George W. Dekker filed a verified answer, denying, among other things, that the defendants were partners, and the case was set for trial and to be tried on February 13, 1888. On that day, with the consent of the parties, the case was passed to the heel of the jury trial docket. On February 22, 1888, the case was regularly called for trial, and on that day the plaintiffs made two applications for a continuance as against both the defendants, and a third one as against George W. Dekker. The first application was founded upon an alleged oral agreement made about February 1, 1888, between the counsel for both parties, that the case should not be tried at that term. Counsel for the defendants denied making any such agreement, and, of course, the court below rightfully overruled that application. The plaintiffs' counsel then made another application for continuance, founded upon the absence of material testimony, and this application was supported by the affidavit of such counsel. It does not appear that any subpoena for witnesses had ever been issued in the case, nor does it appear that any notice to take the depositions of any one of the absent witnesses was ever given until on or after February 15, 1888. The principal witness for the plaintiffs was Daniel B. Clark, who was one of the plaintiffs, and his absence is not sufficiently accounted for. The plaintiffs again, upon this second application for a continuance, relied largely upon the aforesaid alleged oral agreement between their counsel and the defendants' counsel, though they admit that after such alleged agreement, and on February 13, 1888, the case was placed at the heel of the jury trial docket, and that on February 15, 1888, the counsel for the defendants stated in open court that they would insist upon a trial of the case at that term. We cannot say that the court below erred in refusing this second application for a continuance. No sufficient diligence was shown on the part of the plaintiffs to procure their evidence. After this application was overruled, the case was called for trial, but the plaintiffs objected to a trial as between them and George W. Dekker, for the reason that his answer had not been filed 10 days before the commencement of that term of the court: which fact being admitted by the defendants' counsel, the plaintiffs' objection was sustained, and the trial of the case, as between the plaintiffs and George W. Dekker, was then continued to the next term of the court. A jury was then impaneled to try the issues presented by the plaintiffs' petition, and the separate answer of the defendant Nicholas Dekker, and the plaintiffs were directed to proceed with

the trial, but they refused to do so, and the court then dismissed their action as against Nicholas Dekker without prejudice to a future action. The plaintiffs then moved for a new trial, which motion was overruled, and they then, as plaintiffs in error, brought the case to this court for review, making Nicholas Dekker the defendant in error.

It would perhaps be proper to here state that in this state each member of a partnership is liable for the whole of a partnership debt, and each may be sued separately for the whole of the debt; or, if two or more or all the members of a partnership are sued together or jointly, each may answer separately, and a separate trial may be had as to each when justice or convenience requires it, and a separate judgment may be rendered as to each; and hence the continuance as to George W. Dekker did not require that the case should also be continued as to Nicholas Dekker. We would also here state that district courts should not consider themselves bound by the oral agreements of counsel not made in open court, and this is especially true where the counsel differ as to what the oral agreements in fact were, as in this case; and we might further say that when an affidavit is filed stating that certain things transpired in open court, and the record does not in any other manner show such things, and the court decides the questions presented as though such things had not taken place, and the case is afterwards brought to the supreme court, the supreme court must also decide such questions as though such things had not in fact taken place. The district court has some discretion in refusing, as well as much discretion in granting, continuances; and we cannot say, in the present case, that the court below abused its discretion in refusing to grant any continuance as to Nicholas Dekker; and, if it did not, then certainly we cannot say that it erred in dismissing the plaintiffs' action without prejudice as against Nicholas Dekker. The plaintiffs had at that time over \$700 worth of property belonging to one or both of the defendants, tied up by an attachment, and they ought to have been ready for trial as to both the defendants. The judgment of the court below will be affirmed. All the justices concurring.

(44 Kan. 22)

GOODMAN v. NICHOLS.

(Supreme Court of Kansas. May 10, 1890.)

EJECTMENT—ADVERSE POSSESSION—VOID JUDICIAL SALE.

1. Where a purchaser of land at a judicial sale has held the adverse possession of the same continuously for more than 15 years, under a *bona fide* claim of ownership, it will constitute a bar to an action of ejectment by any one not under disability, and give a complete title to the purchaser, although the judicial sale and conveyance were absolutely void.

2. It is permissible for a defendant in an action of ejectment, who has answered denying the allegations and claims of the plaintiff, and has set up the defense of the statute of limitations, to further set forth in his answer a complete statement of the facts relating to his title and possession, re-

citing the giving of a mortgage by the owner, the foreclosure of the mortgage, a sale and conveyance under the decree to himself, the taking of possession under the deed as owner, his payment of taxes, and the making of lasting improvements thereon, in the belief that he was the owner, the alleged defects in the judicial proceedings on which the sale and deeds were based, and then to ask that, in case the court should hold against his title and claim of ownership, it should grant him equitable relief and protection to the amount of the original debt and interest, the taxes paid and interest thereon, and the value of the improvements which he had placed upon the land. Such defenses are not inconsistent with each other.

3. When the court determined and found that such defendant had acquired a complete title by reason of his adverse possession, no error against the plaintiff was committed by its refusal to require the defendant to redeem the land as an equitable assignee of the original mortgage.

(Syllabus by the Court.)

Error from district court, Jefferson county; ROBERT CROZIER, Judge.

Action in the nature of ejectment, brought by Julia M. Goodman against Willoughby Nichols, to recover the N. W. $\frac{1}{4}$ of section 27, township 7, range 18, in the county of Jefferson, and also to recover for the rents and profits thereof, and the damages for the withholding of the possession of the same, from the 1st day of March, 1875, until the commencement of this action. The defendant answered, and admitted that he had been in the possession of the land as alleged, but denied every other averment contained in the petition. For a further answer the defendant alleged the history of the title to the land, and stated that it was purchased from the United States by Martha M. Cody on August 7, 1857, and that on the same day she borrowed the sum of \$200 from John C. Bowles, with which to purchase the land, and executed to him a promissory note for that sum, drawing interest at the rate of 25 per cent. per annum, and also a mortgage upon the land purchased to secure the payment of the note. The mortgage was filed for record, and duly recorded, on August 11, 1857. Subsequently, Bowles duly sold and transferred the note and mortgage to Marcus D. L. Simpson, and thereafter Simpson brought an action in the district court to recover judgment upon the note, and to foreclose the mortgage; and on April 28, 1862, judgment was rendered in favor of Simpson, and against Martha M. Cody, for \$434.28 debt, and \$27.82 costs. On June 5, 1862, a special execution was issued for the sale of the mortgaged premises, in pursuance of which the land was duly sold to Willoughby Nichols, the defendant, for the sum of \$281. The money was paid, and at the October term, 1862, the sale was confirmed; and on November 16, 1862, the sheriff executed to the defendant a deed for the premises. Upon the delivery of the deed, the defendant took possession of the land, until that time vacant and unimproved, and in the full belief of rightful ownership by virtue of the judicial sale. It is also alleged that the proceedings were prosecuted by Simpson against Martha M. Cody as mortgagor in good faith, as a non-resident, and without any knowledge of her

decease, if it was in fact true. It is then stated that, the land having been subject to taxation, and having been sold, the defendant, as owner thereof, redeemed the same by the payment of \$60, and has been in the actual possession of the land as owner since April 29, 1863, without any notice of adverse claim until the commencement of this action, and that he had paid taxes assessed thereon to the amount of \$600, and placed lasting and valuable improvements thereon of more than \$2,000. It is alleged that, if Martha M. Cody was in fact deceased, as asserted by the plaintiff, at the commencement of the foreclosure action, no administration upon her estate had ever been had, and that the heirs at law of said Martha M. Cody have resided in the state continuously, and in the neighborhood of said land, during all such time, and the records of the court and of the tax proceedings have been open to their inspection, and they have in fact known thereof, as well as that the defendant was in the possession, and claimed the ownership, of the land; but they made no objection thereto, in any way, prior to the commencement of this action. Defendant further alleges that, if the deed should prove invalid by reason of the prior decease of Martha M. Cody, he was entitled to protection at the hands of the court for the full amount and value of the note, with interest thereon, and also the sum paid for the redemption of such land from tax-sale, with interest thereon, before the plaintiff should be permitted to disturb him in his possession. The defendant further alleges that, by reason of the facts, plaintiff should be estopped from setting up any claim to the land, and further that the defendant is the equitable assignee of Simpson of the note and mortgage, and all interest of Simpson and Bowles therein, with the right to enforce the same against the land, if it should be held that the plaintiff has the interest of said Martha M. Cody therein. But the defendant denies the claims of the plaintiff, and avers that he has been lawfully in the possession of the land, as the holder and owner thereof, under the judicial proceedings stated, and is entitled to have his title quieted as against the claim of the plaintiff. The defendant also pleads that the action of the plaintiff is barred by the statutes of limitation. The defendant first prayed for general judgment against the plaintiff for costs, and further that, if it should be found that plaintiff held, by purchase or otherwise, the right of Martha M. Cody, based upon the fact of her decease before the mortgage was foreclosed, the amount of the lien thereon by virtue of the note and mortgage should be determined, together with the costs of redemption of the land from tax-sale, and the subsequent taxes paid thereon, and also the value of the improvements thereon, and that the court require the plaintiff to redeem the land from these claims within a fixed time, or order the land sold for the satisfaction of these liens, and that, upon failure of the plaintiff to comply with the decree, she,

and her heirs and assigns, should be barred from all interest or claim upon said land. The plaintiff admitted the allegations of the answer with respect to the mortgage and judicial sale, but alleged that they were wholly null and void by reason of the fact that Martha M. Cody was not alive when such proceedings were had, averring that she died on or about November 1, 1858. The case was tried by the court, a jury being waived; and after the testimony was submitted the court made and stated the following conclusions of fact and law:

“Conclusions of Fact. (1) The land in dispute was Delaware trust land, and sold under provisions of treaty therefor at Osawkie, K. T., August 7, 1857, to Martha M. Cody, for the sum of \$240, and due certificate issued thereon by Daniel Woodson, receiver of the United States land-office for that district. (2) After such purchase, and on said day, said Martha M. Cody, for the consideration of \$200 borrowed of Jonathon C. Bowles, executed to said Bowles, his heirs and assigns, a mortgage of said premises to secure her promissory note of that day for the said sum, payable two years after date, at twenty-five per cent. interest from date, and which mortgage was duly acknowledged and certified, and filed for record in the office of the register of deeds for said Jefferson county, Kan., on August 11, 1857. (3) Said Martha M. Cody intermarried with John E. Crane in the winter of 1857-1858; and they lived together as husband and wife until the fall of 1858, when said Martha M. Cody died intestate, and resident in Johnson county, Kan., and was buried by said John E. Crane as her said husband; but said John E. Crane had previously intermarried in the state of Pennsylvania with one Julia Stanley, who was then living,—his lawful wife; and no administration was ever had upon the estate of Martha M. Cody. (4) Said John E. Crane, as the surviving husband of said Martha M. Cody, on April 27, 1859, executed and delivered to Mordecia H. Haines a warranty deed of conveyance, for the consideration of \$620, for the said described land, which was duly acknowledged and recorded on said date. (5) Prior to September 24, 1861, said Jonathan C. Bowles duly sold and assigned the said note and mortgage to one M. D. L. Simpson, who on said date commenced suit in this court for judgment and foreclosure thereon against said Martha M. Cody as defendant; and on September 24, 1861, summons was issued thereon, and returned not served. Thereupon, upon affidavit for publication, publication notice was made; and at the April term of this court, A. D. 1862, and on, to-wit, April 28th, upon default, judgment was rendered in this court in favor of said plaintiff, against said defendant, for the sum of \$434.28 debt, and \$27.32 costs of suit, and decree of foreclosure of sale of said mortgaged premises. Upon order of sale thereon, issued June 5, 1862, and appraisal and notice, the sheriff of this county made sale thereof

on August 6, 1862, to the defendant, for the sum of \$281, which sale was returned into this court, and, upon proceedings therein had, did thereon order deed at the October term A. D. 1862, on the, to-wit, October 27th; and thereon, on November 18, 1862, sheriff's deed was executed and delivered to the defendant, which was filed for record on November 19, 1862. And all said proceedings were regular and sufficient, but for the prior death of said Martha M. Cody, to have vested full title in the defendant, his heirs and assigns. (6) On said November 19, 1862, upon filing said sheriff's deed, the defendant redeemed said land from sale for taxes for 1861 and 1862 charged up thereon, amounting to the sum of \$18.94, said land having been duly assessed and sold for such taxes, and previously unredeemed therefrom, and then so redeemed by the defendant as the owner thereof by virtue of such sheriff's deed. All of the proceedings in court, and on the part of the defendant, were in good faith, without the knowledge of the death of said Martha M. Cody. (7) At the time of filing said deed for record, said land was vacant, being probably 130 acres prairie, and the balance of timber growth. The defendant forthwith, on obtaining his said deed, made claim of ownership thereunder to said premises, and during the next season put up hay thereon, and protected the timber from trespassers, and the other land from adverse uses; and it was generally known in that neighborhood that the defendant claimed the said land as owner under such sheriff's deed, and from this time it was so generally known; and from year to year the said land was assessed for taxes, and which were paid by the defendant, amounting, up to 1885, inclusive, about the sum of ——— dollars; and in May, 1869, the defendant broke fire-guard strips around said land, so far as the same could be done on account of the timber growth thereon, and thereafter, from year to year, kept the same broken up and burned out, and used the prairie grass portion for pasture and hay; and from 10th November, 1862, down to 1879, he got his firewood from the timber growth, and protected said land from all adverse use up to the spring of 1878, when he entirely inclosed said land with a substantial post and plank fence on three sides, in connection with his adjoining land on the fourth side, and a year or two later he put a partition fence of posts and wire between the two tracts, and which fences and uses have ever since been continued by the defendant, and no part of said land has been put into cultivation except for the purpose of hedge fences on two sides thereof. (8) The value of the wood and grass taken from the land by the defendant as aforesaid, and pasture since 1879, was a considerable sum in each of the years from 1863, inclusive, to the present time. (9) The father of said Martha M. Cody died prior to her death, and her mother died within five years thereafter. There were then and since living, of the brothers and sis-

ters of said Martha M. Cody, deceased, the plaintiff, Eliza Myers, Mary Bradford, Mrs. Jester, and William F. Cody, then aged, respectively, 17, 13, 11, 9, and 7 years; and at the commencement of this action and since, by due deeds of conveyance, the plaintiff has acquired all the interests of her said brother and sisters in and to the land in dispute, and had such deeds in court upon the trial. (10) Until 1878, plaintiff and the other heirs of Martha M. Cody, deceased, supposed that the legal title to the land had passed by John E. Crane's conveyance to Mordecia R. Haines, and did not until then have any actual notice of said purchase and occupation by said defendant.

Conclusions of Law. (1) The said intermarriage of Martha M. Cody with John E. Crane was illegal and void. (2) The said Martha M. Cody having died resident in this state, and no administration having been made upon her estate, no statute of limitations has run in favor of the plaintiff and her co-heirs. (3) The said foreclosure and sale proceedings, by reason of the prior death of said Martha M. Cody, were void as transferring the title to said land, but did operate to transfer the said note and mortgage to the defendant. (4) Under the law in force at the time the note was made and became due, the holder of said mortgage was entitled to the possession of the mortgaged premises, and the defendant, having gone into possession under such foreclosure and sale proceedings, was legally in possession of said premises; and this action of ejectment was not maintainable by the plaintiff at the commencement thereof, or since. (5) No minors' interests having intervened, except as in the ninth finding, the plaintiff and her co-heirs were barred from any action to recover said land at the expiration of five years from the time of the defendant going into possession under his said deed. (6) That the defendant has been in legal possession of said land since November 19, 1862. (7) That the defendant is entitled to recover in this action, together with his costs of suit."

In accordance with the findings of fact, the court rendered judgment in favor of the defendant and against the plaintiff for costs of suit. The plaintiff excepted to the findings of fact and conclusions of law, as well as to the judgment entered, and brings the case to this court for review.

John C. Douglass, for plaintiff in error.
Keeler & Gephart and *W. W. & W. F. Guthrie*, for defendant in error.

JOHNSTON, J., (after stating the facts as above.) The facts found by the court are sufficient to sustain the judgment that was given. Nichols has acquired a title to the land by adverse possession, which is equal to a conveyance in fee. He purchased the land in 1862 at a judicial sale, and has been continuously in possession of it since November 19, 1862. It is true that the judicial proceeding and sale were invalid by reason of

the fact that Martha M. Cody was deceased when the foreclosure proceedings were instituted against her; and therefore the sale, and the deed made in pursuance of the sale, were void, and conferred no title on Nichols, who was the purchaser. The title of the defendant, however, rests upon his possession, and not upon the judicial sale or the deed. The proceeding and sale were conducted in good faith, upon the theory that Cody was then alive, and that due notice had been given to her of the foreclosure action. Nichols became a purchaser at the sale in good faith, supposing that he was acquiring a complete title. He entered into possession under a claim of ownership, and not as mortgagee or the trustee of any one. He continued in the actual, visible, and exclusive possession, under claim of title, from 1862 until the commencement of this action, in 1885,—a period of nearly 23 years,—paying the taxes, and making valuable improvements thereon, as owner. A title by prescription arises in the adverse occupant at the end of 15 years, if the owner labors under no disability; and, if he does, within two years after the disability is removed. Civil Code, §§ 16, 17. It is conceded that the youngest heir of Martha M. Cody attained majority in 1877; and, there being but two years after the removal of the disability within which to bring action, the bar was complete, and the title of Nichols had fully ripened, in 1879. Although the deed under which he claimed was void, it afforded color of title. The claim of ownership under the deed being *bona fide*, it furnished a good basis for adverse possession, although wholly ineffectual to convey title. 3 Washb. Real Prop. (5th Ed.) 149. "When the bar of the statute becomes complete, however destitute of the color of title such occupancy may have been under, to the extent that it was actual, visible, and continuous, a title by prescription arises in the adverse occupant. This title is in all respects equal to a conveyance in fee. The only distinction which can be recognized between title acquired under the statute of limitations by adverse occupancy, under claim and color of title, and without such claim or color, is that in the latter case title will only be co-extensive with actual, visible, and continued occupancy, while in the former color of title may, by construction, embrace lands only part of which was thus actually occupied." *Roots v. Beck*, 109 Ind. 472, 9 N. E. Rep. 698; *Gildehaus v. Whiting*, 39 Kan. 706, 18 Pac. Rep. 916. The deed under which a party claims title gives character to his possession, and gives rise to the presumption that he intends his entry shall be co-extensive with the description in his deed. An adverse possession of real estate for the statutory period, held in good faith under a deed, will confer title, however defective the deed may be, and although the judicial proceedings and sale under which it is issued were void, and will do so even if the deed is void on its face. *Walker v. Hill*, 111 Ind. 223, 12 N. E. Rep.

387; *Hall v. Law*, 102 U. S. 461; *Tremaine v. Weatherby*, 58 Iowa, 615, 12 N. W. Rep. 609; *Sands v. Hughes*, 53 N. Y. 297; *Chandler v. Spear*, 22 Vt. 388; *Hoye v. Swan*, 5 Md. 237; *Humphries v. Huffman*, 33 Ohio St. 395; *Austin v. Rust*, 73 Ill. 491; *Ellicott v. Pearl*, 10 Pet. 412; *Logan v. Jelks*, 34 Ark. 547; *Murphy v. Doyle*, 33 N. W. Rep. 222; Ang. Lim. § 404.

The plaintiff insists that Nichols was holding under the Cody mortgage as an equitable assignee, and must be treated as holding the possession in trust for the heirs of the mortgagor. She claims that, as the issues were framed and found, the defendant is only entitled to the rights, and is bound by the obligations, of a mortgagee in possession, and that the decree rendered should have been for an equitable redemption. As we have seen, the entry of the defendant was not under the mortgage, but he took and held possession under a claim of absolute ownership. The defendant recognized no trust, nor any title other than his own, and at no time was he intending to hold in subserviency to another. His possession was open and hostile from the inception, and so continued until the commencement of this action. Under the facts found, there is no ground for the contention that the defendant was holding under the mortgage.

Plaintiff contends that by the pleadings the defendant limited himself to the defense of equitable relief under the mortgage, and was not entitled to avail himself, or to receive the advantage, of the defense of the statute of limitations. We do not agree with this contention. The petition of the plaintiff was an ordinary one in ejectment, alleging ownership and the right of possession, and asking for rents and profits and the recovery of possession. The defendant answered by denying generally every fact alleged in the petition, except that he was in possession of the premises; and he averred that he had been in the open, notorious, continuous, and adverse possession from November, 1862, as the owner thereof under the judicial sale and deed; and therefore that the plaintiff was barred under the laws of the state from prosecuting the action. In further answer he sets up a detailed history of the title of the land from its sale by the United States down to the commencement of the action, reciting at length the giving of the mortgage, its foreclosure, the sale of the land, and the execution of the deed to himself, his possession and payment of taxes, as well as making improvements thereon; and he refers to the alleged defect in his deed by reason of the death of Martha M. Cody prior to the commencement of the foreclosure proceedings. He then asks that, if his title should fail upon the other defenses, and by reason of the defects mentioned, he should be granted equitable relief and protection to the full amount of the note and interest, the taxes and interest, and the value of the improvements which he had placed on the premises. In connection with

these allegations, it was stated, however, that by reason of the facts stated the plaintiff was the actual owner of the premises, and that the plaintiff was barred from the prosecution of the action, or the setting up of any claim or title to the land. There is no inconsistency in the averments of the answer, nor anything which precluded the court from awarding the judgment that was rendered. A defendant is entitled to set forth as many grounds of defense and for relief, either legal or equitable, as he may have. Civil Code, §§ 94, 95. In this case the defendant claimed ownership by adverse possession, and that the plaintiff was barred under the laws of the state from maintaining her action; but, failing in these defenses, he asked for such relief as the facts alleged would warrant. We see no reason why this practice is not permissible. In actions for slander the defendant may include in his answer a denial that he used the language imputed to him, as well as an averment that the language so imputed is true. These defenses are held not to be inconsistent, and certainly there is no more ground for holding the defenses made in this action to be inconsistent with each other. *Cole v. Woodson*, 32 Kan. 272, 4 Pac. Rep. 321.

The legal defense of title arising from adverse occupancy and the statutes of limitations is fully sustained by the facts which have been found, and hence there was no occasion for the court to go further. The equitable relief was only asked in the event that the court should find from the facts that the legal defenses were not made out. It is immaterial that some of the conclusions of law stated by the court may be incorrect, so long as the facts sufficiently support the judgment; and, this being true, the judgment that was rendered should be, and will be affirmed. All the justices concurring.

(19 Or. 250)

SPERRY *et al.* v. LEWIS.

(Supreme Court of Oregon. May 17, 1890.)

ACTION ON NOTE—PLEADING.

In an action on a promissory note which had appended to it on the same sheet of paper an agreement by the maker to deliver his entire wool clip for a particular year, as security for the note, and which provided that the plaintiffs were to sell the same on commission, and apply the proceeds in payment of said note, held, that a complaint which was sufficient in every other particular, but did not allege that the defendant failed to deliver the wool, or that it was insufficient to pay the debt, was good on demurrer.

(Syllabus by the Court.)

Appeal from circuit court, Union county; JAMES A. FEE, Judge.

This is an action founded on two promissory notes, which are alike in every particular, except as to amounts, time of payment, dates, etc. One is for \$1,000, upon which a payment of \$1,036.32 is indorsed, and the other is for \$150. Each bears interest at the rate of 10 per cent. per annum until paid, and each note is past due. At the foot of each note, and on the same piece of paper, is the

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following writing, signed by the defendant: "The above being an advance on ———, entire wool clip for 188—, in consideration thereof ——— agree to consign to said J. L. Sperry & Co., at Portland, Oregon, as soon as shorn, the whole of said wool clip from all sheep owned or controlled by ———, numbering ——— head; said wool to be held by said company as security for this and every other obligation of the undersigned to said company, and to be sold by said company for ———, on account on commission under ——— instructions, the proceeds of such sale to be applied, first, to any obligation secured hereby, and the overplus to be paid over to the undersigned." A general demurrer was sustained to the complaint, and, the plaintiffs not wishing to amend their complaint, final judgment was rendered against them, from which this appeal is taken.

J. W. Shelton, for appellants. *Cage Baker*, for respondent.

STRAHAN, J., (*after stating the facts as above.*) There is no defect in the complaint, except the respondent claims that the note and the writing appended to it are to be construed together, and constitute one entire contract, and that, before the plaintiff can recover, he must show by his pleading that the wool specified in the contract was not delivered, or that the same was insufficient to pay the debt. But in this counsel is evidently mistaken. The obligation to pay created by the note is unconditional and absolute, and the most that can be said for the writing appended to it is that the defendant promised to give a particular security from which an amount of money was expected to be received by the plaintiffs sufficient to pay the note. It was the defendant's duty to consign his wool clip to the plaintiffs, and until he did so no duty devolved on the plaintiffs whatever. The complaint alleges the notes have not been paid, except a particular sum on one of them, and the demurrer admits the facts. Under this state of the record it was clearly error to sustain the demurrer. The judgment appealed from will therefore be reversed, and the cause remanded to the court below, with directions to overrule the demurrer, and for such further proceedings as may be proper.

(19 Or. 232)

HOLMES v. PAGE.

(Supreme Court of Oregon. May 13, 1890.)

ACTION ON ACCOUNT STATED—HUSBAND AND WIFE—FAMILY EXPENSES.

1. An account stated is an account which has been rendered by the creditor, and has been assented to by the debtor as correct, either expressly, or by implication of law from failure to object.

2. The action is not founded upon the items of the account, but on the defendant's consent to the balance stated.

3. Where goods are bought as family expenses, and are so used, either husband or wife, or both, are liable in an action for them; but the wife cannot be made liable on a contract based on account stated between her husband and the plaintiff, to which she has not assented.

(Syllabus by the Court.)

Appeal from circuit court, Umatilla county; JAMES A. FEE, Judge.

This is an action on an account stated, in which the defendants, as husband and wife, were sued jointly. The defendant Thomas P. Page made default, but his wife, the defendant Frances E. Page, answered for herself only. Upon issue being joined, after a trial a verdict and judgment was rendered against the defendant Frances E. Page for the amount demanded, from which the present appeal is taken.

Ramsey & Wager and Wm. Parsons, for appellant. *W. F. Butcher*, for respondent.

LORD, J. The balance on the account stated is alleged to have been due on an account for goods sold and delivered to the defendants for family use, but the record discloses that no accounting ever took place between the plaintiff and the defendant Frances E. Page in which a balance was found due which she agreed to pay. The action is not based upon the original indebtedness for goods sold and delivered by the plaintiff to the defendants for family use, but on an accounting which was had between the plaintiff and the husband of Frances E. Page, in which a balance was found due in the sum named, which he promised to pay. The question raised and to be determined is whether the assent of the husband to a balance due on account stated binds the wife, the defendant Frances E. Page, with whom and the plaintiff no account was ever struck, and balance found to be due which she undertook or agreed to pay. It arises out of the following instruction: "I instruct you that, if you find that an account was stated with Thomas P. Page, and find that Thomas P. Page and Frances E. Page were husband and wife at the time the account was stated, or that they were husband and wife at the time the goods were purchased, then Frances E. Page was bound thereby." The effect of this instruction, in such case, is to say that the assent of the husband is the assent of the wife, and binds her equally with him, so that, if an account was stated between the plaintiff and the husband of the defendant which he admitted to be correct, she is alike bound thereby, and precluded from making any defense that he could not make. An account stated is an account which has been rendered by the creditor, and has been assented to by the debtor as correct, either expressly, or by implication of law from failure to object. *Truman v. Owens*, 17 Or. 523, 21 Pac. Rep. 665. The action is based on an agreement between the parties founded upon an examination of the transaction embraced, and has all the force of a contract. It is in the nature of a new promise, but the consideration of the promise is the stating of the account. As SEARLS, C. J., said: "The original account becomes the consideration for the agreement, and it is not necessary to prove the items of such account; nor can they be inquired into or surcharged except for some fraud, error, or mistake, and such

grounds must be according to the weight of authority set forth in the pleadings." *Auzerais v. Naglee*, 74 Cal. 64, 15 Pac. Rep. 371. The reason is that the action is not founded upon the items of the account, but on the defendant's consent to the balance stated. This agreed statement becomes an original demand, and is equivalent to an express promise to pay the actual sum stated, which the creditor becomes entitled to recover; and, as this is strictly an action on an account stated, the plaintiff must prove it as alleged in his complaint, and nothing short of such proof will support his allegation. *Volkening v. De Graaf*, 81 N. Y. 271. Unless, therefore, the promise or assent of the husband of the defendant operates to bind and make her liable on the account stated, the plaintiff must fail. Section 2874. Or. Code, provides that "the expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them; and, in relation thereto, they may be sued jointly or separately." Here the liability for family expenses is created against either husband or wife, or both, by the statute. Under this provision, each is personally liable when the indebtedness is for the purposes contemplated by it.

The fact that the goods sold were for the use of the family, and were so used, but were charged to the husband individually, or that he may have given his note for the same, will not exonerate the wife from liability on the original indebtedness so long as such note remains unpaid. In *Black v. Sippy*, 15 Or. 575, 16 Pac. Rep. 418, the action was against the wife to recover money for goods and merchandise sold and delivered for the use of the family which had been charged to the husband, and who on an accounting had given his note to the plaintiff for the sum found due, which the plaintiff then held and was unpaid; and the defense urged was that the acceptance by the plaintiff of the note of her husband was payment of the original indebtedness. But the court held that the changing of the form of the indebtedness, as against him, did not release her from liability under the statute to pay for such goods and merchandise incurred as a family expense. No claim was made that the wife was liable on the note, or that her husband, in giving such note, was agent for her. The action was based on the right given the creditor, and the liability declared by the statute against either or both, for a debt, for goods and merchandise, incurred as a family expense; and, if this action was founded upon the original indebtedness for family expenses, the fact that the items of such indebtedness had been charged to the husband, or that, on an adjustment of such account, a balance had been found due which the husband had promised to pay, or for which he had given his note, and which remained unpaid, would not defeat her liability for such indebtedness incurred as a family expense. But the liability sought to be enforced in this action against

the defendant is not on an account for goods sold and delivered to the defendant for family use, but it is based on the promise of the husband to pay the balance found to be due on such an account stated between the plaintiff and him, on the theory that his promise or undertaking in relation thereto is the wife's, or that in such case he is agent for her, and his engagement alike binds her. It thus appears that the plaintiff is not seeking to enforce her liability under the statute, but on her husband's promise or contract to which she is not a party, or to which she has not assented. And, if she is bound, the plaintiff is not required to prove the items, and she is precluded, except for fraud or mistake alleged, from inquiring into their validity, whether they were bought for family use or not, or to make other defense. To so hold is to make her husband her agent against her will, and to enable him to bind his wife without her assent, express or implied.

The principle is elementary that it is only the parties to a contract, and their representatives, that are bound by it. That a husband may be agent for his wife is not doubted; but, as has been said, "a husband has, by virtue of his relation alone, no implied power to act as the agent of his wife in the transaction of her business. Whatever authority he exercises in that capacity must be derived from her prior appointment or subsequent ratification." *Mechem, Ag. § 63.* It is not disputed that, if the goods were bought for family expenses, and were used by the family, the defendant is liable; but she cannot be made liable on a contract based on an account stated between her husband and the plaintiff to which she has not assented. It results that the judgment must be reversed, and the cause remanded.

(19 Or. 176)

STATE v. CHASTAIN.

(*Supreme Court of Oregon. May 1, 1890.*)

INTOXICATING LIQUORS—SALES BY AGENT.

1. Where one sells spirituous liquors as the agent of another, neither he nor his principal having any license, under the statute he is liable personally to an indictment.

2. Statutes prohibiting the sale of liquors, without first having obtained a license therefor, are in the nature of fiscal and police regulations, and make their violation indictable, irrespective of guilty knowledge.

(*Syllabus by the Court.*)

Appeal from circuit court, Klamath county; L. R. WEBSTER, Judge.

The defendant was jointly indicted with one D. A. Scott under a charge of selling spirituous liquors without a license. There was a failure in arresting Scott, and defendant went to separate trial and was convicted. On the trial the defendant sought to introduce substantially the following facts as a defense to the indictment: That one D. A. Scott, the co-defendant in this indictment, about the 1st day of October, 1889, opened a saloon for sale of spirituous liquors at Bonanza, a small village in Klamath county, Or.,

situated about 20 miles from Linkville, the county-seat. That shortly after opening said business the said Scott represented to defendant and other residents of the village that he had deposited with the treasurer of said county the money for his license, in accordance with the custom of parties desiring a license, and that he must go to Linkville and get it. That Scott at this time had a United States revenue license for the sale of liquors, and that after making these representations Scott hired the defendant to tend bar for him until he could go and get his license, and return, which would be in a few days. Scott left with the alleged purpose of getting his license; he never returned. Soon after Scott left, his creditors attached his property and closed his business, but that, during the interval between his leaving and closing the business, the defendant sold the liquor to the witness Truitt. That the defendant had no interest whatever in the business or its receipts, and that he honestly believed that Scott had taken out his license before the delivery of the whisky to the witness Truitt. These facts were sought to be shown by several witnesses, but on objection the court refused to admit the evidence, and, in effect, instructed the jury that such facts would not constitute a defense for selling liquor without a license.

H. K. Hanna, for appellant. Wm. M. Colvig, for the State.

LORD, J. On behalf of the defendant, it is contended that as he was simply a servant or employe of Scott's, and had no interest in the business, or the result of the sales of liquor, and honestly believed his employer had procured a license, and was misled by him, he could have no notice or intention to violate the law, without which his act could not constitute a criminal offense. The contention, therefore, is that, to make a transaction criminal, there must be both the will and act entering into the transaction. That, "the wrongful intent being the essence of every crime, it [the doctrine] necessarily follows that, whenever one is misled, without fault or carelessness, concerning facts, and while so misled acts as he would be justified in doing were they [the facts] what he believes them to be, he is legally innocent, the same as he is innocent morally." 1 Bish. Crim. Law, § 303. "The doctrine which requires an evil intent lies at the foundation of public justice. There is only one criterion by which the guilt of men is to be tested. It is whether the mind is criminal." *Id.* § 287. Thus, in *Faulks v. People*, 39 Mich. 200, where, on a prosecution for selling intoxicating liquors to a minor, it was held a good defense to show that the seller reasonably believed him of age, CAMPBELL, C. J., said: "It cannot be assumed that the legislature would attempt such a wrong as to punish as criminal an act which involved no criminal intent. * * * This principle is as old as the criminal law, and

underlies the whole of it." As illustrative of the principle involved, see, also, *Farrell v. State*, 32 Ohio St. 456; 3 Lawson, *Crim. Def.* 200, 267, 279; 11 Amer. & Eng. *Cyclop. Law*, "Intoxicating Liquors," 694, 698. On the other hand, in other jurisdictions, upon the question whether the seller knew that the buyer was a minor, it has been held that ignorance in this particular, joined with an honest belief that the minor was of full age, is no defense. In *Ulrich v. Com.*, 6 Bush, 400, it was held that it is as incumbent on the vendor of liquors to know that his customer labors under no disability as it is for him to know the law, and that his ignorance of neither will excuse him. In *McCutcheon v. People*, 69 Ill. 606, *SCOTT, J.*, said: "The license procured under the first section of the act confers no authority on the licensee to sell intoxicating liquors to a minor, except upon one condition, viz., he shall have the written order of his parents, guardian, or family physician. * * * The law imposes upon the licensed seller the duty to see that the party to whom he sells is authorized to buy, and, if he makes a sale without this knowledge, he does it at his peril. * * * It is no answer to this view to say the licensee may sometimes be imposed upon and made to suffer the penalties of the law when he had no intention to violate its provisions. This is a risk incident to the business he has undertaken to conduct, and, as he receives the gains connected therewith, he must assume also with it all the hazards." See note to *Farrell v. State*, 30 Amer. Rep. 617.

The principle established by this view is that ignorance of fact is no defense where the statute makes the offense indictable, irrespective of guilty knowledge. As *DIXON, C. J.*, said: "Where a statute commands that an act be done or omitted which in the absence of such statute might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute will not excuse its violation." *State v. Hartfel*, 24 Wis. 61; 1 Whart. *Crim. Law*, § 88; 3 *Greenl. Ev.* § 21. Our statute provides "that no person shall be permitted to sell spirituous, malt, or vinous liquors in this state * * * without having first obtained a license from the county court," etc. Section 1. And again: "If any person or persons shall barter, sell, or dispose of, in any manner, any spirituous, malt, or vinous liquors, without having first obtained a license therefor as provided by this act, such person shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than," etc. Section 9, *Sess. Laws 1889*, pp. 9, 10. The language of this statute is absolute and unconditional. Its purpose is to compel every person who engages in the sale of intoxicating drinks to first obtain a license as required by the statute; otherwise he acts at his peril. Statutes of this character are in the nature of fiscal and police regulations, and impose criminal penalties irrespective of any intent to violate them; the purpose being

to require a degree of diligence for the protection of the public which shall render violation impossible. *People v. Roby*, 52 Mich. 579, 18 N. W. Rep. 365. The statute makes it a positive requirement that a license shall be first obtained before a sale can be made without incurring the penalty denounced. It makes such an act indictable, irrespective of guilty knowledge, and ignorance of fact, however sincere and honest, cannot avail as a defense. Hence it is no defense to an indictment for selling liquor without a license that the defendant sold as the agent of another person. "It is no defense," says Mr. Wharton, "that the defendant was acting as agent for another. He is criminally responsible as principal himself, notwithstanding such agency." 2 Whart. *Crim. Law*, § 1504; *Bish. St. Crimes*, § 1024. In *State v. Bugbee*, 22 Vt. 34, the court say: "It is claimed that if the respondent, in making the sale, acted gratuitously as the mere servant of Hunt, he would not be personally liable to indictment though Hunt had no license. But we think this is not sound. If the respondent justify the act of selling under Hunt, as his principal, he must show an authority in his principal to sell. The agent who does the act can stand in no better situation than his principal. He justifies under him; and, if the principal had no authority to sell, the agent could have none. * * * Hunt having had no license to sell, the respondent must stand as principal, so far as appertains to this prosecution." See, also, 11 Amer. & Eng. *Cyclop. Law*, tit. "Intoxicating Liquors," 714, 715. Standing in the place of his principal, the bar-keeper is bound to know, to excuse himself from liability, that his principal is licensed to sell intoxicating liquors, as otherwise he is charged with the knowledge that such sales are prohibited and in violation of the statute. As statutes of this character bind the party to know the facts and to keep them at his peril, neither the motives nor the intent of the defendant can relieve him, when a sale is made without a license. The intent is immaterial when the statute makes the act indictable irrespective of guilty knowledge; and in such case ignorance of fact, no matter how sincere, can be no defense. It is enough that under the statute the commission of the act prohibited constitutes the offense, irrespective of the motives or knowledge of the defendant, and, as his principal had no license to sell, the defendant must stand for him, so far as appertains to this prosecution. It follows that the judgment must be affirmed.

(20 Or. 50)

STATE v. KAISER.

(Supreme Court of Oregon. May 1, 1890.)

CONTEMPT—NEWSPAPER PUBLICATIONS—PROCEDURE.

1. Acts and omissions deemed to be contempts of the authority of courts, under the laws of Oregon, are only those which are specified as such under the subdivisions of section 650 of the Civil Code,

and in other sections thereof, and can be punished only in the mode therein prescribed.

2. The publication of an article in a newspaper is not a contempt unless it reflect upon the conduct of the court in reference to a pending suit or proceeding, and tend in some manner to influence its decisions therein, or to impede, interrupt, or embarrass the proceedings of the court in reference thereto.

3. A court has no authority to proceed against a party for contempt on account of acts not committed in the immediate view and presence of the court, unless the facts constituting the contempt are shown by an affidavit presented to the court.

(Syllabus by the Court.)

Appeal from a decision of the circuit court for the county of Jackson, in a matter of contempt.

Said circuit court, at a term thereof held on the 13th day of December, 1889, proceeded of its own motion to make and enter the following order: "In the circuit court for Jackson county, Oregon. Whereas, you, E. J. Kaiser and N. A. Jacobs, as editors and publishers of the Valley Record, a newspaper published at the city of Ashland, Jackson county, Oregon, on Thursday, the 12th of December, 1889, in an issue of said Valley Record published on said day, did publish of and concerning the above court, and the judge and officer thereof, the following, to-wit: 'The circuit judge has ordered an investigation into the whys and wherefores of a material witness disappearing in a criminal case, in which his important testimony was needed to convict. While the honorable court is at the investigation business, it might not be more than common justice to go into the wholesale business of investigating itself, and everybody else connected with the management and manipulation of the jurisprudence of southern Oregon. If some of the methods employed could be sifted to the bottom a system of debauchery would be unearthed that may be very warm and interesting to some of the executors. In fact, then, the evidence would be laid bare to the people of southern Oregon, and they would know just why one man can be convicted of murder in the first degree, and "hung by the neck until he is dead," on strong circumstantial evidence; and why another crime, of the same foul magnitude, is committed, and the courts fail to find the author, when the circumstantial evidence that made the first man stretch hemp was far less convicting in its circumstantialness than was the case that the blind Goddess of Justice could not find guilty; why attorneys can offer bribes to even such august personages as grand jurors to bring in suitable verdicts; and why—yes, why—a lot of other things, just as queer, irregular, and delicate, and too numerous to mention, are occurring as periodically as there are exigencies that make them. In fact the court would have an all year's job on its hands. The practicing condition of jurisprudence in this section of the world is as corrupt and criminal in its methods, in proportion to population, amount and magnitude of crime, and purse of criminals, as it is in the cities where these cases are regularly "handled" by the political

boss who "makes" the officials, "fixes" the juries, and attends to the case, for a large sum. These irregular methods are becoming so numerous that it seems as though they have encysted themselves upon, and are a part of, the—unwritten—works of Blackstone. This is one of the conditions and dangerous consequences of the political methods in vogue in Jackson county, an immediate result of which is shown in the shameless way in which its representative officials are allowed to sell out their constituency for a beggarly fee. Another direct result of this condition of affairs has placed an indebtedness of from \$100,000 to \$150,000—such a magnitude that no one does know the actual amount—over the county, that is bearing practically ten per cent. interest, (mighty large returns and safe investment for big capital;) and no effort is being made to stop it from climbing right along up. When will the cupidity, indifference, and lack of courage of the people in public affairs cease, and an effort made to at least put a check to these grasping vultures?' It is, therefore, now hereby ordered that you, and each of you, be and appear before said court, at the court-house in Jacksonville, said county and state, on Monday, 16th December, 1889, at 9 o'clock in the forenoon, then and there to show cause, if any you have, why you should not be punished for contempt of said court for having so published and circulated the matter above set out as aforesaid. Done in open court on Friday, 13th December, 1889. LIONEL R. WEBSTER." A certified copy of the order and citation having been personally served upon the said E. J. Kaiser on the 17th day of December, 1889, he appeared in accordance with the requirements thereof, and filed an answer duly verified by him, of which the following is a copy. "E. J. Kaiser comes, and, in answer to a citation issued out of the above-entitled court, and heretofore served on him, says that he is engaged in publishing a newspaper of general circulation at Ashland, Or; that, in publishing said article that appears in said citation, he did not make any reference to any action or proceeding then pending in said court, or before any grand jury, nor was there any grand jury in session at said time, as defendant is informed; that said article was, so far as the same relates to the courts of this county, a criticism of past acts therein, and the same was not intended to have, and would not have, any tendency to interfere with the proper and unbiased administration of the law in any case or cases then or now pending in said court; and that said article was published only, as the defendant believed, in the interest of society, and defendant earnestly disclaims any intentional disrespect towards said court, or the officers thereof, in the publishing of said article. And, further answering, defendant avers that said court has no jurisdiction of the person of this defendant under this proceeding, and denies that this court has any jurisdiction to punish this defendant, or to adjudge him in contempt, for the pub-

lishing of said article set forth in said citation." The said circuit court, upon the said order, citation, and answer, adjudged the said Kaiser guilty of contempt of the court in the publication of said article, and sentenced him to pay a fine of \$50, and also that he be imprisoned in the county jail for the period of 15 days, from which adjudication the said Kaiser brought this appeal.

H. K. Hanna, for appellant. *Wm. M. Colvig*, Dist. Atty., and *A. S. Hammond*, for respondent.

THAYER, C. J. Two questions are presented for our consideration upon this appeal: *First*, whether the matter published by the appellant was punishable as a contempt of the circuit court; *second*, whether said court had authority of its own motion to cite the appellant to appear before it, and inflict punishment upon him for the alleged offense.

The Civil Code of this state section six hundred and fifty prescribes what acts and omissions in respect to a court of justice, or proceedings therein, shall be deemed to be contempts of the authority of the court. They are as follows: Disorderly, contemptuous, or insolent behavior towards the judge, while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceeding; a breach of the peace, boisterous conduct, or violent disturbance tending to interrupt the due course of a trial or other judicial proceeding; misbehavior in office, or other willful neglect or violation of duty, by an attorney, clerk, sheriff, or other person appointed or selected to perform a judicial or ministerial service; deceit or abuse of the process or proceedings of the court by a party to an action, suit, or special proceeding; disobedience of any lawful judgment, decree, order, or process of the court; assuming to be an attorney or other officer of the court, and acting as such, without authority, in a particular instance; rescuing any person or property in the custody of an officer by virtue of an order or process of such court; unlawfully detaining a witness or party to an action, suit, or proceeding while going to, remaining at, or returning from the court where the same is for trial; any other unlawful interference with the process or proceedings of a court; disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness; when summoned as a juror in a court, improperly conversing with a party to an action, suit, or other proceeding to be tried at such court, or with any other person, in relation to the merits of such action, suit, or proceeding, or receiving a communication from a party or other person in respect to it without immediately disclosing the same to the court; disobedience by an inferior tribunal, magistrate, or officer of the lawful judgment, decree, order, or process of a superior court, or proceeding in an action, suit, or proceeding, contrary to law, after such action, suit, or proceeding shall have been removed from the

jurisdiction of such inferior tribunal, magistrate, or officer. There are various other acts in the Code which are specially declared punishable as contempt; and it authorizes every court of justice, and every judicial officer, to punish contempt by fine or imprisonment, or both, but provides that such fine shall not exceed \$300, nor the imprisonment six months, and that, when the contempt is not one of those mentioned in subdivisions 1 and 2 of section 650, or subdivision 1 of section 916, which empowers every judicial officer to preserve and enforce order in his immediate presence, etc., it must appear that the right or remedy of a party to an action, suit, or proceeding was defeated or prejudiced thereby before the contempt can be punished otherwise than by a fine not exceeding \$100. Section 651. Section 652 of the Code provides that, "when a contempt is committed in the immediate view and presence of the court or officer, it may be punished summarily, for which an order must be made, reciting the facts as occurring in such immediate view and presence, determining that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed;" and section 653 provides that "in cases other than those mentioned in section 652, [642,] before any proceedings can be taken therein, the facts constituting the contempt must be shown by an affidavit presented to the court or judicial officer, and thereupon such court or officer may either make an order upon the person charged to show cause why he should not be arrested to answer, or issue a warrant of arrest to bring such person to answer in the first instance." Section 655 provides that, "in the proceeding for a contempt, the state is the plaintiff. In all cases of public interest the proceeding may be prosecuted by the district attorney on behalf of the state; and in all cases where the proceeding is commenced upon the relation of a private party, such party shall be deemed a co-plaintiff with the state." These various sections of the Code not only provide what acts shall be deemed contempts, and point out the mode of procedure for their punishment, but strongly indicate that, when the act constituting the contempt is not committed in the immediate view and presence of the court or officer, it must be such an one as is calculated to affect the right or remedy of a party in a litigation. Section 651, which limits the punishment to a fine not exceeding \$100, unless it appear that the right or remedy of a party to an action, suit, or proceeding was defeated or prejudiced by the contempt, clearly shows this. If this view be correct, it follows then that, unless the matter published by the appellant constituted a contempt under subdivisions 1 or 2 of said section 650, or under subdivision 1 of section 916, or affected, or tended to affect, the right of a party to a litigation pending in said court, or before the judge thereof, it does not come within the purview of the Code. But counsel for the respondent urge that a court of

justice has power to punish for contempt, and that its power in that respect cannot be limited by statute. This is undoubtedly true, so far as it is necessary to maintain order in the conduct of its business, and in the enforcement of its jurisdiction. The legislature could as well abolish the courts outright as to deprive them of the power to punish for contempt those who impeded, obstructed, and embarrassed the administration of the law. It would paralyze their functions, and render their process, orders, decrees, and judgments mere *brutum fulmen*. But whether they possess inherent authority to punish as contempt acts which do not affect causes actually pending before them, although the acts tend to degrade the court, and bring the administration of justice into disrepute, has never been conceded in this country. Counsel for respondent have cited in support of that doctrine from the American decisions, *State v. Morrill*, 16 Ark. 384, and *Stuart v. People*, 3 Scam. 405; but it is well understood that the courts of the latter state have since held quite to the contrary. *Storey v. People*, 79 Ill. 45.

In *State v. Anderson*, 40 Iowa, 207, the supreme court of that state held that the publication by an attorney of an article in a newspaper criticising the rulings of a court in a cause tried and determined prior to the publication did not constitute contempt punishable by the court, and referred approvingly to *Dunham v. State*, 6 Iowa, 245, in which it was held that the publication of articles in a newspaper reflecting upon the conduct of a judge in relation to a cause pending in court, which had been disposed of before the publication, however unjust and libelous the publication might be, did not amount to contemptuous or violent behavior towards the court, under chapter 94, Code 1851. of that state, nor that such articles were so calculated to impede, embarrass, or obstruct the court in the administration of the law as to justify the summary punishment of the offender under that chapter. The inherent power of a court of justice to punish for contempt one who commits acts which have a direct tendency to obstruct or embarrass its proceedings in matters pending before it, or to influence decisions regarding such matters, is undoubted; but it can hardly be maintained, from the adjudications had upon the subject in the various states, that such power is broad enough to vest in the court the authority to so punish any one for criticising the court on account of its procedure in matters which have fully terminated, however much its dignity and standing may be affected thereby, however unjust, rude, or boorish may be the criticism, or whatever may be its effect in bringing the administration of the law into disrepute. In any event, it seems to me that the legislature has authority to limit the power of courts in regard to matters of contempt to the punishment only of such acts as are specified in the sections of the Code above set out. Nor can I discover any

reason why the legislature does not possess authority to prescribe the mode of procedure to be observed by the courts in the exercise of their powers to punish in such cases. The proceeding is not a personal matter of the court. The state is a plaintiff in all cases of that character. But, when the acts constituting the contempt are committed in the presence of the court, it may take judicial cognizance of them, and inflict summary punishment. It is, however, required to make an order reciting the acts as occurring in its immediate view and presence, and determine that the person proceeded against is thereby guilty of a contempt, and that he be punished, etc. As I view the said sections of the Code, they are little more than declaratory of the law upon the subject of contempt as understood by a large portion of the courts of the several states at the time of their adoption. They provide every means necessary to the preservation of order and decorum in the presence of the courts of the state, while engaged in the transaction of their business, for the enforcement of obedience to their lawful judgments, decrees, orders, and processes, and for the performance of official duty upon the part of their officers. Whether, therefore, the said matter published by the appellant constituted a contempt depends upon whether it falls within any of the cases specified in said sections; and whether the circuit court had authority, of its own motion, to cite the appellant to appear before it, and inflict upon him the punishment imposed, depends upon whether the offending was done in the immediate view and presence of the court.

For what purpose or with what intent the appellant published the said matter, unless it were to create an idle, silly sensation, is an enigma. His doing so probably resulted from a freak or spleen. He certainly could not have expected to gain any advantage from such a profusion of extravagancy, nor have supposed that a half-witted person, even, would give any credence to his grotesque account of the affairs of Jackson county referred to in his production. Why any man other than an addle-brained lunatic should print such absurd, ridiculous stuff in a newspaper is difficult to imagine. The indulgence in such shilly-shally by managers of newspapers indicate a mania on their part to abuse, vilify, and insult officials selected to administer the affairs of government, however devoted and faithful to the public interests those officials may be. Such a course only tends to incite anarchy, the most dangerous and dreaded enemy with which a republican government has to contend. It is well known to this court, and to the community generally, that no such condition in the judicial matters of "southern Oregon" as the appellant endeavored to represent exists, and that no such abuses as he depicted prevail there, but, upon the contrary, that justice is as well and faithfully administered in that locality as in any other part of the

state. Yet the appellant, the editor of the newspaper, whose desire should not only be to have upright and competent officials in the administration of the local affairs of his section, where he consistently can take pride in having them so regarded by the community and the world at large, makes use of his position to traduce and degrade them. Instead of attending to his business of imparting useful information,—instead of assisting in building up the community and its institutions,—he acts the part of an iconoclast. The course pursued by such persons is a positive damage and injury to society. It is a poor requital for the faithful services of the learned judge who presides in the first judicial district, and whom the people thereof selected to determine the law in their matters of difference, to subject him to a wholesale charge of dereliction of duty, coming from whatever source it may.

The publication, according to the general definition given by Blackstone, and by some of the more modern law-writers, upon the subject, would probably constitute contempt; but, under the Code of this state, it does not; nor do I think it would according to the weight of decisions made under the constitutions of the various states. If it had reflected upon the conduct of the court with reference to a pending suit, and tended in any manner to influence its decision therein, it would, unquestionably, have been a contempt; but it was not shown that any suit was then pending by which the rights of any litigant were, or could have been, affected by it. The article itself states that the court had ordered an investigation into the "whys and wherefores" of a material witness disappearing in a criminal case, in which his testimony was needed to convict; but it does not appear in the proceeding for contempt that such was the fact, nor, as I can see, that it was calculated to influence the decision in that matter. It appears to have been a vague, wanton fault-finding in regard to the general manner in which official duty in that part of the state had been performed, not arising to the dignity of a criticism, nor entitled to any notice whatever. If the publishers of such contemptible articles are left alone to breathe and scent their own fetid exhalations, it will be the most suitable punishment which can be inflicted upon them. If the act were such an one as could have been in the immediate view and presence of the court, it would, doubtless, have been what is termed a "direct contempt;" but, it not having been so committed, and not involving a direct disobedience to any order of the court, it comes within the class denominated "constructive contempt." 20 Amer. Law Reg. 147. In proceedings to punish that class of contempts, it is necessary that a proper information should be filed before the court is authorized to act in the matter. Said section 653 of the Code, above set out, makes it imperative that the facts constituting the contempt in such cases must be shown by an affidavit presented to

the court, etc., before the proceeding can be taken. "The power of a court," said WALLACE, J., in *Batchelder v. Moore*, 42 Cal. 414, "to punish for an alleged contempt of its authority, though undoubted, is in its nature arbitrary, and its exercise is not to be upheld except under the circumstances and in the manner prescribed by law." I am of the opinion, therefore, that the court was not authorized to proceed in the matter of its own motion; nor was the court empowered to punish the appellant by imprisonment. Section 651 of the Code, above referred to, is decisive upon that point. The decision appealed from must therefore be reversed.

(19 Or. 213)

STATE v. TOWNSEND.

(Supreme Court of Oregon. May 8, 1890.)

LARCENY—TESTIMONY OF ACCOMPLICE—CORROBORATION.

Where the corroborative evidence showed that the defendant and his accomplice were together at or near the place where the larceny of the animal was committed, under circumstances which indicated concert between them in furtherance of a common purpose, *held*, that the evidence did tend in some degree to connect the defendant with the commission of the crime.

(Syllabus by the Court.)

Appeal from circuit court, Umatilla county; JAMES A. FEE, Judge.

The defendant was jointly indicted with others, and convicted of the crime of larceny of a cow, charged to have been committed on the 14th day of January, 1889. One Jed Beal, a co-defendant, testified, as an accomplice, to the particulars of the stealing of the cow by the defendant and himself. The evidence corroborative of the accomplice, Beal, testified to by one Charles Stencil, was as follows: "About January 14, 1889, I was at Frank Beal's place, about four miles from town. At one time that night, I think about 8 o'clock P. M., Jed Beal was there, and he left, and a little later he came back to the house with the defendant Townsend. Townsend was then introduced to me by Jed Beal as 'Jack Murton.' In a short time they left again. I know the pasture where the cow was. I heard next day the cow was missing. There was no one else at the house when the defendant came." The owner of the cow also testified that she was stolen from his pasture on the night of January 14, 1889. The other evidence in the case shows that the place where the witness Stencil saw the defendant Townsend that night was on Wild Horse creek, between four and five miles from the town of Pendleton, and a short distance from where the cow was stolen. The state having rested, the counsel for the defendant moved for a nonsuit, on the ground that there was not sufficient evidence of the defendant's guilt to be submitted to the jury, without further evidence.

J. C. Leasure, for appellant. J. L. Rand, Dist. Atty., and J. J. Balleray, for the State.

LORD, J., (after stating the facts as above.) The question raised is whether the testimony

of the accomplice, Beal, was sufficiently corroborated to sustain the verdict and judgment. The testimony of the accomplice is full, stating the circumstances in detail under which he and the defendant, on the night charged, stole the cow from the pasture of her owner, drove her to the slaughter pen in Pendleton, and delivered her to the other co-defendants, as had been previously arranged, where she was slaughtered. The contention for the defendant is that the corroborative evidence only shows that he was in the vicinity where the crime was committed, and that under the ruling in *State v. Odell*, 8 Or. 30, such evidence was held to be insufficient. As that case is relied upon, it needs to be examined to understand the principle applied. In that case "the testimony of the other witnesses only tended to show that Odell was in the town about the time of the commission of the alleged crime, and that a sack of flour was missed from the place where the larceny was alleged to have been committed. Such evidence," said the court, "did not tend to connect the appellant with the commission of the crime." And again, to the same point, in refusing to give the following instruction: "The fact of the presence of the defendant Odell in the same town, at the time of the commission of the offense, or immediately before or afterwards, is not sufficient evidence to connect the defendant Odell with the commission of the crime charged in the indictment," which the court thought pertinent to the facts, and should have been given, and was therefore error to refuse it. This ruling was undoubtedly correct, as there was nothing in the mere fact of the presence of the defendant Odell in the same town that was unusual, or which was not likely to occur without any previous arrangement between him and his co-defendant to commit the offense. But where the facts show that the defendant and his accomplice were together at a place under circumstances not likely to have occurred unless there had been concert between them, the case presents a different aspect. In the former, (*State v. Odell*), there was nothing in the circumstances not likely to happen without any previous arrangement between the defendant and his accomplice, and alone, therefore, could not have the effect or tend to connect the defendant with the commission of the crime; while in the latter, when the circumstances are such as are not likely to occur without some previous understanding or concert between them, they indicate an identity of purpose which tends to connect the defendant with the commission of the crime. In the case at bar the defendant and his accomplice are not only found together at an out of the way place, where they could have no business, and would not likely be without some previous arrangement between them, but it is at the time when and place from which the cow was stolen. Nor is this all. The facts show that Frank Beal, the brother of the accomplice, lived near the pasture from which

the cow was stolen, which, perhaps, might furnish some excuse, under some circumstances, for the presence of Jed Beal in that vicinity, but that his accomplice did not take the defendant into the house when he first came, but that a little later he left the house and came back with the defendant, whom he introduced under an assumed name. They are thus not only together at an unusual hour and place, in the vicinity of the place from which the cow was stolen, but they have advanced with the precaution of finding out that there is no one at the house but Stencil, to whom the defendant is introduced under a false name. Why mask his identity under a false name, at such a place, under the circumstances, unless for the purpose of concealment, or to avoid the discovery of some contemplated act? He could furnish no excuse for being where he was, under an *alias*, and if it be conceded that his accomplice, under some circumstances, may have had one by reason of his brother living near the place where the cow was stolen, it is utterly destroyed by his conduct in the premises, which indicates a formed design to mislead as to the defendant, and of which the defendant was cognizant, and concerning which he understood the purpose to be served thereby. Taking these facts together, do they not tend to show that the defendant and his accomplice were at the place where the larceny of the cow was committed by concert between them, formed in furtherance of a common purpose, and that their conduct at the time was characterized by devices intended to mislead, and to protect the defendant against discovery of the crime contemplated? They show that the defendant was not only in the vicinity when the crime was committed, but that he was there under a false name, and at night, and under circumstances not likely to occur without concert between him and his accomplice, in furtherance of some common enterprise. In such case it can hardly be said that the facts do not tend in some degree to connect the defendant with the commission of the crime. As this is the only question we deem necessary to be decided on this record, it results there was no error, and that the judgment must be affirmed.

(19 Or. 236)

SNODGRASS v. ANDROSS *et al.*

(Supreme Court of Oregon. May 13, 1890.)

ASSUMPSIT—PLEADING—INCONSISTENT AVERTMENTS.

1. Defenses in a pleading can only be adjudged inconsistent when they are so contradictory of each other that some of them must necessarily be false.
2. Where a defendant in an answer denies positively the allegations of a complaint, and then pleads as a defense thereto new matter in the nature of confession and avoidance, the denial and new matter are not necessarily inconsistent with each other, as it is possible for both of them to be true.

(Syllabus by the Court.)

Appeal from circuit court, Umatilla county; JAMES A. FEE, Judge.

The appellant commenced an action in said

circuit court against the respondents for the recovery of money. He alleged in his complaint that about April, 1883, he made an agreement with respondents to let to them 500 head of ewe sheep for the term of five years from August 1, 1883, for one-half of the wool and one-half of the increase, the respondents to be at the expense of feeding, herding, and caring for the sheep during the term; that, by reason of the fact that no lot of sheep could at the time be found satisfactory to the parties, the time for furnishing the sheep to respondents was extended by mutual agreement; that appellant, about June 1, 1884, in accordance with the agreement, furnished to respondents 600 head of ewe sheep, which were unsheared, and had with them 427 lambs; that by reason of the fact of the sheep being unsheared, and having with them the lambs, and of their having been fed and cared for from August 1, 1883, until the time of their delivery to the respondents, the appellant was compelled to pay for them \$1,200 more than their value would have been on August 1, 1883; that in consideration of the appellant's delivering to the respondents the said sheep unsheared, and of their having lambs, the latter agreed to pay the former the reasonable value for the herding, feeding, and caring for them from said 1st day of August, 1883, to the time of their delivery, and that the reasonable value thereof was \$1,075; which sum the respondents had neglected and refused to pay. The complaint also contained two other alleged causes of action, one of which was for furnishing pasturage for certain horses and cattle belonging to respondents during the years from 1883 to 1887, both inclusive, for which he claimed \$290; the other was the use of a stallion during the season of 1885, for which he claimed \$100. Respondents filed an answer to the complaint, in which they admitted the agreement wherein appellant was to let to them the 500 head of ewe sheep upon the terms mentioned in the complaint, and of the furnishing them the 600 head of unsheared sheep and their lambs; but denied that the time for furnishing said 500 head was extended by mutual agreement of the parties, or by any consent or agreement of the respondents, or that, in consideration of appellant's delivering to them said 600 head of sheep with their lambs, or otherwise, they undertook or agreed to pay appellant for herding, feeding, or caring for said sheep from August 1, 1883, up to the time of said delivery, or for any other time, the sum of \$1,075, or any other sum. The respondents, for a further defense to appellant's first cause of action, averred that in the fall of 1885 they fully paid the appellant all demands on account thereof by paying to him the sum of \$383.50 in full satisfaction and discharge of the same; and, for a further defense thereto, the respondents averred that in the year 1885 they and the appellant submitted said demand alleged in appellant's first cause of action, and other controverted

matters, to the arbitration of certain persons chosen by them as arbitrators; that said arbitrators made and published an award that the respondents pay to appellant the sum of \$65, which they accordingly thereupon paid. The respondents denied that the appellant furnished them pasture for any horses and cattle during the several years alleged in the complaint, or any time; and, for further defense thereto, averred that they and the appellant, on the 9th day of April, 1883, agreed that, for all pasturage appellant might furnish to respondents within five years thereafter, the latter should not be required to pay any greater rate therefor than four dollars per annum for female stock, and nothing for other stock; and that they had fully paid appellant for all pasturage so furnished. Respondents denied that appellant furnished to them at any time the use of a stallion. Respondents, by way of counter-claim, alleged that they pastured 47 head of cattle for appellant from August 10, 1886, to December 28, 1886; that they wintered a steer for him during the winter of 1886 and 1887; that at his instance and request they paid out and expended for him the sum of \$38 for threshing his grain in the year 1886; that the pasturage of the cattle and wintering of the steer were reasonably worth the sum of \$245. The appellant filed a reply to the new matter contained in the answer, denying the same as alleged. He averred that the parties submitted the matters set out in the first count of his complaint to arbitration, but alleged that the arbitrators awarded that the respondents pay to him, in full satisfaction of all demands then submitted, the sum of \$383.50; that appellant agreed to accept that sum, but that the respondents refused to pay it, or any part thereof. The appellant, in effect, admitted in his reply that respondents pastured the 47 head of cattle in the year 1886, but claimed that they only pastured them about two months, and that the pasturage was upon the lands of appellant, which were leased to respondents, and was not worth more than \$47; also admitted the wintering of the steer, which he claimed was not worth more than \$5. The action was tried by jury, who returned a verdict for the respondents, and upon which the judgment appealed from was entered.

R. J. Slater, for appellant. *J. C. Leasure*, for respondents.

THAYER, C. J., (*after stating the facts as above.*) It appears from the bill of exceptions settled and signed in this case that the appellant, at the trial of the action in the circuit court, gave testimony tending to prove the allegations contained in his complaint, and thereupon rested; that the respondents then offered testimony contradicting that given by the appellant, to which the appellant's counsel objected, upon the grounds that it was irrelevant, immaterial, incompetent, and contrary to the admissions of respondents in their pleadings. Said counsel

also objected to the respondents' giving evidence tending to prove the allegations of new matter contained in their answer. The circuit court overruled these various objections, and the appellant's counsel saved exceptions to the rulings, which present the only questions for our consideration herein. The theory of the appellant's counsel is that the defenses of payment, settlement, arbitration, and award, and payment of the award, set forth in the respondents' answer to the complaint in the action, are inconsistent with the denials in the answer. He also claims that the respondents' admission in the answer that they received the sheep under the agreement alleged in the complaint to have been entered into between the parties about April, 1883, was inconsistent with their denial that they agreed to extend the time for the furnishing of the 500 head of ewes. The counsel's contention is that a defense, in the nature of a confession and avoidance, cannot be united with an absolute denial of the matter which it is intended to answer. Where a defendant, in an answer to a complaint, positively denies the facts alleged therein from which the plaintiff claims an indebtedness against him, and in the same answer pleads payment of the debt, an accord and satisfaction of the claim, or that it is barred by the statute of limitations, or any other defense which in effect confesses that the debt had existed against him, such pleas have the appearance of being inconsistent with the denial. The Code, however, permits a defendant to plead as many defenses as he may have; and unless the court can see from an inspection of them that they are necessarily inconsistent with each other, and cannot all be true, it has no authority to interfere with the party's right to unite them in the same pleading. In this case the circuit court could not have determined that the defenses contained in the answer were not all true. The respondents may never have agreed to pay the appellant for herding, feeding, and taking care of the sheep and lambs delivered to them, and yet they may have paid him for so doing. They may have agreed with the appellant to submit his said claim to arbitration, and have paid the award made by the arbitrators thereon, without having been originally liable for its payment. We are of the opinion that the circuit court committed no error in admitting the testimony excepted to by the appellant's counsel. The judgment appealed from will be affirmed.

(19 Or. 222)

RHODES v. McGARRY *et al.*

(*Supreme Court of Oregon. May 12, 1890.*)

ATTACHMENT — RESTRAINT BY HOLDER OF PRIOR EQUITY — PLEADING.

1. An attaching creditor under a writ of attachment levied upon real property will not be deemed a purchaser in good faith, and for a valuable consideration, of the property, under section 150, Civil Code, as against an owner of a prior equity in the property, unless it appears that the attachment was duly issued and levied upon the property to enforce collection of a valid debt; that

a certificate was duly made, delivered, filed, and recorded as provided in section 151, Id., and that up to the time of the consummation of these proceedings the creditor had no notice or knowledge of such prior equity.

2. And where, in a suit by the owner of the outstanding equity, which included the equitable title to the property, against attaching creditors and others, to restrain them from selling it upon executions issued to enforce liens alleged to have been created against it by virtue of attachments proceeding in their favor, and against a party in whom the legal title to the property remained, *held*, that an answer filed by them to the complaint in the suit, which merely traversed the plaintiff's allegations, and did not set forth affirmatively the issuance of the attachments, and other facts above mentioned and referred to, was insufficient to entitle them to claim to occupy the standing of purchasers in good faith of the property. *Held, further*, that the prior outstanding equity was paramount to the right acquired by the levy of the attachments.

(*Syllabus by the Court.*)

Appeal from circuit court, Umatilla county; JAMES A. FEE, Judge.

The appellant commenced a suit against the respondents, in said circuit court, to reform a deed to real property executed by the respondent McGarry to appellant, also to restrain the other respondents from selling real property which, she claimed, was intended to be conveyed to her by such deed. The appellant alleged in her complaint that on the 24th day of February, 1885, said McGarry was the owner in fee, and in possession, of block 285 of the Reserve addition to the town of Pendleton, Umatilla county, and that on said last-mentioned date, in consideration of \$100 paid to him by her, sold to her said block, and, for the purpose of conveying it to her, executed to her a deed; that the party who wrote the deed, erroneously and by mistake, wrote therein, "block No. 258," instead of and for "block No. 285;" that, by the mutual mistake of the parties, said deed was executed and delivered to appellant in said condition; that under and by virtue thereof, and of said sale, appellant entered upon and took possession of block No. 285, and thereafter sold the same to one George Mathews, and executed to him a deed of conveyance to the same, containing a general covenant of warranty; that thereafter said Mathews executed a deed to Elizabeth Hardwick, conveying to her said block 285, which deed also contained a general covenant of warranty; that the respondent Flack, on the 24th day of September, 1888, commenced an action in said circuit court against said McGarry to recover the sum of \$2,000 and upwards upon a debt claimed to be due him from said McGarry, and sued out a writ of attachment in said action, which was delivered to respondent Houser as sheriff of said county, who by virtue thereof proceeded to attach said block 285 as the property of said McGarry; that said Flack subsequently obtained a judgment in said action against McGarry, and an order for the sale of said block, and caused an execution to be issued thereon, and delivered to said Houser as such sheriff, who by virtue thereof was proceeding

to sell the same; that the respondent Dawson, also on said 24th day of September, 1888, commenced an action in said circuit court against said McGarry, and subsequently obtained a judgment therein against him for \$1,200 and upwards, and an order for the sale of said block, and caused an execution to be issued thereon to said Houser as such sheriff, who was threatening to sell said block under and by virtue thereof; that at the time of the attachment of the said block the said Elizabeth Hardwick was in the actual, open, and notorious possession of it; that she was unwilling, and had refused, to be a party plaintiff to the suit, and therefore appellant had made her party defendant. The appellant also alleged notice and knowledge upon the part of the respondents Houser, Flack, and Dawson of the alleged mistake in the deed of conveyance from McGarry to her, and also of such possession of said block 285 in her and her said grantees, and also charged in the complaint a conspiracy and confederation on the part of the defendants in the suit to cheat and defraud her, and render her liable upon her covenant of warranty contained in her deed to said Mathews, and that for said purpose said Flack and Dawson had caused the said block to be levied upon by said Houser, as such sheriff, under the attachment proceedings. She also alleged the ordinary facts entitling said circuit court, as a court of equity, to take cognizance of the suit, and demanded as a relief that said McGarry be compelled to execute to her a good and sufficient deed to the block, and that said Houser, Flack, and Dawson be enjoined from selling it. The respondents filed an answer to the complaint, denying the allegations contained therein relating to McGarry's ownership of the block, the sale thereof to appellant, the mistake in the deed, the several conveyances thereof, possession of it by the grantees, and the alleged conspiracy and confederation of the respondents, but did not set forth therein any affirmative defense.

The cause was referred to a referee to find the facts and conclusions of law. The referee subsequently made his report to the court, in which he found that said McGarry, at the time alleged in the complaint, was the owner in fee of the block; that at said date he sold it to appellant by deed, but that, by mutual mistake of the parties, he made, executed, and delivered to her a deed conveying block No. 258, instead of said block No. 285, which deed was received by appellant, she then believing it was a deed to said block No. 285, and that said appellant immediately went into possession of the south half of said block No. 285, and remained in possession thereof for nine months; that on May 3, 1887, appellant and her husband, for a valuable consideration, executed and delivered a deed of conveyance of said block No. 285 to one George W. Mathews, in which appellant warranted the title as against all lawful claims and demands whatsoever; that said Mathews took possession of the south half of said block

285, and remained in possession thereof for three months; that on December 6, 1887, said Mathews and his wife, for a valuable consideration, executed and delivered to said Elizabeth Hardwick a deed of conveyance of said block 285, which was valid between the parties, and those having notice thereof; that said Elizabeth Hardwick soon thereafter entered into possession of the south half of said block, and held possession of the same until about September 1, 1888, at which time she removed therefrom, and has since been residing upon another block in the town of Pendleton, and has only been in possession of said south half of said block 285 by having an inclosure around the same, and certain improvements thereon; that said last-mentioned deed contained a covenant of general warranty; that on September 24, 1888, said Flack commenced the action mentioned in the complaint against said McGarry, and caused the said writ of attachment to be issued; that it was placed in the hands of said Houser, as sheriff of said county of Umatilla, for service; that said Houser at that time was the sheriff of said county, and that by virtue of said writ he thereupon attached said block 285; that thereafter judgment was recovered in said action, and an order was made for the sale of said block; that in February, 1889, said Flack caused a writ of execution to be issued on said judgment, which was placed in the hands of said Houser as sheriff, who was proceeding to execute the same as alleged in the complaint; that said judgment appears on the records of said county as a lien against said block No. 285; that said I. R. Dawson, on September 24, 1888, commenced an action against said McGarry as alleged in the complaint; that a writ of attachment was issued therein to the sheriff of said county, and who by virtue thereof duly attached said block No. 285; that judgment was recovered in said action, and a writ of execution issued thereon to said sheriff, who was proceeding to enforce the same as alleged in the complaint; that, when said actions were brought against said John McGarry, and when said attachments were levied upon said block No. 285, there were none of the respondents in such actual, open, and notorious possession of any part of said block as to put said Flack, said Dawson, or said Houser, or their agents, upon notice of the rights or interests of said Elizabeth Hardwick, and no one was then living on said block; that said Elizabeth Hardwick has refused to be a party plaintiff in this suit; that no one of defendants Houser, Flack, or Dawson had any notice or knowledge of said mutual mistake in the conveyance from McGarry to Mary M. Rhodes prior to the levying of the attachment aforesaid; that the defendants in this suit have not conspired or confederated together to cheat or defraud plaintiff, or to make her in any way liable, nor did said I. R. Dawson or said J. W. Flack cause the sheriff of Umatilla county, Or., Houser, to levy on said block No. 285 for said or any such purpose, nor did they, or either of them, know

that McGarry had no interest in said block of land, but said levy of said two writs of attachment were made in good faith, and said Flack and said Dawson were unaffected by any knowledge or notice of the rights of the appellant, or her successors in interest, in said block, as there was not such a possession of said Hardwick as to affect them with notice; that said sheriff, Houser, was about to and did threaten to sell all of said block 285 by virtue of and under said two executions on March 1, 1889, and said Elizabeth Hardwick did refuse to defend her rights or protect her interest in said block No. 285. These several findings purport to have been findings of fact. The said referee thereupon found as conclusions of law the following: "(1) That the appellant, Mary M. Rhodes, is entitled to a decree of this court ordering and directing the respondent John McGarry to make to her a good and sufficient conveyance, if she desire it, in fee, of said block No. 285 of the Reserve addition to the town of Pendleton, Or., but said appellant is not entitled to any other relief prayed for in her complaint in this suit; (2) that the injunction heretofore granted in this suit should be dissolved; (3) that the whole of the costs and disbursements in this suit should be taxed against the respondent John McGarry." Upon the said report being filed, the said circuit court made an order approving the same, except as to costs, and ordered that the respondents have and recover costs and disbursements against the appellant, upon which order the decree appealed from was entered.

R. J. Slater, for appellant. *W. E. Crews*, for respondents.

THAYER, C. J., (*after stating the facts as above.*) I have read the depositions of the witnesses taken herein, and the exhibits submitted in proof, and am of the opinion that they fully sustain the referee in his findings regarding the mistake in the execution of the deed by John McGarry to the appellant. The testimony shows beyond question that the parties had in view the sale and purchase of block 285 in the Reserve addition to the town of Pendleton, Umatilla county, Or., and that in filling out the said deed the said block was by mistake described as "block 258." Said findings as to the conveyance of said block 285 by appellant to George Mathews, his conveyance to Elizabeth Hardwick, and the taking possession of and occupying the said block by the said parties, respectively, are also fully sustained by the testimony and exhibits. There can be no doubt but that the appellant, as against the said McGarry, is entitled to a decree to compel the reformation of the said deed in the particular referred to. Nor can there be any question but that the appellant, as a matter of justice, should be entitled to a decree against the respondents Houser, Flack, and Dawson, enjoining them from proceeding to sell said block upon the judgments and executions referred to in said findings. Said Flack and Dawson are en-

gaged in an attempt to enforce satisfaction of their respective debts against McGarry out of the property of the appellant through a mere technicality of law. They are endeavoring to profit out of an unfortunate mistake, and rely upon the language of the statute governing attachment proceedings to enable them to succeed in their efforts. Section 150, Hill's Civil Code, provides that, "from the date of the attachment until it be discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith, and for a valuable consideration, of the property, real or personal, attached, subject to the conditions prescribed in the next section as to real property." Under this provision of statute, it is claimed upon the part of said Houser, Flack, and Dawson that they occupy the same position with reference to said block as a purchaser thereof in good faith; and in consequence of its language the said referee and circuit court found and determined that the appellant was entitled to no relief in the suit as against said parties. This decision left the appellant no alternative but to acquiesce in the sale of the block for the purpose mentioned, and be rendered liable upon her covenant of warranty contained in her deed to Mathews.

The respondents did not allege in their answer that the attachment proceedings against said block were taken in good faith, nor attempt to prove it as a fact by any testimony whatever. The only ground upon which they claim to be deemed purchasers in good faith, and for a valuable consideration, of the property, is that the said proceedings were duly instituted. If they had purchased the block from McGarry for a valuable consideration, and claimed by virtue of such purchase a right to it, to the exclusion of the equitable title which the appellant had therein, they would have been compelled to allege and prove that they had no notice whatever, down to the time of the actual payment of the consideration, of any such title, nor of the circumstances alleged in the complaint from which such notice could be inferred; and then they would only have established an equity in themselves equal to that in favor of the appellant, though their having the legal title would give them a superior advantage. The legal title, however, without being coupled with an equal equity, will not prevail over the equitable title. It seems to me that, notwithstanding the language of the Code above set out, an attaching creditor, in order to be deemed a purchaser in good faith of the property as against one having an outstanding equity, must allege and prove all the facts necessary to establish that character of ownership in favor of a purchaser of such property as against such an equity. It can hardly be supposed that the legislature intended, by the provision of the Code referred to, to place an attaching creditor upon any more favorable grounds with reference to his rights in the property attached than

those occupied by a purchaser of the property, nor to deem the former a purchaser in good faith except under the same circumstances in which the latter would be deemed such a purchaser. Any other view would lead to absurd consequences, and occasion injustice. It would enable a party to cut off an outstanding equity by resorting to an attachment when he would not be able to accomplish it by a direct purchase of the property. Such a result was, obviously, not contemplated by the adoption of the said provision of the Code. If this view be correct, it follows that the answer of the said respondents to the complaint in the suit was not sufficient to show that they were entitled to the standing of purchasers of the block in good faith. The answer filed by them does not contain any such defense, but confines itself strictly to a traverse of the appellant's allegations. If the respondents had desired to claim that they be deemed purchasers in good faith of the property, they should have averred the facts which under the statute would have constituted them such, in avoidance of the matters alleged in the complaint regarding the appellant's equity, and not have attempted to avail themselves of such defense by merely controverting those allegations. Such pleas were very common under the former equity practice. The defendants' statement therein was to the effect that the complainant may have had an outstanding equity in the property, but that the former had purchased it in good faith, without notice of such equity, and that therefore the latter was not entitled to assert or claim the equity. The plea did not deny the fact that the complainant did have the equity, but it barred his enforcement of it, by alleging the new matter; and the same principle in pleading such matters exists now as formerly, although the system of pleading has materially changed. The respondents in this case should have alleged the facts showing that the attachment proceedings were duly commenced upon a valid debt; that the block in question was duly levied upon by the sheriff under the said proceedings; that he made a certificate containing the title of the cause, the names of the parties, a description of the real property, a statement that the same had been attached at the suit of the plaintiffs therein, the date thereof, and that he had delivered such certificate to the county clerk of the county of Umatilla, and that the latter had duly filed and recorded it as provided in section 151, Civil Code; and that they had no notice or knowledge of the mistake in the deed from McGarry to appellant at the time such proceedings were taken and had. These facts, properly set forth in the answer, would doubtless have entitled the attaching creditors to claim, as against the appellant, that they were entitled to "be deemed purchasers in good faith, and for a valuable consideration, of the property attached." Instead, however, of pursuing that course, the respondents chose to stand upon a strict denial

that such mistake was made. Nor do the proofs submitted at the hearing show facts sufficient to entitle the respondents to claim that they, or either of them, under said provision of the Code, should be deemed purchasers of the said block in good faith. The attachment proceedings were not introduced in evidence, and there is nothing to show that any such certificate by the sheriff was delivered to the county clerk, or was filed or recorded by him as provided in said section 151, Id., which, according to section 150, is a condition to the plaintiff in an attachment proceeding being deemed a purchaser in good faith. The language of the latter section, as will be observed by reference to it, is: "The plaintiff * * * shall be deemed a purchaser * * * of the property, real or personal, attached; subject to the conditions prescribed in the next section as to real property."

According to this view, the respondents Houser, Flack, and Dawson acquired no rights in the said block under the said attachment proceedings that were not subject to the equity of the appellant therein, whether the possession thereof by the appellant and her grantees was sufficient or not to impart notice to them of such equity. Their attempt, therefore, to sell the block under the said proceedings was a clear violation of the appellant's rights in the premises, and contrary to equity and good conscience. The decree appealed from will be reversed, and a decree entered in this court in accordance with the prayer of the appellant's complaint, and the case be remanded to the said circuit court with directions to enter such decree as the decree of that court, and for such further proceedings as may be necessary to carry the same into effect.

(19 Or. 240)

LARSEN v. OREGON RY. & NAV. CO.

(Supreme Court of Oregon. May 16, 1890.)

EMINENT DOMAIN—PUBLIC LANDS—HOMESTEAD SETTLERS—DAMAGES—PLEADING—INSTRUCTIONS.

1. By failing to reply to new matter in an answer, every material fact that is well pleaded therein stands admitted, but legal conclusions need not be denied.

2. To entitle a railroad company to a right of way through the public lands of the United States as against one in possession of such lands, it must appear that such railroad company complied with the act of congress of March 3, 1875; that is, it must have filed with the secretary of the interior a copy of its articles of incorporation, and due proof of its organization under the same, and it must also have claimed the benefits of said act by filing with the register of the land-office of the proper district a profile of its road.

3. When a homestead claimant settles upon the public lands of the United States, and in due time files upon said homestead claim as required by the act of congress granting homesteads to actual settlers upon the public lands of the United States, said homestead claim thus becomes separated from the public domain, and ceases to be public lands of the United States; and thereafter a railroad company, by complying with the act of March 3, 1875, does not acquire a right of way through the homestead claim of such settler. And *held, further*, that the act of congress of March 3, 1875, does not purport to grant a right of way through the

claims of those who had, prior to the time such right attached, acquired possessory rights in such public lands, and that by the third section of the act such rights are only to be taken by condemnation.

4. When a railroad company, without the consent of the owner of land, constructs its road over and across such owner's land, and runs its cars thereon, and no special damages are alleged, the correct measure of damages is the difference between the annual rental value of the premises with the railroad track down, and the road operated as it is, and what the rental value of the premises would have been if the road had not been there; and when it also appeared that the defendant, in effecting an entry, broke the plaintiff's close, but no special damages are alleged, the measure of damages for such breaking would be such sum as would restore the premises to such a condition of safety for use as they were in before such breaking.

5. When an instruction otherwise proper was asked by the defendant, but said instruction, in effect, submitted to the jury to find from the pleadings what was and what was not specially pleaded, its refusal was not error. It is the province of the court to declare what are the issues to be tried, and to construe the pleading, and of the jury to find the facts. The instruction refused submitted matters of law to the jury, the decision of which properly belonged to the court.

6. When there was no allegation of special damages, the refusal of the court to give this instruction was *held* erroneous: "The plaintiff having neither pleaded nor proved any special damages resulting from the alleged frightening of his horses, he can recover nothing from that cause."

(Syllabus by the Court.)

Appeal from circuit court, Gilliam county; J. H. BIRD, Judge.

This is an action for trespass alleged to have been committed by the defendant on the plaintiff's lands in Gilliam county, Or. The complaint alleges, in substance, that on the 1st day of May, 1888, the plaintiff was the owner and in the possession of certain real property mentioned in the complaint, and that, while the plaintiff so owned and possessed said lands, the defendant, willfully, unlawfully, and with force and arms, broke his close and entered said premises, and that said defendant at said time broke down a fence inclosing a portion of same, and did wrongfully, willfully, and unlawfully, without plaintiff's consent, and against his will, then and there construct and build a railway over, through, and across said premises; that defendant has since said March 1, 1888, and up to the date of the filing of this complaint, maintained, used, occupied, and operated said road over, across, and through said premises, and continuously run trains upon same, whereby plaintiff was prevented from using, occupying, and enjoying his said premises as fully as he might otherwise have done, and whereby plaintiff's horses were prevented from watering at their usual and customary watering place upon said premises, all to the damage of the plaintiff in the sum of \$1,000, for which sum he demands judgment, etc. The answer denies the allegations of the complaint, except it admits that it built and operated its railroad across said premises as alleged. By way of separate defense the answer alleges that on the 1st of May, 1888, the tract of land described in the complaint, and

continuously since that time, was and is public land of the United States; that, in pursuance of the provisions of an act of congress entitled "An act granting to railroads the right of way through the public lands of the United States," approved March 3, 1875, the defendant duly acquired a right of way upon and over said land for its railroad, extending from Heppner, in Morrow county, Or., to a point of junction near Willows, in Gilliam county, Or., with the main line of the defendant's railroad from Portland, Or., to Umatilla Junction, in said state; that about the month of July, 1888, the defendant lawfully entered into and took possession of a strip of land embraced within, and constituting a part of, the tract in the complaint described, for said right of way for its said railroad, and has been in continuous possession thereof to the present time; that during the time it has been so in possession the defendant has constructed upon said right of way a railroad which forms a part of its said line from Heppner to said point of junction with said main line; and that since the 1st day of December, 1888, the said defendant has been running trains of cars upon and over its said railroad, and did so run its cars upon and over the same, and on the 28th of December, 1888, which said running of said cars is the supposed trespass mentioned in the complaint. To this answer no reply was filed. The remaining facts appear in the opinion.

W. W. Cotton, for appellant. A. S. Bennett, for respondent.

STRAHAN, J., (*after stating the facts as above.*) In disposing of this appeal, it will be most convenient to first consider the new matter in the answer, and then to refer to the exceptions taken upon the trial; for the reason that, if the answer contains sufficient to give the defendant a right of way over the land in controversy, the judgment would have to be reversed, for the reason there is no reply, and whatever facts contained therein which are well pleaded stand admitted on the record.

1. The appellant claims that the act of congress of March 3, 1875, (18 St. at Large, 482,) granted to it the right of way through the lands in controversy. So much of that act as is material is as follows. "Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory except the District of Columbia, or by the congress of the United States, which shall have filed with the secretary of the interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said

railroad, also ground adjacent to such right of way for station buildings, depots, machine-shops, side tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of road. Sec. 2. That any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any canon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canon, pass, or defile for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway, where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed, at its own expense, in the most favorable location, and in as perfect a manner as the original road, provided that such expense shall be equitably divided between any number of railroad companies occupying and using the same canon, pass, or defile. Sec. 3. That the legislature of the proper territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and, where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled 'An act (to amend an act entitled "An act") to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes, approved July 1, 1862,' approved July 2d, 1864. Sec. 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land-office for the district where such land is located a profile of its road, and upon approval thereof by the secretary of the interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way; provided that, if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

It is, in effect, claimed by the appellant that the grant made by the first section of the

act operates in favor of all railroads passing through any lands of the United States, notwithstanding the same may have been taken as a homestead, which shall locate its line of road across said lands at any time before a patent shall be issued for the same; in other words, that a homestead continues to be "public lands of the United States" until a patent issues to the homestead claimant. It may be well doubted whether this question is presented by this record, for the reason that it does not appear that the appellant has filed with the secretary of the interior a copy of its articles of incorporation, and due proof of its organization under the same, as required by the first section of the act; nor does it appear that it ever claimed the benefits of said act, as required in the fourth section, by filing with the register of the land-office of the proper district a profile of its road, or that the same was ever approved by the secretary of the interior. These are plain requirements of the act; and, without entering at large upon their discussion at this time, I think it sufficient to say that, before the appellant could acquire any rights under the act as against one in possession of the land in question, it must show a compliance with its terms. But it is claimed by the appellant that the allegations in the answer that the defendant lawfully entered into and took possession of a strip of land embraced within, and constituting a part of, the tract in the complaint described, for said right of way for its said railroad, and that it did this in pursuance of the act of congress referred to, shows a compliance with said act; but this would be enlarging and extending the allegations of the answer far beyond their scope. Not only so, but the answer is bad, in substance, in failing to allege what the defendant company did by way of compliance with said act. It alleges nothing but legal conclusions. In such case where the right claimed depends entirely on the existence of facts which are not disclosed, the simple fact that the party claimed the right is no evidence of the existence of the necessary facts to confer it. But there is one other objection which, owing to its importance, I think proper to notice. It appears from the bill of exceptions that the plaintiff settled on the land in controversy as a homestead in the month of December, 1886, or January, 1887, and in the month of February, 1887, made the necessary filing, in the proper land-office, of its said settlement and claim. Inasmuch as no patent had been issued for said land, and the plaintiff's right thereto was still possessory, the five years not having expired from the date of the commencement of his residence, the appellant claims that at the time of its entry thereon the same was public land, and within the power of congress to dispose of as it might think fit, and that the grant made by said act of March 3, 1875, is such disposition; and counsel cites the Yosemite Valley Case, 15 Wall. 77, and Frisbie v. Whitney, 9 Wall. 189. Waiving for the present the particular

objections to the defendant's claim already pointed out, I do not think the authorities cited support the defendant's contention. I have no doubt that when, in compliance with the act of congress granting homesteads to actual settlers upon the public lands of the United States, a person qualified under the act makes a settlement thereon, and then complies with said act, the land claimed by the settler ceases to be public lands of the United States, and that congress has not the power, without the consent of such settler, to appropriate said lands to any other public use whatever; nor has it in the instance assumed to exercise such authority in this case. Such settlement and compliance with the act severs the land claimed as a homestead from the mass of public lands, and it is taken out of the act of congress of March 3, supra. This is the effect of the doctrine of *Wilcox v. Jackson*, 13 Pet. 498, and *Railroad Co. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. Rep. 112; and such is the construction given to this act in *Railroad Co. v. Sture*, 32 Minn. 95, 20 N. W. Rep. 229. And this conclusion seems clearly deducible from the act itself, for the reason it does not assume to grant the possessory claims of those who had acquired them prior to the time of compliance with the act by a railroad company claiming the benefit of the act, for the reason that the third section of the act provides for the condemnation of such possessory claims. This provision is a clear recognition of such claims as against any corporation claiming by title subsequent to their acquisition. But counsel contend that these views cannot be correct, for the reason the United States have in a large number of cases maintained actions of trespass against homestead claimants for cutting timber off the lands claimed by them, and he cites *U. S. v. Taylor*, 35 Fed. Rep. 486; *U. S. v. Stores*, 14 Fed. Rep. 824; *U. S. v. Smith*, 11 Fed. Rep. 487; and *U. S. v. Cook*, 19 Wall. 591. It is true that after settlement by a homestead claimant, and his incipient compliance with the act, his title is inchoate. He has that which will ripen into a perfect title by a complete compliance with the act, and in the meantime he is in under the right which has been conferred upon him by the United States. Neither the right to destroy the timber growing upon the land, nor to use it for speculative purposes, is conferred; and, should he transcend the power conferred upon him by his grantor before his title has matured and become perfect, no reason is perceived why he might not be required to respond in damages for an act which is in its nature waste.

2. It appeared upon the trial in the court below that the plaintiff's entire claim was worth from \$800 to \$1,200. The jury gave him a verdict of \$600 damages. A motion was made for a new trial, which was overruled by the court, in passing upon which the learned circuit judge said: "I am satisfied that, in all cases where a corporation is a party, more or less prejudice exists,

sometimes for, but more frequently against, the corporation, and that juries frequently render unjust verdicts in such cases. In this case, I am satisfied that the jury were prejudiced, and that the verdict is excessive; but I do not know it, and therefore overrule the motion for a new trial." It would seem that this was enough to have given the defendant a new trial under subdivision 5 of section 235, Hill's Code. That provision allows a new trial when excessive damages have been allowed, appearing to have been given under the influence of passion or prejudice, and, while the finding of the court brings the case substantially within the provision, he saw proper to disallow the motion for a new trial; and we will not interfere with the action of the court in this particular case, for the reason that a new trial must be awarded for other reasons, presently to be adverted to. Still, I am strongly inclined to think that when it does appear from the record that the damages are excessive, and when passion or prejudice influenced the jury in reaching the conclusion, the party injured is entitled to a new trial as a legal right, and to refuse it is reversible error. These facts would very rarely appear in the record, as they do in this case. But, while we have determined not to award a new trial in this case on account of such excessive damages and prejudice found by the court, their existence makes it all the more imperative on this court to look carefully into the record, so far as errors are assigned, to ascertain if any errors occurred at the trial prejudicial to the appellant.

3. In this case no special damages are alleged. The plaintiff was therefore only entitled to recover such damages by reason of the unauthorized laying of the defendant's railroad track across his premises, and the operation of the road, as well as the actual damages he sustained by the breaking of his close. In such case the correct measure of damages is said to be the difference between the annual rental value of the premises with the railroad track down and operated, as it is, and what the rental value of the premises would have been if the road had not been there. *Blesch v. Railway Co.*, 43 Wis. 183. Of course this rule would not include special damages in a case where such damages are pleaded, and in this case it does not include the damages for the breaking of the plaintiff's close; but the latter item would only be such sum as would restore the premises to such a condition of safety for use as they were in before the breaking. In this case no special damages are alleged, and therefore none are recoverable. The general tenor of Instructions 1 and 2, which were asked by the defendant, and refused by the court, is in harmony with what is here said, and the substance ought to have been given; but, in the particular form in which they were asked, they left it to the jury to find out what was or was not specially pleaded. This was the province of the court, and it did not err in

refusing to give an instruction which, in effect, left that question to the jury. But the defendant also asked the court to give the jury the following instruction, which was refused: "The plaintiff having neither pleaded nor proved any special damages resulting from the alleged frightening of his horses, he can recover nothing from that cause." This instruction was refused, and such refusal was clearly error. It impliedly conceded more to the plaintiff than he was entitled to; that is, it seems to assume that, if the plaintiff had alleged and proved something of that kind, it would have formed a proper basis for a recovery, which may well be doubted. But, whether that is so or not, such a claim was not included in the pleadings, and could not be considered by the jury. Evidence which was properly excepted to was also allowed to go to the jury on this subject, which was also error. The case seems to have been tried, so far as appears, without any very definite rule as to its scope under the pleadings, or the measure of damages, and entirely at variance with what is here said. The judgment appealed from will therefore be reversed, and the cause remanded to the court below for a new trial.

(14 Colo. 327)

**DENVER & S. F. RY. CO. v. SCHOOL-DIST.
NO. 22 IN ARAPAHOE COUNTY.¹**

(*Supreme Court of Colorado. Feb. 23, 1890.*)

CONDITIONAL CONVEYANCE—SCHOOL LANDS—RAILWAYS—EJECTMENT.

1. Lands were granted on condition to be used for school purposes. Afterwards, in the expectation that the school would be removed, but without a contract to that effect, grantor conveyed other lands in lieu thereof, and then conveyed the first lands to defendant's grantor. The school was not removed. *Held*, that defendant received no title.

2. Under a supposed license from its grantor, defendant entered and began constructing its railroad upon such lands. Shortly after, the school trustees, protesting that the school-district owned the lands, attempted to settle the matter with defendant, and, failing therein, built a fence around them, and notified the contractors not to enter; but the fence was torn down, and the railroad completed. *Held*, there was no acquiescence by plaintiff to estop it from bringing ejectment.

Commissioners' decision. Appeal from district court, Arapahoe county.

Wells, McNeal & Taylor, for appellant.
Enos Miles, for appellee.

PATTISON, C. This was an action of ejectment brought by appellee to recover the possession of a strip of land 100 feet in width, being a part of lots 1, 2, 3, and 4, in block 3, in the town of Petersburg. The complaint alleges ownership and the right to the possession of the property. The answer first puts in issue the allegations of the complaint. For an affirmative defense it is alleged, in substance, that on September 15, 1880, Peter Magnus, then the owner in fee of the lots mentioned, conveyed them to appellee, upon condition that the land should be used for

school purposes, and that when such use should cease the property should revert to him; that on February 15, 1887, the appellee, not desiring to use the lots longer for school purposes, asked Magnus for other lots, which he on that day conveyed; that, in consideration of such conveyance, appellee agreed to vacate the lots in question, and remove the school-house therefrom, at the close of the term then in session. It is then alleged that Magnus, relying upon appellee's agreement to vacate the premises, on March 2, 1887, conveyed the same to David G. Peabody; that thereafter Peabody conveyed the undivided one-half of said lots to William J. McGavock; that on July 1, 1887, and after the close of the school term, Peabody and McGavock, relying upon plaintiff's good faith and intention to perform the agreement made with Magnus, gave permission to defendant to enter upon and construct its railway over the strip of land described in the complaint, which was done at a cost of over \$1,000. It is then alleged that appellant was not informed that plaintiff intended to use the lots for school purposes; that appellee had notice while the work was in progress that appellant was in possession of the land under the license given by Peabody and McGavock, and gave appellant no notice that it had or claimed any right or interest in the same; that afterwards, and on October 1, 1887, Peabody and McGavock conveyed the premises in question, with other lands, to appellant. It is further averred that some time in September, 1887, after defendant had completed its railroad over the lots mentioned, appellee proposed to "Peabody and McGavock that, if they would convey to plaintiff, in lieu of the second aforesaid site conveyed to it by said Magnus, which had become unacceptable to plaintiff, an acceptable school-site, plaintiff would forthwith remove its school-house thither, and would convey said site conveyed to it by said Magnus to said Peabody and McGavock; and that said Peabody and McGavock offered to plaintiff, and plaintiff accepted, for its school-site, lots 1, 2, 3, and 4, in block 13, of said Englewood, situate in the said school-district of plaintiff; and said McGavock being then absent from the state, and unable to join in the conveyance of the said last-named lots, plaintiff requested said Peabody to execute to plaintiff, and said Peabody did, to-wit, on the 8th day of September 1887, execute to plaintiff, his written agreement to convey jointly with said McGavock, upon his return to Denver, the said last-named lots to plaintiff, in consideration of one dollar and the removal of plaintiff's school-house; that plaintiff, in disregard of its aforesaid promises and agreements, and after said last-mentioned agreement, wrongfully re-entered upon the lots described in the complaint, and wrongfully reopened its school in said school-house," etc. No more of the answer need be recited. The affirmative defenses were put in issue by the replication, and upon the issues thus formed a

¹ Publication delayed pending application for rehearing.

trial was had, which resulted in a judgment for the appellee for possession of the premises.

The evidence tends to show that on September 15, 1880, Peter Magnus conveyed the premises above described, by quitclaim deed in the usual form, to the appellee. The deed contains the following covenant: "It is hereby agreed that the said above-described property is to be used for school purposes, and that, whenever it shall cease to be so used, the said property shall revert to the grantor herein, his heirs and assigns, and this said agreement is hereby declared to be a covenant running with the said lots." The premises had been occupied for school purposes prior to the execution and delivery of the deed, and were so occupied after the deed was made, and at the time the action was brought. Some time in the year 1886 some steps appear to have been taken to locate the school-house in some other part of the district. In that year Peter Magnus conveyed a tract of land, called the "Public Square in Petersburg," to the school-district, for use in lieu of the premises in question. Under what circumstances this conveyance was made does not appear. The premises were never occupied by appellee for any purpose. The minutes of the meetings of appellee, which were introduced in evidence by appellant, show that on May 16, 1887, at an adjourned meeting of the school-district, the question whether the school-house should be located in the center of the district, or in the public square of Petersburg, was voted upon. "The highest number of votes carried it to the center; being 10 for, and 6 against." At the same meeting a committee was appointed, consisting of Thomas Skerrit, R. M. St. Clair, and Adolph Candler, to locate the school-house site as near the center of the district as practicable. On May 26, 1887, at a meeting of the school-district, R. M. St. Clair was elected a director or trustee in place of Thomas Skerrit. The board then consisted of Robert M. St. Clair, Adolph Candler, and Thomas Lockhart. March 2, 1887, Magnus conveyed the premises in question, with other lands, to Peabody. After the appointment of the committee to select a school-site, Skerrit, as one of that committee, had some talk with Peabody about another site for the school-house, which resulted in an agreement for the conveyance of other lots, but the precise terms of that agreement nowhere appear. The negotiations between Skerrit and Peabody seem to have taken place some time in June, 1887. No one of the school directors took any part in the matter. Whether Skerrit reported the negotiations and agreement is not disclosed. The agreement was never acted upon by appellee in any way, and no conveyance of the lots selected was ever made by Peabody, pursuant to the agreement. Immediately after the negotiations between Peabody and Skerrit, Peabody gave permission to appellant to construct its railway over the premises in

controversy. This permission seems to have been given with the understanding that the school-house was to be removed, but no agreement to that effect had been made by any one having authority to represent the appellee. Neither does it appear that any one of the school trustees had notice that such an agreement had been made, or that permission had been given by Peabody to appellant to enter upon the premises. Some time in July or August, but at what time the record does not clearly disclose, the employees of appellant entered upon the premises and began work. Very soon after entry was made, at an informal meeting, the school trustees named determined to take the steps necessary to protect the property. Lockhart went to Denver, and called upon Manning, the right of way agent, to ascertain by what right appellant had taken possession of the property. The interview with Manning resulted in nothing except the assertion by him of a claim of right under Peabody, and the promise to meet the school trustees at the school-house, upon a day named, to adjust the matter. Manning failed to keep the engagement, and thereupon a wire fence was built about the premises. When the contractors came to lay the ties and iron, they were notified not to enter upon the land. The notice was disregarded, the fence was torn down, the grading completed, and the ties and iron laid. Before this suit was brought, another attempt appears to have been made by appellee to adjust the difference, and avoid litigation. The trustees visited Manning again. They were willing to accept other lots from Peabody, but they declined to surrender possession of the land in question, unless the expense of removing the school-house was paid in advance. Manning refused to advance the sum of \$225, which was the sum demanded, but undertook to pay for removing the building after the work had been done. This proposition was not satisfactory to appellee, and it refused to accept it.

The first question to be determined is whether the license given by Peabody to appellant to enter upon the land in controversy conferred any right of entry, and whether the deed subsequently made by Peabody and McGavock vested appellant with any interest in the premises whatever. The legal effect of the deed first made by Magnus to appellee is clearly apparent. It was in form an ordinary quitclaim deed, and divested the grantor of all his right, title, and interest in the land. The covenant providing that, when the premises should be no longer used for school purposes, the title should revert to the grantor, was clearly a limitation. The title conveyed, therefore, was a qualified fee. Whenever the event might occur upon which the limitation was based, the estate of appellee would immediately cease. Nevertheless, until the happening of that event, appellee had the same right in, and the same dominion over, the estate that it would have.

had, had there been no limitation whatsoever. "Yet while the estate continues, and until the qualification upon which it is limited is at an end, the grantee has the same rights and privileges over his estate as if it were a fee-simple." *State v. Brown*, 27 N. J. Law, 13, 20, and authorities cited; *Tied. Real Prop.* §§ 44, 281. As Magnus had conveyed his entire estate, it is clear that nothing remained to him which he could convey to Peabody, unless the limitation was such as to leave him vested with an estate in reversion which could be the subject of grant. Such reversion could not exist, however, unless, from the nature of the limitation, it appears that the event upon which it was based, in the nature of things, must happen. That event was the abandonment of the use of the premises for school purposes. It is manifest that such an event might never occur. The premises might always be used for the purpose for which they were conveyed. This being true, Magnus was not vested with a reversion, or an estate in reversion, and there was nothing left to him save the mere "possibility of a reverter." No interest in the estate, therefore, could pass by his deed to Peabody, and, as a matter of course, as Peabody took nothing, he could convey nothing, either to McGavock or to the appellee. Whether these deeds might not operate as an assignment of the reversion, or the possibility of reverter, it is unnecessary to determine. It is sufficient to say that they did not convey the title or vest the grantees named in them with any right or interest, either present or contingent, in the body of the land itself. *Tied. Real Prop.* § 385; 2 Washb. *Real Prop.* 739. It follows, therefore, that Peabody was without authority to grant the license under which entry was made; that his conveyance was without legal force or effect; and that appellant took possession of the premises without right.

When appellant entered upon the land, the title in fee, and the exclusive right of possession, was vested in appellee. The right of appellee to maintain ejectment, therefore, was perfect. That right was not lost, unless the conduct of its officers in the premises was such that equity and good conscience would require that the value of the land be sued for instead of the land itself. In other words, the right could not be lost except by estoppel or acquiescence in the taking.

It is undoubtedly true, when a railway company enters upon the land of a citizen, even though such entry be without right, and constructs thereon its road-bed, that after the railway is finished and is being used by the railway company, in the conduct of its business as a common carrier, and in the discharge of its duties to the public, the land-owner will not be permitted to maintain ejectment, but will be limited to a recovery of the value of the land, if it appears either that he has actually acquiesced in the possession of the railway company, or that by affirmative acts, laches, or other conduct he has placed himself and the railway company

in such a position as to make it inequitable for him to insist upon restoration of the possession of the land. But, to maintain such a defense to the action of ejectment, the evidence must be clear and decisive. It must appear that the land-owner did actually acquiesce either in the entry or in the occupation of his property. If this does not appear; if, on the contrary, the entry was made without the consent of the owner; if he has at all times used reasonable diligence to protect his property,—then the defense of estoppel or acquiescence cannot prevail. The theory that a man may be deprived of his property by a railway company, by the operation of an estoppel, or by acquiescence is based upon considerations of the interest of the public at large. Although the interests of the public are always entitled to serious consideration, yet the taking of property for public use, without right, cannot be justified, nor will the owner be restricted to compensation and damages, when he has at all times insisted upon his rights in the premises, and has applied to the courts for protection with reasonable diligence. *Lewis, Em. Dom.* § 648; *Mills, Em. Dom.* (2d. Ed.) §§ 140, 141; *Pickert v. Railway Co.*, 25 N. J. Eq. 316; *McAulay v. Railway Co.*, 33 Vt. 311; *Railway Co. v. Allen*, 113 Ind. 581, 15 N. E. Rep. 446; *Railroad Co. v. Soltwedde*, 19 N. E. Rep. 111. In this case there is no evidence upon which an estoppel can be predicated, or from which acquiescence can be inferred. In June, 1887, when Peabody assumed authority to grant the license to appellant to enter upon the premises, he was without right or interest in the land. When appellant entered upon the land, appellee took the steps deemed necessary to protect the property. The officers visited Manning, only to be told by him that he had a right of way from Peabody, and that he would meet them at a future day. When he failed to do this, the property was fenced. From the beginning to the end of the transaction, the attitude of appellee was that of protest, and never that of acquiescence. When the road-bed was completed, Manning was again visited, and told the terms upon which appellee would yield its rights in the premises. These terms he refused to accept. Appellee then brought this action, which it had an undoubted right to do. The judgment is affirmed.

RICHMOND and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

ELLIOTT, J., not sitting.

(14 Colo. 577)

BULLOCK *et al.* v. MCGERR.

(*Supreme Court of Colorado.* May 16, 1890.)

CONSTITUTIONAL LAW—SUPREME COURT COMMISSION—ORAL ARGUMENT.

1. The constitutionality of the legislative act providing for a supreme court commission is not

necessarily involved upon the petition for a rehearing of a cause which had been referred to the commission in pursuance of said act.

2. Courts ordinarily decline to determine the constitutionality of legislative enactments in a case where the record presents some other and clear ground upon which the judgment may rest.

3. The supreme court alone can promulgate opinions and render judgments, and its duty is not discharged by the adoption *pro forma* of the conclusions of the supreme court commission.

4. The privilege of being heard orally before the supreme court prior to final judgment is a right which, though subject to reasonable regulation, cannot, under our practice, be denied to any party litigant making seasonable application therefor.

(*Syllabus by the Court.*)

On petition for rehearing.

The provisions of the act of the general assembly specially referred to in the opinion are as follows: Act of April 1, 1889: "Sec. 2. Said commissioners shall be subject to such rules and orders as the supreme court shall from time to time adopt for their government, and for procedure before them. They shall examine and consider together and report upon such cases as shall be referred to them by the court for that purpose, and perform such other services as the court shall require. Their reports shall be in writing, and signed by one of their number, and shall show which concur therein, and which, if any, dissents, and a dissenting commissioner may likewise make a report. Every report shall contain a concise, but comprehensive, statement of the facts in the case, the opinion of the commissioner or commissioners submitting the report, and a citation of the authorities relied on in support of the opinion. The court may provide by rule for a hearing of an oral argument by counsel before said commission: provided, that no cause shall be referred to said commissioners in which they, or any of them, are or have been interested as counsel or otherwise. Sec. 3. Every opinion shall be promptly delivered to the chief justice, who shall lay the same before the court. The court may approve or modify or reject any such opinion. Whenever it shall approve and adopt an opinion as submitted or as modified, the same, as approved and adopted, shall be promulgated as the opinion of the court, and shall be filed and reported, and judgment shall be rendered in the same manner, and with the same effect, and subject to the same orders, motions, and petitions for rehearing, as in the case of other opinions and judgments of the court; and every such opinion shall show which commissioner prepared the opinion, and which concurred, and the approval and adoption, and by the concurrence of which judges; and, whenever the court shall reject the opinion of the commissioners in any cause, the opinion of the court shall be prepared, and a like proceeding had in all respects as in other causes submitted to the court."

Morrison & Fillius, Geo. H. Kohn, and Hugh Butler, for appellants. *C. C. Post* and *L. C. Rockwell*, for appellee.

ELLIOTT, J. This cause was brought to this court on appeal from the district court of Clear Creek county, and, being regularly pending here, was, in pursuance of the act of April 1, 1889, (Sess. Laws, 444,) referred to the supreme court commissioners to examine and consider. After an oral argument before the commissioners they reported an opinion advising that the judgment of the lower court be affirmed. That opinion was, upon consideration by this court, approved, adopted, and promulgated as its opinion, and judgment of affirmance was rendered thereon. In this the provisions of the act mentioned above were regularly pursued. The order of reference was open and known to the parties through their respective counsel. Opportunity was given for a full hearing of the cause before the commission upon the whole record, orally as well as by the printed arguments of counsel on file; but the parties did not have an opportunity to be heard orally before the court, either in person or by counsel, prior to the decision of the case, nor did they have an opportunity to make objections or exceptions to the opinion as reported by the commissioners until after the same was approved and promulgated as the opinion of this court. Among other grounds upon which a rehearing is now asked, is the following: "The counsel for appellants desire to argue the validity of an opinion of the supreme court in the form of an indorsement or ratification of the commission based on an oral argument heard before the commission." By the briefs and arguments of counsel, questions relating to the constitutionality of the act providing for a supreme court commission are presented for the first time in this court. These questions being of general interest, and of the highest public concern, we have deviated from the usual practice in respect to petitions for rehearing, and, after hearing oral arguments and considering the printed briefs presented upon both sides of the controversy, have concluded to file opinions in writing, so that our views upon the subject may not be misunderstood. Questions relating to the constitutionality of supreme court commissions have recently been considered by the supreme courts of several states. In Indiana, the question having been presented to the court by a writ of prohibition, Chief Justice ELLIOTT, in an elaborate opinion, concurred in by the whole court, declared the act of the legislature creating such tribunal unconstitutional. In California the proceeding was by *quo warranto*. Learned opinions were delivered by Chief Justice BEATTY and by Mr. Justice FOX sustaining the commission. It will be observed, however, that the constitutions, as well as the legislative acts of the two states, differ from each other in some particulars, and also that in both these proceedings the commissioners were made respondents. In Kansas the question arose as follows: A case pending in the supreme court upon writ of error had been referred to the commission-

ers, who, after hearing oral argument, prepared an opinion, which, upon due consideration by the court, was promulgated as its opinion. The defeated party sought by motion to obtain a rehearing upon the ground, as alleged, that a hearing had not been had before the supreme court; that the hearing before the commissioners was without force or effect; that the commission was unconstitutional; and that the parties had been deprived of a hearing before a duly constituted and legal court. The Kansas court was divided in opinion upon this motion, though the majority of the court, speaking by Mr. Justice VALENTINE, in a well-considered opinion, refused to consider the question of the constitutionality of the act, and, passing upon the merits of the case, denied the rehearing. Chief Justice HORTON, however, in a dissenting opinion of rare ability, contended that it was the denial of an "inestimable right" to deprive a suitor of an oral argument before the court prior to rendering final judgment. *State v. Noble*, (Ind.) 21 N. E. Rep. 244; *People v. Hayne*, (Cal.) 23 Pac. Rep. 1; *Railroad Co. v. Abilene*, (Kan.) 21 Pac. Rep. 1112.

Upon careful consideration, we conclude that the constitutionality of the legislative act providing for a supreme court commission is not necessarily drawn in question by the petition for a rehearing, so we shall not express any opinion concerning its validity. Our reasons for this course are well expressed in the language of an eminent author on constitutional questions as follows: "It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously, and with due regard to duty and official oath, decline the responsibility. * * * Neither will a court, as a general rule, pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. 'While courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both more proper and more respectful to a co-ordinate department to discuss constitutional questions only when that is the very *lis mota*. Thus presented and determined, the decision carries a weight with it to which no extrajudicial disquisition is entitled.' In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of with-

out considering it, and when consequently a decision upon such question will be unavoidable." *Cooley*, Const. Lim. 159, 163.

Though it is deemed inexpedient to determine the constitutionality of the act creating the commission in this proceeding, yet the constitutional duties and obligations of this court to litigants are directly involved; and, in order to pass upon the questions fairly within the purview of a petition for a rehearing, it seems necessary to consider to some extent the nature of the supreme court commission, and the character of its work in connection with the hearing and disposition of causes in this court. The vital question is, are the rights or privileges of parties in any manner denied or abridged by the reference of their causes to the commission, and the proceedings consequent thereon? The question is one of much difficulty. Article 3 of our state constitution divides the powers of the government into "three distinct departments," and forbids any encroachment by one department upon another. By the provisions of article 6 of the constitution, we find that "the judicial power of the state" is vested in the courts; that "appellate jurisdiction" is vested in the supreme court; and that "the supreme court shall consist of three judges." While these constitutional provisions remain unchanged, the rights thereby secured cannot be destroyed or impaired by any legislative enactment; neither can the number of judges upon the supreme bench be increased, nor can their essential powers and responsibilities be shared by others. It is unnecessary to enter into a lengthy discussion of these familiar principles. The first and second sections of article 2 of the constitution express the fundamental principles of our free institutions, to the effect that the powers of civil government are "vested in and derived from the people" of the state, subject to the constitution of the United States. The people of this state by their constitution have vested in the judicial department of the government all the judicial power they had to give, with a few specified exceptions; and have made the same exclusive, thus making the judiciary co-ordinate with the legislative and executive departments. The supreme court belongs to the judicial department. It derives its existence, organization, powers, and jurisdiction from the constitution. The supreme court commission is of legislative creation. The act providing for the commission requires that the commissioners "shall possess the same qualifications" as judges of the supreme court, and that they shall examine, consider, and report opinions upon "such cases as shall be referred to them by the court for that purpose;" yet it is clear that they cannot, by mere legislative authority, be invested with those powers which have been committed to another tribunal, under and by virtue of a constitution which declares that the powers properly belonging to one department shall not be exercised by either of the others.

Without undertaking to determine the exact line of demarkation between those governmental powers which are judicial in their nature and those which are not, it is clear that the exercise of judicial power comprehends something more than the use of the perceptive and reflective faculties by which legal conclusions are deduced from the facts of a case. Such acts are intellectual and preliminary. The plenary exercise of judicial power calls into activity, also, the other attributes of the mind,—the sensibilities and the will. The deliberate assumption of responsibility; the authoritative expression of legal conclusions in declaring the sentence of the law; the pronouncing of judgment in open court in the presence of those who are to be affected thereby, so as to bind and control persons and property; the protection, and sometimes the loss, of life and liberty, as well as the character and fortunes of individuals; the establishing of precedents which may affect the most cherished rights of persons and property for all time,—all these are often involved in the exercise of judicial power, and serve to illustrate its importance. Such powers cannot be wisely exercised, except by those who personally avail themselves of every opportunity to guide their judgment. They cannot be lawfully exercised, except by those intrusted therewith by the people under the constitution. While the commissioners, in the performance of their work, are required to consider questions of a judicial nature, and to express their opinions thereon, still their opinions must be considered and approved by the judgment of the court, so as to become essentially the opinions of the court before they can be considered in any proper sense judicial opinions. The work of the commissioners is in some respects like that of counsel, with this important distinction: that the commissioners are sworn to faithfully and impartially discharge their duties as paid officers of the state, so that, in considering their work, we do not have to make allowance for the bias or prejudice which partisan feeling, self-interest, and paid zeal are calculated to inspire. The difference between the argument of counsel and the decision of the court is easily comprehended. The former may be replete with as much or more legal learning than the latter; it may be the result of as much or more exercise of the reasoning faculties; it may show as much or more legal discrimination and sound judgment; it might, if followed, lead to as good or even better results in the administration of the law in a given case; but the argument of counsel lacks the force and power of the judicial decision, in that it is not pronounced by one clothed with judicial authority under the constitution to give effect to it as a judgment of the court. See opinion of the present Chief Justice of this court in *Hooverly Invinible M. Co. v. Howcutt*, 6 Colo. 574.

It follows, from foregoing views, that every litigant having a cause properly pending in this court is entitled to have the same

fully considered and determined by the court itself; that is, by the supreme court, established and vested with judicial power under the constitution. Every such litigant also has the right to have his cause heard by the court itself upon oral or written arguments before final judgment is rendered. It is a matter of common observation that different minds are affected differently by the same arguments, and they sometimes draw different conclusions from the same state of facts. Hence the reference of a cause to the commission may in some instances affect its ultimate determination. The report of the commissioners may bring before the court something which will break the force and effect which the briefs or arguments of counsel might otherwise have produced upon the members of the court who are to decide the cause. Such a result would not be likely to occur in an ordinary case, but, upon evenly balanced or doubtful questions, the strongest minds are more or less influenced by the reasoning of others. Hence, whether a case is referred to the commission or otherwise, it is undoubtedly the duty of the court to consider the whole case before promulgating its final opinion. In case of a reference, the whole record, including the briefs and arguments of counsel, must be considered in order that the opinion reported by the commission may be intelligently approved, modified, or rejected. It is for these reasons that this court has strenuously resisted all importunities to approve and promulgate the opinions of the commissioners *pro forma* in the first instance without consideration. The constitutional rights of the parties require that the opinion, by whomsoever prepared, shall be approved and adopted by the court before it is promulgated as the opinion of the court.

Whether the legislature can control the judicial department, so far as to require that any cause or number of causes pending in this court shall be referred to the commission, thereby imposing upon the court the duty of examining and considering the opinions reported by the commission; also whether the legislature can require opinions reported by the commission to be promulgated in any particular form or manner, in case of their approval and adoption,—are questions which need not now be determined. But, in view of what has been so strongly urged concerning the "indorsement or ratification" of commissioners' opinions and the importance of "oral arguments," some expression seems to be called for concerning the views and practice of the court in this regard, for the information of all concerned. It is proper, therefore, to state that this court is now, and always has been, of the opinion that it cannot discharge its constitutional obligations to litigants by the promulgation of any opinion, by whomsoever prepared, without first being satisfied of the correctness of the opinion in all substantial particulars; and also that the privilege of being heard orally before the court prior to final judgment is a right which,

though subject to reasonable regulation by the court, cannot justly be denied to any party litigant making reasonable application therefor. "Hear before you strike," was a maxim of the ancient jurists. Whenever it is necessary that an oral argument should be had in order to a correct understanding and determination of a cause, such necessity is not satisfied by allowing such hearing before the commission; the effect of such oral argument cannot be fully appreciated by the court, except the argument be made to the court.

It would seem to be an improvement in the practice if, when an opinion is reported by the commission, any suitor conceiving himself prejudiced thereby should have the opportunity of making objections or exceptions thereto, and have the same considered by the court itself before final judgment is rendered. Experienced lawyers, as well as judges, know the superior advantage of being heard before judgment is pronounced, rather than afterwards. Ordinarily, a motion for a new trial or for a rehearing is not equivalent to a full hearing, before the ideas of the judicial mind upon a given case have become settled by the expression of an opinion in writing. There is something in the act of formulating ideas or mental conclusions into words and sentences that strengthens the conviction of the author as to their correctness. Hence the importance of mature consideration before the entry of judgment, especially in a court of last resort. The fact that this court does not perform the literary labor of expressing the views embodied in the opinions of the commissioners is rather favorable than otherwise to the applicant for a rehearing in such cases. Nevertheless, it would seem to be more prudent to give opportunity to litigants to examine and make objections or exceptions to opinions reported by the commission before the court undertakes to consider them, so that they may be passed upon in the light of such objections.

Though the matters considered in this opinion have not been heretofore formally presented or discussed by this court, yet it will be observed from what has already been said that they have not been altogether overlooked. In many cases oral rehearings have been allowed, when applied for, on the ground that arguments made orally before the commission could not be fully appreciated by the court. It may be said that the act providing for a supreme court commission was designed by the legislature to facilitate the disposition of business in this court, and that the court should not interfere with such object by assuming the burden of reviewing their work in all cases. The unanswerable reply to this is: Constitutional rights of litigants cannot be sacrificed to expediency. It is true, this court is overburdened with accumulated business. The reasons for this are obvious. Since the adoption of the constitution, Colorado has more than quadrupled in wealth and population, and litigation has increased in a still greater ratio. There are now three times

as many district and county courts in existence and in active operation as when the state was admitted, and this court may be required to review every one of their judgments by appeal, writ of error, or other remedial writ. Besides, the number of causes of which this court must take original jurisdiction is constantly increasing, and yet the number of judges on this bench remains the same. Hence it should not be a matter of surprise, after the lapse of nearly 14 years, considering the novel and diversified character of the questions presented to this court for consideration, that the court, desiring to decide every case with due regard to the rights of parties and in strict conformity to legal and constitutional principles, should be somewhat behind upon the calendar. It is unnecessary, in my opinion, to consider at this time the other grounds upon which the rehearing is asked. In order that appellants may have an opportunity to be heard orally by this court upon the merits of their cause, the petition for a rehearing will be allowed.

HAYT, J. No question as to the constitutionality of the act providing for the supreme court commission is either necessarily or properly involved in this determination, and I shall not, therefore, follow counsel in their able and exhaustive argument in this field. In addition to the reasons given for this conclusion by Mr. Justice ELLIOTT, in the opinion filed herewith, the fact that the honorable commissioners are not parties to this action should have great weight in support thereof. The commission, as an institution, has now been in existence in this state for upwards of three years, and the public at large may well be supposed to have an interest in the determination of the constitutional question, compared with which this litigation over a few cows sinks into insignificance; and this method of collateral attack ought not to be now encouraged. In my judgment, the only question in relation to the supreme court commissioners properly before the court upon this motion may be stated as follows: Under the provision of the act of April 19, 1890, in reference to oral arguments, is the duty of this court discharged in cases referred to the commission by providing for an oral argument before that body, or is the party in such cases entitled to an oral argument before the supreme court, before its judgment shall be pronounced? The present act, "providing for a supreme court commission," was passed at the last session of the legislature, and was approved upon the 1st day of April, 1890. A few days later, and at the same session, an act was passed entitled, "An act to regulate the terms of the supreme court and the practice therein," which reads as follows: "Section 1. That in each year there shall be three terms of the supreme court; one beginning on the second Monday in September, another beginning on the second Monday in January, and another beginning on the second Monday in April.

Sec. 2. The court shall be in open session as often as practicable during each of its terms, to hear and determine matters and causes which may come before it, and oral arguments shall be allowed on final hearing in any cause on the request of any party thereto." In section 2 of this latter act the right of a party litigant to be heard orally before this court upon request, before final judgment, is expressly declared. If anything can be found in the statutes which would authorize a refusal by this tribunal to hear a party orally as above, it must grow out of the power given the court to provide by rule for oral arguments before the commission in certain cases. The two acts must be considered together, and effect given to both, if possible. Such effect can best be given by holding that the legislature, in employing the language used in the latter act, intended to put beyond a dispute the right of a litigant to have his case orally argued before this court upon final hearing. It was then legislating with reference to the body designated by the constitution as the supreme court. And the above conclusion is in accordance with the natural and obvious import of the language employed. It cannot be said that, by referring causes to the commission, parties can be deprived of the right to a final hearing before the court. As conclusively shown in Mr. Justice ELLIOTT'S opinion, the court alone can render judgment, and its duty is not discharged by the adoption *pro forma* of the conclusions of the commission. And to deprive a party litigant of his right to an oral argument before this court upon such final rehearing, no matter what opportunities may have been accorded him in presenting his case to the commission, would be a palpable violation, not only of the terms of the act itself, but would be contrary to the uniform practice of this court as promulgated by rule 27, provided he has seasonably applied for such oral argument. In the opinion of the commission in this case, the correctness of the propositions of law announced in certain instructions prayed by appellant, and refused by the trial court, is conceded; the refusal to give such instructions being justified only upon the ground that they were not warranted by the evidence. The correctness of this conclusion is contested by counsel. The point seems to be in much doubt, and, in my opinion, the court ought not to refuse any assistance to its correct determination which counsel are willing to give. A stipulation by counsel for an oral argument having been filed more than one year ago, and before the reference, I am of the opinion that a rehearing should be granted, to the end that such oral argument may be made to this court, as requested by appellants.

HELM, C. J. The members of the court are agreed upon two propositions: *First*, that the legal existence of the supreme court commission should not be determined upon the present collateral challenge; *second*, that the rehearing in the case at bar should be al-

lowed upon grounds appearing in the record, and wholly independent of the foregoing or any other constitutional question. In my judgment, the above announcement is all that should be made at the present time. Having squarely declined to consider the constitutionality of the commission statute, it would seem inconsistent to promulgate an opinion discussing matters pertaining solely thereto. Therefore I must be excused from even tacitly sanctioning such a proceeding, as well as from giving a silent indorsement to irrelevant propositions, the logical sequences from which do not meet my approval. It seems to me, also, that explanations concerning the manner in which this court discharges its constitutional duties would be more appropriate upon some other occasion. Nor am I now prepared to favor the position taken by one of my associates regarding oral arguments. The conclusion reached is necessarily predicated upon the legislative right to prescribe a court regulation in the premises. The statute relied on is but a repetition of the standing rule of this court in force several years prior to its enactment. This rule the court has always regarded as obligatory, and never, to my knowledge, has an oral argument upon final hearing of a cause been refused, when proper application was made therefor. Hence I must not be understood as in any way questioning the utility or propriety of the practice. On the contrary, I am, and have always been, an earnest advocate thereof. If an oral argument is the litigant's constitutional right,—a matter upon which I express no opinion,—the statute does not magnify or strengthen such right. If, on the other hand, this be but one of the privileges usually extended in the trial of causes, a statute commanding its allowance by the court may be an unwarranted departure from the field of proper legislation. If the legislature can command the court to hear oral arguments, it would seem to follow that, if the right be not constitutional, it might forbid the hearing thereof; and, if this be conceded, I do not see why that body may not fix the time to be consumed by counsel, command or forbid printed arguments, arrange the order of business, and make any and all other rules or regulations regarding judicial proceedings. Undoubtedly, legislation may and must cover a wide range of subjects, connected directly or indirectly with judicial action; but that a limit exists somewhere to legislative power over the manner in which courts created by the constitution shall perform judicial duties, and conduct judicial business, will hardly be questioned. The supreme court of California has held that the legislature cannot require its opinions to be reduced to writing. *Houston v. Williams*, 13 Cal. 24. Doubtless many other illustrations might be found of instances where legislative authority in the premises has been denied. But I have said sufficient to explain my reluctance in approving the major premise, upon which the opinion in question necessarily rests. My as-

sociates have seen fit to adopt, as a standing rule of court, a regulation in pursuance of which opinions of the commission are deposited with the clerk, and treated to all intents and purposes as reports of referees in ordinary judicial proceedings. The adoption of this rule is, to some extent, an outgrowth of the present controversy. It must have been based either upon grounds of expediency or of legal necessity. The efficiency of the plan, whether resting upon one ground or the other, I am led, upon reflection, to seriously doubt. I do not consider whether the rule is consistent with the statute creating a supreme court commission. My misgivings are predicated upon the fear that it will not simplify the disposition of cases, or remove the embarrassment that has heretofore necessarily attended the joint labors of the court and commission. In my judgment, moreover, it is doubtful if any of the alleged constitutional exceptions urged against the organization and work of the commission are thus obviated. But I shall for the present refrain from entering into a discussion of specific objections. The rehearing is allowed.

(14 Colo. 259)

FIRST NAT. BANK OF CENTRAL CITY v. HUMMEL et al.

(Supreme Court of Colorado. Feb. 28, 1890.)

EXECUTORS AND ADMINISTRATORS—ASSETS—PARTIES—MISJOINDER OF ACTIONS.

1. Plaintiff sent to one E., a banker, a draft on E., directing him to remit the proceeds to a certain bank for plaintiff's credit. Money was deposited with E. to meet the draft. Before the remittance was made according to plaintiff's instructions, E. died. *Held*, that the title to the fund was in plaintiff, and did not become part of E.'s estate, though it was mingled with other funds of E., and an action for recovery will lie; Gen. St. Colo. 1883, § 3606, which provides that debts and demands, other than those owing by decedent, as executor, administrator, or guardian, shall be exhibited within one year from the granting of administration, not applying to such case.

2. One H. having agreed to lend money to R., it was agreed between R., H., and E., a banker, that R. should draw on E. at sight for the amount of the loan, and that, on receipt of the draft, H. should provide money to meet it. R. drew on E. accordingly, and deposited the draft with plaintiff bank for collection. Plaintiff sent the draft to E., with instructions to remit to a certain other bank, for plaintiff's credit. E. received the draft, and money to meet it was deposited with him, but he died immediately afterwards without having remitted the proceeds. *Held*, in an action for the proceeds against E.'s administrator, that R. was within Code Colo. § 10, providing that "all persons having an interest in the subject of the action * * * may be joined as plaintiffs," and, having refused to sue, was properly joined as a defendant under section 12, which provides that, "if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant."

3. The complaint does not improperly unite different causes of action where, in addition to the prayer for judgment against the principal defendant for the fund sued for, it asks that R. reimburse plaintiff for all costs and expenses of the suit, as no cause of action is stated against R., but only the reasons for making him a defendant are alleged as required by Code Colo. § 12.

Commissioners' decision. Appeal from district court, Arapahoe county.

Hugh Butler and *A. B. McKinley*, for plaintiff in error. *A. H. De France*, for defendant in error.

PATTISON, C. In this case, plaintiff in error seeks to review a judgment sustaining a demurrer to the complaint. It is alleged, in substance, that June 28, 1884, Risdon borrowed from one Heatly, then a resident of Golden, the sum of \$1,200, for which he gave his note secured by a trust-deed; that the money was not paid by Heatly to Risdon at the time, but an arrangement for the payment thereof was entered into between Heatly and Risdon and one Everett; that, by the terms of the arrangement, it was provided that Risdon should draw his draft at sight on Everett, at Golden, for said sum of \$1,200; that, upon the receipt of the draft, Heatly should provide the money to pay it, and that thereupon Everett should transmit the sum received from Heatly to Risdon, or make such other disposition of it as Risdon should direct; that on July 15, 1884, pursuant to the arrangement, Risdon made his draft upon Everett, "in and by which draft he directed the said F. E. Everett to pay said sum of \$1,200 to this plaintiff, and said Risdon then and there delivered said draft to this plaintiff, whereby the plaintiff became entitled to receive of and from the said Everett said sum of \$1,200 upon presentation and delivery of said draft;" that on the 16th day of July, 1884, the plaintiff sent the draft by mail to Everett, accompanied by a letter instructing him to remit the said sum of \$1,200 to the German National Bank, at Denver, Colo., for the benefit of the plaintiff; that on July 17, 1884, the draft and the letter were received at the banking office of Everett, in Golden, and at or about the same time the said Heatly paid into said banking office the sum of \$1,200, being the money called for and mentioned in the draft and the letter of plaintiff, and the draft was then stamped and canceled as paid; that the said sum of \$1,200 was received by said Everett, or some one in his employ for him, as the money mentioned in the draft and letter, and was paid by Heatly, in pursuance of the arrangement mentioned; and that, under said arrangement, it was the duty and obligation of Everett to at once remit the said sum to the German National Bank of Denver for the credit of the plaintiff. It is then alleged that, within a short time after the money was received, Everett suddenly died, and the bank was immediately closed, and no further business transacted therein, and that when Everett died, and when said bank was closed, the said sum of \$1,200 remained in the bank, and had not been remitted to the German National Bank at Denver, as directed; that the bank was not opened thereafter. It is further alleged that on November 12, 1884, the defendant Hummel took possession of the said banking office and its contents, and kept possession of the same; that, among other effects therein, he took possession, and has since had posses-

sion, of said sum of \$1,200; that thereafter, and on November 20, 1884, plaintiff demanded of Hummel the payment and delivery of said sum of \$1,200, but that he refused to pay the same. It is then alleged, in effect, that, by the terms of the contract between plaintiff and Risdon, the plaintiff was to collect the draft, and, in case it was paid, and the amount thereof deposited in the German National Bank of Denver to the credit of the plaintiff, then plaintiff was to give Risdon credit for the sum of \$1,200; that on August 12, 1884, plaintiff informed Risdon that the draft had been paid by Heatly, but that its proceeds had not been remitted to the German National Bank of Denver, as requested; that the money was in the possession of the person in charge of Everett's property; and plaintiff then notified and requested Risdon to take early and proper steps for the recovery of the same; that Risdon refused to take such steps, and notified plaintiff that he should look to plaintiff only for said sum of money; that plaintiff requested Risdon to join as co-plaintiff in the suit; that he refused, and for that reason he was made a party defendant. Judgment is demanded "that said Hummel deliver and pay over to the plaintiff said sum of \$1,200, together with interest thereon at the rate of 10 per cent. per annum from said 20th day of November, 1884, and costs." There is also an additional prayer, in the following language: "And demands judgment against John S. Risdon that he pay plaintiff a reasonable sum of money, sufficient to reimburse plaintiff for all costs and expenses paid and incurred in the prosecution and maintenance of this suit, and for the recovery of said money; that he be adjudged the owner of said sum of \$1,200, less the expense of collection so found as aforesaid; and that plaintiff be released from any and all liability to said John S. Risdon by reason of making presentation and payment of said draft as aforesaid, and of all the other facts hereinbefore set forth."

To this complaint the defendant in error demurred upon the grounds—*First*, that the complaint did not state facts sufficient to constitute a cause of action; *second*, that there is misjoinder of parties defendant, etc.; *third*, that several causes of action have been improperly united, etc.; *fourth*, that the causes of action so improperly united are not separately stated. The demurrer was sustained. Plaintiff in error "elected to abide by said complaint," and thereupon the judgment was rendered, now sought to be reviewed. The causes of demurrer will be considered in the order in which they have been stated.

First, then, are the facts alleged sufficient to constitute a cause of action against the defendant in error? In other words, upon the facts stated, is plaintiff entitled to the judgment demanded, or to any judgment or relief in the premises whatever? In the discussion of this question, it will be necessary, first, to define the relation of the several parties to the fund in question. That relation must

be determined from the facts as alleged in the complaint. The facts, then, are that on June 28, 1884, Heatly agreed to loan to Risdon \$1,200. On that day, Risdon made his note, and delivered the same to Heatly. The money to be loaned was not paid over by Heatly to Risdon. It was arranged that, on July 15th following, Risdon should be paid by Heatly. To accomplish this, it was agreed between Heatly, Everett, and Risdon that, on the day named, Risdon should draw a draft on Everett, which Everett should pay if Heatly provided the funds for payment. Pursuant to the arrangement, Risdon drew his draft upon Everett, and delivered it to the plaintiff. It is a fair inference from the allegations of the complaint that the draft was payable to the order of the plaintiff. The plaintiff sent the draft to Everett with instructions that, when Heatly paid the money to him, he (Everett) should transmit the money received from Heatly to the German National Bank for the credit of the plaintiff. Upon this state of facts, the relation between the several parties is clear and well defined. Risdon made the plaintiff in error his agent to obtain the fund in question. The plaintiff made Everett its agent to receive the fund from Heatly. When he received the fund, it was his duty to transmit the identical money received to the German National Bank for the credit of the plaintiff. When the money was paid by Heatly to Everett, therefore, the title to the fund was vested in the plaintiff. The beneficial ownership was vested in Risdon; Everett had no title or interest in the money, or any part of it. His failure, therefore, to transmit the money received from Heatly to the German National Bank, was a violation of the duty he owed the plaintiff and Risdon. When he received the money, it became the money of the plaintiff and Risdon. When he died, the fund was their property, and was their property when received by defendant in error. The question presented upon these facts is whether this sum of \$1,200 can be recovered. The action is brought against the defendant in error individually. It will be assumed, however, that the fund was taken by him as the personal representative of the decedent. The case will first be considered without reference to the statute of this state relating to the administration of estates of deceased persons. It was conceded by counsel for defendant in error, upon the oral argument, that, if this specific sum of \$1,200 could be identified in any way, then the action could be maintained. But it was insisted, if the fund when received was mingled with other funds belonging to decedent so that its identity was lost, then, and in that event, no action could be maintained to recover it. This proposition was predicated upon the principle that money, as such, cannot be recovered, because, in the language of the books, it has no "earmark" by which it can be distinguished. If this principle can be successfully invoked in this case, then a fund to which decedent had

no title, and in which he had no beneficial interest whatever, became a part of the body of his estate to be distributed among the general creditors. If the estate of Everett is insolvent, such a result would not only be inequitable and unjust, but a reproach to the law. It is undoubtedly true that the principle contended for was at one time so well settled as to be elementary. It is clearly stated in *Schouler, Ex'rs*, § 205. Attention is only called to two clauses of this section: "Only those things in which the decedent had a beneficial interest at his death are assets, and not those which he holds in trust, or as the bailee or factor of another. In order, however, that the third party or new fiduciary may claim his specific thing as separable from assets, its identity should have been preserved; and the rule is that, if the deceased held money or other property in his hands belonging to others, whether in trust or otherwise, and it has no ear-mark, and is not distinguishable from the mass of his own property, it falls within the description of 'assets,' in which case the other party must come in as a general creditor." In support of the proposition last quoted the author cites two cases: *Trecothick v. Austin*, 4 Mason, 29; *Johnson v. Ames*, 11 Pick. 172. The first case was decided in 1825; the second, in 1831. It is needless to trace the development of the law which has resulted in a radical change in the principle stated since these decisions were made. At this time the owner of money which has been received by another as trustee, or in any fiduciary capacity, can undoubtedly recover the money or its equivalent whenever the same can be followed, no matter what form it may take.

The departure from the rigid doctrine of "ear-mark" or identification of money, to entitle the owner to recover, seems to have been first initiated in England. As the English cases cited have been very generally followed by the courts of this country, attention will be first called to them. The case of *Pennell v. Deffell*, 4 De Gex M. & G. 372, was a controversy between creditors and the administratrix of one George Green, who in his life-time was one of the official assignees of the court of bankruptcy. It is only necessary to say that, in the course of the administration of his office, the deceased was accustomed to mingle trust funds with his own, and to deposit the same in bank. In the discussion of the proposition in question, Lord Justice KNIGHT BRUCE uses the following hypothesis: "Thus, let me suppose that the several sums for which, as I have said, Mr. Green was accountable at the time of his death, had been (that is to say, that the very coins and the very notes received by him on account of the trusts, respectively, had been) placed by him together in a particular repository, such as a chest, mixed confusedly together as among themselves, but in a state of clear and distinct separation from everything else, and had so remained at his death. It is, I apprehend, certain that

after his death the coins and notes thus circumstanced would not have formed part of his general assets,—would not have been permitted so to be used,—but would have been specifically applicable to the purposes of the trusts on account of which he had received them. Suppose the case that I have just suggested to be varied only by the fact that, in the same chest with these coins and notes, Mr. Green had placed money of his own—in every sense his own—of a known amount, had never taken it out again, but had so mixed and blended it with the rest of the contents of the chest that the particular coins or notes of which this money of his own consisted could not be pointed out,—could not be identified. What difference would that make? None, as I apprehend, except, if it is an exception, that his executors would possibly be entitled to receive from the contents of the repository an amount equal to the ascertained amount of the money in every sense his own so mixed by himself with the other money. But not in either case, as I conceive, would the blending together of the trust moneys, however confusedly, be of any moment as between the various *cestuis que trustent* on the one hand, and the executors, as representing the general creditors, on the other." In the same case, Lord Justice TURNER said: "It is, I apprehend, an undoubted principle of this court that, as between *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration, without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subjected to or affected by the trust." Again, in *Knatchbull v. Hall*, 13 Ch. Div. 696, a most exhaustive discussion of this question is found. At page 710, JESSEL, M. R., said: "Now, that being the established doctrine of equity on this point, I will take the case of the pure bailee. If the bailee sells the goods bailed, the bailor can in equity follow the proceeds, and can follow the proceeds wherever they can be distinguished, either being actually kept separate, or being mixed up with other moneys. I have only to advert to one other point, and that is this: Supposing, instead of being invested in the purchase of land or goods, the moneys were simply mixed with other moneys of the trustee, using the term again in its full sense, as including every person in a fiduciary relation, does it make any difference, according to the modern doctrine of equity? I say, none." At page 723, THESIGER, L. J., said: "There is no doubt that there are to be found, here and there in the books, *dicta*, principally of common-law judges, which would appear to militate against the generality of that proposition, and which would appear to show that, in the minds of those judges, there was the view that, while chattels might be followed, or

money so long as it could be looked upon as a specific chattel, as moneys numbered and placed in a bag, yet, when those moneys had been mixed with other moneys, that there was no ear-mark, and neither at law nor in equity could they be followed. With reference, however, to those *dicta*, it appears to me there are two observations to be made: In the first place, I cannot find any decision which has followed out those *dicta* to their consequence, assuming that those *dicta* are to be treated as having the generality which at first sight attaches to them; and, in the second place, it appears to me that in many cases those *dicta*, looking to the facts of the particular case, may be restrained to those facts, and possibly may have a more limited meaning than that which has been attached to them by Mr. Justice FRY in the case of *Ex parte Dale*, 11 Ch. Div. 772, or by the master of the rolls in his judgment in the present case. As far as I can judge, the only exception to the general proposition which I have stated is not a real exception, but an apparent exception; for all cases where it has been held that moneys mixed and confounded, but still existing, in a mass, cannot be followed, may, I think, be resolved into cases where, although there may have been a trust with reference to the disposition of the particular chattel which those moneys subsequently represented, there was no trust, no duty, in reference to the moneys themselves, beyond the ordinary duty of a man to pay his debts. In other words, that they were cases in which the relationship of debtor and creditor had been constituted, instead of the relation either of trustee and *cestui que trust*, or principal and agent." At page 713 the master of rolls says: "Now, let us see, therefore, what *Whitcomb v. Jacob*, 1 Salk. 161, decides. It decides that the equity as to following the proceeds attaches to the case of a factor as well as to the case of *cestui que trust* and trustee. That is what it decides; but it decides, secondly, that you could not follow money, because it had no ear-mark. The first part is good law at the present day, the second is not. Whether it was good law or not at the time of Salkeld, it is immaterial to consider. It is very doubtful whether equity had got quite so far at that date as since, and therefore I will not say it was not; but it is not so now." This case is cited with approval in *National Bank v. Insurance Co.*, 104 U. S. 54, in which this and many of the English cases are reviewed. In the syllabus of the case last cited the rule is stated as follows: "As long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust; and, if a man mixes trust funds with his, the whole will be treated as trust property, except so far as he may be able to distinguish what is his. This doctrine applies in every case of a trust relation, and as well to moneys deposited in bank, and to the debt thereby created, as to every other description of property." *Van Alen v. Bank*, 52 N. Y. 1.

Again, in *Bank v. King*, 57 Pa. St. 202, it is held: "Equity will follow a fund through any number of transmutations, and preserve it for the owners, so long as it can be identified, no matter in whose name the legal right stands." STRONG, J., says: "But it is insisted there was no ear-mark to the money. What of that, if the money can be followed, or if it can be traced into a substitute? This is often done through the aid of an ear-mark. But that is only an index enabling a beneficial owner to follow his property. It is no evidence of ownership. An ear-mark is not indispensable to enable a real owner to assert his right to property, or to its product or substitute. Evidence of substantial identity may be attached to the thing itself, or it may be extraneous. It is freely admitted that, if a trustee or agent receive money of a *cestui que trust* or principal, and mingle it with his own so that it cannot be followed, the *cestui que trust* or principal cannot recover it specifically. This is not because the ownership is changed, but because a court cannot lay hold of the property as that of the owner. But, in regard to money, substantial identity is not oneness of pieces of coin, or of bank-bills. If an agent to collect money puts the money collected into a chest where he has money of his own, he does not thereby make it all his own, and convert himself into a mere debtor to his principal. The principal may, by the law, claim out of the chest the sums which belonged to him before the admixture. *Pennell v. Deffell*, supra." In *Peak v. Ellicott*, 30 Kan. 156, 1 Pac. Rep. 499, HORTON, C. J., says: "Counsel suggest: 'If there was a trust created, there must have been a *cestui que trust*, and that, if any one is entitled to follow and reclaim the money, it must be the owner and holder of the note of plaintiff.' It does not make any difference that, instead of trustee and *cestui que trust*, the case is one of fiduciary relationship. If a wrong arises out of such relationship, the same remedy exists against the wrong-doer on behalf of the principal as exists against a trustee on behalf of the *cestui que trust*. Wherever a fiduciary relationship exists, and money coming from the trust lies in the hands of the person standing in that relationship, it can be followed by the principal, and separated from any money of the wrong-doer." In *McLeod v. Evans*, 66 Wis. 401, 28 N. W. Rep. 173, 214, the rule contended for by counsel for defendant in error was, after a careful discussion by COLE, C. J., practically repudiated. The proposition decided is thus stated in the syllabus: "M. left with H., a banker, for collection, a draft upon a New York bank. H. sent the draft to a bank in Chicago, received credit for the amount, and afterwards made drafts upon such bank, which were cashed. Before payment to M., H. made an assignment for the benefit of creditors. At that time, nothing was due him from the Chicago bank. Held, that the proceeds of the draft were a trust fund in the hands of H., and that, as against

other creditors, M. might enforce full payment from the assets in the hands of the assignee, although the trust fund could not be traced to any specific property." *People v. City Bank of Rochester*, 96 N. Y. 32.

No one of the cases cited differs in principle from the case at bar. Suppose the money in question had been placed by Everett in his own pocket, with a mass of other funds belonging to himself, and that he had then died. Suppose that immediately upon his death the mass of currency had been taken into the possession of the defendant in error. If demand had then been made by the plaintiff for the money, could defendant in error have required the plaintiff in error to designate the particular bills which were claimed as a condition of the right to recover them? Certainly not. How does the case supposed differ from the case at bar? It is alleged that the money was paid to Everett, received and retained by him; that it was in his possession at the time of his death; that the same sum came to the possession of the defendant in error. Is it not clear that Everett received the fund in a fiduciary capacity? Does it not follow that the instant it passed into his hands a trust arose, by operation of law, in favor of plaintiff in error? Did not the trust follow the fund when it passed to the hands of defendant in error? If it was mingled with the assets of the decedent, is not the estate impressed with the same trust? Can it be possible that the fact of death increases a man's estate, by adding thereto all property which may be in his hands? Can a man, by an abuse of trust or violation of his fiduciary relations, acquire moneys for the distribution among his general creditors at his decease? Whatever may have been the law applicable to these questions in the past, it is clear that at the present time the estate of no man can be increased by a wrong committed by him under the circumstances set forth in the complaint in this case.

Is the conclusion reached in any wise affected by sections 126 and 136 of the statute of this state relating to wills and administration of estates? It will be observed in this connection that the question at issue is one of title. The conclusion already reached is that at the time of the death of Everett the title to the fund in controversy was in the plaintiff in error; that Everett had no beneficial interest therein whatever. The fund, therefore, constituted no part of his estate. *Schouler, Ex'rs*, § 205. It is contended by defendant in error, however, that the sections of the statute cited have the effect, in law, to convert the fund in question into assets by their operation in the classification of claims, and the order of their payment. The third subdivision of section 126¹ provides that, "where any executor, administrator, or guardian, has received money as such, his executor or administrator shall pay out of his estate the amount thus received and not ac-

counted for, which shall compose the third class." The fourth subdivision provides that "all other debts and demands, of whatsoever kind, without regard to quality or dignity, which shall be exhibited within one year from the granting of letters as aforesaid, shall compose the fourth class." Section 136 relates to the order of payment, and requires that claims be paid according to the classification contained in section 126. It is claimed, first, that the fund in question does not belong to the third class, because debts of the third class are limited to moneys which have been received by the decedent as executor, administrator, or guardian. This is undoubtedly true. As a natural sequence, it is argued that the demand in issue in this suit is a debt, and belongs to the fourth class. If the plaintiff in error was proceeding against the defendant in error as a general creditor, then, as a matter of course, the position of defendant in error would be correct. Such, however, is not the case. The relation of debtor and creditor, as between plaintiff in error and Everett, never existed. The statute, therefore, has no application. The ultimate fact upon which the right of action in the case at bar is predicated is that the funds in question were never the property of Everett at all; that neither the legal title nor the beneficiary interest vested in him; that the identical fund was in his possession at the time of his death, and that the same fund came to the defendant. Prior to 1872 the provision of the statute of Illinois classifying claims against the estate of a deceased person was identical in language with that of this state. In the year last mentioned the legislature of Illinois amended that provision so that it reads as follows: "(6) Where the decedent has received money in trust for any purpose, his executor or administrator shall pay out of his estate the amount thus received and not accounted for." In the case of *Wilson v. Kirby*, 88 Ill. 566, it was held that "the clause of the statute relating to the classification of claims against estates of deceased persons, and which gives a preference in cases where the deceased has 'received money in trust for any purpose,' does not not necessarily extend to and embrace every kind of trust. It does not embrace trusts implied by the law." The same case was before the supreme court of Illinois a second time, and is reported in 98 Ill. 240. It was there held that, "where a person sells the cattle of another as his agent, under a contract, and receives and retains the purchase money until his death, it becomes the money of the owner of the cattle, as the substitute or representative of the cattle; and the fact that the widow of the person so selling, during his illness or after his death, takes such funds, and deposits the same in bank in her own name, and afterwards gives her check for the same to her husband's executor, will not destroy the identity of the fund, and make it subject to the general creditors of the testator, but the owner of the cattle so sold will

¹Gen. St. Colo. 1883, § 8606.

have a preference over the other general creditors of the estate. In such case, it is not necessary that the identical bills received by the testator should have come into the hands of his executor." Upon examination of this case, it will be discovered that the decision is based upon the sole fact that the money in controversy was the money of the owners of the cattle, and that the section of the statute cited is without application, for the reason that, as was said by the court, (*Wilson v. Kirby*, supra,) the statute does not embrace trusts implied by the law. In the decision of this case, therefore, the provisions of our statute which have been cited should be disregarded, and the conclusion predicated upon the legal and equitable principles which have been discussed. In the light of these principles, it is clear that the complaint states a cause of action.

The next question presented is whether John S. Risdon was improperly joined as a defendant. It is claimed that, if plaintiff in error was the real party in interest, Risdon could not be properly joined either as plaintiff or defendant. The relation of the parties to each other was as follows: (1) Risdon was one of the original parties to the contract or arrangement upon which the action was predicated, to-wit, the payment of \$1,200 by Heatly to Everett for him. (2) The plaintiff was the agent of Risdon for the purpose of collecting the money to be paid by Heatly to Everett, and had the legal title to the draft which was drawn, and the right in the first instance to receive the money; but Risdon was the beneficial owner of the fund. This being the relation of the parties, the question of parties plaintiff does not seem to be difficult. Section 3 of the Code, which was in force when this action was brought, provides that "every action shall be prosecuted in the name of the real party in interest, except as otherwise provided." Section 5 provides that the trustee of an express trust may bring an action without joining beneficiaries, and that a trustee of an express trust includes a person in whose name a contract is made for the benefit of another. Section 10 declares that, "all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs." Section 12 provides that, "of the parties to the action, those who are united in interest shall be joined as plaintiffs or defendants; but, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint." The meaning of the language of the first section cited has been frequently construed by the courts. The "real party in interest" is held to mean the person in whom the legal title to the claim in suit is vested. *Bassett v. Inman*, 7 Colo. 270, 3 Pac. Rep. 383, and cases cited. The suit, therefore, was properly brought in the name of the plaintiff. But, inasmuch as Risdon was a party to the contract upon which the action

was predicated, and was in fact the beneficial owner of the claim, he must be deemed to be interested in the subject of the action, within the meaning of section 10, above cited, and therefore a proper party plaintiff in the suit. In commenting upon the section last mentioned, Pomeroy, in his work on Remedies and Remedial Rights, at section 199, says: "The extent of the interest is not the criterion, nor its source, nor origin. If the persons have any interest,—whether complete or partial, whether absolute or contingent, whether resulting from a common share in the proceeds of the suit, or arising from the stipulations of the agreement,—the language applies, without any limitation or exception, and without any distinction suggested between actions which are equitable and those which are legal." All persons standing in the relation to the subject-matter of the action, as above defined, may be properly joined as plaintiffs. In this particular case, Risdon refused to unite with plaintiff, and was properly joined as defendant.

It is also contended that different causes of action are improperly united. This position cannot be sustained, for the simple reason that no cause of action is stated against Risdon. As a part of the prayer for relief, the court is asked to allow the plaintiff a reasonable sum for its costs and expenses, and to require this amount to be paid to plaintiff by Risdon. No attempt is made to state a cause of action against him. The only allegations are those which are made in compliance with section 12 of the Code, as the reason for making Risdon a party defendant. Two causes of action, therefore, are not improperly united; there being but one cause of action stated. The judgment is reversed.

RICHMOND and REED, CC., concur.

ELLIOTT, J. Having heard and determined this case in the court below, I have given the foregoing opinion careful consideration. At *nisi prius*, I must have overlooked some of the averments of the complaint showing that Everett was, by the previous arrangement of the parties, constituted as trustee of the particular fund paid to him by Heatley, for the express purpose of being immediately paid over to Risdon or his order.

PER CURIAM. For the reasons expressed in the opinion of Mr. Commissioner PATTISON, the judgment of the district court is reversed, with leave to defendants below to answer the complaint.

(14 Colo. 321)

KEITH *et al.* v. WELLS.

(*Supreme Court of Colorado*. March 28, 1890.)

EXAMINATION OF WITNESS—APPEAL—REVIEW.

1. In an action for the alleged wrongful attachment of a stock of goods, where there is a wide difference of opinion among witnesses as to its value, it is not improper for the trial judge to subject the witnesses to a searching examination as to their

competency, to enable the jury to judge of the value of their evidence.

2. Where bank deposit books have been admitted in evidence without objection, their contents are before the jury for consideration; and it is not prejudicial error for the trial court to permit the bank teller to read their contents to the jury, though he has no personal knowledge as to part of the entries.

3. Where, by consent, the charge to the jury is given orally, an exception to the "giving of said charge, and each several proposition of law therein contained," without calling the judge's attention to any particular error, is insufficient to bring up for review alleged erroneous portions of the charge.

4. Where only part of the evidence given at the trial is preserved in the bill of exceptions, and no new trial was asked for in the court below, the supreme court can review only errors of law occurring at the trial to which exceptions were duly reserved.

Appeal from district court, Arapahoe county.

In the early part of the year 1882 the plaintiffs, Osborne R. Keith, and Alexander B. Adams, as copartners, etc., commenced suit against Margaret S. Withers, defendant, for the sum of \$1,158.52 and costs of suit. The plaintiffs caused an attachment to be issued in said suit, and levied upon a certain stock of millinery as the property of the defendant. The conceded facts show that the defendant, for several years prior to the commencement of the action, was the owner and proprietor of a certain millinery business in the city of Denver. While the business was being so conducted, and upon the 21st day of March, 1882, Miss Withers went to Chicago to replenish her stock. While there she purchased from the plaintiffs, O. R. Keith & Co., upon credit, the bill of goods for which she was sued in this action. Afterwards she made a confession of judgment in favor of Mrs. Wells for moneys claimed to have been advanced Miss Withers from time to time to assist her in the business; upon which confession judgment was immediately entered in the district court of Arapahoe county, and an execution issued. Upon this execution the stock was sold at public auction by the sheriff, Mrs. Wells being the purchaser. After the sale, Mrs. Wells took charge of the business, and continued it in her own name, replenishing the stock from time to time, for a period of about one year, at which time the plaintiffs, assuming that such confession of judgment was fraudulent as to the creditors of Miss Withers, caused the entire stock to be attached, and again sold as her property. In this suit a petition of intervention was afterwards filed by Mrs. Wells, in which she claimed to be the owner of the attached property, and sought to recover its value. Upon the issues raised upon this intervention the case was thereafter tried, the trial resulting in a verdict and judgment for the intervenor for the sum of \$4,402.81, from which judgment the plaintiffs, Keith & Co., took this appeal.

Stuart Bros. & Andrews, for appellants.
Tilford & Gilmore, *Amos Steck*, and *M. B. Carpenter*, for appellee.

HAYT, J., (after stating the facts as above.) It is conceded that only a part of the evidence introduced upon the trial is preserved in the bill of exceptions. Of the amount and character of the evidence omitted we are not advised. For this reason alone, according to well-settled rules of practice, this court is precluded from considering the evidence for the purpose of determining its sufficiency to support the verdict. An examination of the record discloses, also, that a new trial was not asked in the court below. Under these circumstances our review cannot be extended further than an examination of such errors of law as it is claimed intervened at the trial, and to which exceptions were duly reserved at the time; and very few exceptions of any kind appear in the record.

The first assignment of error is in relation to the testimony of Charles R. Pierce, a witness introduced by the intervenor. This witness testified that he was a teller of the Safe Deposit Bank, and identified certain books as the deposit books of Miss Withers in that bank, the entries in which were made by whoever happened to be at the counter at the time. At this point the books were introduced in evidence without objection. Afterwards the witness was permitted, against plaintiffs' objection, to read the contents of these books, although the witness had no personal knowledge in reference to a part of the entries, such entries having been made by others. As the books had been previously admitted in evidence without objection, their contents were before the jury for their consideration. Therefore appellants could not have been injured by the oral evidence of Pierce, and, consequently, are not in a position to complain of the action of the court in admitting the testimony of the witness against her objection.

The next error assigned is upon the testimony given in reference to the value of the property. The testimony upon this point shows that some difference of opinion existed between the several witnesses in reference to such value. Mr. Howland, a witness for the plaintiff, placed the value at about \$2,500, while the other witnesses estimated the value at double that amount. Mrs. Wells, a witness in her own behalf, testified that in her judgment the property was at that time worth more than \$6,000. Appellants claim that this witness included the fixtures in her estimate, and that it was error to permit the testimony to go to the jury against plaintiffs' objection, as her competency to judge of the value of such fixtures is not shown. We think the full examination of this witness shows that her estimate was based solely upon the value of the millinery stock, without the fixtures. Aside from this, the objection now urged to her testimony was not made in the court below.

In connection with the evidence of Mrs. Wells, counsel for appellants call attention to the fact that the witness Howland was

subjected to a searching examination in reference to his competency, by the presiding judge, before he was permitted to give an opinion as to the value of the property; the claim advanced being that the court exceeded reasonable bounds in conducting this examination, and that the questions propounded were of a character well calculated to prejudice the minds of the jury against the witness, and did actually destroy the effect of his answers. As we have seen, there was a wide difference of opinion among the witnesses in reference to the value of the property, and, under the circumstances, it is fair to presume that the court was of the opinion that the jury were entitled to the fullest information in reference to the competency of the witnesses testifying as to the value; and, as the questions propounded to the witness by the court were calculated to elicit information in reference to the knowledge of Howland on this subject, we are of the opinion that the error assigned is not well taken.

The third objection is to the cross-examination of Keegan, and to the testimony of Norris and that of Mrs. Wells, concerning a difficulty that she had had with Keegan. To all of this testimony there were but one or two objections made, and these were of the most general character. No exceptions were reserved, and it in no way appears that the objections now argued were called to the attention of the trial court, and for this reason alone they ought not to be considered here.

We are also prevented from considering the errors assigned upon the charge of the court to the jury on account of the failure of counsel to call attention of the trial judge to the points which are claimed to be erroneous. By the express consent of counsel, the charge to the jury was given orally. In the printed abstract this charge occupies seven pages. At the close of the charge the court invited suggestions from counsel as to any exceptions which they might wish to make to the same, as is shown from the following colloquy taken from the record: "Mr. Baxter, (for plaintiff.) We except to the charge, or portions of the charge. The Court. If there are any exceptions, I will hear any suggestions. Judge Steck, (for intervenor.) We note an exception, if your honor please, to the charge. Mr. Baxter. Note our exception also." It is true in the bill of exceptions it is stated, generally, "that to the giving of said charge, and each several proposition of law therein contained, the plaintiffs at the time excepted." This language probably refers to the previous colloquy, and, perhaps, should be held to be limited by the more particular recitals of the same. Be this as it may, under the decisions, appellants are in no better position to have the charge reviewed in this court by reason of the subsequent recital. In *Railway Co. v. Ward*, 4 Colo. 33, it is said: "When instruction given by the court are in the nature of a general charge, excepting to each and every of the instructions will not avail." This

rule is in entire accord with the decisions. Where the charge is given orally, as in this case, the judge will often fall into errors which would be corrected if his attention was called to them at the time, and counsel, being listeners, are more apt to notice such errors than the judge himself, and, failing to call his attention thereto, they will be considered as waived. *Hayne*, New Trial & App. § 128. The exceptions, taken singly or together, did not call the attention of the court to any particular error in law of which counsel desired to complain. If the points which are now presented in this court had been called to the attention of the trial judge, we cannot say what his ruling thereon would have been; and it would be manifestly unfair, not only to the trial court, but to the opposite party, to consider errors assigned to the instructions upon appeal, based upon matters that were not called to the attention of either upon the trial, or by a motion for a new trial. The silence of the record upon these matters indicates either that the counsel then conducting the case for appellants were of opinion that they had but little cause of complaint upon the conduct of the trial, or that they purposely refrained from calling the attention of the trial court to many of the matters now complained of, in the hope that they would be overlooked below, and furnish a ground for reversal here. Whatever may have been the reason controlling them then, in deference to well-settled rules of practice this court will not undertake to review such matters when presented here for the first time. *Webber v. Emmerson*, 3 Colo. 248; *Coon v. Rigden*, 4 Colo. 275.

By the last assignment of error the sufficiency of the plea of intervention is attacked. As the plea filed seems to meet all the requirements of the statute, and is in substantial compliance with approved forms, it must be held sufficient, particularly as against an objection raised for the first time in this court. *Puter*, Pl. 633. The judgment must be affirmed.

(14 Colo. 559)

FITZGERALD v. BURKE.

(*Supreme Court of Colorado*. April 18, 1890.)

PLEADING—ANSWER—FORMER RECOVERY—JOINT AND SEVERAL CONTRACT.

1. A plea in an action on a written contract that "at the time of the execution of the contract set up in the complaint the plaintiff and defendant agreed," etc., setting up a contemporaneous parol agreement inconsistent with the written contract, is insufficient, and a replication is unnecessary.

2. A plea that a contract sued on is joint and several, and that plaintiff has already recovered judgment against one of the joint and several obligors in another suit, is insufficient in that it does not allege satisfaction of the judgment.

Appeal from Pitkin county court.

Action upon written contract for sinking shaft upon mining property belonging to the defendant and others. The complaint alleges the making of the contract, which is given in full in the opinion of the court, and it is further alleged that plaintiff completed the

shaft as per contract on the 31st day of August, 1885, at which time he claims there was due him from the defendant as his proportion the sum of \$332, of which amount no part has been paid except the sum of \$90. Prayer for a judgment, and lien for the balance. The appellant in his answer admits the ownership of the mining claim, as alleged in the amended complaint, and that he is the owner of an undivided one-fifth interest in said lode. He also admits that on July 31, 1885, each of the persons named entered into a contract in writing with plaintiff, and delivered the same to him, but says, as to the exact nature and terms of said contract, this defendant has no knowledge or information upon which to base a belief; that he is ignorant of the terms of said contract, and craves oyer of the same. All other allegations of the complaint are put in issue by this answer. And for a further answer appellant sets up a contemporaneous oral agreement, and for a still further and separate answer says "that the plaintiff ought not to have the recovery of anything in this action, nor further prosecute this suit, for the reason that the contract sued on in this case is a joint and several contract of all parties named as owners of said Franklin lode, and that plaintiff has already sued one of the joint and several obligors named in said contract in this court, and has recovered judgment for the violation of said contract; such judgment being rendered in a certain suit lately pending in this court wherein James Burke is plaintiff and J. E. Eames is defendant." Afterwards appellee moved to strike out appellant's second and third defenses, which motion the court overruled; and, appellee failing to reply to these defenses, a default was entered against him, but the court refused appellant's motion to enter judgment in his favor upon the pleadings. In this state of the pleadings the parties went to trial before the court without a jury. Appellee introduced witnesses in support of his complaint, but no testimony was offered by appellant. The trial resulted in a judgment for the plaintiff in the sum of \$264.65, and decree for a lien. The defendant, having reserved his exceptions, brings the case here for review upon appeal.

Downing & Franklin, for appellant. *J. E. Rockwell* and *F. G. Salmon*, for appellee.

HAYT, J., (*after stating the facts as above.*) The first two assignments of error are predicated upon exceptions taken to the rulings of the court anterior to the filing of the amended complaint. These assignments have not been alluded to in the argument filed upon appeal, and we need not further consider them. The amended complaint superseded the original, and upon this pleading, with the answer thereto, appellant, at the trial, moved for judgment, which motion was overruled by the court, and the ruling is made the basis of the third assignment of

error; the contention of the appellant being that, as no replication was filed either to the second or third defenses, the new matter alleged in those defenses must be taken as true, and that the defendant was entitled to a judgment upon the facts so admitted. We are clearly of the opinion, however, that the matters pleaded in such defenses did not constitute a defense to the action.

The second defense is clearly insufficient. In this defense the execution of the written contract is admitted in this language: "At the time of the execution of the contract set up in the complaint, the plaintiff and defendant agreed," etc. And this is followed by the statement of an alleged contemporaneous parol agreement, wholly inconsistent with the written contract. This constituted no defense to the action. The principle is elementary that the terms of a valid written instrument cannot be varied or contradicted by a contemporaneous oral agreement. 1 Add. Cont. *199; Whart. Ev. § 920.

The third defense was no better. It admits that the contract sued upon is a joint and several contract. It is expressly so made by statute. Upon such a contract the plaintiff could sue all parties jointly, or each or all of the parties severally, for the whole amount due, and a recovery against one without satisfaction would be no bar to a suit against the others. To constitute a bar it must be shown that the judgment had been fully satisfied, and a plea stopping short of this is not good. Therefore, the court below committed no error in refusing to enter judgment upon these pleas. *Freem. Judgm.* § 235; *Hix v. Davis*, 68 N. C. 233; *McReady v. Rogers*, 1 Neb. 124; *Elliot v. Porter*, 5 Dana, 299; *Harlan v. Berry*, 4 G. Greene, 212.

By the fourth assignment of error the ruling of the court upon the defendant's motion to dismiss the case after plaintiff's testimony was introduced is questioned. The motion was based upon the assumption that the plaintiff could not alone maintain the action, but that the witness John Burke should have been joined as a co-plaintiff, because the testimony showed that said Burke had an interest in the contract. The nature of such interest is not shown. Burke did not sign the contract, and was not a party to it, but became interested in the work with the plaintiff some time after the execution of the written contract. He is not shown to have been a necessary party to the action. Aside from this, it was too late to raise this question at the trial. A defect of parties must be raised either by demurrer or answer, and if not so raised it is waived. *Sections 55, 59, 60, Code 1883; Great Western Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46, 20 Pac. Rep. 771; *Crouch v. Parker*, 56 N. Y. 597; *Lewis v. Greider*, 51 N. Y. 231.

The fifth and sixth assignments of error relate to the admission of the written contract in evidence, and the admission of oral testimony to show that the liability of the parties

thereto was several instead of joint and several, and these may be considered together. The written contract is marked "Exhibit A," and is as follows: "Witness this agreement, made and entered this 31st day of July, between John Canning, James Fitzgerald, Thomas Hynes, John Eames, Wm. Doeltz, H. H. Gilman, Thomas J. Duncan, Frank X. O'Brien, parties of the first part, and James Burke, party of the second part. Parties of the first part, being the owners of the Franklin mining claim on Aspen mountain, undertake and agree to pay to the party of the second part twenty dollars (\$20.00) per foot to sink said Franklin shaft to a depth of four hundred feet, said shaft being down at the present time to a depth of three hundred and seventeen feet. And the second party agrees to sink the same, and also to timber and partition said shaft, to said depth, in a good workman-like manner; also, to have said shaft perpendicular; parties of the first part to furnish lumber for lining said shaft. And the party of the second part further agrees to carry down said shaft the dimensions that it now is. And the parties of the first part agree to pay to the party of the second part on completion of the first fifty feet seventy-five per cent. of the same, retaining twenty-five per cent. until the completion of this contract; and it is expressly understood and agreed between the parties of the first part and the party of the second part that the latter party will hire two competent engineers to take charge of and run the engine that is now in said Franklin mine. And it is further agreed between both parties that the party of the second part shall continue to work three shifts until said contract is finished. JAMES BURKE. PATRICK FITZGERALD. JOHN C. EAMES, 1-5. Witnessed: ANNA H. CANNING, 1-10. [Seal.] By JOHN K. CANNING. JAMES FITZGERALD, 1-5. [Seal.] H. H. GILMAN. [Seal.] By CHARLES BURNS, 1-10. THOMAS J. DUNCAN. [Seal.] By CHARLES BURNS, 1-10. [Seal.] FRANK X. O'BRIEN. By CHARLES BURNS, 1-5. [Seal.] THOMAS HYNES, 1-20. WILLIAM F. DOELTZ, 1-20."

The assignment of error based upon the admission of the instrument has not been pressed in this court. If it had been, it could not have availed, as the authority of Canning and Burns to execute the contract for and on behalf of the parties for whom they claimed the right to act at the time having been shown, and also the due execution and delivery of the contract, the instrument was properly admitted in evidence.

It is shown by undisputed evidence that at the time of the institution of this suit there was due the plaintiff upon the contract an amount equal to the amount for which judgment was obtained below, the only question being as to whether one or all the defendants were liable for this amount. We have seen, however, that under the statute the parties denominated in the contract "parties of the first part" are both jointly and severally lia-

ble for the full sum due under the contract, and, being so severally liable, plaintiff was entitled to a judgment against Fitzgerald for the entire amount. Permitting appellant to introduce evidence tending to show that the figures appearing after the names of the parties were appended for the purpose of showing the interest which each held in the mining claim, and to limit the liability of each accordingly, if error, was entirely harmless. If plaintiff succeeded upon the proof, then the defendant was liable for one-fifth of the contract price; if he failed, the defendant, as one of several jointly and severally liable, was liable for the entire amount due the plaintiff upon the contract, which was still but one-fifth of the total amount earned by plaintiff, as the remaining four-fifths had been paid him prior to suit. The same result would follow in either case. Appellant could not, therefore, have been prejudiced by the evidence.

The seventh assignment of error has not been argued by counsel. It is in relation to the admissibility of certain evidence, which is not set forth in the printed abstract, as required by the act of 1885, under which the appeal was taken. It will not, therefore, be considered. *Halsey v. Darling*, 13 Colo. —, 21 Pac. Rep. 913.

By the eighth and last assignment it is claimed that the court erred in rendering judgment for the plaintiff. The views already expressed show that the plaintiff was entitled to recover. The judgment is accordingly affirmed.

(14 Colo. 228)

HEINSEN v. STATE.

(*Supreme Court of Colorado*. Feb. 14, 1890.)

STATUTES—AMENDMENT—REPEAL—INTOXICATING LIQUORS—MUNICIPAL CONTROL.

1. Where the language of a statute is radically changed by a subsequent amendment, such change indicates a change of intent on the part of the legislature.

2. Although the provisions of an amendment to a law are ambiguous, it is the duty of the courts to discover, if possible, the intention of the legislature in framing the same, and to give the amended act such construction as will best effectuate the change intended.

3. The authority of the city council of the city of Denver to license, tax, and regulate tippling-houses, dram-shops, etc., is subject to the following, among other, conditions: (1) That the license rate to be charged shall not be less than certain minimum fees specified by the statute; (2) that the power granted shall only be exercised subject to the general law of the state regulating the manner of conducting the business by the licensee.

4. By the general law of the state the keeping open of a tippling-house on the Sabbath day or night is made a criminal offense, punishable by fine or imprisonment, and the fact that such house is situate in the city of Denver will not avail as a defense, under the present city charter.

5. When an act or part of an act is repealed, it is not revived by a subsequent repeal of the repealing act.

6. When the suspension of a general law within a municipality results from a city ordinance passed in pursuance of a special charter, the repeal of the ordinance will leave the general law in force within the city.

(*Syllabus by the Court*.)

1. The constitutional jurisdiction of the district courts is general, unlimited, and, so far as regulated by law, must be uniform throughout the state.

2. The general assembly may confer upon the municipal authorities jurisdiction concurrent with that of the state courts over certain offenses; but any legislative enactment which purports to make such jurisdiction exclusive over an offense declared to be a crime or misdemeanor by the public law of the state is repugnant to the constitution, and conveys nothing more than concurrent jurisdiction over such offense.

3. So long as section 151 of the Criminal Code remains a part of the public law of the state, any intentional violation of its provisions is a crime or misdemeanor, and, as such, is within the constitutional jurisdiction of the district court of the county where the offense is committed, and it is beyond the power of the general assembly to divest the district court of such jurisdiction.

(*Per Elliott, J., concurring.*)

Error to district court, Arapahoe county. *Edgar Cayless* and *W. B. Felker*, for plaintiff in error. *S. W. Jones*, Atty. Gen., *H. Riddell*, *I. N. Stevens*, and *L. C. Rockwell*, for the State.

HAYT, J. Plaintiff in error, defendant below, was convicted in the district court of Arapahoe county for keeping open a tippling-house on the Sabbath day, in violation of section 151 of the Criminal Code of this state. The place at which the act is shown to have been committed is situate within the corporate limits of the city of Denver, and the only defense relied upon is that said city, under its special charter, is excepted from the operation of the statute. The court below being of the opinion that the state law was in force within said city, the defendant was sentenced accordingly. To review this judgment, the case has been brought here upon error. The nature of the defense will more fully appear from an examination of the following provisions of the various special charters of the city of Denver, which have been in force at different times from the year 1883 to the present. Paragraph 15, § 17, art. 11, of the charter of 1883, reads as follows: "*Fifteenth.* The city council shall have exclusive power within the city to license, tax, restrain, regulate, prohibit, and suppress tippling-houses, dram-shops, and the selling or giving away of any intoxicating or malt liquors, by any person within the city, except by persons duly licensed." This provision was re-enacted without material change in 1885. See Sess. Laws 1885, p. 82. In the Revision of 1887 the same provision was retained, with the same proviso added: "Provided, that no license shall be issued to keep any liquor saloon or dram-shop, except on petition of the owners of a majority of the real estate within the frontage of the block in which said business is to be carried on, or upon the opposite frontage. When the person applying for such license has fully complied with the laws and ordinances applying thereto, the city council shall order such license issued. No license shall be granted for a saloon or dram-shop located within one block of any church or school building." Sess. Laws

1887, p. 84. At the next session of the legislature (1889) the section was materially amended. In this case our attention will be directed more particularly to the section as amended. It reads as follows: "*Twelfth.* (Exclusively subject to the general law of the state, but not at a lower price than six hundred dollars to keep open until twelve o'clock, nor lower than eight hundred dollars to keep open until two o'clock, nor lower than one thousand dollars to keep open all night.) To license and tax tippling-houses, dram-shops, billiard tables, and bowling-alleys, and selling or giving away of any intoxicating or malt liquors by any person within the city, and to regulate the same: provided, that no license shall be issued to keep any liquor saloon or dram-shop except on petition of the owners of a majority of the real estate within the frontage of the block in which said business is to be carried on. When the person applying for such license has fully complied with the laws and ordinances applying thereto, the city council may order such license issued: provided, however, that such license may be renewed from time to time, at the discretion of the city council, for a period not exceeding three years, without further petition. No license shall be issued for a saloon or dram-shop located within five hundred feet of any church or school building; the measurement to be along the same street on which the church or school building fronts, and along the adjoining side streets in the case the license is sought for a dram-shop or liquor saloon on such side street." See Sess. Laws 1889, p. 126. During all the times hereinbefore mentioned the section of the Criminal Code under which this indictment was framed has been upon our statute books. The section reads as follows: "Sec. 151. If any person shall be guilty of open lewdness, or other notorious act of public indecency, tending to debauch the public morals, or shall keep open any tippling or gambling-house on the Sabbath day or night, or shall maintain or keep a lewd house or place for the practice of fornication, or shall keep a common, ill-governed, and disorderly house to the encouragement of idleness, gaming, drinking, fornication, or other misbehavior, every such person shall, on conviction, be fined not exceeding one hundred dollars, or imprisonment in the county jail not exceeding six months." See Gen. St. 331.

The only question presented for our determination upon this writ of error is, has the provision of section 151 of the Criminal Code, relating to tippling-houses, been in force within the territorial limits of the city of Denver since the charter as amended in 1889 went into effect? It is settled by repeated adjudications of this court that, under the charter provision as it was framed prior to the adoption of the amendment of 1889, the state was divested of its control over tippling-houses within the territorial limits of the city of Denver, the city having accepted and exercised the exclusive powers conferred by its

special charter. The correctness of those decisions has been vigorously assailed in argument, and as strongly supported. In view of the conclusions reached upon another branch of this case, it is unnecessary for us to follow counsel in this discussion, as the result in this case would not be affected by any conclusion reached therein. Therefore, without questioning the result announced in those cases, we shall consider the effect of the amendment made at the last (1889) session of the legislature. That the phraseology of the provision has been radically changed is conceded. The effect of such change is in dispute.

As a preliminary observation, attention is called to the fact that the authority of the legislative department of the state government over the subject-matter of the provision must be conceded within constitutional limitations. Arguments in reference to the policy and wisdom of particular laws are properly made to that department, and not to the judicial. As before announced by this court, it is for the courts to declare what the law is, and not what it ought to be. It must be admitted in the outset that the provision of the charter under consideration is not free from ambiguity. But, while the uncertainty of the language to convey the intention of the legislature is to be regretted, it is nevertheless the duty of the judicial department to discover the intention of the law-making power in making changes, so far as such intention may be disclosed by the application to the provision of well-settled rules of statutory construction, and, when discovered, to so construe the act as to effectuate the purpose of the framers thereof. In obedience to one such rule of construction, we are required to presume that the change of language made by the amendment indicates a change of intent on the part of the legislature, and consequently calls for a change of construction; and, in deference to another rule of construction, some meaning must, if possible, be given to every part of the act.

We shall not attempt to give a critical grammatical analysis of the provision, nor shall we enter into a discussion as to the arrangement and specific definitions of the words employed, which produce the obscurity and ambiguity complained of. It might be difficult to discover an excuse for the use of language in the careless and ambiguous manner in which it is employed in the section under consideration. It is sufficient to say that any attempt to transpose the words, change the punctuation, strike out or transpose the parenthetical marks, in the manner advocated by counsel, would be open to serious criticism; and we conceive that such a process would be more apt to lead us to erroneous results as to the legislative intent than the course we shall pursue. Therefore, without indulging in specific speculations, we shall undertake to derive a conclusion from the entire context of the section, in the light of the two other rules of construction above

mentioned. Doing this, our conclusion is that the legislature intended to confer upon the city council of Denver the authority to license, tax, and regulate tippling-houses, dram-shops, etc., and that such authority was intended to be subject to the following, among other, conditions: (1) That the license rate charged by the city council for the privilege of keeping a tippling-house should not be less than certain minimum fees specified by the statute, varying according to the time of night when the same should be required to close; and (2) that the power thus granted be exercised subject to any general law of the state regulating the manner of conducting the business,—that is to say, there being provisions in the general law requiring tippling-houses to be closed on the Sabbath day and also on election days, while the city council may regulate the carrying on of the business in other particulars, it can take no action that shall either prevent prosecutions under such provisions or confer rights in conflict therewith. By this construction we give some meaning to every part of the act, and we have assumed, as we may properly do, that the legislature, in making the amendment, had in view the effect given to the word "exclusive" by the prior decisions of this court.

It is urged that this court in the case of *Huffsmith v. People*, 8 Colo. 175, 6 Pac. Rep. 157, and also in *Rogers v. People*, 9 Colo. 450, 12 Pac. Rep. 843, declared that the part of the Criminal Code upon which this prosecution is based was repealed within the corporate limits of the city of Denver the moment the exclusive power given the city to regulate tippling-houses was accepted and exercised by the corporate authorities; and, consequently, that the amendment of 1889, requiring the city to exercise its power subject to the general laws of the state, does not revive the section, in view of the inhibition of section 3142, Gen. St., viz.: "No act or part of an act, repealed by another act, shall be deemed to be revived by the repeal of the repealing act." The argument derives its force entirely from the use of the word "repealed" in said opinions. If, therefore, it appears that this word, while sufficiently accurate, in view of the questions presented, was, strictly speaking, improperly used, and that when the city passed the ordinance the general law was not thereby repealed, but was, at most, suspended for the time being within the corporate limits of the city, and that the suspended statute was revived upon the repeal of the suspending act, the argument must fall. The difference between a repealed and a suspended law is this: A repeal puts an end to the law; a suspension holds it in abeyance. *Brown v. Barry*, 3 Dall. 365. That this distinction was in the mind of the judge who wrote the opinion in *Rogers v. People* is apparent from the fact that the word "suspend" appears several times in the opinion. The question before the court in that case is stated in this language: "Does the statute of 1885 * * * have the effect of sus-

pending within the corporate limits of the city the operation *pro tanto* of section 839 of the General Statutes?" And the conclusion is stated in this manner: "(3) As we have already seen, the effect of this statute is simply to suspend within the corporate limits of Denver the operation of a part of said section 839."

The one instance in which the word "repeal" occurs in the opinion is in the midst of an argument, where the word "suspend" is used synonymously therewith, but care was taken to state the question presented, and the conclusion of the court thereon, with technical exactness. In reference to the use of the word "repeal" in the previous case of *Huffsmith v. People*, supra, the language of PAINE, J., speaking for the court in *Smith v. Hoyt*, 14 Wis. 273, is precisely in point: "It is true we have an established rule, in the construction of statutes, that where an act or part of an act is repealed it shall not be deemed to be revived by the repeal of such repealing act. * * * It is true, also, that this court has, in speaking of the effect of the act of 1858 upon the previously existing provisions in regard to the time to answer, said that it repealed them so far as foreclosure actions were concerned. * * * That language was natural, in view of the questions presented in that case, and was sufficiently accurate for the purpose of disposing of them. But we are of the opinion that, strictly speaking, the general provision requiring defendants to answer within twenty days was not repealed by the act of 1858, nor by that of 1859, allowing ninety days to defendants in mortgage foreclosure cases, but that those acts merely excepted this particular class of defendants from its operation. That being so, where the statute creating the exception is repealed, the general statute, which was in force all the time, would then be applicable to all cases according to its terms. And this would be no violation of the rule of construction, before referred to, that the repeal of a repealing act should not revive the act repealed. * * * If a proviso creating an exception to the general terms of a statute should be repealed, courts would be afterwards bound to give effect to it according to those general terms, as though the proviso had never existed; and this could not be said to revive a repealed statute. The rule against this relates to cases of absolute repeal, and not to cases where a statute is left in force, and all that is done in the way of repeal is to except certain cases from its operation. In such cases the statute does not need to be revived, for it remains in force, and, the exception being taken away, the statute is afterwards to be applied without the exception."

Our attention is called to the case of *State v. De Bar*, 58 Mo. 395. The facts in that case were very similar to those presented here. In the previous case of *State v. Clarke*, 54 Mo. 17, the court had held that a charter granting exclusive authority to the city of St. Louis repealed, by implication, the gen-

eral statute of the state, etc., within the territorial limits of said city. Afterwards, upon repeal of this provision of such charter, the question arose as to whether the general law was revived within the city by such repeal, and the court, by a bare majority, held that it was not. In reference to this conclusion, Judge Dillon, who is perhaps the best living authority upon the law governing municipal corporations under our system of government, expresses his disapproval in this emphatic language: "This last decision seems to the author to be erroneous, on the ground that the act of 1870 did not *ipso facto* repeal the general law in the city, but such repeal, or suspension, rather, was only effected when the city passed the ordinance. If so, a repeal of the ordinance by the council, without the act of 1874, would have left the general law of the state in force within the city, and its repeal by the act of 1874 would have precisely the same effect." 1 Dill. Mun. Corp. 115.

As the argument advanced in the opinion of the majority of the court in *State v. De Bar* does not commend itself to our judgment, we shall decline to follow the conclusion reached. In our opinion, that portion of section 151 of the Criminal Code relating to tippling-houses has never been repealed. At most, the city of Denver for a time was excepted from its operation, or it may be said this provision was suspended for a time within the territorial limits of said city. Upon the taking effect of the amendments of 1889 the suspension ceased, and the operation of the general law was restored. The judgment must therefore be affirmed.

ELLIOTT, J. In my judgment, the decision of this case should be placed upon broader and more substantial ground than is taken in the foregoing opinion. The general assembly may, undoubtedly, by special charter, confer upon the city council of Denver power by ordinance to license and regulate tippling-houses, as well as to suppress and prohibit all disorderly houses within the limits of the city. But the vital question for our determination is, may such power be made exclusive? In popular parlance, may the city council be invested with power to declare by ordinance that people may commit certain offenses with comparative impunity within the limits of the city of Denver, which, if committed outside of such limits, would subject them to indictment and punishment by heavy fines or imprisonment? In more legal phrase, may such power be so vested in the city council of Denver as to take away the power and jurisdiction of the district court to enforce the general public law of the state within the limits of the city in relation to certain crimes or misdemeanors, as provided by the Criminal Code? Important as these questions may be, when considered in relation to the public morals and the general welfare of the state, I shall consider them only from a legal and constitutional standpoint, bearing

in mind that my official duties are judicial, not legislative.

The district courts of this state are invested by the constitution with "original jurisdiction of all causes, both at law and in equity." Article 6, § 11. By section 28 of the same article, it is provided that "all laws relating to courts shall be general and of uniform operation throughout the state; and the organization, jurisdiction, powers, proceedings, and practice of all the courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments, and decrees of such courts severally, shall be uniform." Section 1 of the Criminal Code (chapter 25, Gen. St.) reads as follows: "A crime or misdemeanor consists in a violation of a public law in the commission of which there shall be a union or joint operation of act and intention, or criminal negligence." From these constitutional and legislative enactments, it follows that, so long as section 151 of the Criminal Code remains upon our statute books as a public law of the state, any intentional violation of its provisions is a crime or misdemeanor, and, as such, is within the constitutional jurisdiction of the district court of the county where the offense is committed, and that it is beyond the power of the general assembly to divest the district court of such constitutional jurisdiction.

It cannot be denied that the general assembly may confer upon the municipal authorities jurisdiction concurrent with that of the state courts over certain offenses; but any legislative enactment which purports to make such jurisdiction exclusive over an offense declared to be a crime or misdemeanor by the public law of the state is repugnant to the constitution, and conveys nothing more than concurrent jurisdiction over such offense. The constitutional jurisdiction of the district courts, being general, unlimited, and uniform throughout the state, cannot be impaired by such legislation. The general assembly may repeal section 151 of the Criminal Code altogether. Thus the same would cease to be a public law of the state, and thus the power and jurisdiction of the district courts throughout the state, in relation to keeping tippling-houses open on Sunday, would cease. This, however, would be no infringement upon the uniform jurisdiction of such courts.

But it is contended that the provision of the city charter purporting to give exclusive power over tippling-houses and other kindred matters does not interfere with the uniform jurisdiction of the district courts; that it is not a law relating to such matters, nor designed to regulate their jurisdiction; that the effect of the charter provision is to suspend the operation of a certain portion of the criminal law within the city limits whenever the city council by ordinance accepts and assumes jurisdiction of the matters thus confided to its special care. This argument is ingenious, but, in view of the position taken by the party advancing it in this litigation, it cannot be

accepted as ingenuous. If the provision in the charter purporting to give exclusive power to the city council in relation to tippling-houses is not designed to regulate or interfere with the jurisdiction which the district court of Arapahoe county exercises in common with that of other district courts in the state in cases of this kind, how does it happen that, in this and other cases arising under section 151 of the Criminal Code, we find the accused pleading such charter provision, and the ordinances enacted in pursuance thereof, against the jurisdiction of the Arapahoe county district court? It is not pretended that an indictment for such an offense could be quashed by such a plea in the district court of any other county. Impressed with the importance of upholding judicial decisions as a means of giving stability to the law, and security to public and private rights, I have hesitated to take the responsibility of expressing views in conflict with some of the previous decisions of this court; but the strongest necessity seems to demand such a course before we drift too far from fundamental principles. The views here expressed are not intended as a revolt against *stare decisis*, but rather as a restoration of that rule; for, while they are opposed to the doctrine announced in *Huffsmith v. People*, 8 Colo. 175, 6 Pac. Rep. 157, and *Rogers v. People*, 9 Colo. 450, 12 Pac. Rep. 843, they are nevertheless in harmony with the earlier decisions of this court, as well as the current of decisions of other appellate courts upon similar questions. An examination of the authorities will abundantly confirm this statement.

Section 12, art. 6, of the constitution of Illinois, adopted in 1870, confers upon the circuit courts of that state "original jurisdiction of all causes in law and equity." Section 29 of the same article reads as follows: "All laws relating to courts shall be general, and of uniform operation; and the organization, jurisdiction, powers, proceedings, and practice of all courts, of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments, and decrees of such courts, severally, shall be uniform." It will be observed that sections 11 and 28 of article 6 of our constitution, adopted six years later, are in legal effect complete duplicates of the Illinois constitution, with the addition of the three words "throughout the state," which additional words only serve to emphasize the uniform construction which this provision has received from the supreme court of Illinois. No one can doubt that these provisions of the Colorado constitution were borrowed from Illinois. Hence, so far as such provisions had received a definite construction by the supreme court of Illinois prior to their adoption by this state, it is, by a familiar rule, to be presumed that we adopted such construction with the provisions. In the case of *People v. Rumsey*, 64 Ill. 44, it was held that an act relating to the employment of stenographic reporters in the courts of Cook county was a local or special act, and obnox-

ious to the constitutional provision requiring uniformity in all laws relating to courts, and that "this provision of the constitution executed itself and operated *in presenti*," and so the local enactment was held to have been abrogated by the adoption of the constitution. This decision was rendered in 1872. Numerous decisions of a similar kind were rendered during the years 1871, 1872, and 1873 by the Illinois supreme court. The case of *Myers v. People*, 67 Ill. 503, was decided in 1873. It was a prosecution for the illegal selling of liquor. One of the questions considered and passed upon was whether an act purporting to invest the county courts in certain counties with exclusive jurisdiction in certain criminal cases was in conflict with section 29, art. 6, of the Illinois constitution. The court held that the act "must be construed as conferring only concurrent jurisdiction;" the legislature having "no power to abridge the original jurisdiction of the circuit courts;" and also that so much of the act as attempted to restrict its application to the courts of certain counties was unconstitutional,—thus carefully preserving the jurisdiction of all the circuit courts intact and unimpaired, and also making the law uniform throughout the state. Here was a definite and clear construction of both constitutional provisions under consideration. This decision was announced three years before we borrowed the constitutional provisions from Illinois, and made them a part of our fundamental law. Certainly, it cannot be maintained that the general assembly may, in a matter pertaining to the administration of a public law, such as the Criminal Code, confer exclusive power upon the city council to accomplish by mere ordinance what it cannot confer directly upon constitutional tribunals, such as county courts established throughout the state. The case of *Siebold v. People*, 86 Ill. 33, decided in 1877, was a prosecution by indictment in the circuit court for keeping a tippling-house open on Sunday in the city of Peoria, Ill. The conviction was sustained, though the decision has no direct bearing upon the question under consideration, inasmuch as the charter of Peoria did not profess to confer upon the city authorities exclusive jurisdiction in such matters.

The case of *Hart v. People*, 89 Ill. 407, decided in 1878, is directly in point. The opinion in that case was on an appeal from a conviction in the circuit court of Jo Daviess county for keeping open a tippling-house on Sunday within the limits of the city of Galena. An effort was made to reverse the judgment on the ground that the charter of the city provided that the city council should have full and exclusive power and authority to tax, license, regulate, restrain, and prohibit tippling-houses, etc., within the limits of the city. In that case, as in the one now under consideration, there was considerable controversy as to the proper construction and effect of the several charters of the city of Galena in connection with the criminal law of the

state; but the court, without determining these questions, placed its decision squarely upon the ground that exclusive jurisdiction over the offense could not be conferred upon the city. The following extract from the opinion will show the views of the Illinois court: "These are questions [referring to the construction and effect of the several charters] which we do not find it necessary to consider, as there is another ground upon which we must hold there is no exclusive power and authority over the subject-matter of this offense in the city of Galena; and that is, the operation of the constitution of 1870. By section 29, art. 6, of that constitution, 'all laws relating to courts shall be general, and of uniform operation; and the organization, jurisdiction, powers, proceedings, and practice of all courts, of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments, and decrees of such courts, severally, shall be uniform.' It is inconsistent with this section of the constitution that, after the adoption thereof, exclusive jurisdiction over this offense should be in the city of Galena, and the circuit court of Jo Daviess county not have cognizance thereof. All other circuit courts of the state have jurisdiction of this offense, when committed in the respective counties of such courts, they having cognizance thereof by indictment in such courts; and if the circuit court of Jo Daviess county be held an exception in this respect, and not to have cognizance of the offense, then its jurisdiction in this respect will be anomalous, and not uniform with that of the other circuit courts of the state. This would be inconsistent with the constitutional provision that the jurisdiction of all courts of the same class or grade shall be uniform. Any exclusive jurisdiction, then, which there may have been in the city of Galena in respect to the subject-matter of this offense, before the adoption of the present constitution, must be held as having been taken away and abrogated by the adoption of that constitution, as being inconsistent with the above-cited provision thereof." The foregoing opinion, as well as all the Illinois decisions construing the new constitution upon this subject, appear to have been pronounced by the unanimous concurrence of the seven judges.

Before considering other authorities, let us see what the decisions of the supreme court of Colorado have been upon the subject of local and special legislation, as affecting the jurisdiction of the courts and the rights and privileges of the people. In *Patton v. People*, 1 Colo. 77, it was held that a party might be convicted under the general law of the territory for selling liquor in quantities less than one quart, notwithstanding he had a license from an incorporated city where the offense was committed; but in that case the city was not given exclusive power over the subject. In *Hetzer v. People*, 4 Colo. 45, a municipal license was held

to be a complete protection from prosecution under the general law, the authority to license being vested exclusively in the corporate authorities; but the cause of action in the Hetzer Case arose, and final judgment was rendered in the district court, before the adoption of our constitution, though not reviewed in this court until afterwards. In *Ex parte Stout*, 5 Colo. 509, decided in 1881, an act providing for a criminal court in Arapahoe county was held to be repugnant to section 28, art. 6, of the constitution, and so was declared unconstitutional on the ground that it was "clearly a special or local act, applicable to the criminal court of Arapahoe county only, and wholly independent of the Lake county act in every respect." In that case, section 28, art. 6, of our constitution, is spoken of as "borrowed from the constitution of 1870 of the state of Illinois;" and several Illinois decisions subsequent to 1870 are cited giving the construction to the provision as heretofore shown by this opinion. In the *Stout* Case the court also said: "No discretion is invested in the legislature concerning the character of the law by which the organization, jurisdiction, powers, proceedings, and practice of these courts shall be prescribed and regulated. The direction is peremptory that it shall be a general law, of uniform operation throughout the state."

In 1885, the *Lowrie Habeas Corpus* Case, 8 Colo. 499, 9 Pac. Rep. 489, came before this court. *Lowrie* had been convicted and sentenced to the penitentiary by the criminal court of Arapahoe county for the crime of grand larceny. In a most elaborate opinion the court held the conviction void, on the ground that the prosecution was by information in the criminal court instead of indictment. Section 28, art. 6, was discussed in the opinion, but the decision was based upon section 8 of the bill of rights, which provides, *inter alia*, "that, until otherwise provided by law, no person shall, for a felony, be proceeded against criminally, otherwise than by indictment;" and it was held that an act dispensing with an indictment by a grand jury in felony cases, to be constitutional, must not only be "general and of uniform operation throughout the state," as applied to "courts of the same class or grade," but that it must also be applicable to all courts having jurisdiction of felony cases. The following significant and pertinent language was used in the opinion: "Clearly, if the object of the grand jury system is to guard certain fundamental rights of every citizen of the state, it follows, according to elementary principles of construction, that the change, regulation, or abolition of the system must be so made as to equally affect the whole community in respect to the same rights and immunities, under the same or similar circumstances. It cannot reasonably be contended that such is the effect produced by the act of February 7, 1883. The effect of such legislation to the citizen is, if he be charged with the commission of a felony or infamous crime not cap-

ital, within the jurisdiction of a criminal court, an information may be filed against him therein, upon the oath of a single informer, and he may be put upon his trial therefor; whereas, if charged with the commission of the same offense outside of such jurisdiction, or if proceedings be instituted against him within such jurisdiction, but in a district court instead of a criminal court, he would be accorded the right and privilege of having the truth of the charge investigated by a grand jury composed of his peers, before he could be put to the expense, inconvenience, and disgrace of a public trial."

The foregoing quotations from the *Stout* and *Lowrie* Cases indicate how strictly the constitutional jurisdiction of the courts of this state have been protected from the encroachments of special and local legislation calculated to affect their uniformity; and also how jealously individual rights and privileges have been guarded by the enforcement of constitutional guaranties securing equal and impartial protection to the people of every community in respect to prosecutions for crime in every part of the state. These judicial utterances, based upon sound reason, and inspired by a conscientious regard for constitutional requirements, as well as individual rights and privileges, have an important bearing upon the cases next to be considered.

The case of *Huffsmith v. People*, 8 Colo. 175, 6 Pac. Rep. 157, was a conviction upon an indictment by the grand jury in the district court of Arapahoe county for the offense of keeping open a tippling-house on Sunday. Upon error in this court, it was decided that the accused was entitled to show that the house so kept was located within the corporate limits of the city of Denver; that the city had assumed jurisdiction over the entire subject pertaining to such houses, by the enactment of certain ordinances in pursuance of the charter giving the city council exclusive power within the city to license, tax, regulate, restrain, prohibit, and suppress tippling-houses; and so it was held that "the amended charter of the city of Denver, and the ordinances passed thereunder, afford the defendant protection against this prosecution,"—the court declaring that the "jurisdiction of the city was exclusive as to the whole subject-matter of the offense," and also that it seemed "impossible that a concurrent jurisdiction to restrain tippling-houses can exist in the state and in the city as well. The same statute which confers upon the city exclusive control over such houses divests the state of its control over them," and also that to this extent the charter "repealed the general law by necessary implication." Evidently the idea that a portion of the Criminal Code was suspended—not repealed—by the exclusive clause in the charter, and that the same does not interfere in any manner with the jurisdiction of the courts, was not then entertained by this court. The case of *Rogers v. People*, 9 Colo.

450, 12 Pac. Rep. 843, extends the doctrine of the Huffsmith Case to the keeping of lewd houses. The plaintiff in error, having been indicted for such offense in the district court of Arapahoe county, sought shelter under the provision of the Denver charter, and the ordinances enacted in pursuance thereof; and they were held available to protect the accused, and to defeat the prosecution, in the court of last resort. The indictments in the Huffsmith and Rogers Cases were based upon the same statute, (section 151 of the General Criminal Code of the state,) which provides, in substance, that if any person shall be guilty of open lewdness, etc., or shall keep open any tippling or gaming house on the Sabbath day or night, or shall maintain or keep a lewd house, etc., or shall commit certain other offenses therein specified, such person shall, on conviction, be fined not exceeding \$100, or imprisoned in the county jail not exceeding six months. This statute was enacted prior to the adoption of the state constitution, was continued in force by that instrument, and has remained a part of the Criminal Code of Colorado ever since the revision of 1868. As the law has existed during all that time, punishment in case of a violation of this statute can only be inflicted upon conviction in a court of record upon an indictment by a grand jury of the proper county. It requires no argument to show that the Denver charter is construed by the decisions in the Huffsmith and Rogers Cases to be a law regulating and restricting the jurisdiction of the district court of Arapahoe county in tippling and lewd house cases, while it does not in any manner affect the jurisdiction of the several district courts in such cases elsewhere in the state. Such construction, therefore, must be erroneous, because it cannot be reconciled with section 28, art. 6, of the constitution, which provides that the jurisdiction "of all the courts of the same class or grade, so far as regulated by law, * * * severally, shall be uniform."

Neither the Myers Case, in 67 Ill., nor the Hart Case, in 89 Ill., nor any of the numerous cases decided by the Illinois supreme court bearing upon our borrowed provisions of her new constitution, are noticed in the opinion delivered in the Huffsmith Case. As none of these cases appear in the brief of the attorney general filed in that case, I am constrained to conclude that they were overlooked by the court, and yet such conclusion seems strange; for they had been decided and published years before,—the Hart Case six years before the Huffsmith decision, and the Myers Case three years before the adoption of our constitution. Besides, they had been frequently cited and always followed in the *nisi prius* courts of Arapahoe county until the announcement of the Huffsmith decision rendered them unavailing. The Siebold Case was noticed in the Huffsmith opinion, but, as we have seen, it does not bear upon the question of uniform jurisdiction. The

case of Bennett v. People, 30 Ill. 359, was also relied on, but the opinion was rendered therein long before the adoption of the new constitution, so it furnishes no better support than the Hetzer Case in Colorado. The only other authorities cited in the Huffsmith opinion are two cases from Missouri; but, as that state has no such constitutional provision as ours concerning the uniform jurisdiction of courts, her judicial decisions can have no weight, as against the unbroken current of unanimous decisions by the supreme court of Illinois, based squarely upon the constitutional provisions in question.

Turning to the Rogers Case, decided two years after the Huffsmith Case, we find the same dearth of authority in respect to the question under consideration. Not a single authority is noticed or cited in the opinion bearing upon the construction of section 28, art. 6, of our constitution. An able effort, however, is made to combat the construction given by the Illinois courts to that constitutional provision. It is strongly urged by the able jurist delivering the opinion in the Rogers Case, that "the statute conferring upon the city council of Denver exclusive authority to prohibit and suppress the evil mentioned is sanctioned by the constitution itself;" and that the charter "does not deal, nor was it intended to deal, in any manner with courts or their jurisdiction." Notwithstanding all this, the accused having challenged the jurisdiction of the court by pleading the charter and ordinances of the city against the indictment, the opinion concludes with the statement that "the plea to the indictment was good." In other words, the argument is that the granting of exclusive power to the city is equivalent to taking away the jurisdiction of the court, and yet that the charter does not deal with courts nor affect their jurisdiction. I must confess myself incapable of comprehending this logic. It is true the charter does not purport to affect the jurisdiction of courts in general, but it is construed by the opinion to affect the jurisdiction of one court in particular, and therein lies the mischief.

Some reliance is placed upon the fact that the city of Denver has a special charter; and section 13, art. 14, of the constitution, is referred to in the Rogers Case as authorizing the organization and classification of towns and cities, and the granting of different powers and restrictions to the different classes of municipal corporations. The learned justice claims that "there is clear constitutional authority for bestowing upon one class, within certain limits, exclusive legislative control over a given subject pertaining to local self-government, while another class is allowed only concurrent power in connection therewith." But we look in vain for any constitutional provision by which municipal corporations, whether organized under special charter or by general law, may be authorized to interfere with the uniform constitutional jurisdiction of the district courts in the en-

forcement of the general laws of the state, civil or criminal. In the case of *Darrow v. People*, 8 Colo. 417, 8 Pac. Rep. 661, it was held that the charter provision providing that each board of the city council shall be the sole judge of the qualifications, election, and returns of its own members, deprives the court of jurisdiction in determining such matters; but this was a special provision pertaining to the organization of the council itself, and, so far as the election and returns of its own members are concerned, exclusive authority might well be thus vested in pursuance of section 12, art. 7, of the constitution, which authorizes the general assembly to provide for the trial of election contests in certain cases. This view was taken in the case of *People v. Londoner*, 13 Colo. —, 22 Pac. Rep. 764, but in the *Darrow Case* it seems not to have been urged in behalf of the people that the charter provision making each board the sole judge, etc., might, in certain *quo warranto* proceedings, be in contravention of the constitutional requirement concerning the uniform jurisdiction of the courts; at least, that point is not discussed in the opinion.

I shall not extend this opinion to an examination of further authorities in detail. Judge Dillon, in his standard work on *Municipal Corporations*, speaking of by-laws or city ordinances, says they must be reasonable and lawful, impartial, fair, and general; must not contravene common right; must be consistent with the public legislative policy; and subordinate to the general laws of the state. Mr. Justice Cooley, in his able treatise on *Constitutional Limitations*, speaking of the suspension of general laws, says: "The legislature may suspend the operation of the general laws of the state; but when it does so the suspension must be general, and cannot be made for individual cases or for particular localities." Page 484.

So far as we have been advised, no state, other than Illinois, has a provision corresponding to our own requiring uniformity of jurisdiction for courts of the same class or grade. But authorities are not wanting to the effect that city governments, even under most liberal charters granted by states having no such constitutional restrictions, cannot nullify the general laws of the state by the enactment of mere municipal ordinances. Missouri and Texas, and perhaps other states, without constitutional safeguards to control their legislatures and protect the equal rights of all their citizens, may be fairly claimed to allow a discrimination between their cities and rural communities in respect to the observance of some of their general criminal laws. But Indiana, Michigan, West Virginia, Arkansas, New Jersey, Georgia, and North Carolina, and perhaps other states, have recorded opinions of an opposite character and tendency. *Sloan v. State*, 8 Blackf. 361; *Slaughter v. People*, 2 Doug. (Mich.) 335; *Eckhart v. State*, 5 W. Va. 515; *Reich v. State*, 53 Ga. 73; *State v. Moss*, 2 Jones, (N. C.) 66; *State v. Anderson*, 40 N. J. Law, 224; *Rector v.*

State, 6 Ark. 187; *State v. Devers*, 34 Ark. 189.

It is not claimed that the rule is absolute that under no circumstances may we borrow a constitutional or statutory provision from another state, and then reject the construction which the courts of the former state have previously given it; but such departure should not be made without the strongest reasons therefor. In this instance, we find the Illinois construction in harmony with our own earlier decisions upon analogous subjects. It was manifestly the intention of our people, in adopting our excellent constitution, containing so many provisions against local and special legislation, and so many in favor of uniformity, to secure equality and impartiality in the administration of the law among all classes and communities throughout the state. The construction contended for in this opinion is one step, and a long one, in the right direction. It is unfortunate that it did not meet with the unanimous approval of this court when the occasion was first presented, as it did in the courts of Illinois. Our court started aright in the *Stout Case*, recognizing the fact that the provision of section 28 of our judiciary article was borrowed from the constitution of 1870 of the state of Illinois. The same rule was recognized and extended in the *Lowrie Case* four years later. I am aware it may be said that the *Lowrie Case* was one of felony, and that the decision turns upon the fact that the word "felony" is used in section 8 of the bill of rights; but the language which we have quoted from that opinion is equally applicable to the case under consideration. A single illustration will suffice: A person charged with an offense under section 151 of the Criminal Code, in the city of Denver, might well claim that he should be "accorded the right and privilege of having the truth of the charge investigated by a grand jury composed of his peers before he could be put to the expense, inconvenience, and disgrace of a public trial." So, too, stating the illustration conversely, a person charged with committing such an offense outside of the limits of the city might well claim that he should not be subject to indictment, conviction, and imprisonment so long as his fellow-citizens might commit such offenses within the limits of the city without subjecting themselves to anything more than a paltry fine, under the city ordinances. Indeed, the offense specified in the indictment in this case cannot be committed at all within the city, under the ordinances as now framed, except between the hours of midnight Saturday night and 5 o'clock Sunday morning. But it is idle to pursue these illustrations. Common fairness, common justice, and common sense revolt at such inequality and such unjust discriminations between individuals and neighboring communities in the same state. If the people desire tipping-houses kept open every day and night in the week, election days as well as Sundays; if they desire to remove all re-

strictions against selling liquor to Indians, children, and common drunkards, as well as other people,—let the law upon these subjects be repealed, and let these privileges be extended equally to all classes and communities of our people. I know of nothing in the constitution to forbid such a course. What I am insisting upon is that such laws as we have shall be enforced by the courts throughout the state according to the uniformity rule prescribed by the constitution. Neither the constitution nor the laws of Colorado recognize any particular form of religious faith or practice. In fact, the constitution very properly forbids any such legislation. But the constitution does guaranty the free exercise and enjoyment of religious profession and worship without discrimination, and secures the liberty of conscience to every one so far as the same is consistent with good morals and the peace and welfare of society. Our laws do not recognize Sunday as having any particular sanctity or sacredness above other days; but the law does recognize the fact that large numbers of our people abstain from their usual employments on Sunday, and that many of them devote the day more or less to religious worship and works of charity, while others enjoy it as a day of rest, recreation, or pleasure, according to their several inclinations. Hence the law provides that public offices shall not be kept open, that courts shall not sit, except in cases of necessity, and that commercial paper shall not mature, on Sunday. Provision is also made to secure peace and quiet, and to prevent dissipation and disturbance, to the end that citizens of all classes may enjoy the privileges of the day as they severally please, in an orderly manner, without trespassing upon the privileges of others. These are proper subjects of legislation, of which no one can justly complain, so long as they bear equally upon all classes. The observance of one day in seven as a day of rest is conducive to the sanitary, moral, and physical well-being of the race, as the history of the world and experience of mankind abundantly attest. It is not contended that these considerations have a controlling effect upon the construction of the constitution and laws in question, but they are persuasive in favor of accepting the construction already given by the highest court of a sister state upon the subject. So I conclude that this court should feel itself bound by that construction and interpretation of the constitution which forbids that the city of Denver should be allowed by ordinance to nullify the general laws of the state. For these reasons I concur in the conclusion announced in the opinion of Mr. Justice HAYT, that the judgment of the district court must be affirmed.

(14 Colo. 586)

FINDING *v. HARTMAN et al.*

(*Supreme Court of Colorado. April 25, 1890.*)

FRAUDULENT CONVEYANCES—SALE OF GOODS—ATTACHMENT.

1. A contract under which a firm of merchants are to furnish supplies and money to the owners

of a mine, and in return are to receive ore as mined, is not a present absolute sale of the ore, though it contains the words, "sells, assigns, and transfers;" and it is therefore not within the provision of Gen. St. Colo. c. 43, § 14, declaring that every sale of chattels, unless accompanied by an immediate delivery and a continued change of possession, shall be conclusively presumed fraudulent as against creditors of the vendor.

2. Under such a contract, title to the ore vests in the merchants on its delivery, and a creditor of the mine-owners who thereafter attaches it takes nothing by his levy.

3. The contract having been carried out by the mine-owners jointly, and title to the ore having vested in the merchants on its delivery, the attaching creditor cannot assail the contract because it was executed in the name of only one of the mine-owners.

Appeal from district court, Summit county.

Dolman, Staley & Blackman, as lessees, were engaged in extracting and shipping ore from the Cincinnati mine, near Breckenridge. For the purpose of obtaining provisions and materials from time to time as needed to carry on said business, Dolman, in their behalf, entered into a written contract with J. H. Hartman, acting for the firm of J. H. Hartman & Bro., merchants in the town of Breckenridge. The terms of this contract sufficiently appear in the opinion. Dolman et al. became indebted to Hartman & Bro. in the sum of \$441, and in pursuance of said contract they undertook to deliver to Hartman & Bro. 13,518 pounds of selected ore. This ore was brought to the town of Breckenridge, and loaded into a railroad car. Thereafter, and before the car was sealed, the deputy-sheriff notified the station agent that he attached it, but made no effort to take possession. On the same day the car was duly sealed ready for shipment, in the name of J. H. Hartman & Bro., to whom the bill of lading was made out. At a later hour the sheriff and deputy returned, broke open the car, levied upon the ore under the writ of attachment, took possession, and removed it to the ground. Prior to this levy, Hartman notified the officer that the ore belonged to J. H. Hartman & Bro. The attachment proceeding mentioned was instituted by appellant, Finding, for a sum due him from Dolman and one Hudson, who had previously acted as copartners, under the firm name of Hudson & Dolman. Plaintiff obtained judgment for the amount of his claim, and the regularity of the issue of his attachment writ was sustained. Hartman & Bro., however, intervened under the statute, and upon the plea of intervention the principal trial took place. The intervenors recovered a judgment for the redelivery of the ore, together with \$50 damages. From that judgment the present appeal was taken. Between the dates of levy and trial in the district court the ore lay on the ground, exposed to the weather, driven over and somewhat scattered by wagons, for a period of six months. The two grades into which it had previously been divided were by the sheriff, in unloading, indiscriminately mingled. Testimony was offered by plaintiff showing

the injury thus occasioned. Proof was also admitted to the effect that Hartman & Bro. paid \$75 attorney's fee at the first trial, which took place in the county court.

M. B. Carpenter, for appellant. *Montgomery & Frost*, for appellees.

HELM, C. J., (after stating the facts as above.) Finding was not a creditor of Dolman, Staley & Blackman, nor was he a creditor of Dolman alone. His claim was against Hudson & Dolman, a partnership that had previously ceased to exist. It is extremely doubtful, therefore, if he could in any event maintain his attachment upon the ore in question. Certain it is that he was not entitled to hold the interest therein of Staley and Blackman. The mere fact that their names do not appear in the so-called "bill of sale" to Hartman & Bro. does not conclude their rights in the premises. But we prefer to rest the present decision upon other grounds.

The jury must, under the instructions, have found that the ore in question was delivered to Hartman & Bro. before the levy of the attachment, and there is no doubt but the evidence amply sustains this finding. The attempt of the deputy-sheriff to levy his writ in the morning was ineffectual, because he took no possession. It is insisted, however, as a matter of law, that, under section 14 of the statute of frauds, the failure to make an immediate delivery of the ore, upon execution of the alleged bill of sale or assignment, rendered the entire transaction void as to creditors of the vendor. If this position be correct, it is decisive; for, as a matter of fact, 26 days intervened between the execution of the instrument and delivery of ore thereunder. Assuming, for present purposes, that Finding was a creditor of Dolman, Staley & Blackman, we shall proceed to consider this objection.

At the common law, and under statutes in affirmance of the common law, the absolute sale of personal property, unaccompanied by immediate delivery and continued change of possession, was regarded as fraudulent. But as to whether such transactions should be treated as frauds *per se* and void, or simply as indications of fraud, in fact subject to contradiction by proof of good faith, and hence merely voidable, there was great contrariety of judicial opinion. In some instances the same tribunal has at different periods favored both doctrines; this is true of the supreme court of the United States. See *Hamilton v. Russell*, 1 Cranch, 310; *Warner v. Norton*, 20 How. 448. To put the matter entirely at rest, the specific provision under consideration was wisely enacted. Its conclusiveness in fixing upon such transactions the character of fraud in law, incapable of explanation, has been frequently recognized by this court. *Cook v. Mann*, 6 Colo. 21; *Wilcox v. Jackson*, 7 Colo. 521, 4 Pac. Rep. 966; *Ray v. Raymond*, 8 Colo. 467, 9 Pac. Rep. 15; *Bassinger v. Spangler*, 9 Colo. 175,

10 Pac. Rep. 809; *Sweeney v. Coe*, 12 Colo. 485, 21 Pac. Rep. 705.

The statute in question reads: "Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, and this presumption shall be conclusive." Gen. St. c. 43, § 14. Obviously, this provision deals with sales or assignments of personal property capable of immediate delivery, when the present transfer of title is affirmed. It was intended to prevent fraud upon creditors and purchasers through retention of possession and continued apparent ownership after an asserted sale or assignment, complete in all other respects. The object of its framers was, so far as possible, to remove temptation for the commission of fraud in transferring the ownership of chattels. The alleged bill of sale or assignment upon which reliance is placed in the case at bar does not belong to such a transaction. It is inartificially drawn, and the words, "sells, assigns, and transfers," are employed; but several elements usually characterizing an actual sale are absent. No present payment, either in money or goods, is recited, nor is a present delivery of ore pretended. No definite quantity of ore is mentioned, and no purchase price is specified. The ore itself had not been mined, and could hardly be said to have had more than a potential existence. It was not only incapable of immediate delivery, but, owing to the uncertainties of mining, serious doubt existed if delivery would ever be possible. Hartman & Bro. were only to receive enough of the ore as extracted to satisfy the amounts due from time to time, upon orders previously paid, either in goods or money. This might require the total output, or it might take but a small fraction thereof. If, perchance, more than a sufficient quantity of ore for this purpose were delivered, they would doubtless have to account to Dolman & Co. for the surplus of proceeds. The idea of security is conspicuous in the writing, and the agreement is executory, having reference entirely to future transactions. It is intended to secure future advantages to one party, and give protection in connection therewith to the other. Hartman & Bro. are to furnish supplies and money, and in return are to receive ore as mined. This agreement is binding between the parties, but it does not constitute a present absolute sale as to creditors. Hartman & Bro. have a right to require compliance so long as it is within the power of Dolman & Co. to render the same. But, if a creditor attaches before delivery under the contract, such creditor takes precedence in payment, and a title acquired through his

levy would undoubtedly be good. Thus it appears that not only is the transaction in its nature intrinsically without the letter of the statute now under consideration, but also without its spirit; for creditors are not thereby deceived or prejudiced.

Under this contract, title to the ore on one hand, or to the goods or money on the other, does not pass until actual delivery thereof. But, since such actual delivery to Hartman & Bro. of the ore in controversy took place prior to the levy of the attachment writ, we are of the opinion that the title passed, and appellant took nothing through his subsequent levy. We have avoided the discussion, because it would be improper, of the question elucidated in the California decisions referred to, viz.: Whether or not, when the chattel sold, being capable of immediate delivery, is retained by the vendor for a considerable period, but nevertheless is delivered to the vendee before levy of a creditor's writ, the sale is by the retention rendered void as to such creditor.

It appears from the evidence that, though the written contract was executed in the name of Dolman alone, it was in fact entered into on behalf of the partnership of Dolman, Staley & Blackman; also that it was carried out by this partnership. But if counsel's contention were true that, notwithstanding these facts, it could not be regarded in the present action as a partnership contract, appellant receives no benefit therefrom. The transfer to Hartman & Bro. being *bona fide*, and the title having passed by actual delivery before appellant's levy, it is obviously a matter of indifference to him who the real vendors were. Nor can we agree with counsel that the slight variance relating to the firm name of the intervenors, pointed out between the plea of intervention and proofs, could in any way affect a substantial right of appellant. This objection must therefore be disregarded.

It is clear from the evidence that the jury awarded the \$50 for injuries to the ore, occasioned by its exposed and unprotected condition while in the sheriff's hands. It could not have been given as reimbursement of the attorney's fee for the trial in the county court. If, therefore, there was any error in receiving evidence relating to this fee, or in submitting that matter to the jury, it was error without prejudice. The judgment of the district court is affirmed.

(14 Colo. 540)

MCMICHAEL v. GROVES *et al.*

(Supreme Court of Colorado. April 25, 1890.)

APPEAL—DISMISSAL—WRIT OF ERROR.

Under Civil Code Colo. 1887, § 397, providing that the dismissal of an appeal may, by order of the court, be made without prejudice to another appeal or writ of error, where an appeal is dismissed, but no order is made that it shall be "without prejudice," a writ of error will not lie.

Error to district court, Chaffee county.

The facts are sufficiently stated in the opin-

ion of the court. The statutory provisions of the Civil Code, adopted in 1887, referred to, are as follows: "Sec. 397. The dismissal of an appeal may, by order of the court, be made without prejudice to another appeal or writ of error; but, unless another appeal or *supersedeas* be taken or allowed within thirty days after such dismissal, the dismissal of an appeal or writ of error shall operate as an affirmation of the judgment of the trial court, so as to make the sureties upon the undertaking given by the appellant or plaintiff in error liable on such undertaking." "Sec. 406. Writs of error shall lie from the supreme court to every final judgment of any court of record in this state." "Sec. 401. A writ of error shall not be brought after the expiration of three years from the rendition of the judgment complained of." And section 402 provides for the issuance of the *supersedeas* in connection with the writ of error, when ordered by the court, or, if in vacation, by some justice thereof, upon giving a bond provided for in such order.

Sam P. Rose and M. G. Cage, for plaintiff in error. *C. S. Libby*, for defendants in error.

HELM, C. J. McMichael prosecuted his appeal from a decree rendered against him in the court below. That appeal was dismissed by this court, but no order was entered that such dismissal should be without prejudice to another appeal or a writ of error. Subsequently, and after the expiration of more than 30 days from the date of dismissal, he sued out the present writ of error, which was by order of the court, and upon the filing of his bond, duly made a *supersedeas*. The motion now presented is to dismiss the writ of error and discharge the *supersedeas*. Prior to the year 1887, the dismissal of a writ of error or an appeal, without express affirmation of the judgment, operated, regardless of the ground relied on, as a nonsuit in the former instance, and as a discontinuance of the particular appellate proceeding in the latter. *Freas v. Engelbrecht*, 3 Colo. 377; *Monti v. Bishop*, Id. 605. Section 397 of the present Civil Code introduces a new rule upon this subject. It provides that "the dismissal of an appeal may, by order of the court, be made without prejudice to another appeal or writ of error." That is, unless the order of dismissal expressly reserves the right, the judgment stands affirmed, and a further review, either by appeal or by error, cannot be had. This is the obvious design and consequence of the provision; for it would be idle to declare that the dismissal may by order be made without prejudice, if the intention was to allow a second appeal or a writ of error, the order being silent with reference thereto. And since, at least as to district courts, no constitutional inhibition forbids, effect must in the present case be given to the legislative intent. Under the foregoing view, the statute before us does not take away the right to a writ of error

conferred by section 406 of the same act. Upon entry of final judgment in any court of record, the unsuccessful party may take his writ. If, however, he elects to present his case by appeal instead, he voluntarily hazards a review by error; such hazard resting upon the contingency that his appeal may be dismissed without the saving clause relating to prejudice. When an appeal is dismissed without prejudice, appellant's right to a writ of error at any time within three years from the rendition of judgment remains. See sections 401, 406, Civil Code. But availing himself of this privilege does not stay proceedings in the trial court pending the review. If he wishes to accomplish this result, he must procure a *supersedeas*; and here, again, section 397, above mentioned, introduces an important qualification hitherto unknown to the law. Unless plaintiff in error procures his *supersedeas* within 30 days after the dismissal, its functions are materially curtailed; for the sureties upon his appeal undertaking nevertheless become and remain liable thereon as in case of affirmance. The statutory provision under consideration is in some respects anomalous, but its language is reasonably plain, and the courts may not, by construction, change its effect. We are obliged to sustain the motion before us. Since the appeal was not dismissed "without prejudice," the writ of error did not lie. This proceeding is accordingly dismissed, and, in pursuance of such dismissal, the *supersedeas* must, of course, be discharged.

(14 Colo. 593)

PLEYTE v. PLEYTE.

(Supreme Court of Colorado. April 25, 1890.)

APPEAL—ORDERS SUBSEQUENT TO FINAL JUDGMENT.

Where, after a writ of error has been docketed in the supreme court, an error in the record of the court below is discovered, and an application to correct it has been refused, a separate writ of error should not be taken to such refusal, but the proceedings should be reported as an amendment to the transcript already filed; and this rule is not affected by Laws Colo. 1889, p. 73, making rulings subsequent to final judgment reviewable.

Error to district court, Arapahoe county.

Sullivan & May, for plaintiff in error.
Patterson & Thomas, for defendant in error.

HELM, C. J. Dirk Pleyte obtained a decree of divorce in the superior court of Denver from Elizabeth Pleyte, his wife. To review that decree, Mrs. Pleyte subsequently sued out of this court a writ of error, and the cause was here docketed as No. 2,494. Counsel for plaintiff in error afterwards discovered what they claim to be a clerical mistake in recording certain action in the court below. Upon application, this court suspended further proceedings in that cause, so that counsel might have the alleged mistake corrected by the trial court. In the mean time the superior court had been discontinued, and its records transferred to the custody of the district court of Arapahoe county under a legislative mandate. To the latter court

application was made, upon due notice, by petition and affidavits, for the correction in question. While finding at the hearing that the facts were as claimed by petitioner, and that the petition was presented at once upon discovery of the mistake, the district court nevertheless decided that, as a matter of law, it could not amend the record, and entered judgment denying the application. Plaintiff in error thereupon took her exception to the ruling in question, sued out the present writ of error, and docketed the cause as a separate and distinct suit in this court. The motion before us is to dismiss this writ of error. The proceeding in the court below was not an independent suit. It was purely auxiliary to the original divorce proceeding to be reviewed by this court in cause No. 2,494. The object was not to vindicate an independent right of action, or obtain a separate judgment. It was to secure the correction by the court below of an alleged mistake or misprision of its clerk in making a certain record entry, which correction was deemed essential to a proper review of the matters before us in the case referred to. The result of these supplemental proceedings should have been reported as an amendment to the transcript filed in the former cause. They should not have been brought here as a foundation for a separate suit upon error. Such is the established practice of this court in similar cases. *Wolfey v. Mining Co.*, 3 Colo. 296; *Knox v. McFerran*, 4 Colo. 348. By the statute of 1889, (section 5, p. 73, and section 1, p. 78,) rulings subsequent to final judgment are expressly made reviewable; but we do not construe these provisions as abrogating the former practice of the court, and authorizing a new and independent writ of error in cases like the one at bar. When the court below, as in the present instance, declines to make the correction demanded, counsel, of course, does not tender his supplemental transcript for the purpose of having it govern the final hearing. He presents in this way, for consideration under the statute of 1889, the alleged errors committed in refusing his application to correct the record. It may be necessary to dispose of the new matters thus brought before the court prior to a final hearing of the cause. If so, the parties can be heard in pursuance of appropriate special orders adopted for the purpose. The present writ of error must be dismissed, but counsel may withdraw the record, and, upon notice, tender it for leave to refile as a supplemental transcript in No. 2,494. The foregoing conclusion is decisive of the motion before us, and we deem it improper to consider at this time the conflicting views of counsel upon the correctness of the ruling in question by the court below. It will be time enough to examine these matters when the supplemental transcript is filed, if counsel shall determine to present the same in accordance with the foregoing suggestion. The motion is sustained, and the writ of error is accordingly dismissed.

(1 Wash. St. 206)

OREGON RY. & NAV. CO. v. SMALLEY.

(Supreme Court of Washington. March 8, 1890.)

DUE PROCESS OF LAW—INTERDEPENDENT PROVISIONS OF STATUTE—RAILWAYS—KILLING STOCK.

1. Act Wash. T. 1883, p. 51, § 1, provides "that all railroad companies owning or operating lines of railway within the territory of Washington shall be liable to the owners of all live-stock * * * killed or maimed by their passing trains." Section 8 reads: "No railroad company shall be liable for stock killed upon their roads when the same is fenced by such company with a good lawful fence." *Held* that, as there is no law making it the duty of a railway company to maintain a fence, the enforcement of this act would in many cases exact a penalty from one guilty of no fault, which would result in taking property without due process of law; and the act, therefore, is unconstitutional.

2. Sections 2-7 of the act were declared unconstitutional by *Dacres v. Navigation Co.*, 20 Pac. Rep. 601, because they denied the right of trial by jury. Those sections provide for the giving of notices of the date and place of killing or maiming, and the kind of animals; for the appointment of an appraiser, by whose award both parties were bound; and that the amount thereof might be recovered in any court having jurisdiction. *Held*, such rights and remedies are interdependent with those under sections 1 and 8, and all must fall together.

Overruling *Oregon Ry. & Nav. Co. v. Smalley*, 23 Pac. Rep. 415.

SCOTT and DUNBAR, JJ., dissent.

Appeal from district court, Walla Walla county.

W. W. Cotton, for appellant.

STILES, J. This was an action against a railroad company for the value of a colt killed by a train of the company, and for injuries to another colt by the same train. The complaint alleged facts which, if proven, would have been sufficient to warrant a recovery at common law; and the answer put in issue all its material allegations. At the trial, however, both the plaintiff and the court appear to have regarded it as a case prosecuted under the act of November 28, 1883. Accordingly the testimony of the plaintiff was limited to the facts of ownership, the killing and maiming, the want of a fence along the track, and the value and damage. The defendant offered to show that its train was managed without fault, and that the plaintiff's negligence contributed to the accident, but the court rejected the evidence as being irrelevant and immaterial; and this ruling was excepted to. It did appear, however, that the animals had strayed into a fenced field, not the property of their owner, and that from that field, which extended to the railroad track, they had gone upon the track at the point where they were struck by the train. The defendant requested a number of instructions to the jury which would have been applicable in the absence of any statute; but the court refused to give them, and did give the following: "Railroad companies owning or operating lines of railway within this territory are liable for the value of all live-stock killed or maimed by their passing trains, where their roads are not fenced." Exceptions were taken to the refusal to give the instructions asked, and to the giving of the

instructions noted above. Error is assigned upon all the exceptions. This case brings this court squarely to a review of the act of 1883,¹ commonly known as the "Fence Law," and of the case of *Dacres v. Navigation Co.*, decided by the supreme court of Washington Territory, January 29, 1889, and reported in 20 Pac. Rep. 601. The court in that case, and the parties there and here, decided and admitted that sections 2-7 of the act were unconstitutional, because they deny the right of trial by jury; but, in response to its own question, "Is the whole act void by reason of the unconstitutionality of the sections named?" the court answered in the negative, and upheld the first and eighth sections as valid and binding law, being complete in itself, and "capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected," as the court said. The ruling was based upon the general principle, as stated by Judge Cooley's *Constitutional Limitations*, (5th Ed.) 212, thus: "Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other. * * * If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, it must be sustained." The act in question, as it is left, including its title, is as follows: "An act to secure to the owners of live-stock payment of the full value of all animals killed or maimed by railroad trains. Be it enacted," etc.: "Section 1. That all railroad companies owning or operating lines of railway within the territory of Washington shall be liable to the owners of all live-stock for the full value of all such live-stock killed or maimed by their passing trains." "Sec. 8. No railroad company shall be liable for stock killed upon their roads when the same is fenced by such company with a good lawful fence." Construing the act, the court held that its general object was to enlarge and extend the rights of owners of live-stock, as against railroad companies, so long as the railways are not properly fenced; and its final construction of the two sections retained was as follows: "Where an animal, being lawfully upon adjoining land, thence escapes upon a railway track at a place which is not fenced, but which the company may properly and lawfully fence, and the animal is killed by a passing train, the company is liable for the value of the animal, if killed, and, if injured but not killed, for the amount of damages caused by the injury. * * * It is evident

¹Laws Wash. T. 1883, p. 51.

upon the face of this statute that the legislature intended to make the neglect or failure of railway companies to fence their railways evidence of negligence. This is made clear by section 8, which exempts companies from liability for the killing of live-stock where the railways are properly fenced." Viewing this act in the light of its title alone, we should be inclined to agree with that court as to the general object sought by the legislature. But that, by its terms, it was a reasonable statute, or one such as has been commended by courts in the cases cited, or that its provisions could be toned down and softened by the construction put upon them so as to make it a reasonable statute, we are unable to discover, even after a careful study of the decision quoted. The liability of a railroad company for injuries to live-stock is based upon a supposed negligence in the performance of some duty imposed under the general rules of law or a statute; but to fence its track is not the duty of a railroad company under any law of Washington, either written or unwritten, not excepting the act in question. Therefore, without this statute, the usual rules as to negligence and the burden of proof would apply in these stock-killing cases; and the plaintiff would be answerable for contributory negligence. By this act, however, without imposing upon a railroad company the duty of fencing at any place where a fence would be reasonable, a conclusive presumption of negligence on its part is enacted, and its absolute liability fixed, without regard to the possible contributory negligence of the owner. Nor is any distinction made in cases where no lawful fence could be erected, as at street or highway crossings or in towns. So that, were a case presented where the owners of animals hitched to a vehicle, with gross negligence, drove them along a highway in front of a passing train, and both owner and animals were injured, while the owner could recover nothing for his own injury, he could have the value of his live-stock from the owner or operator of the train. Liability of this kind is to be imposed upon him who is found at fault, the injured party not being himself in the wrong; but here is a statute which imposes a penalty for no fault, which is a taking of property without due process of law, which is forbidden by the constitution. Nor are we able to see in section 8 anything to relieve section 1, of these objections. Under it, railroad companies may fence or not, as they please; but, if they do fence, they may escape every reasonable liability, to the great wrong of owners of stock, through whose herds, accidentally strayed upon their tracks, their engineers may wantonly drive locomotives, killing and maiming helpless beasts without fear of consequences. A late and well-considered case upon this subject, growing out of a statute similar to section 1, is that of *Bielenberg v. Railway Co.*, 20 Pac. Rep. 314. In many states there are statutes which make it the duty of railroad companies to fence their tracks at reasonable

places, and, when animals are killed where there ought to have been a fence, but where none had been erected, the absence of the fence is made conclusive presumption of negligence in some cases, and of liability in others; and these statutes have been upheld. But, until the duty of fencing is imposed, no such penalty can be attached to an omission to fence.

Again, it will be noted that, in Judge Cooley's rule as to holding part of an act constitutional although another part be held unconstitutional, it is laid down as requisite that the part upheld must be "capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected;" and the court, in *Dacres v. Navigation Co.*, held section 1 to meet the requirement. But let us examine. It is true it would be a very simple thing for courts to enforce the provisions of sections 1 and 8, if they had been enacted alone. But, leaving out all question of the right of trial by jury, upon which the court in the former case held sections 2 to 7 to be unconstitutional, and suppose there were no such possible objection, what is it that the legislature intended and provided that the owner might recover; and when can the action be commenced? By section 4, notice of the killing must be given to the superintendent, local business manager, or agent of the railroad company, by the owner. The notice must be in writing, and contain the date and place of the killing, with the number and kind of the animals. And, by section 3, 10 days were allowed the company to appoint an appraiser. Both parties were bound by the appraisement; and no suit could be brought until at least 10 days after the notice of the killing, given in writing to the defendant, through some one of its responsible agents. Presumably, the appraisers chosen would have been more or less experts in valuing stock, and their judgment more satisfactory than the verdict of a jury. Who can say with certainty that the legislature did not intend, in view of the severe rule adopted against the railroad companies as to their liability, that they should, before being put to the cost of a suit, have the time and notice required as substantial rights, and that both parties should have the advantage of expert opinion as to value directly employed in fixing the amount to be paid, rather than as mere evidence before a jury? These advantages are totally lost with the obnoxious sections out, but we regard them as having been materially within the legislative intent in enacting the law. And, further, although section 1 provides that companies shall be liable for "the full value," it seems clear to us that to ascertain for what they are, after all, really liable, section 1 must be read with section 5, where the provision is that, after the appraisement, "the amount of such assessment shall thereupon become due and payable, with interest from date of said assessment at the rate of one per cent per month; and said amount, together with interest and

costs, including attorney's fees, now allowed as costs in the district court, may be recovered by suit in any court having jurisdiction thereof." That is, the suit of the owner, instead of being in trespass for the injury to his chattel, would be in *assumpsit*, upon the award of the appraisers. The actual value of the chattel would be immaterial, and need not be pleaded or proved; and the very fact of the killing need be pleaded only as matter of inducement for the award sued on. Was it the intention of the legislature that, instead of the cause of action provided for in section 5, companies should be compelled to respond to, or owners should be required to plead, some entirely different cause of action, or that both should produce their proofs as to value in a different form from that provided in the act? On the contrary, it seems to us that the clear intention of the legislature was to give to both parties all the privileges above mentioned as a substantive part of the right in the one and the liability in the other, and that, therefore, section 1 is not "capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected," and must fall with the other unconstitutional sections.

We sustained sections 1 and 8 in the case of *Navigation Co. v. Dacres*, ante, 415, (decided at this term,) but solely upon the ground that the decision of the court in the same case, in 1889, constituted the law of the case upon the new trial. The judgment of the court below is reversed, and a new trial granted.

We concur: HOYT, J., and ANDERS, C. J.

We dissent: SCOTT and DUNBAR, JJ.

(1 Wash. St. 89)

HAAS *et al.* v. GADDIS *et al.*

(Supreme Court of Washington. Jan. Term, 1890.)

APPEAL—PRACTICE—SHERIFFS—DUTIES.

1. Where an attorney has appeared in an action generally for all the defendants, without objection by any of them, his stipulation that a notice of appeal might be given and a statement of facts settled after the expiration of the time limited by law is binding on all the defendants, though two of them were represented specially by other attorneys; and the fact that a third defendant was specially represented by a firm one of whose members bears the same surname as the stipulating attorney will not warrant the court in assuming the attorney signing the stipulation was the member of the firm, and that he represented only the third defendant.

2. Under Acts Wash. T. 1883, p. 59, § 3, which provides that in all causes removed to the supreme court the removing party may have the facts transmitted thereto "with the transcript," it is not essential that the statement of facts should be attached to the transcript; and a statement duly certified by the trial judge, and bearing the same number and title as the transcript, and filed therewith in the supreme court, is sufficiently identified and connected with the transcript to warrant its consideration by that court.

3. The provision of Code Wash. T. § 460, that the transcript on appeal must be filed in the supreme court at least 15 days before the beginning of the term, applies to cases appealed under Acts

1883, p. 59, as section 1 of that act requires the transcript to be filed within the time required by law.

4. Though a transcript on appeal has not been filed in the supreme court in due time, an appellee who has not filed a certified copy of the judgment appealed from, and of the notice of appeal, as required by Code Wash. T. § 461, is not entitled to a dismissal of the appeal.

5. Where the trial judge certifies that the statement contains all the material facts in the case, the omission of an instruction not claimed to be material by appellees is no ground for dismissing the appeal.

6. Under Code Wash. T. § 2090, which provides that no officer shall be required to perform any official act unless his fees are paid "where he demands the same," a sheriff who has not demanded his fees in advance is liable for his failure to serve an execution placed in his hands without a tender of his fees, though Code Wash. T. § 2772, provides that no sheriff shall be liable for neglecting or refusing to serve any civil process unless his fees are first tendered him. ANDERS, C. J., dissenting.

7. Where the property of a partnership has been attached in a suit against one of the partners individually, subsequent judgment creditors of the partnership, who have not applied to the court to set the attachment aside or to have their debts first paid out of the partnership property, cannot impose on the sheriff the burden of deciding on the legality of the respective claims, and they cannot recover for his failure to proceed under the executions on their judgments.

Appeal from district court, Montesano county.

Action by Charles Haas, William Haas, Kolman Haas, and Leopold Klam, partners, against D. J. Gaddis, sheriff, S. H. Beckwith, G. S. Roderick, and S. B. Ford, as executor of W. H. Ticknor, sureties on the sheriff's bond, for the sheriff's failure to proceed under an execution in plaintiffs' favor. There was a judgment for defendants, and plaintiffs appeal. Acts Wash. T. 1883, p. 59, § 1, provides: "Any person desiring to remove a cause from any district court of Washington territory may do so either in person or by his attorney of record, and in the following manner: Such person or attorney may give notice in open court or at chambers that he appeals such cause to the supreme court of the territory. Such notice shall, by order of the court or judge having jurisdiction of the cause, be entered in the journal of such court, and no other service or notice of process shall be required; and thereupon the clerk of such court shall make and certify a full and complete transcript of said cause, including the journal entries thereunto appertaining, and cause such transcript to be filed with the clerk of the supreme court within the time allowed by law, and thereupon the supreme court shall have complete and perfect jurisdiction of such cause." Section 3 provides: "In all causes removed to the supreme court, * * * the party so removing the same may have the facts, or any portion thereof, transmitted thereto, with the transcript of the cause," etc. Code Wash. T. § 460, provides: "The notice of appeal or suit in error must be served at least 30 days, and the cause filed and docketed at least 15 days, before the first day of the next term of the supreme court, or the same shall not then be tried unless by consent of par-

ties." Section 461 provides: "If the appellant fails to file a transcript, and have the cause docketed, as provided in the preceding section, the appellee or defendant in error may file a certified copy of the judgment or order appealed from, and of the notice served, and on motion have the appeal or suit in error dismissed, or the judgment or order appealed from affirmed." Section 2099 provides: "All fees are invariably due in advance when demanded by the officer required to perform any official act, and no officer shall be required to perform any official act unless his fees are paid when he demands the same." Section 2772 provides: "No sheriff * * * shall be liable for any damages for neglecting or refusing to serve any civil process unless his legal fees and an indemnifying bond, if he requires one, are first tendered him."

George L. Moody, for appellant. *Bignold & Robinson and Evans & Irvin*, for appellees.

SCOTT, J. The defendants Beckwith and Roderick, appellees, move to strike the notice of appeal, the statement of facts, and to dismiss the case, for the following reasons: That no notice of appeal was given, and no notice to said appellees to appear at the time the statement of facts was settled; that the statement of facts is not connected with the transcript, or sufficiently identified to be considered in the case; that the transcript was not filed within the time prescribed by law; and that the instructions given by the court to the jury are not all here.

The transcript shows that notice was served June 12, 1888, on appellees by appellants, that they would give notice of an appeal August 18, 1888, at an hour therein specified, before the judge at chambers who tried the cause below, and would also apply at the same time to have a statement of facts settled; that said notice was given within the time prescribed by law after the rendition of judgment, and was otherwise sufficient; that appellants duly appeared at the time and place specified, but were unable to give notice of an appeal or to apply for a settlement of a statement of facts, by reason of the absence of the judge before whom the cause was tried; that at said time a stipulation was entered into between appellants' attorney and Elwood Evans, one of the attorneys on the defense, providing that a notice of appeal might be given and a statement of facts settled in said action on the 17th day of September, 1888, at the Montesano term of the district court then and there to be held, at which time the notice of appeal was given and statement of facts settled. Attorneys Bignold and Robinson were present, but refused to take any part in the settlement of the statement. Appellees Beckwith and Roderick claim they were not parties to said stipulation, and are not bound by it; that they were represented in this case only by the firm of Bignold & Robinson, and that Elwood Evans, who signed said stipulation, was an attorney

for certain other of the defendants only. It further appears by the transcript that the action was commenced in June, 1887, and in July, 1887, Bignold & Robinson first appeared therein as attorneys for the defendants Gaddis, Beckwith, and Roderick, and that they subsequently withdrew for the defendant Gaddis; that August 13, 1887, Mason Irvin appeared as attorney for defendant Ford, and on May 16, 1888, at the time of the trial, Elwood Evans appeared as an attorney in the action apparently for all of the defendants, the journal entry relating thereto reciting that the defendants appeared by their attorneys Elwood Evans, Mason Irvin, and Bignold & Robinson. All of said attorneys subsequently admitted service generally for the defendants of a notice of a motion for a new trial, and in the order of the court denying the motion Elwood Evans is again spoken of as an attorney for the defendants, without specifying any particular ones. His only other act in the case was the signing of the stipulation aforesaid on August 18, 1888. Prior thereto the firm of Evans & Irvin appear as attorneys in the action by a written admission of service of the notice to settle the statement heretofore mentioned, specially limiting their appearance, however, for the defendant Ford, and Bignold & Robinson admit service thereof specially for the defendants Beckwith and Roderick, who move to dismiss this appeal, claiming that Elwood Evans, who signed the stipulation, was a member of the firm of Evans & Irvin, who only represented the defendant Ford, and that he had no authority to bind Beckwith and Roderick. If it appeared in the record that Elwood Evans was the Evans named in the firm of Evans & Irvin, the fact that the firm admitted service specially for the defendant Ford may have operated as a notice to the appellants that he was only authorized, and that he only intended, to act for said defendant Ford; but it does not so appear. It does appear, however, by an affidavit of service in the record, that Mason Irvin is one of said firm, and he does not act individually in the case after the appearance of the firm name. Elwood Evans does by signing the stipulation. From these facts the court will not presume that Elwood Evans was a member of said firm, or that he only represented the defendant Ford, when his every act indicates that he appeared for all of the defendants, and at no time does it appear that any objection was made thereto by the defendants Beckwith and Roderick until now.

As to the point urged that the statement is not connected with the transcript, and is no part of the case, it appears to have been filed in said cause in the court below, and bears the same number (97) that the papers contained in the transcript were numbered below. The certificate of the trial judge mentions it as the statement in case No. 97, Haas Bros. v. D. J. Gaddis et al., and it appears to have been filed in this court at the same time the

transcript was filed. From these facts the court finds it is properly here and a part of the case; that it is not essential that the statement should be attached to the transcript, the statute only requiring it to be sent up therewith. Act 1883, p. 59, § 3.

As to the further point that the transcript was not filed within the time prescribed by law, it appears that it was filed December 27, 1888, less than 15 days before the first day of the next term of the supreme court thereafter. This appears to be contrary to the provisions of section 460 of the Code, taken in connection with section 1 of the appeal act of 1883, requiring the transcript to be filed in this court within the time required by law, as section 460 is the only place where the time of filing is specified. The supreme court in the case of *Turner v. Saxon*, 3 Wash. T. 473, 18 Pac. Rep. 67, where the question of notice only was involved, which is excepted in the act of 1883 from the operation of any other law, held that section 460 does not apply to cases appealed under the 1883 act. We are of the opinion that it does apply as to the time of filing the cause, but appellees not having taken advantage of such failure in the manner provided by section 461 of the Code, or before the transcript was filed, their objections will not be allowed to prevail.

As to the last point made, that the instructions are not all here, it appears that three instructions were given at the trial, and only two are contained in the record. There was no request or attempt by any of the parties to have the other one brought up. The instructions here are contained in the statement, which is duly certified by the judge to contain all the material facts in the cause.

It is not claimed by the appellees that the instruction omitted is material, nor do they ask to have it brought here; and, as all the parties to the action and the judge who tried the cause seem to have regarded it as unimportant for a fair consideration of the cause in this court, it is held by us to be unnecessary. The motion to dismiss is therefore overruled.

ANDERS, C. J., and STILES, J., concur; HOYT and DUNBAR, JJ., not sitting on the hearing of the motion.

ON THE MERITS.

SCOTT, J. This was an action brought by appellants against the sheriff of Chehalis county and his bondsmen, for failure to proceed under certain executions issued upon judgments in favor of plaintiffs against J. D. Mace and Harvey C. Minkler, who were partners, doing business under the firm name of J. D. Mace & Co. It appears that on the 30th day of September, 1884, I. B. Dawson commenced suit against said J. D. Mace individually, and therein on said date attached certain property belonging to said firm. Subsequently the plaintiffs herein commenced suit against the firm, and obtained the judgments upon which said executions were is-

sued. It appears that writs of attachment were first issued in said actions and were levied upon the same property seized in the suit begun by Dawson, but were subsequent thereto, and also by the sheriff's return it appears that such levies for plaintiffs were made subject to the seizure for Dawson. Judgment was rendered in the suit brought by Dawson against J. D. Mace, and execution issued therein and levied upon the property previously attached, but before a sale the plaintiffs obtained judgments in their actions, and had executions issued to the sheriff. The sheriff sold the goods under the Dawson execution, who received the proceeds thereof, whereupon plaintiffs brought this action upon his official bond, claiming said goods should have been sold under their writs for their benefit. As one of his defenses thereto the sheriff alleged that he demanded an indemnifying bond of plaintiffs, which they refused to give, and also that the plaintiffs were bound to tender him his fees for serving their writs, although he made no demand therefor, and as they did not do so he claimed the action could not be maintained against him. See Code, § 2772. The court in effect instructed the jury that it was incumbent on plaintiffs to tender the sheriff his fees in the first instance, regardless of a demand, and section 2772 would seem to bear no other interpretation; but we hold it should be construed in connection with section 2099 of the Code upon the same subject-matter. We see no reason why section 2099 should not have equal force with the section first cited. Either statute, literally interpreted, conflicts with the other, and, as some violence must be done to the language of one of them, we must give force to that construction which accords with good sense and justice. Therefore we hold that the instruction was erroneous, and that it was not necessary to tender the sheriff his fees without any demand from him therefor.

But are plaintiffs in a position to take advantage of this error,—were they injured thereby? Dawson had a prior levy upon the property. It is true his attachment and execution were only against one member of the firm, and the sheriff seized and sold the firm's goods thereunder. In such a case the sheriff would ordinarily be justified in selling only the interest of the defendant partner therein, not the entire property. But there is nothing to show that the partner who was not a defendant in the Dawson suit objected in any way to the sheriff's action, and, for aught that appears, both members of the firm may have consented that the partnership property be taken by the sheriff to satisfy the individual debt. In such a case, in the absence of any fraud, the property might have become divested of its partnership character by virtue of the levy. It was incumbent on plaintiffs, if they desired to assert a superior claim to the firm's property over Dawson, to have taken some steps to have their rights as against him adjudicated. They could not im-

pose upon the sheriff the burden of deciding upon the legality of their respective claims. They did not apply to the court in any manner to have the Dawson levy set aside, or to have their debt first paid out of the partnership property, and we must hold that their case against the sheriff and his bondsmen, after giving the most liberal intendments to their pleadings and the testimony, was insufficient to support a verdict had they obtained one, and consequently that they were not prejudiced by the erroneous instruction. The judgment of the court below is therefore affirmed.

DUNBAR, J., concurs.

STILES, J., (*concurring*.) I concur in the affirmance, for the reason that, in my judgment, the plaintiffs had adequate means at their disposal to have the question of the title of the property and the correctness of the sheriff's action determined in proceedings for that purpose. With such means at hand, they could not force upon the sheriff the dilemma of deciding the question of title, and then take advantage of his error by an action for damages.

ANDERS, C. J., (*concurring*.) I concur in the result, but I do not think the court below erred in instructing the jury that the sheriff would not be liable unless his fees were tendered him. The instruction was in the exact language of the statute, and therefore in my opinion not erroneous.

HOYT, J., not sitting.

(1 Wash. St. 24)

CLINE *et al.* v. MITCHELL.

(*Supreme Court of Washington.* Jan. 28, 1890.)

APPEAL—PRACTICE—BOND—PARTIES.

1. Where judgment has been rendered in the district court against the sureties in the bond given on appeal from a justice of the peace, as provided by Code Wash. § 1867, and a writ of error is taken from the decision of the district court, the writ will be dismissed unless the sureties are made plaintiffs in error, or notice is given, as required by section 454, that they do not desire to become plaintiffs in error.

2. On an appeal from a justice of the peace to the district court, the sureties, by signing the appeal-bond, submit themselves to the jurisdiction of the court, and are concluded by the judgment against them without further notice.

Error to district court, King county.

P. P. Carroll, for plaintiffs in error.
Ronald & Piles, for defendant in error.

ANDERS, C. J. On the 20th day of April, 1887, defendant in error sued plaintiffs in error, in a justice's court in Kitsap county, for the recovery of \$299 and costs. A change of venue was had to another justice, and on May 8, 1887, judgment was rendered in favor of defendant in error for \$295 and costs, from which judgment plaintiffs in error appealed to the district court holding terms at Seattle. On taking said appeal, plaintiffs

in error filed an appeal-bond, with sureties, as required by law. The district court, on the trial of the cause, rendered judgment against the defendants therein and their sureties, in pursuance of the provisions of section 1867 of the Code of Washington. From this judgment plaintiffs in error sued out a writ of error, and ask to have said judgment reversed, for the reasons: *First*, that the district court was without jurisdiction to try the cause; *second*, that the judgment against the sureties is null and void, and the statute authorizing the same is unconstitutional; and, *third*, that the complaint does not state facts sufficient to constitute a cause of action, and that it was error to render judgment thereon.

Defendant in error moves to dismiss the writ of error for the reason, among others, that all the parties to the judgment in the district court have not joined in or been made parties to this writ of error. We are all agreed that the judgment of the court below was properly rendered against the sureties on the appeal-bond, and that the claim of counsel for plaintiffs in error, that the sureties were not brought into court by proper notice or otherwise, is untenable. By signing the bond, they submitted to the jurisdiction of the court, and are concluded by the judgment. The law then in force was a part of their contract as sureties, and they must abide by it in all its requirements. The sureties being proper parties to the judgment appealed from, they should be parties here, or, if they did not desire to become plaintiffs in error, notice should have been served upon them by plaintiffs in error, and proof thereof filed with the clerk of this court in accordance with the provisions of section 454 of the Code. This was not done, and it therefore follows that the writ of error should be dismissed; and it is so ordered.

HOYT, DUNBAR, SCOTT, and STILES, JJ., concur.

(1 Wash. St. 125)

NELSON *et al.* v. TERRITORY.

(*Supreme Court of Washington.* Feb. 21, 1890.)

APPEAL—PARTIES.

On a writ of error to a judgment against three defendants, an affidavit by two of them that they are informed and believe that the third defendant is not in the state, that they have diligently endeavored to find him, but have not been able to do so, and therefore have been unable to serve him with a copy of the notice of the writ of error, as required by Code Wash. § 1887, is not sufficient to dispense with the joinder of such third defendant as a plaintiff in error.

Error to district court, King county.

Metcalfe, Turner & Burleigh, for plaintiffs in error. Stratton & Fenton, for the Territory.

HOYT, J. The judgment in this case was against three defendants, only two of whom have joined in the appeal to this court; and, as the appellee urges the non-joinder of the

third defendant as a reason for the dismissal of the appeal, the case is brought directly within the authority of *Cline v. Mitchell*, ante, 1013, (decided at this session,) and the motion to dismiss the appeal must be granted unless a certain affidavit filed by the two defendants in the court below, and brought here with the transcript, has the effect of taking the case out of the rule established in the case above cited. Said affidavit is as follows, to-wit: "John Eagan and Oscar Johnson, each being duly sworn, each for himself deposes and says that he is one of the plaintiffs in error named in the annexed notice of writ of error; that he is acquainted with Charles Nelson, the defendant in the action entitled in said notice; that said Nelson is not at this time, as affiant is informed and verily believes, within the territory of Washington; that affiant has made repeated inquiries, and has otherwise endeavored with diligence to ascertain the whereabouts of said Nelson, and has been unable to ascertain his whereabouts, and for that reason has been unable to serve said Nelson with a copy of said notice;" and we do not think it sufficient for the purpose for which it was made. The object of the statute requiring all of the parties to a judgment to join in an appeal therefrom is to have the entire case presented to the appellate court at one time, and not to allow each of the several parties to prosecute a separate appeal, and thus, perhaps, require the appellate court to hear the same cause several times. And if this is the reason of the statute, the logical sequence is that, in case all the parties to a judgment do not join in the appeal, then there must be such service upon or notice to the other parties as will estop them from afterwards claiming their right of appeal. Could the defendant, who did not join in this appeal, be thus estopped by the filing of the affidavit in question? We think it clear that he could not, as said affidavit does not show that he ever had any knowledge of, or opportunity to join in, this appeal, or that there ever was any service upon him of the notice, either actual or constructive. But it may be urged that this construction of the law will place it in the power of one of several parties to a judgment to deprive co-parties of their right of appeal. We think, however, that it is always within the power of the court which has once acquired jurisdiction of the person of a party to an action to provide for the constructive service upon such party of any and all papers that it may be necessary to serve upon him in the progress of the cause in which such jurisdiction was obtained, upon proper showing being made that actual service cannot be had. The remedy of a part of the parties to a judgment who desire to appeal would be to make diligent effort to serve the proper notice upon the other parties, and, in the event of their being unable to make such service as the statute requires, to make a showing to the court having jurisdiction of what they have done, and obtain an order

for such substituted service as the court may think proper. The appeal must be dismissed.

ANDERS, C. J., and SCOTT, STILES, and DUNBAR, JJ., concur.

(2 Idaho [Hasb.] 686)

GILPIN v. SIERRA NEVADA CON. MIN. CO.

(*Supreme Court of Idaho. March 1, 1890.*)

For majority opinion, see ante, 547.

SWEET, J., (*dissenting.*) The plaintiff is the owner of what is termed the "Apex Mining Property," situated in Yreka mining district, Shoshone county, Idaho. This property is composed of three claims, called the "Tip Top," "Apex," and "Rambler." The defendant, a corporation, is the owner of the Sierra Nevada mining claim. The properties of plaintiff and defendant join, the three first-named claims lying along the west side line of the Sierra Nevada. Plaintiff asks that a writ be issued, restraining the defendant from mining and extracting ore from within the grounds of the Rambler mining claim. Defendant admits that it is extracting ore from within the lines of the Rambler, but avers that it has a lawful right so to do, by reason of the alleged fact that in crossing the west side line of the Sierra Nevada, and entering the ground of the Rambler, it is following a vein upon its dip, the apex of which is within the boundary lines of the Sierra Nevada. Plaintiff admits that, if defendant is following a vein upon its dip, the apex of which lies within the defendant's lines, it has a perfect right so to do, but avers that defendant is not following the vein upon its dip, but upon its strike. It is conceded by counsel that the vein in controversy is situated on or is a part of the great mineral ledge or vein beginning with the Sullivan, in Milo gulch, and extending to the Eureka, in Government gulch, a distance of about two miles. Both sides appeal to the same authorities, the same cases, and, one may almost say, to the same facts. Maps have been filed and witnesses have been examined touching every phase of the controversy; but, after a careful consideration of the entire matter, partly from the evidence and partly from the maps, acknowledged by both parties to be correct, I find myself unable to assent to nearly all the conclusions presented in the opinion just rendered, and believe it to be my duty to dissent from the same at some length.

If the general strike or trend of the vein is in an easterly and westerly direction, it must necessarily cross the side lines of the Sierra Nevada on its strike; and, if it so crosses the Sierra Nevada on its strike, it must pass through the Apex property on its strike, and its true dip would, under this showing, be to the south. If, on the other hand, the general strike or trend of the vein is north and south, and admitting that it crosses the Sierra Nevada in a north-westerly and south-easterly direction, then, as a matter of course

and as a matter of fact, its true dip could not be either to the north or south. It must be either to the east or west, or to the south-west or north-east, depending upon the question as to whether there is considerable variation in the vein from a direct course of north and south. It is not necessary for me to deal extensively with the authorities cited, for the reason that no serious legal propositions are in dispute. As before stated, it is almost entirely a question of fact; certain legal propositions being, perhaps, more or less involved.

I cannot assent to the conclusion that it is the duty of the defendant to show that plaintiff is not the owner of the surface ground embraced within the lines of the Rambler. I believe the correct determination of this phase of the question to be as follows: Plaintiff must show, by a preponderance of evidence, that he is entitled to the writ asked for by reason of his ownership of the ground, and must also prove his ownership of the ground by a preponderance of testimony. Having established his title to the Rambler, (sufficiently, at least, for the purposes of this action,) and thus becoming the legal owner, *prima facie*, of all ore found within its boundary lines, it would devolve upon defendant to show by a preponderance of testimony that it was authorized to cross its own side line into the ground of the Rambler. I am therefore disposed to consider the right of the defendant to enter the ground of the Rambler solely from two stand-points: *First*, and principally, as to whether defendant is following the Sierra Nevada vein upon its dip; and, *second*, the validity of the Rambler location,—the latter question being hereinafter discussed, from the stand-point raised by counsel for plaintiff, upon what must be termed a theory of the case, but a theory that has been implicitly accepted and relied upon in the decision just rendered.

The court in this instance would not, of course, try the title to the surface ground of either of the properties involved. It would devolve upon the plaintiff, however, to show, *prima facie*, a valid location; and this must depend, first, upon a valid discovery, otherwise plaintiff would simply appear on behalf of the United States to enjoin the defendant from mining in ground that did not belong to it, or from unlawfully following its vein beyond its side lines. Such a position is not assumed by plaintiff, but reliance is placed upon the *prima facie* discovery.

Plaintiff seems to rely upon two theories, as nearly, at least, as I am able to ascertain his exact claim. One is that his location is based upon the actual discovery of the Sierra Nevada vein, as the term "vein" is commonly understood, within the lines of the Apex; and that the Sierra Nevada location was made upon this same vein as it extended in an easterly and westerly direction through the ground covered by the Sierra Nevada location. It is also proposed to place this case within the rule laid down in Eureka Con.

Min. Co. v. Richmond Min. Co., 4 Sawy. 302, reprinted in 9 Morr. Mines, 578. At least, whether plaintiff relies upon the Eureka v. Richmond decision or not, the opinion presented is based upon that theory. This may be due to the fact that counsel for plaintiff, during his very forcible presentation of the case, always referred to the vein as a zone or belt. In the opinion rendered, it seems to be treated as a zone or belt. The conclusion must be reached, not from the evidence submitted in the case, but from the declarations of counsel. This theory is that what has heretofore been called a "vein," extending from the Sullivan location in Milo gulch to the Eureka location in Government gulch, is a mineralized belt or zone, and that a location made on this belt is a location within the law; and that, therefore, a location within the boundary lines of the Apex was valid, whether any ore body located in or extending through this belt came to the surface at that point or not. In Eureka Con. Min. Co. v. Richmond Min. Co., Justice FIELD, speaking for the court, defines the meaning of the word "lode," as used in the act of congress, as follows: "But to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock, lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term, as used in the acts of congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by counsel, all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes."

Having defined a "lode," within the meaning of the act of congress, to be, under some circumstances, a zone or belt of mineral, Justice FIELD discusses the vein in controversy in the Eureka-Richmond Case, and says: "We find that it is contained within clearly defined limits, and that it bears unmistakable marks of originating, in all its parts, under the influence of the same creative forces. It is bounded on the south side for its whole length, at least so far as explorations have been made, by a wall of quartzite of several hundred feet in thickness, and on its north side, for a like extent, by a belt of clay or shale ranging in thickness from less than an inch to seventy or eighty feet. At the east end of the zone, in the Jackson mine, the quartzite and shale approach so closely as to be separated by a bare seam less than an inch in width. From that point they diverge until, on the surface in the Eureka mine, they are about five hundred feet apart; and on the surface in the Richmond mine, about eight hundred feet. The quartzite had a gen-

eral dip to the north at an angle of about 45 degrees, subject to some local variation. As the course changes, the clay or shale is more perpendicular, having a dip at an angle of about eighty degrees. At some depth under the surface these two boundaries of the limestone, descending at their respective angles, may come together. In some of the levels worked, they are now only from two to three hundred feet apart."

Thus, in the Eureka Case, we have a belt of mineralized limestone, lying between formations of quartzite and shale. The ore is found in pockets or bodies, regardless of any uniformity in course, except as to the general course of the entire belt. Justice FIELD also defines a "lead" to be a vein or seam or strata indicating mineral, and, followed by the miner, takes him to the body of ore he seeks. Of course, it is understood that this vein or seam or strata must be in place; and by being "in place" it means that the mineralized substance, whatever it may be, is presented in a separate and distinct form from that which lies upon either side of it; although, perhaps, it is not necessary for the discovery that both walls be perfectly defined, and the vein, as a fissure vein, be perfectly demonstrated.

Plaintiff does not pretend that he has a vein of pay ore from the surface in the Apex ground to the point where the workings of the Apex come in conflict with those of the Sierra Nevada. He claims a seam of mineralized talc, iron, and quartzite, considered by him as an indication of ore, and that, as a miner, he believed would lead him to ore. Starting on this seam at the surface, he followed it until he reached the workings of the Sierra Nevada, and he therefore claims that the finding of ore justified his theory in following the indications mentioned. To justify the location of material of this sort in the mind of a practical miner, and in the absence of knowledge on his part that he would find a body of ore by sinking the shaft, whether he had indications of mineral or not, it is doubtful if he would expend very much money in following such an indication, unless it lay between well-defined walls, and was, in fact, a fissure vein. Then he would spend a large or a small sum of money, depending upon how strong the indications were, and whether or not he might be an adventuresome or a very conservative miner. In this case the plaintiff was bound to discover the ore, because the defendant was already taking it from the ground beneath his shaft; and, as a matter of course, it was only a question of the depth of the shaft until the ore body would be reached. I am of the opinion that this position is not consistent with the other claim made by plaintiff,—that the Sierra Nevada is a well and clearly defined ledge, extending in an easterly and westerly direction, crossing the Sierra Nevada, and entering the ground of the Rambler upon the strike of the vein, instead of upon its dip. It is hardly possible that the two conditions

can exist. If this entire quartzite belt is similar to the belt or zone described by Justice FIELD in *Eureka Con. Min. Co. v. Richmond Min. Co.*, then the Sierra Nevada can be but a pocket or chute of ore in that belt. Messrs. Burke, Clement, and Porter agree that, in examining the under-ground workings of the Sierra Nevada, whatever its course or dip may be, they found a perfect vein, with perfect walls, and in the judgment of each it was a complete and genuine fissure.

Again, the quartzite belt is not sufficiently defined by any of the witnesses to authorize a court in sending the question to a jury on that issue. There must be something more to this belt to make it a mineralized zone, within Justice FIELD's decision, than iron-stained quartzite. By the witnesses referred to, the Sierra Nevada vein is described as a very strong and powerful one. That it should stain the adjoining rock for a greater or less distance along its entire course is not at all remarkable, and would, perhaps, be expected. In defining the character of this fissure, the witnesses describe it as being incased within walls of quartzite, with a gangue between the ore body and the walls. The only thing to indicate that it is a part of a belt is that both walls are of quartzite, and this only demonstrates that it is not a contact vein.

To return to the theory that it is a belt or zone of mineral, composed of many veins and deposits, it must be borne in mind that no witness has defined it. In the Eureka Case, the mineral belt, which was held to be a zone, was confined within well-defined walls of quartzite and shale; and the only thing remarkable about the vein in that case was its extraordinary width and narrowness at different places. There is no evidence whatever as to the well-defined limits, or as to the lead in question being incased between walls of any character. Proceeding on this theory, the plaintiff followed a seam composed of talc, iron, and mineralized quartzite from the surface in the Apex to the point where he came in conflict with the workings of the Sierra Nevada, within the Rambler lines. Plaintiff had the lead, but where did it lead him to? It led him to a body of ore. To what body of ore? To the Sierra Nevada, which had been followed from the surface, where the outcropping was plain and undisputed, to the point where plaintiff's workings came in contact with the ore. The defendant, to be sure, had crossed the side line of its claim; and this brings us to the second phase of the case. In crossing the side line, was it following the vein upon its dip, or upon its strike? And thus the two questions of fact in this very important case are before us.

In passing from the belt or zone theory of the plaintiff, (if it may be said that the plaintiff has any such theory,) which is, that a location anywhere on the belt, outside the lines of any other valid claim, is good, I can state that, if plaintiff had established a case sufficient to bring the issue at bar within the

rule laid down in *Eureka Con. Min. Co. v. Richmond Min. Co.*, this investigation would assume more difficult proportions. Within the zone or belt theory, a location was made upon the Apex and Rambler. The examination of the witnesses shows that the discovery amounted to iron, manganese, and iron-stained quartzite. So far as any evidence has been introduced on the subject, such is the general character of the entire mountain. Again, I say, whether this mountain is in itself a vein, lying between distinct formations and containing different veins and pockets, as in the *Eureka-Richmond Case*, there is not sufficient evidence to show; and, unless it does come within that rule, it is clear that no valid discovery was made on these claims lying to the west of the Nevada, unless the course of the vein is east and west, and not north-west and south-east. Under the theory adopted in the opinion just submitted, the location of the Apex is valid, because, if I correctly understand it, it is higher on the surface of the mountain than the location in the *Sierra Nevada*. Carrying out this theory, if the entire mountain is a vein, the one who finally locates on the very summit has the apex of the vein. Three or four locations of this character, if such reasoning be correct, will secure all the ore in the *Coeur d'Alene*.

Defendant contends that the *Sierra Nevada* vein, as located, constitutes a vein, within the meaning of the law; not as contemplated in the *Eureka-Richmond Case*, but that it is a true and complete fissure, and in no sense a part or portion of such a belt as is defined in said case. Each and every witness testified that this vein was perfect in every particular. Its perfection and completeness were emphasized by witnesses supposed to be interested with, or in sympathy with, both plaintiff and defendant; and, as already stated, on all of the evidence presented, I am forced to the same conclusion, and think no court justified in accepting the zone or belt theory for any purpose whatever. What the future may develop I am not here to decide. Plaintiff and defendant agree that the *Nevada* vein, whether it be a mineralized zone or belt, or a distinct fissure vein, as commonly understood, is a part of the great vein of mineral extending from the *Sullivan* to the *Eureka*, a distance of about two miles. Both parties admit that the true dip of a vein is at right angles to its true strike; and, as a matter of course, the converse must be true. If, therefore, the dip can be obtained, there is no difficulty in settling the true strike or course of the vein; and, on the other hand, if we can obtain the true course of the vein, it would settle the true dip. The parties to this action agree up to this point.

Plaintiff, however, maintains that the true dip can and should be ascertained from the workings within the *Sierra Nevada*. The defendant relies upon what the workings in the mine demonstrate, as well as upon the

well-known course of the vein. I am of the opinion that the true dip of this vein may be more correctly ascertained by examining the map showing the general course of the vein along its entire known length, in connection with the workings, than by attempting to settle it from the dip in the comparatively few feet exposed in the workings of the *Sierra Nevada*.

It is claimed by plaintiff that the general course is easterly and westerly; and by the defendant, that it is north-west and south-east. Plaintiff urges, in vindication of his theory, that, while the vein dips to the south-west, it dips to the south more than to the south-west, and that this fact is demonstrated by the entire workings in the *Nevada*. Defendant admits that, at the place indicated, the dip is more to the south than to the south-west; but claims that, inasmuch as the course of the vein is in a north-westerly and a south-easterly direction, the dip to the south is but a wave in the vein, for the reason that it is impossible for a vein running north-westerly and south-easterly to dip to the south, because the dip, as both admit, must be at right angles to the true course. Mr. Clement testified that the course of the vein through the *Nevada* was north and south, by 40 deg. west. Mr. Gibbons testified that the vein crosses the west side line of the *Sierra Nevada* at right angles. If this be true, the position taken by plaintiff is correct. Without going into a consideration of the evidence upon this point, I must conclude, from the croppings, as they appear, without dispute, along the surface of the *Sierra Nevada* claim; from the fact that on a line drawn from the *Sullivan* to the *Eureka* the general course or trend of this vein would be north-west and south-east; from the fact that it dips to the south-west with as much uniformity as to the south,—that it cannot cross the west line of the *Sierra Nevada* at right angles, and that its true dip would not be to the south, notwithstanding it may thus appear from the tunnels now run upon the foot wall within the *Nevada* claim.

Conceding that the true course of this vein is north-west and south-east, the true dip, at right angles with that course, would be south-west; which would certainly be parallel with the *Nevada* end lines, making said end lines practically at right angles with the true course of the vein, and the side lines substantially parallel therewith. This conclusion as to the dip and strike of the vein is based upon taking into consideration the entire course of the vein between the points indicated, the statements of witnesses, and the admissions of counsel. I do not believe the true dip of this vein can be ascertained from the underground workings in any one mine on its course, at the depth as yet attained by any of these properties. No doubt the entire vein runs in waves, as it crosses gulches and climbs mountains, until it straightens up under the mountains, or passes beyond the effect of surface disturbances.

My conclusions are: (1) If the vein in question does not come within the rule laid down in the Eureka-Richmond Case, the Rambler location is void. There is no proof whatever that the mineralized belt, or portion of the mountain upon which the Rambler is located, is incased within walls; or, in other words, that it constitutes a lead, lode, or vein, with the meaning of the rule laid down in the Eureka-Richmond Case. Indeed, the showing as to the completeness of the Sierra Nevada vein is overwhelming; and upon that question, as the evidence now stands, it would be impossible to send the issue to a jury. (2) The true course of the vein being, in my judgment, north-west and south-east, it is impossible that its true dip could be a little east of south; and, as it is conceded that the vein crosses the south end line of the Nevada, it is impossible that it should cross the west side line at right angles. Under the showing made, the true strike must be practically at right angles with the end lines of the Nevada. I have dissented at considerable length, because I deem the conclusions reached so far from the merits involved in the issue at bar as to be dangerous to the property interests of the community, in the absence of a demonstration of the theory set forth and adopted in the opinion just rendered.

(9 Mont. 452)

O'DONNELL v. GLENN *et al.*

(Supreme Court of Montana. May 2, 1890.)

LOCATION OF MINES—COMMON ERROR—PROVINCE OF COURT AND JURY.

1. The fact that, during a period of two years, 83 per cent. of the mining locators in only one of the counties of the territory disregarded both laws of congress and of the territory, by omitting to state the date of the location of the mine in the verification of the location notice, is not such a common error as will justify the application of the maxim, *communis error facit jus*, to one of these defective notices, especially where there is nothing to show that any considerable number of persons have relied on the alleged common error, or that any valuable property rights are based thereon.

2. Whether or not the alleged common error existed, as well as its effect, are questions to be determined by the court, and not the jury.

Appeal from district court, Silver Bow county; STEPHEN DE WOLFE, Judge.

This action is the ordinary one, between claimants of quartz mining ground, brought to determine the right of possession, and the right to proceed in the United States land-office to obtain a patent to the premises. The plaintiff founds his rights upon a location of a claim called the "Flapjack;" defendants, upon their Argonaut claim. The respective locations are in geographical conflict. The validity of the Argonaut location notice was contested upon the trial. The notice and verification thereto is as follows:

"Notice is hereby given that the undersigned, having complied with the requirements of chapter 6, tit. 32, of the Revised Statutes of the United States, and the local laws, rules, and regulations and customs of

miners, have located 1,500 linear feet on the Argonaut lode, (— acres plain mining ground,) situated in Summit Valley mining district, Deer Lodge county, territory of Montana, and being more particularly described as follows, to-wit: Beginning at a stake, south-east corner, and running west 1,500 feet; thence north 600 feet; thence east 1,500 feet; thence south 600 feet, to place of beginning. Said lode is bounded on the south by the Silversmith, and south-west by the Goldsmith, and on the east by what is known as the 'Rooney Lode.' Above lode runs 900 feet easterly, and 600 feet westerly, from discovery shaft, and 300 feet on each side. Located Dec'r 22, 1880. Attest: JOHN H. GLENN. JOHN HALL. JOHN B. CAMERON."

"Territory of Montana, county of Deer Lodge—ss.: J. B. Cameron, first being duly sworn according to law, deposes and says that we are citizens of the United States, and are the locators of the following described mining premises; that the description therein contained, as beginning at a stake at the south-east corner, running west 1,500 feet; thence north 600 feet; thence east 1,500 feet; thence south 600 feet, to the place of beginning,—is true, and that the locators, whose names are subscribed thereto, are *bona fide* residents of Montana territory. JOHN B. CAMERON. Subscribed and sworn to before me this 24th day of December, 1880. A. H. BARRET, Notary Public. Filed for record Dec'r 27th, 1880, at 11½ o'clock A. M. JAS. S. McANDREWS, County Recorder."

This case was before this court at the July term, 1888, and the location notice above recited was then held to be fatally defective by reason of the verification omitting to state the date of the location. 8 Mont. 248, 19 Pac. Rep. 302. On the new trial granted by this court, from which trial this appeal is now prosecuted, the district court admitted this notice in evidence upon testimony and a theory that were not before this court at the hearing, July, 1888. Defendants introduced testimony for the purpose of showing that large numbers of mining location notices with verifications of the sort annexed to the above were used and recorded in the county about the time this notice was filed, and urged that the fault of the verification was common among the people at that period, and that large property interests were involved in the construction of the verification, and invoked the maxim, *communis error facit jus*. The evidence introduced for this purpose from the records of Deer Lodge county, in which the location was made, was as follows: At about the time of the filing of the location notice in question, it seems that three forms of verification were in use in Deer Lodge county. For the sake of definition, counsel call them the "Old Form," the "Correct Form," and the "Glenn Form;" the latter being the form used in the notice above recited. In the year 1878, 75 per cent. of the notices recorded in the county were in

the correct form, with 25 per cent. divided between the old form and the Glenn; the latter being, therefore, some fraction of 25 per cent. not stated. In February, 1879, 46 out of a total of 50 were in the old and Glenn forms. In March there were 25 Glenns against 35 of the two others. In April, one-half were Glenn and old forms. In the two years 1879 and 1880 there were 914 locations, of which 283 were Glenn, 97 old, and 534 correct form. The Glenn and old together form 42 per cent. of the whole. The Glenn alone is 31 per cent. of the whole. Leaving out of consideration the old form, and computing the Glenn and correct form, the Glenn is 33 per cent. of the total. From and after March, 1880, the use of the Glenn form steadily and rapidly decreased. In March the Glenn form was 27 out of a total of 60; in April, 22 out of 100; May, 11 out of 65; June, 7 out of 40; July, 2 out of 30; August, 1 out of 45; September, 2 out of 35; October, 2 out of 25; November, none. December 22d, we meet the notice in controversy, and with that the use of the form disappears from the records. For six months preceding the date of the record of the Argonaut location the objectionable form was used 14 times in 190 location notices. This analysis is taken from the brief of appellant, and was admitted by respondent to be correct. The district court admitted the evidence, and upon the subject gave the following instruction: "The burden of proof is on the defendants to show that the Argonaut was a valid location, and that in making the same they complied with all that the law requires to make a valid location, as defined to you above, [referring to preceding instructions,] and that such location included within its boundaries the ground in controversy. If the jury believe from the evidence that the defendants, or their predecessors in interest, prior to the location made by plaintiff, located the premises in controversy as the Argonaut claim, and in the affidavit of the location failed to state the date of said location, and to verify the same, but said Argonaut claim was in all other respects located and recorded as required by law, the court instructs you that the failure or omission to give the date of the location in the verification did not render the location invalid, the error or omission having been one of frequent or common occurrence at the time; and if the jury believe that the location of the Argonaut was in all other respects regular, and such as the law requires, their verdict should be for the defendants for the possession of the premises in controversy." The verdict and judgment were for the defendants. Plaintiff appeals from the judgment. Among his exceptions saved is his objection to the admission of the above testimony as to the alleged common error, and the construction of the court, in the foregoing instruction, that the alleged error was a common one at the time, and, as such common error, made the location notice of the Argonaut good, for the purposes of the action,

notwithstanding that the location notice was, intrinsically, fatally defective, as held in 8 Mont. 248, 19 Pac. Rep. 302, cited. Respondent still insists, upon this hearing, that the location notice and verification were good, notwithstanding the decision of this court, that they may preserve their point in case an appeal should lie from the present decision of this court.

William Scallon, for appellant. *John F. Forbis*, for respondent.

DE WITT, J., (*after stating the facts as above.*) The sufficiency of the location notice of the Argonaut claim is no longer an open question in this case. It was decided to be invalid on the former appeal. 8 Mont. 248, 19 Pac. Rep. 302. That decision is now the law of this case. The other consideration is whether the common error sought to be proved, and relied upon by defendants, was in fact a common error, and whether, as such, it was of a nature to make good, for the purposes of the action, the defective location notice.

The district court held that both the existence and effect of a common error of this sort is a question for the court, and not the jury. The matter is one of mixed law and fact. In the application of the maxim, *communis error facit jus*, the inquiry is whether the law is made. If the fact of the existence of a common error is to be submitted to the jury, and the jury finds its existence, then the court has no province but to complete the maxim, and say, "*facit jus*." But that is the very question for a court; that is, to say what is the law. The court must say what the law has been made, whether by a common error or by a legislature. We are therefore of opinion that the lower court was correct in holding that both the existence and effect of the alleged common error was for court, and not for the jury. To hold otherwise would be to make the jury the judges of the law. See *McKeen v. Delancy's Lessee*, 5 Cranch, 22, and cases cited below.

We will now endeavor to determine whether the court erred in its decision that such a common error existed as should be held to make the law that the controverted location notice was good for the purposes of the case on trial. The application of the maxim under consideration, like that of all abstract generalizations, is attended with difficulty and danger. A review of the authorities leads us to the conclusion that each case of the invocation of the rule must stand largely upon its own facts. In *Coke upon Littleton*, we find that the learned author often prefaces the announcement of a legal principle with the words: "It is commonly said." By these words, we understand, is meant: "It is commonly the legal opinion." To the expression cited, *Littleton* adds: "That is, it is the common opinion, and *communis opinio* is of good authority in law. *A communi observantia non est recedendum*,"—which we may read: "There must not be a departure from a com-

mon or general observation or practice." The annotator to Coke upon Littleton adds at this point: "Other rules immediately connected with this are, that *communis error facit jus*, and *res judicata pro veritate habetur*, and also that *minime mutanda sunt quæ certam interpretationem habuerunt*." 186a. The two latter may, perhaps, be well rendered, "An adjudicated matter shall be deemed to be correct," and "those matters shall be least changed which have attained a certain interpretation." The language of these maxims carries the idea of an observance, an interpretation, a construction, and to some extent a judicial one at that, as evidenced by the words "*observantia*," "*res judicata*," and "*interpretationem*." Thus we find our maxim under purview, at an early day, in company with language tending to the view that the common error that makes the law is an error in the observing, the construing, the interpreting law, and not an error in totally disregarding, and in practice repealing, a positive statute; and, furthermore, that the error is general, and not confined to a portion of one class of the inhabitants of one geographical or political division of the jurisdiction, as was the case with the error being considered, which was confined to 33 per cent. of the prospectors of the county of Deer Lodge, in the territory of Montana.

In the year 1764 the supreme court of Pennsylvania say: "These deeds, and this mode of examination of *femes covert* on conveying their estates, have generally prevailed in this province from its settlement, and undergone from time to time the notice of the courts of justice. It would be very mischievous now to overturn them. The maxim, *communis error facit jus*, cannot operate more properly than in this case." *Davey v. Turner*, 1 Dall. 14. Here a general practice had received tacit judicial approval for years. The same court in 1768 apply the maxim to a "constant usage;" the individual instance of which having occurred 41 years prior to the controversy before the court. *Lloyd v. Taylor*, Id. 17. The supreme court of the United States in 1809 apply and discuss the doctrine. Says Mr. Chief Justice MARSHALL: "The first question which presents itself in this case is, was this deed properly proved? Were this act of 1715 now for the first time to be construed, the opinion of this court would certainly be that the deed was not regularly proved. A justice of the supreme court would not be deemed a justice of the county, and the decision would be that the deed was not properly proved, and therefore not legally recorded. But, in construing the statutes of a state on which land titles depend, infinite mischief would ensue should this court observe a different rule from that which has been long established in the state; and, in this case, the court cannot doubt that the courts of Pennsylvania consider a justice of the supreme court as within the description of the act. It is of some weight that this deed was acknowledged by the chief justice,

who certainly must have been acquainted with the construction given to the act, and that the acknowledgment was taken before another judge of the supreme court. It is also recollected that the gentlemen of the bar * * * spoke positively as to the universal understanding of the state on this point, and that those who controverted the usage on other points did not controvert it on this. But what is decisive with the court is that the judge who presides in the circuit court for the district of Pennsylvania reports to us that this construction was universally received." *McKeen v. Delancy's Lessee*, 5 Cranch, 22. In this case there was a "universal understanding in the state," and the learned chief justice refers to the judicial and professional construction in the state. In *McFerran v. Powers*, 1 Serg. & R. 101, the same question was before the supreme court of the state of Pennsylvania, and was decided upon the authority of the case last above cited; and here, again, we find the idea of a universal and judicial or professional construction. In the supreme court of the United States, in 1803, in the case of *Stuart v. Laird*, 1 Cranch, 299, the court, PATERSON, J., says: "To this objection, which is of recent date, it is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course the question is at rest, and ought not now to be disturbed." This case is another instance of the universal and judicial character of the error. See, also, *Green v. Neal's Lessee*, 6 Pet. 291, which reviews many of the cases. The supreme court of Massachusetts say in *Rogers v. Goodwin*, 2 Mass. 475: "Of these statutes a practical construction early and generally obtained,—that in the power to dispose of lands was included a power to sell and convey the common lands. Large and valuable estates are held in various parts of the commonwealth, the titles to which depend on this construction. Were the court now to decide that this construction is not to be supported, very great mischief would follow. * * * We cannot shake a principle which in practice has so long and so extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is that long and continued usage furnishes a contemporaneous construction which must prevail over the mere technical import of the words."

We cite Mr. Justice BLACKBURN as follows in *Reg. v. Justices of Sussex*, 2 Best & S. 664: "I think, also, that there are cases in which a mistaken notion of the law has, no matter why, become so generally accepted, and been so acted upon, as to render it prob-

able that business has been regulated, and the position of parties altered, in consequence; and in such cases we may hold that the general acceptance of the mistake has made that law which was originally error. *Communis error facit jus*. But, then, I think that, before we act upon this principle, we ought to see it clearly made out that the error has been commonly accepted, and that the nature of the case is such that parties are likely to have acted upon the mistake, and so altered their rights and position." Lord BROUGHAM, Ch., says, in *Devaynes v. Noble*, 2 Russ. & M. 495: "If it be true that even a prevailing error—what has been called a common or universal error—may be said to make the law, this at least may be allowed to be a sound foundation of the doctrine I am referring to, namely, that, unless a great and manifest deviation from principle shall have been committed, it may create much further mischief to reverse an individual case by way of correcting a slight error, if that error has been acted upon for a long series of years, than to leave it as it stands; more especially if the opinion of lawyers and the decisions of judges have been ruled by it, and if, upon the analogies of that case, the same principle has been recognized and adopted in other cases connected with and relating to it." The learned chancellor above calls a common error a universal error, and speaks of the opinions of lawyers and the decisions of judges being ruled by it. In *Re Will of Warfield*, 22 Cal. 71, the court says: "Courts feel themselves constrained to uphold, where it is possible, contemporaneous interpretation of statutes, under which interpretation rights of property have for many years been acquired."

In the case of *Penaud v. Jones*, 1 Cal. 488, the court cites with approval a Spanish authority, *Esriche's Derecho Espanol*, as follows: "Legitimate custom acquires the force of law, not only when there is no law to the contrary, but also when its effect is to abrogate any former law which may be opposed to it, as well as to explain that which is doubtful. Hence it is said that there may be a custom without law, in opposition to law, and according to law." Counsel for respondent has urged this opinion in his argument. We hesitate to adopt the views therein contained, however, to the extent that a common error can have the effect to abrogate a positive statute, except under most extraordinary circumstances, of which we now have no knowledge. The California decision was made in the earliest history of the jurisprudence of that state, when it had just fallen heir to much that was Spanish, and, along with the rest, perhaps some customs that were not so valuable as other portions of the inheritance. We have reviewed some of the leading cases in which the maxim under consideration has been discussed and applied, with the view of discovering what the current opinion would be as to the facts in the case at bar. See,

also, the cases cited in the foregoing authorities, and, also, *Broom, Leg. Max.* *141; *Corn Exch. Bank v. Nassau Bank*, 91 N. Y. 74; *Hazard v. Martin*, 2 Vt. 77.

It is not possible to deduce from the authorities inflexible rules governing the practical scope of the maxim, *communis error facit jus*. The decisions tend, however, towards a few general principles, each of which principles has at some time been invoked in some case, but not all of them, perhaps, in the same case. In every case, we find some of them applied, while in some cases some of them may be disregarded. We cannot lay down rules, any one of which would be decisive of every case. But we state the following principles, with the suggestion that, if an individual case fell within the purview of all of them, there would be no difficulty with the maxim, and that, in proportion as the facts of a case depart from the principles announced, the difficulty of application is increased. Every case depends upon its own facts. The rules, as we conceive them to be,—rules flexible in their nature, and subject to the qualifications above suggested,—are: (1) The common error must be one having some judicial or professional recognition, approved or tolerated by decisions of judges or opinions of lawyers, or, to put the rule less positively, such judicial or professional recognition adds to the law-making force of the common error. We further qualify the rule in this, that common error may possibly have the law-making power, when supported by lay opinion only, provided that other rules may be forcibly applied. (2) Courts will not lightly or inconsiderately allow a common error to subvert a rule of law, or abrogate a positive statute. (3) The error must be a universal or very general one. The nearer universal, the more forcibly will it address itself, as a law-maker, to the approval of courts. (4) The acquiescence in the common error, has involved, or there depends upon it, large property interests. (5) The error must be one that people have relied and acted upon, and have fixed their rights and positions thereby. (6) The longer the error has existed, the greater force it has. (7) The error must be clearly proved. (8) The error must be one in the observing, construing, or interpreting law, and not an error in directly disobeying and abrogating that which is law.

We have called the above suggestions "rules," but the word "rules" must be received with the limitations above laid down. If the facts in the case at bar met the requirements of all these rules, or if they fell fairly within them, we should affirm the judgment below. But let us examine the facts in the order in which we have stated the rules: (1) The alleged common error in the location notice in question never received approval or toleration by judicial decision or legal opinion. The form of verification was adopted simply by a few prospectors in a part of the territory, without any assurance from any

source that it was correct. (2) The United States and territorial laws as to the requirements of a location notice, as construed in 8 Mont. 248, 19 Pac. Rep. 302, are peremptory. We hesitate to admit that 33 per cent. of the mining locators of one county of a vast territory can by their own unauthorized practice abrogate, repeal, and nullify a positive law. (3) So far from the error being general or universal among the people, it was limited to a very small number. (4) It is not shown that large property interests depend upon the upholding of this location notice. Only 283 of these notices are found, and these all in 2 years. This was 10 years ago. In the history of mining prospecting, 10 years will see the valuable mines patented, and the others abandoned or relocated. They are, in either instance, beyond the necessity of relying upon the defective location notice. (5) It does not appear that any considerable number of persons have relied upon, or sought to fix their rights upon, the alleged common error. (6) The error existed but a short time. It attained its height months before the location of defendants. From March, 1880, it rapidly waned into desuetude, and disappeared with the defendants' location, December 22. (7) The error was clearly enough proved so far as it went. (8) The error did not consist in any effort to observe, construe, or interpret the law of congress or the territory. It was rather a direct disobedience of those laws. To construe or interpret a statute is to read it for the purpose of ascertaining its meaning and effect. He cannot be said to construe or interpret who clearly disregards the law. That is not construing. It is refusing to do so. It is defying the law.

We arrive at the opinion that the facts in the case at bar are almost wholly in conflict with all the principles governing the application of *communis error facit jus*. The district court erred in instruction No. 3, recited above, upon the subject of common error. The action of the court in this matter of the alleged common error was objected to, and exception saved in other manner as well as in the instruction referred to. The judgment is reversed, and the case remanded for a new trial.

BLAKE, C. J., and HARWOOD, J., concur.

(9 Mont. 468)

BLUE BIRD MIN. CO., Limited, v. MURRAY et al.

(Supreme Court of Montana. April 14, 1890.)

MINING CLAIM—INJUNCTION—APPEAL.

1. Plaintiff, under Rev. St. U. S. § 2322, which gives the owner of a vein or lode, whose apex lies upon the surface of his own location, the right to follow it within the lands of others, was mining upon lands owned by defendants, and obtained an injunction, pending litigation, to prevent them from interfering with it. On motion of defendants, the injunction was modified so as to allow them to enter and inspect, within the compass of their own lands, the tunnels and galleries of plaintiff, and to prosecute certain development work therein, in order to obtain a knowledge of the char-

acter and identity of the veins, for use at the trial. Held that, notwithstanding the statute, the plaintiff was *prima facie* a trespasser, and there was no abuse of discretion in making the modification.

2. By Code Civil Proc. Mont. § 421, "an appeal may be taken * * * to grant or dissolve an injunction," and by section 444, "from an order granting or dissolving an injunction." Held, an appeal was properly taken from the above order, which modified, or partially dissolved, an injunction.

3. Appeals from injunctions are regularly heard upon the pleadings and affidavits, and therefore no bill of exceptions is necessary when the papers are before the reviewing court.

Appeal from district court, Silver Bow county; JOHN J. MCHATTON, Judge.

John F. Forbis and M. Kirkpatrick, for appellant. William Scallon, for respondents.

BLAKE, C. J. The Blue Bird Mining Company, Limited, is a corporation organized under the laws of the territory of Montana, and owns the Blue Bird lode mining claim, which is situated in the county of Silver Bow. Murray et al. own or possess, as lessees, the Darling, Little Darling, and Lena K. lode mining claims, which are south of, and, viewed as a whole, adjoin, the property of the company. It is conceded that the company, asserting the right to follow its vein in the dip and beyond the side lines of the Blue Bird lode mining claim as located, has been working at places which are within the limits of the claims of Murray et al. It is maintained by Murray et al. that this under-ground development is not upon the property of the company, and the parties have resorted to the courts for legal and equitable relief. At the commencement of the action of the company against Murray et al., the court granted an injunction enjoining Murray et al. from working upon the Blue Bird lode mining claim, and afterwards, upon a hearing, ordered that the same be continued in force pending the litigation. A motion was then filed by Murray et al., and supported by affidavits, applying for permission to prosecute certain work, and, after a hearing, an order was made, March 29, 1890, which is before us for review. The application alleges that "it is necessary to the preparation of this case for trial, and to the ascertainment of the exact rights of the parties, and to the continuity and identity of the veins in question in this cause, or the absence thereof, to prosecute development work, and particularly work hereinafter mentioned; and * * * an injunction has heretofore been issued in this case against the defendants, and * * * the plaintiff has refused its consent to the prosecution of the work hereinafter mentioned." Accurate descriptions are given of the cross-cuts, shafts, winzes, logging, and levels, which are to be the subjects of further labor, and the object thereof is distinctly pointed out.

While the general nature of this development has been stated in the application, some definite specifications are cited to show the reasons for this order: "Fourth. To run east on the level known as the 'two-hundred foot

level' of the Little Darling, to the east end line of the claim, through the openings made by the Blue Bird Company, and particularly the floor or drift known as the 'Foley Drift,' thus named after the man who last worked there for the Blue Bird Company. [The intention is here to extend said drift beyond the point where the Blue Bird Company left off, in order to determine whether or not any vein shows beyond said point.] * * * *Sixth.* To open the logging which now closes up the connection made by the Blue Bird Company between levels Nos. 4 and 5, and which connection is made from the winze last mentioned, and an incline from the bottom thereof, and a raise from the five-hundred foot level. [This being a connection or cross-cut recently made by the Blue Bird Company, and immediately logged up by it, so that these defendants had no opportunity to examine the same; and the importance of which is shown in the affidavits filed in support thereof.]"

The conditions which are set forth in the order appealed from should be considered: "Provided, however, that all of the above-described work shall be done by the said defendants at their own cost; and all dirt, *débris*, and ores shall be raised through their own shaft, except that, if the plaintiff so desires, it may itself take, raise, and hold, until the final determination of this suit, any ores which may be extracted from the vein shown on No. 4 level, or from any vein which may be encountered north thereof, or from the winze on No. 4 level; and except, also, that, if plaintiff desires it, the opening of the logging in the connection between levels No. 4 and 5 may be done by plaintiff, or under plaintiff's supervision: provided, full liberty be allowed defendants to examine the same; and provided, further, that in the examination of said cross-cut connection between levels 4 and 5, and the cross-cut from No. 4 south, nothing more be done than is necessary for the examination thereof, and the ascertainment of the nature of the ground, or the formation, through which the same are run; that, if these matters can be determined without the removal or opening of any of the timbering, or by digging in the bottom thereof, then it shall be done accordingly. And it is further ordered that, for the purpose of doing the foregoing work and inspection, the defendants, and all persons employed by them, have a right of way through any openings, levels, and cross-cuts made by the Blue Bird Company within the lines of the Little Darling claim. * * * And provided, also, that the work, and particularly the inspection, shall be done in such a manner as not to endanger any of the present workings or openings; and that said connection between levels 4 and 5, and the cross-cut south from the Blue Bird shaft, shall be left or replaced in the same condition that the same now are or may be at the time immediately prior to the inspection; and it is further provided that any and all work done by the defendants by virtue hereof must be done

in good workman-like and mine fashion, and timbered in best mining fashion; and that these defendants, or such thereof as shall cause said work to be done, shall be in no manner relieved from liability for the doing of said work, or the manner in which it is done, by this order, but that the same liability shall attach to them on account of such work as would attach if done without this order, in case the ground or veins in which the same may be done be found or determined to belong to the plaintiff; and it is also further provided that, in order to prevent any collision or interference between cars or other instruments of transportation of the ores or *débris*, that the defendants shall furnish, at their own expense, all necessary signalmen to warn the men employed by either party of the approach of cars, etc.; and the court reserves jurisdiction of the matter of this order for the purpose of seeing that it is carried out according to its spirit, and in proper manner; and provided, further, that nothing in this order contained shall authorize the defendants, or any of them, to go outside of the boundaries of their own claims."

The respondents moved to dismiss this appeal for the following reasons, to-wit: "(1) That this court has no jurisdiction of the appeal or case; (2) That the order sought to be appealed from is not appealable; (3) that no exception was taken, or appears to have been taken, to said order, and that there is no bill of exceptions thereto in the record, and that none was taken or filed, or appears to have been taken or filed." The notice of appeal states that the plaintiff appeals "from the order made and entered in the above-entitled cause, * * * whereby said judge, upon the application of the defendants, modified the injunction granted in this case against the defendants, and permitted defendants to prosecute certain work in the workings of plaintiff, and from the whole and every part of said order."

The Code of Civil Procedure provides that "an appeal may be taken * * * to grant or dissolve an injunction," (section 421,) and "from an order granting or dissolving an injunction," (section 444.) The order of injunction, obtained by the appellant, restrained Murray et al. from working upon the property, which it described as the "Blue Bird lode mining claim." The court, in making the order under examination, modified, and thereby partially dissolved, the original injunction, by authorizing work within certain restrictions to be done. In Hunt v. Steese, 75 Cal. 626, 17 Pac. Rep. 920, the court says: "Motions for injunction are regularly heard upon complaint, answer, and affidavits, and no bill of exceptions is necessary, unless it be to identify the papers used on the hearing. The appeal is heard upon the papers used on the hearing in the court below." These provisions of the Code of Civil Procedure of this state are similar to those of the Code of California, and we have adhered to

the same rule. *Mining Co. v. Weinstein*, 7 Mont. 346, 17 Pac. Rep. 108; *Vaughn v. Dawes*, 7 Mont. 360, 17 Pac. Rep. 114. The necessary papers have been properly certified, and the motion to dismiss the appeal must be overruled. See, also, *Hefflon v. Bowers*, 72 Cal. 270, 13 Pac. Rep. 690. The contention of the appellant is that the court had no authority to make the order; that it is unprecedented, and deprives the Blue Bird Mining Company, Limited, of the possession of its property without due process of law. The counsel for the appellant in their brief say: "The plaintiff is within the limits of the defendants' ground. That is not disputed, but it claims it has a right there; that where it has worked, it has a right to be; and, as a necessary consequence, that the defendants have no right to be." How does this concession affect the relation of the parties? In *Cheesman v. Shreve*, 37 Fed. Rep. 36, Mr. Justice BREWER says: "These defendants are entering beneath the surface, within the side lines of ground patented to complainants, and seeking to mine and take ore therefrom. *Prima facie* they are trespassers. They justify this entrance under authority of the laws of the United States, and especially section 2322 of the Revised Statutes, which give to the owner of a vein, lode, or ledge, the top or apex of which lies within the surface lines of his own location, the right to follow that vein downward, outside of the side lines of his location, and into territory whose surface belongs to another. * * * As the defendants are entering within the side lines of complainant's property, *prima facie* they are trespassers; and where the affidavits, upon an application for a preliminary injunction, are conflicting, the rule is to preserve the possession as against such *prima facie* trespassers by a preliminary injunction, leaving the question of title to the property to be established by a suit at law."

The granting or refusal of an injunction is a matter of discretion in the court below, and this rule was recognized at an early period in the courts of Montana. *Nelson v. O'Neal*, 1 Mont. 284; *Atchison v. Peterson*, Id. 570; *Hicks v. Michael*, 15 Cal. 107; *Hicks v. Compton*, 18 Cal. 206; *De Godey v. Godey*, 39 Cal. 167; *Rogers v. Tennant*, 45 Cal. 186; *Hiller v. Collins*, 63 Cal. 238. The question to be decided is whether there has been an abuse of judicial discretion. In *Milling Co. v. Montana Co.*, ante, 510, this court reviewed the English and American authorities upon the right of parties interested in mines to have an inspection and survey under the laws of the state. We arrived at the conclusion that the source of these statutory provisions was the chancery practice of England, and, avoiding repetition, we will say that most of the cases cited in the opinion relate to orders which were made by virtue of equitable jurisdiction. Under the constitution, "the district courts shall have original jurisdiction in all cases at law and in equity, including all cases which involve the

title or right of possession of real property. * * *" Article 8, § 11. Independent of the statute upon the subject, we think that the court below, by virtue of its equity powers, could authorize the inspection and survey of the premises in controversy upon the motion of any party to the action. It was also maintained, in *Milling Co. v. Montana Co.*, ante, 510, that the object of these proceedings was to obtain the best evidence for the trial, and that no constitutional rights of the owner of the property to be viewed had been infringed, although there would be an interference with its possession. The appellant admits that it is willing that the respondents shall have all the privileges essential to an inspection and survey of its vein and works, but denies the power of the court to allow any work to be done thereon. The books seem to be destitute of precedents. The court is preserving the property pending the litigation, and the sole purpose of the order permitting any development by the respondents is to ascertain the facts, if possible. The appellant, according to *Cheesman v. Shreve*, supra, is *prima facie* a trespasser, and therefore the respondents are *prima facie* in the rightful occupancy of the levels, shafts, winzes, and cross-cuts, which are described. The respondents submit with their brief certified copies of five orders, which have been made in controversies relating to lode mining claims by the circuit court of the United States for the district of Colorado. They contain all the features of which the appellant complains as obnoxious. Viewing the order as the best means of discovering the truth, and having the practical effect of an inspection and survey, and considering the actual condition of the property, we are unable to hold that the court below abused its discretion. It is therefore adjudged that the order be affirmed, with costs.

HARWOOD and DE WITT, JJ., concur.

(3 Cal. Unrep. 256)

HARMON v. SAN FRANCISCO & S. R. R. CO.
(No. 12,017.)

(Supreme Court of California. May 3, 1890.)

MECHANIC'S LIEN—FILING CLAIM—SUFFICIENCY.

1. A claim of lien filed by a material-man against a railway company for materials furnished a contractor and his assignee, who assumed all liabilities, although it omits to show the proportion of materials furnished to each, is sufficient, under Code Civil Proc. Cal. § 1187, requiring that the claim state the name of the person to whom the materials were furnished. *Distinguishing Hardware Co. v. Railroad Co.*, 23 Pac. Rep. 406.

2. The fact that a claim of lien filed by a material-man includes more than is due him, if the error is without fraud, will not defeat his right to recover.

In bank. Appeal from superior court, Marin county; E. B. MAHON, Judge.

On rehearing. For former report, see 22 Pac. Rep. 407.

J. H. BOLT, H. A. POWELL, and HEPBURN WILKINS, for appellant. HANLON & LIPPITT,

O. P. Evans, and Lloyd & Wood, for respondent.

PATERSON, J. This cause was heard in department 1, and the judgment and order were affirmed October 4, 1889, on the authority of *Hardware Co. v. Railroad Co.*, 22 Pac. Rep. 406, (filed on that day.) By consent of counsel for the respective parties the court below, before the trial of either cause, made an order that the two actions be consolidated. When the cases were considered by this court it was assumed that the record in this case was substantially the same as the record in No. 12,030; but our attention was called to the fact in the petition for a hearing before the court in bank, and at the argument, that this assumption was not correct. The record in this case differs from the other in two material respects: In this case the evidence shows that "the work on the contract was completed on June 2, 1884." There is nothing in this record to the contrary, and we cannot, as claimed by respondent, look at any evidence in the other record to explain or contradict this testimony. *Second.* The description of the materials furnished in the other case was "nails, spikes, iron, steel, picks, shovels, and other like material." In this case the materials furnished are described as "lumber, timber, and logging, and other like material." The first description given above was held not good because too indefinite and uncertain, part of the materials described being property for which no lien could be maintained. The case of *Malone v. Big Flat Min. Co.*, 76 Cal. 578, 18 Pac. Rep. 772, was relied on as authority for the contention that, although the claim of lien was in part for articles not the subject of lien, the court should permit the party by proof to make the necessary segregation, throw out the value of such articles, and declare a lien for the balance. In that case there were as many claims as there are letters in the alphabet, (Exhibits A to Z, Vol. XLV. 1888, Supreme Court Records, pp. 38-120,) all of which were assigned to the plaintiff; and, of course, the fact that one of them was for materials not the subject of lien did not prevent a recovery of the others, which were good.

Respondent claims that the claim filed by plaintiff, and upon which this action is based, must have included material for which no lien could be maintained, because the plaintiff testified that of the lumber he furnished "there was used \$1,159.13 worth in the building of temporary houses," and \$577 paid on the lumber for freight and cartage. It does not clearly appear whether there was extra material included in the claim of lien, or an erroneous statement as to the value; and, as the claim filed contained no articles except such as are the subject of lien, we cannot say that a lien for so much lumber, etc., as was actually used in the construction of the road, should be defeated by reason of this testimony. As was said in the former opin-

ion, the bare fact that he had filed his lien for too much lumber, or set too high a price on it, would not, in the absence of fraud, defeat his right to recover.

In *Hardware Co. v. Railroad Co.*, the department held that the failure to designate what portion of the materials were furnished to each of the contractors was fatal to the lien. Whatever may be the rule in ordinary cases where the material-man furnishes materials to several independent contractors, we do not think it was necessary for the plaintiff to segregate the amounts in the claim which he filed. Hawley was the only person with whom the company had to settle. The latter was liable only for the balance of the contract price held by it. It was in no way interested in the question how much had been furnished McDonald before the assignment. Hawley had simply stepped into McDonald's shoes, with the knowledge and consent of the company, and had assumed all liabilities. There was but one contract on the part of the defendant. On final settlement, McDonald was entitled to nothing, and we are unable to see how the company could be prejudiced by the failure to designate the amount furnished to each. No question of priority is involved herein. Where a statute required a claimant to state from whom the debt was due, it was held that a mistake in the name of the contractor would not defeat the lien if it appeared that the owner was not harmed by the error. *Putnam v. Ross*, 46 Mo. 337. In the case at bar the proof does segregate the amounts furnished to Hawley from that which was furnished to McDonald, so that no injury could possibly occur. In the *Gordon Case* this was not done. In view of the facts stated, we think that the court ought not to have rejected the notice of lien. We have examined other points made by respondent, but we do not think the objections raised are well taken. If the facts shown by the evidence of the plaintiff are true, he is entitled to have his lien declared good, at least, to an amount not exceeding the amount of the contract price in the hands of the company at the time the notice of lien was filed. Judgment and order reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; FOX, J.; McFARLAND, J.; THORNTON, J.

GORDON HARDWARE CO. v. SAN FRANCISCO & S. R. R. CO. (No. 12,030.)

(*Supreme Court of California.* May 3, 1890.)

In bank. Appeal from superior court, Marin county; E. B. MAHON, Judge.

On rehearing. For former report, see 22 Pac. Rep. 406.

Hepburn Wilkins, for appellant. *E. S. Appitt, O. P. Evans, and Lloyd & Wood*, for respondents.

PATERSON, J. The judgment and order were affirmed in Department 1, and the reasons therefor given in an opinion filed on October 4, 1889. We

are satisfied that the conclusion there reached was correct, but have taken occasion in *Harmon v. Railroad Co.*, ante, 1024, (this day filed,) to explain and limit one or two of the points therein decided. The judgment and order are affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; FOX, J.; THORNTON, J.

(84 Cal. 27)

LYONS v. ROACH *et al.* (No. 12,021.)

(Supreme Court of California. May 3, 1890.)

JUDGMENT—SETTING ASIDE DEFAULT—APPEARANCE.

A default judgment against an administrator will not be set aside because the summons and default name him as executor, where the judgment recites that defendant appeared by attorney, as such appearance, under Code Civil Proc. Cal. § 416, is equivalent to personal service, and such recital will be presumed correct, in the absence of a showing to the contrary in the record.

In bank. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Matt I. Sullivan and R. Percy Wright, for appellant. *J. C. Bates*, for respondent.

MCFARLAND, J. After argument in bank, we are satisfied that the judgment should be affirmed. The action is for the enforcement of a street assessment. Patrick Cunningham in his individual capacity, and also Patrick Cunningham as a representative of the estate of May Cunningham, deceased, were made parties defendant. The complaint charges Cunningham as "administrator" of the estate, and the summons is directed to him as "executor." The affidavit of service of summons shows that he was served as administrator. A default was entered against him as "executor." Afterwards, Roach succeeded Cunningham as administrator, and was substituted as defendant; and he appeals from the judgment in favor of plaintiff. His main point is that the judgment against Cunningham as representative of the estate is void, because the summons and default name him as executor, while the complaint and judgment are against him as administrator. If we were compelled to decide this extremely technical point, we would be inclined to hold that the estate was substantially and fairly brought into court through its legal representative, and that the mistake or inadvertence by which he was called in some of the papers "executor," and in others "administrator," was not fatal to the default. But it is not necessary to determine this point, because the judgment recites that the defendants, "after service of summons, regularly appeared in said action by Robert Ash, Esq., an attorney of the court, who also was present on the trial thereof." This appearance was equivalent to personal service of summons and complaint. Code Civil Proc. § 416; *Ghiradelli v. Greene*, 56 Cal. 629. The Code does not require such appearance to be made part of the judgment roll; and, as appellant appeals upon the judgment roll alone, which shows nothing contradictory of, or inconsistent with, said recital, it must be taken as at

least *prima facie* true. All presumptions not contradicted by or inconsistent with the record are in favor of the correctness of the judgment. *Parker v. Altschul*, 60 Cal. 330. The doctrine of *Lick v. Stockdale*, 18 Cal. 219, *Alderson v. Bell*, 9 Cal. 315, and kindred cases, have been modified only with respect to those matters which are required to be shown in some part of the record other than the judgment itself. The cases cited by appellant are mostly cases where the recitals were of matters required to appear elsewhere in the roll, or which were inconsistent with matters which did thus elsewhere appear; and the main difference between collateral and direct attacks is that in the former the record alone can be inspected, and is conclusively presumed to be correct, while on direct attack the true facts may be shown, and thus the judgment itself, on appeal, may be reversed or modified. See *Freem. Judgm.* §§ 124-134, and cases there cited. But in the case at bar the appellant showed nothing, and offered to show nothing. He comes here on the judgment roll alone, and merely contends that the judgment roll, apart from the judgment itself, does not affirmatively show that appellant appeared by attorney. He does not attempt to show that the recital of appearance is not true. But, as before stated, the Code does not require the fact of appearance to be shown by the roll.

Respondent offered to amend the record by attaching to it a certified copy of a formal written appearance for Cunningham as administrator of the estate, filed in the court below. But, in the *first* place, such document, not being part of the judgment roll, could not be part of the record here; and, in the *second* place, under the views above expressed, it would not be necessary.

The printed record contains a statement, in parenthesis, made by some one, that the complaint was amended by changing "executor" to "administrator;" but this statement is no part of the judgment roll or of the record in this case, and cannot be considered. It would make no difference, however, as the appearance by attorney was afterwards. And this answers appellant's second point, as to the service of amended complaint.

We think that the averments of the complaint were sufficient, particularly in the absence of a demurrer. Judgment affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.; FOX, J.; PATERSON, J.

(84 Cal. 21)

DAVIDSON v. ELLMAKER. (No. 12,068.)

(Supreme Court of California. May 3, 1890.)

UNLAWFUL DETAINER—ESTOPPEL TO DENT LANDLORD'S TITLE.

1. In unlawful detainer, defendant claimed the premises as legatee of her husband, though she admitted having signed a lease from plaintiff's grantor, but denied that she ever took or hired the property under it. The court found that she signed the lease, but failed to find whether it was executed and delivered. *Held*, that such finding was error, as not covering the material issues.

2. Defendant, who at the time of the execution of the lease was in possession of the premises under claim of title, is not estopped from disputing plaintiff's title derived from the lessor.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

W. T. Baggett, for appellant. *E. J. & J. H. Moore*, for respondent.

PATERSON, J. This is an action of unlawful detainer. The plaintiff alleged that the defendant, on August 11, 1880, took and hired from plaintiff's grantor the premises described in the complaint at the monthly rental of one dollar per month, payable in advance. Defendant admitted that she had signed the lease set out in the complaint, but denied that she took or hired the property thereunder, or at all, from plaintiff, and alleged that while in possession, on said August 11, 1880, she was induced by plaintiff's grantor to sign the alleged lease by false and fraudulent representations. She also alleged that neither the plaintiff nor the savings and loan society, under which he claimed, was the owner, or entitled to the possession, of the property, and averred that she, as sole legatee of her deceased husband, was the owner thereof. The appeal is from the judgment, and on the judgment roll only. The findings do not cover the material issues.

1. There is no finding on the issue as to whether the savings and loan society, plaintiff's grantor, leased the premises to the defendant. The court found that the defendant signed the agreement set forth in the complaint, but did not find whether the agreement was ever delivered. The relation of landlord and tenant cannot be predicated on the production of the lease signed without evidence of a delivery. *Caldwell v. Center*, 30 Cal. 544. The court found that "defendant Eilmaker never in any manner acknowledged the delivery, force, or effect of said tenant's agreement, except to execute the same." It is apparent from other findings that the court here used the word "execute" in the sense that it had before used the word "sign."

2. The court found that, at the time the agreement was signed, defendant was in possession of the premises, claiming title thereto. She was not estopped, therefore, even if the lease was executed and delivered, from disputing the title of the plaintiff. *Peralta v. Ginochio*, 47 Cal. 460. We are not advised by the findings whether she offered any evidence in support of her allegation of ownership. There is no finding on that issue.

Judgment reversed and cause remanded, with directions to the court below to find on all the issues upon the evidence taken at the trial, and such other evidence as may be adduced, and thereupon render judgment.

We concur. *BEATTY, C. J.*; *McFARLAND, J.*; *SHARPSTEIN, J.*; *THORNTON, J.*; *FOX, J.*

MYERS v. DAUBENBISS *et al.* (No. 12,252.)

(*Supreme Court of California.* May 3, 1890.)

HIGHWAYS—LIMITATIONS—PARTIES.

1. Under Pol. Code Cal. § 2320, providing "a road not worked or used as a highway for five years ceases to be a highway for any purpose whatever," a public road cannot be opened over a man's land 14 years after judgment rendered in the district court, establishing it as a highway over his property.

2. In a suit to enjoin the opening of a public road through plaintiff's land, the county supervisors may be properly joined as co-defendants with the road overseer, under Code Civil Proc. Cal. § 879, providing that any person may be made a defendant who has or claims an interest adverse to plaintiff.

Commissioners' decision. Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

Wm. T. Jeter and *Charles B. Younger*, for appellants. *Julius Lee*, for respondent.

BELCHER, C. C. The plaintiff brought this action to obtain an injunction, restraining the defendants from laying out, opening, or constructing a public road or any road over, across, or upon a certain described tract of land, situate in Santa Cruz county, or from opening, breaking, or tearing down the inclosure about the said tract of land, or in any manner entering thereon for the purpose of making such road. The court below granted the relief prayed for, and the defendants appeal from the judgment, and from an order denying them a new trial.

It is alleged in the complaint that, on the 18th day of August, 1873, an action for the partition of the rancho San Andreas was pending in the district court in and for the county of Santa Cruz, wherein Titus Hale was plaintiff, and Edward Briody, Francis Larkin, and others were defendants; that on the day named a judgment was duly given, made, and entered in the action, by which the tract of land described in the complaint in this action was allotted and set apart to the said Larkin in severalty; that under and by virtue of this judgment Larkin entered upon the premises so set apart to him, claiming and having the title thereto, and thereafter, continuously, up to October 21, 1882, had and held the actual, open, notorious, exclusive, and adverse possession of the whole of said premises, and paid all taxes levied or assessed thereon; that on the day last named Larkin sold and conveyed the whole of said premises to this plaintiff, who thereupon, under and by virtue of his deed of conveyance, entered upon the same, and has ever since had, held, and claimed the actual, exclusive, open, notorious, and adverse possession thereof, and has paid all taxes levied or assessed thereon; and that there is not and never was any road or highway across the said premises or any part thereof, but that the same at all times named have been inclosed by a substantial fence. It is further alleged that in December, 1883, and again in January, 1887, the defendant Freshour, who was the road

overseer of the district in which the plaintiff's land was situate, was insolvent, and was "instigated thereto and aided and abetted" by the other defendants, who were the supervisors of the county, broke and tore down plaintiff's inclosure, and entered upon his land, dug up and removed the soil, trampled down and destroyed the grass and other crops growing thereon, and cut down and removed trees standing thereon, with the avowed intention and purpose of laying out, opening, and constructing a public road over and across said land; that the acts of defendants are trespasses which, if continued, will do great and irreparable injury to the plaintiff, and that they will be repeated and continued, unless restrained by the court. The defendants demurred to the complaint on the grounds: (1) That there was a misjoinder of parties defendant; and (2) that the facts stated were not sufficient to constitute a cause of action. The demurrer was overruled, and an answer filed. The answer denies plaintiff's ownership of the land, and most of the other allegations of the complaint. It then sets up that, by the judgment in the partition suit of *Briody v. Hale et al.*, entered on the 18th of August, 1873, it was, among other things, ordered, adjudged, and decreed that there be, and thereby was, laid out and established over and across the lands allotted to Larkin a public road, which was known and called the "Larkin Valley Road," and was particularly described, and that it was this road which defendants were trying, and had a right, to open. At the trial the plaintiff offered and read in evidence the judgment roll in the case of *Briody v. Hale et al.*, and thereupon the parties stipulated as follows: "This action is hereby submitted to this court for its decision and judgment upon the following question of law, viz.: Does the said judgment in said action of *Briody v. Hale et al.* of itself establish or declare a public road or highway over or across the lands described in the complaint herein, called in said judgment the "Larkin Valley Road," (it being conceded that the said Larkin Valley road named in said judgment passes over the lands described in said complaint herein, so far as said judgment can establish a road,) so as to justify the defendants herein, acting in their official capacity of supervisors, or road overseer, or otherwise, in now entering upon said lands, and opening, laying out, working, or using a public road over or across the same, along the route set out and described in said judgment, defendants not having entered upon any other portion of said lands? If the court shall decide that said defendants are not justified in so doing, then plaintiff is entitled to a judgment as prayed for in his complaint, but without damages; if defendants are so justified, then they are entitled to a judgment that plaintiff take nothing by said action, but that they recover their costs herein, and that said road be adjudged a public road in accordance with the prayer

of defendants' answer." The case was then submitted for decision.

1. We think the court acted rightly in overruling the demurrer. The complaint stated a cause of action, and, if its averments were true, the supervisors were joint trespassers with the road overseer, and were properly joined with him as defendants. Code Civil Proc. § 379; *Grigsby v. Burnett*, 31 Cal. 406.

2. The stipulation leaves for consideration only one other question, and that is, did the partition judgment, rendered in 1873, "of itself," and unaided by any other fact, authorize the defendants in December, 1886, and January, 1887, nearly 14 years afterwards, to break the plaintiff's close, and enter upon his land to construct the road? In the pleadings in the case referred to there was no reference to roads, and no prayer that any portion of the property be set apart for road purposes; and at that time the statutes gave the district courts no power to set apart or establish roads by their judgments in actions for partition. On March 24, 1874, this power was conferred, for the first time, by an amendment to section 764 of the Code of Civil Procedure. In support of the proposition that the judgment of the court, setting apart and declaring the Larkin Valley road to be a public highway, was binding and conclusive, and not subject to collateral attack, counsel for appellants cite *Carey v. Rae*, 58 Cal. 159. But that case does not sustain their contention. This is made evident by an examination of the record of the case, which shows that the judgment of partition then under review was entered in December, 1876, more than two years after the amendment above referred to was made. Counsel also cite section 2618 of the Political Code, which declares that "in all counties of this state public highways are roads * * * laid out or erected as such by the public, * * * or made such in actions for the partition of real property." This section, however, cannot aid the appellants, for the reason that the last clause of it, on which they rely, was first made a part of the section by an amendment adopted in 1883. The other cases cited hold only, in effect, that, when a court has jurisdiction of the parties and of the subject-matter, its judgment, though erroneous, cannot be attacked collaterally. This is undoubtedly true; but did the court, in *Briody v. Hale et al.*, have jurisdiction of the subject-matter, of laying out and establishing highways? The power to lay out roads was at that time given by the statutes exclusively to the boards of supervisors, and if the court had such jurisdiction how did it obtain it? Suppose the court had undertaken by its judgment to set apart for the use of the public a portion of the land as a public park, would it have had jurisdiction of that subject-matter, and would its judgment in that respect have been final and conclusive as against any collateral attack? It is unnecessary to answer these

questions, for if it be conceded that the court had the jurisdiction which it attempted to exercise, still we think the judgment in this case must be upheld. When the judgment was entered in 1873, and continuously thereafter until 1883, section 2620 of the Political Code—as applicable to Santa Cruz county—provided as follows: “A road not worked or used for the period of five years ceases to be a highway for any purpose whatever.” Hitt. Codes, 331; St. and Amend. Codes 1883, p. 5. Now if the judgment had the effect “of itself” to establish the Larkin Valley road, and to give the right to open and use it as a public highway, it had all the effect which of itself it could have; at the time it was rendered. But as the road so established was not opened, worked, or used for nearly 14 years afterwards, and, under section 2620, *supra*, had ceased to be a highway “for any purpose whatever,” it is clear that the judgment of itself did not justify the defendants in entering upon the plaintiff’s land, and doing the acts complained of. We therefore advise that the judgment and order be affirmed.

We concur: GIBSON, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

I concur in the judgment: BEATTY, C. J.

(84 Cal. 50)

In re ACOCK. (No. 20,620.)

(*Supreme Court of California.* May 3, 1890.)

CONTEMPT—ABUSE OF PROCESS—AFFIDAVITS.

1. Plaintiff in replevin executed the proper undertaking, and had the sheriff take the property. Defendants then executed an undertaking, duly approved by the court, for the redelivery of the property. Plaintiff dismissed his action, and, by false representations to sheriff’s watchman, got possession of the property, and disposed of it. *Held*, plaintiff was guilty of contempt, under Code Civil Proc. Cal. § 1209, providing that deceit or abuse of process by a party to an action is contempt.

2. Where, in a contempt proceeding, defendant is convicted after full hearing, the judgment is not void because some of the material allegations in the affidavits upon which the proceeding is based are stated on information and belief.

In bank. *Habeas corpus.*

Grove L. & Albert M. Johnson, for petitioner. *A. L. Hart*, for respondent.

PATERSON, J. The petitioner was adjudged guilty of contempt by the superior court of Sacramento county, and seeks to be discharged from custody, by this proceeding, on the ground that the commitment and judgment are void. The commitment is a certified copy of the judgment. The recitals in the judgment show that on the 22d day of August, 1889, an action of claim and delivery was commenced by the petitioner, against Salome E. Acock and Nellie T. Halsey, for the recovery of some wheat and barley then in the possession of one W. K. Lindsay as

the agent of the defendants in said action; that a proper affidavit and undertaking on claim and delivery were made by the plaintiff in said action, and an order was indorsed upon said affidavit, directed to the sheriff, requiring him to take said property from the possession of the defendants; that, in pursuance of said order, said property was taken by the sheriff into his possession, and held by him until the 4th day of September, 1889; that, on August 30th, seven days after the service of the summons and other papers in said action upon defendant Halsey, the defendants therein executed and delivered to the sheriff an undertaking, which was afterwards approved by the judge of said superior court, for the delivery of said property to him; that this undertaking was approved, after a regular justification of the sureties, on the 3d day of September, 1889, and was caused to be filed by the judge on that day; that “thereupon said Acock, wrongfully, and for the purpose of preventing the return of said property to said defendants, did procure said Ed Treganza, the keeper of said property, to remove the same from the land of one W. K. Lindsay, where the same had been seized by the sheriff, and was being kept, onto the land of said Acock, which removal was without the knowledge or consent of said sheriff; that immediately after the removal of said property, to-wit, on the 4th day of September, 1889, the attorneys of said Acock, at his instance and in his presence, and with the intent and purpose on the part of said Acock of preventing said return of said property, did dismiss said action, while the said property was in the hands of said sheriff as aforesaid, and thereupon the said Acock did, immediately after said dismissal, and on the same day, go to the place where said property was situated, and, while the same was still in the possession and under the control of the sheriff of said county of Sacramento, and was by him held as an officer of this court, and under the process of this court, did then and there falsely represent to said keeper that said case had been settled, and thereupon, in disrespect of this court and its process, the said Acock did unlawfully and forcibly take the said property into his possession, without the previous consent or knowledge of the sheriff of said county of Sacramento, did provide himself with wagons, and did load the said property so held by the said sheriff upon said wagons, and did haul away, sell, and convert the same to his own use, all of which was done without the knowledge or consent of the defendants in the said action, and with the intent to evade the process of said court, and to prevent the said defendants from getting possession of said property from said sheriff, in pursuance of their said bond for a redelivery thereof; that it appears to the court, from the evidence in said cause, and the court finds, that the said action was not commenced or prosecuted in good faith, but was commenced and prosecuted with the intent and purpose on the part of said Acock

of using said court and its process in an improper effort to obtain the possession of said property in an unlawful manner, without having previously tried the title of said property, or obtained a judgment in said action." The petitioner claims that the facts stated in the judgment are not supported by the testimony taken at the hearing, but admits that, under the decisions of this court, they are conclusive in this proceeding. He contends that the judgment is void for the following reasons: (1) Material allegations of the affidavits are made upon information and belief; (2) the facts alleged do not show any abuse of the process of the court, or any offense for which the court could adjudge him guilty of contempt.

1. Whatever the rule may be with respect to the rights of persons held for examination under an attachment which has been issued upon an affidavit made on information and belief alone, we do not think that, after a full and fair hearing, in which the prisoner has been given full opportunity to present his defense to the charge made against him, a judgment of conviction can be held to be void because some of the charges are made on information and belief. It would be impossible, in many cases of contempt committed out of the presence of the court, to secure the apprehension or conviction of the guilty parties if every fact essential to sustain the judgment were required to be stated in positive terms. In the case at bar, if the moving parties had been required to state positively, upon oath, that the petitioner was the person who removed the grain, the proceedings, probably, could not have been instituted. We think, at least, that after judgment the point made is not well taken. *Ex parte Ah Men*, 77 Cal. 198, 19 Pac. Rep. 380; *Ex parte Kearney*, 55 Cal. 228.

2. A great many reasons are assigned for the contention that the facts stated constitute no offense. It is said that the action had been dismissed, and no contempt could be committed unless the litigation was pending; that if any offense was committed the remedy was by criminal action; that there was an adequate remedy by action at law on the undertaking; that no process or order was abused or violated, and no deceit was practiced; that there was no rescue of property in the hands of an officer, and no such charge was made against him in the affidavits, yet the court found him guilty of that offense, thus going beyond the issues; that petitioner was entitled to the possession of the property, under section 514 of the Code of Civil Procedure, because the time within which the defendants could give a counter-bond, and claim the property, had expired before he took the property from the keeper. We have carefully considered all of these points, and are unable to agree with counsel for petitioner. If the facts stated are true—and they cannot be assailed here as contrary to the evidence—the acts of petitioner were contempts, within the meaning of section 1209 of the Code of

Civil Procedure. That section provides that "the following acts * * * in respect to a court of justice, or proceedings therein, are contempts of the authority of the court: * * * (4) Deceit or abuse of the process or proceedings of the court by a party to an action or special proceeding; * * * (7) rescuing any person or property in the custody of an officer by virtue of an order or process of such court." See, also, *Biggs v. Garrard*, 6 B. Mon. 484; *King v. Barnes*, 113 N. Y. 476, 21 N. E. Rep. 182. And, if the facts stated are true, it is clear that the petitioner could not, by a dismissal of the action, shield himself from the legal consequences of his acts. The fact that the petitioner may be prosecuted in criminal and civil actions does not prevent a prosecution for contempt. A party may be liable civilly and criminally for an assault upon an officer in open court, and at the same time may be punished for the indignity laid upon the court.

We think the findings of fact are within the issues. It was alleged that the petitioner deceived the officer of the court, and thereby unlawfully converted the property to his own use; that he abused the process of the court, and used the same for a purpose wholly at variance with the purpose for which it was issued, and to deprive the owners of it, and appropriate it to his own use; that the grain was removed from the farm of Lindsay, with the consent and connivance of petitioner, and for the purpose of placing the property in a position which would enable him, by a dismissal of the action, to unlawfully take the same, and deprive the defendant thereof. The summons was not served on the defendant S. E. Acock until August 26th, and she made a demand, and gave an undertaking, for the return of the property on August 30th. Each one of the defendants was entitled to claim the redelivery of the property at any time within five days after service of notice upon her. Upon the giving of the undertaking within the five days after service upon defendant Acock, it was the duty of the sheriff to hold the property until the sureties justified, and upon such justification to turn it over to her. Sections 514, 515, Code Civil Proc. It is found that, after the giving of said undertaking, and justification by the sureties, the petitioner, knowingly, and for the purpose of preventing the return of the property to the defendants in the action, removed the property from Lindsay's ranch, and dismissed the action.

We have examined the cases cited by counsel for petitioner, and find nothing in them which, taken in connection with the provisions of our Code, cited above, support the contentions made herein against the validity of the judgment. The prayer of petitioner is denied, and the petitioner is remanded into the custody of the sheriff of Sacramento county.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; FOX, J.; THORNTON, J.

(83 Cal. 645)

KNEEBONE v. KNEEBONE. (No. 13,439.)

(Supreme Court of California. May 3, 1890.)

CONTINUANCE—DISCRETION—REPLEVIN—JUDGMENT.

1. The refusal of a continuance on plaintiff's application, supported by affidavit that he was unable, from sickness, to attend, and that another material witness could not attend the trial, will not be disturbed where defendant opposed the motion, and filed affidavits controverting plaintiff's statements, as such action is in the discretion of the court, and will not be reviewed unless its abuse is affirmatively shown.

2. In an action of replevin dismissed for want of prosecution, judgment that the property described in plaintiff's writ be returned to defendant is not error, under Code Civil Proc. Cal. § 667, providing that in replevin the judgment shall be in the alternative, as that section only applies to judgment after trial.

Commissioners' decision. Department 2. Appeal from superior court, Yuba county; PHIL W. KEYSEK, Judge.

A. J. Ridge, for appellant. C. A. Webb, for respondent.

BELCHER, C. C. This action was brought to recover the possession or value of certain personal property. The answer denied all the allegations of the complaint, and demanded judgment for a return of the property. The case was set for trial on the 29th day of June, 1889, and on that day the plaintiff appeared by attorney, and moved the court to continue the case for two weeks. In support of the motion the attorney read two affidavits made by plaintiff on the 26th of June. In one of the affidavits the affiant stated that he would be unable to attend the trial at the time set for it, or for two weeks thereafter, on account of sickness caused by his fall from a tree on the 18th of June, and that he would be a material and necessary witness in his own behalf. In the other affidavit, it is stated that one William Kneebone was an important witness for plaintiff, and if present would testify to certain material facts which are set out; that plaintiff was not informed that the case was set for trial till the 18th of June; and that at that time the witness was absent in another county, more than 30 miles from the place of trial, and had continued so absent, and plaintiff could not, by the use of any diligence in his power, secure his attendance at the trial, nor procure his deposition. In opposition to the motion, defendant read counter-affidavits which tended to contradict the plaintiff's affidavits, and to show that both the plaintiff and his witness might have been present at the time set for the trial. The court denied the motion, and thereupon, counsel for plaintiff declining to proceed with the trial, judgment was entered dismissing the action for want of prosecution, "and that plaintiff return the property described in plaintiff's complaint to defendant, that the undertaking in said action be delivered to the defendant, and that defendant have and recover of and from the plaintiff her costs," etc. From the judgment so entered the plaintiff appeals.

In support of the appeal, it is first claimed

that the court erred in denying plaintiff's motion, and that for this error the judgment should be reversed. It is settled law in this state that applications for continuance are addressed to the sound discretion of the trial court, and its action will not be disturbed on appeal unless the record affirmatively shows that it abused its discretion. In *Musgrove v. Perkins*, 9 Cal. 212, the court, per FIELD, J., said: "The granting or refusing a continuance rests in the sound discretion of the court below, and its ruling will not be revised except for the most cogent reasons. The court below is apprised of all the circumstances of the case, and the previous proceedings, and is therefore better able to decide upon the propriety of granting the application than an appellate court; and when it exercises a reasonable, and not an arbitrary, discretion, its action will not be disturbed." And similar language has been used in many subsequent decisions. After carefully reading all the affidavits found in the record, we are unable to see that the court in any way abused its discretion in refusing to grant the continuance.

It is next claimed that the court erred in adjudging that "plaintiff return the property described in plaintiff's complaint to defendant." It is said the judgment should have been for a return of the property, (describing it,) or the value thereof in case a return could not be had; in other words, in the alternative form, as prescribed by section 667 of the Code of Civil Procedure. The section referred to applies to cases where judgment is entered after trial, and not to cases like this, where the action is dismissed without trial. It would seem from the record that the property in controversy here must have been taken from the possession of the defendant, when the action was commenced, under the provisions of section 512, Code Civil Proc., and, if so, the defendant was clearly entitled to its return when the action was dismissed; and it was a matter of no concern to the plaintiff whether the judgment was in the alternative form or not, as he had no option as to whether he should pay for or return the property. In *Waldman v. Broder*, 10 Cal. 380, the court said: "The legal effect of a finding for the defendants on the question of the plaintiff's right to the property is to entitle the defendants, from whom it was taken, to its restoration. Nor is there anything in the failure to give an alternative judgment for the value of the property. This omission might be complained of by defendants if they had shown the value, but it is no ground of complaint on the part of the plaintiff." In our opinion the judgment was in proper form, and we advise that it be affirmed.

We concur: GIBSON, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(5 Cal. Unrep. 745)

HEILBRON *et al.* v. CAMPBELL, Judge.
(No. 13,478.)

(Supreme Court of California. March 15,
1890.)

PROHIBITION—PROCEDURE—DEMURRER AND ANSWER.

Where respondent to petition for writ of prohibition filed a demurrer and answer, and the demurrer was overruled, and judgment absolute given against respondent on the insufficiency of his answer, when, in the absence of a motion for judgment on the pleadings, he expected that only the demurrer would be passed on, a motion to vacate the decision on the ground of surprise, and to allow an amended answer, will be granted. *PATERSON, J.*, dissenting.

S. C. Denson and *A. L. Hart*, for petitioners.

FOX, J. This was an application for a writ of prohibition. Upon the return of the alternative writ, the respondent demurred to the petition, and at the same time filed an answer. Argument was had upon the demurrer, but in the decision thereon, which was filed December 28, 1889, reference was made to the fact that a certain allegation in the petition and writ was not denied, and the decision is open to the construction that it was made upon the pleadings generally, and not simply upon the petition or writ, and the demurrer thereto. Although not so stated in terms, the legal effect of that decision was to overrule the demurrer, and give final judgment in favor of the petitioner. That judgment, in our opinion, was entirely correct upon the petition or writ and demurrer, as the legal effect of the latter was to admit the truth of allegations of the former. But an answer was in, the sufficiency of which was unchallenged; and there was no motion for judgment on the pleadings, putting the respondent upon notice that his answer was insufficient to constitute a defense. In the briefs filed after the argument, petitioner expressly claims that the hearing is upon respondent's demurrer only, and not upon the pleadings generally. It may well be that under these circumstances a final decision of the whole case was, in law, a surprise to the respondent. He has now, and in due time, moved the court to vacate the decision then rendered, pass upon the demurrer directly, and, if overruled, to allow him to file an amended answer in the cause, a draft of which, duly verified, he has deposited with the clerk of this court. This motion is made on affidavit, and on the ground of surprise. We think he is entitled to this relief, and to be heard upon the merits of the cause. It is therefore ordered: (1) That the judgment rendered in this cause on the 28th day of December, 1889, be, and the same is hereby, vacated and set aside; (2) that the demurrer of the respondent to the petition heretofore filed in this cause be, and the same is hereby, overruled; (3) that the amended answer of respondent, now deposited with the clerk of this court, be filed as and for his answer in the cause, and that, if not already done, a copy thereof be served upon attorneys for pe-

titioner within 10 days from the filing of this order; (4) that this cause be placed upon the bank calendar of this court for the May term, 1890, at Sacramento, for such further proceedings as the parties may then desire to take therein; (5) that, until the further order of this court in this cause, the respondent, *J. B. Campbell*, judge of the superior court of the state of California in and for the county of Fresno, do absolutely desist and refrain from sitting or acting as judge in any proceeding had or to be had in the case of *Charlotte F. Clarke et al. v. August Heilbron et al.*, now pending in said superior court, or from making any further or other order in the cause except such as may pertain to the arrangement of the calendar of his court, or such as may be agreed to by the counsel on both sides.

We concur: *McFARLAND, J.*; *SHARPSTEIN, J.*; *THORNTON, J.*

PATERSON, J., (*dissenting.*) I do not see how it can serve any useful purpose to hear this matter any further. The learned judge, respondent herein, naturally feels like having nothing more to do with the case, his interests and motives being questioned, and, exercising his good taste, states to this court, in his answer, "that now that his attention is called to the fact that one of the parties to said action claims, or pretends to claim, that the land of the respondent is included within the land therein in controversy, the defendant does not intend to, and will refuse to, hear or determine any motion, or to sit or act in any proceeding whatever, therein." What is the use of issuing a restraining order when the judge thus positively states his determination not to act in the case? What good can arise from the trial of the other issues of fact? If the petitioners should fail to prove that respondent has any interest in the subject-matter of the litigation, or in the success of either party thereto, the result would be the same. The judge would still refuse to act in the case. No doubt it would be gratifying to Judge Campbell to be given an opportunity to show that the allegations as to his interest in the case are groundless, and I wish it could be done. But he has already denied them under oath. There is no presumption against him; and it would only result in expense, annoyance, and delay to investigate the question as to whether the petitioner or respondent is correct, and consume unnecessarily the time of this court.

(84 Cal. 71)

SAN LUIS OBISPO v. GRAVES, Tax Collector.
(No. 13,554.)

(Supreme Court of California. May 5, 1890.)

CONSTITUTIONAL LAW—UNIFORM AND GENERAL LAWS—LICENSE TAXES.

A license tax collected, under an ordinance of the board of supervisors of a county, for a business carried on within a municipality in that county, must, under Pol. Code Cal. § 3363, be paid into the county treasury for the use of the county; and the county government act, § 189, subd. 15, as amended, (St. 1889, p. 283,) which requires that all

license taxes collected in counties of a certain class, within the limits of an incorporated city or town, shall be paid over to the town authorities for street improvements, is unconstitutional and void as violating Const. Cal. art. 11, § 4, providing that the legislature shall establish a uniform system of county governments; also article 1, § 11, which provides that all laws of a general nature shall have a uniform operation; and also article 4, § 25, subds. 9, 33, forbidding local legislation in relation to county business.

In bank. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Graves, Turner & Graves, for appellant.
Wm. Shipsey, for respondent.

Fox, J. The plaintiff is a county of the twenty-seventh class. The respondent is license tax collector of the county. The city of San Luis Obispo is a municipality of the sixth class, situate within the county. The county is divided into five supervisor districts, numbered from 1 to 5. District No. 3 consists of the city, and one election precinct outside the city, known as "Orcutt Election Precinct." The city itself comprises three of the county election precincts, numbered 1, 2, and 3. The county, exclusive of the territory, lying within the corporate limits of the city, is divided into 17 road-districts, numbered from 1 to 17. Road-district No. 5 is composed of the territory embraced in Orcutt election precinct. No part of the territory within the municipality belongs to any road-district in the county. On the 8th of March, 1889, the board of supervisors passed an ordinance "concerning licenses, and to provide for the collection thereof." By section 1 of this ordinance, a license tax was imposed "upon every kind of business carried on in the county of San Luis Obispo, and all shows, exhibitions, and lawful games carried on therein." Section 20 provided that the licenses must be procured from the license tax collector, and that no license issued under the order should authorize any person to carry on any business within the limits of any incorporated city or town empowered by its charter to levy city or town licenses, unless such person also procure the license required by the ordinances or orders of any such city or town. Section 24 of the ordinance reads as follows: "On the first Monday of each month, the license tax collector must return to the auditor all the unsold licenses, and be credited therewith, and the auditor must apportion all license money collected to the road funds of the several supervisorial districts of the county from which the said license money was collected; and the license tax collector must appear at the county treasurer's office, and pay into the road funds of the several supervisorial districts the license money so appropriated, less his compensation or percentage, for licenses sold during the preceding month, take the treasurer's receipt therefor, and file duplicates with the auditor. The auditor must credit the license tax collector, and charge the treasurer therewith." The county licenses collectible within the city of San Luis Obispo under this ordinance

amounted to \$1,000 per quarter, but in road-district No. 5, Orcutt election precinct, no business was carried on which was subject to license tax under the ordinance.

In August, 1889, the defendant collected \$22 for license to carry on a business within the corporate limits of the city. On the 5th of September, 1889, the county auditor made a written demand upon him to pay over this \$22 to the county treasurer in accordance with the terms of the said ordinance, which the defendant failed to do; and thereupon the alternative writ of mandate was sued out of the superior court, commanding the defendant to pay said money into the county treasury as demanded, or show cause why he did not do so. On the return of the writ the defendant admitted the collection and possession of the money, and alleged that he held the same to pay it over to the city treasurer of the city of San Luis Obispo "under the provisions of subdivision 15 of section 189, as amended in 1889, of an act of the legislature of the state of California entitled 'An act to establish a uniform system of county and township governments,' approved March 14, 1883." St. 1889, p. 283.

The proceeding is evidently one to determine the conflict between section 24 of the ordinance and subdivision 15 of section 189 of the county government act. That section is in relation to counties of the twenty-seventh class, and subdivision 15 thereof contains this provision: "All moneys collected in counties of this class for licenses within the limits of any incorporated city or town shall be paid over by the officer collecting the same to the officer authorized to receive the same of the incorporated city or town in which such licenses are collected, to be expended by the authorities thereof in the improvement of the streets of such incorporated city or town wherein such license money was collected." There can be no question, and we understand it to be conceded, that, if this provision of the county government act is constitutional, so much of the ordinance as provides for the payment of the moneys collected for license tax upon business carried on within the municipality into the county treasury is in conflict with the general law, and void. It is claimed by appellant that this provision of the state statute is special and local, in direct conflict with certain provisions of the constitution, and void; and we have no doubt that it is so. It is found, it is true, in an amendment to a general law. But it is upon a subject which is not germane to the section or subdivision of the general law to which it is attached, and undertakes to establish for and in a single class of counties a rule which is in conflict, upon the subject of which it treats, with the law prescribed for all other counties, and classes of counties, in the state.

In the first place, the most general of all the laws of the state, the Code, (Pol. Code, pt. 3, tit. 7, c. 15,) treats of the subject of licenses. It prescribes all the different

classes of business upon which a license tax may be imposed, and also prescribes a rate of license which shall be collected upon the several classes of business in all the counties of the state, and the mode and manner of collecting the same, and, by section 3363, provides that the moneys so collected shall be paid into the general fund of the county. In the absence of other legislation upon the subject, the county authorities would undoubtedly be required to collect the rate of license prescribed in this chapter. But, as the question of rate is largely a matter of local interest, the legislature has, by other and appropriate legislation, authorized the boards of supervisors, by ordinance, to fix the rates, in the several counties, to be imposed upon all business authorized by law to be so taxed, and to provide for the collection thereof; but it has in no instance that has come under our observation, authorized any board of supervisors to permit any business which the general law requires to be licensed to be carried on in any county without a license. The rule prescribing what business shall be charged with a license is uniform throughout the state. The rate to be charged may be prescribed by the local authorities. Whether the rate which may be fixed by the board of supervisors can be less than that prescribed by the general law, we are not now called upon to say. Whether it be the one fixed by the board of supervisors or by the general law, the only exception made by statute to the rule that it must be paid into the general fund of the county treasury is that fund in the provision above quoted from the proviso attached to subdivision 15 of section 189 of the county government act, as amended in 1889. The subject of the proviso has no relation whatever to the subject of the section, or of the subdivision thereof to which it is attached. The subject of the disposition of the license tax fund is not germane to any part of the entire act of which the section is a part. That act provides for the organization, classification, and powers of counties, and the powers, duties, and compensation of county officers. The organization, powers, and duties of counties and their officers is provided for in a portion of the act which is common to all the counties. Then follows a provision classifying the counties,—a duty which the constitution imposed upon the legislature. The sole purpose of that classification is declared by the constitution to be that of regulating the compensation of the officers in proportion to their duties. Const. art. 11, § 5. All the law relative to the powers and duties of counties and their officers is found in the sections of the act preceding the one making the classification, (section 162,) which expressly declares the purpose of the classification to be the same as that prescribed in the constitution. The sections following this, to and including section 210, are devoted exclusively to fixing the compensation of the officers in the several classes; sec-

tion 189 being the one which fixes the compensation of officers in counties of the twenty-seventh class. Subdivision 15 of that section fixes the compensation of supervisors; and to this is tacked on the provision which we have above quoted, and which is wholly foreign to the section, and to the purpose for which, and for which alone, the legislature is authorized to classify counties. It is an attempt to classify counties upon a subject and for a purpose for and in relation to which the legislature is not authorized to make any classification. Except for the sole purpose of fixing the compensation of county officers in proportion to their duties, the duty of the legislature was and is to "establish a system of county governments which shall be uniform throughout the state." Article 11, § 4. The attempt to make any such discrimination as that sought to be made in this case is not only in violation of the section of the constitution last cited, but also of article 1, § 11, and article 4, § 25, subds. 9, 33. License taxes collected under provisions of the Code, or of an ordinance of the board of supervisors are monies collected for the use of the county; and it is the duty of the collector to deposit them with the county treasurer. Const. art. 11, § 16. Under another and different law, municipalities are authorized to impose and collect license taxes for municipal purposes. These, and these only, of the license tax collected in the county, are to be paid into the municipal treasury.

Counsel for respondent has cited several authorities in support of the proposition that the disposition made by the legislative provision above quoted is not unconstitutional; for that it requires that the money, though paid into the municipal treasury, shall be devoted to a purpose which is a county purpose, namely, the improvement of the streets in the municipality, such streets being public highways within the county. It is unnecessary for us here to decide whether a county could appropriate moneys from its treasury for the improvement of streets of a municipality within its borders, or not. The authorities cited would seem to indicate, by a parity of reasoning, that it could. But that question is not now before us. What we are here considering is whether or not the legislature of the state can make such a disposition of county funds, and require that they be deposited, not in the county treasury, but into a municipal treasury, to be disbursed by a government other and different from that for which, and by whose authority, they were collected. That it cannot do so, we are satisfied.

The judgment of the court below was in favor of defendant. From the conclusion which we have reached, it follows that the judgment must be reversed, and it is so ordered.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.

(84 Cal. 219)

ROSEWARN v. WASHINGTON G. M. Co.
(No. 12,281.)

(Supreme Court of California. May 31, 1890.)

INJURY TO SERVANT—DEFECTIVE APPLIANCES.

In an action by a servant against a mine-owner for personal injuries, plaintiff alleged that a defective bell-wire, fastened at intervals of 100 feet in the shaft, coiled around his leg as he was ascending in the bucket, and inflicted the injury. The court found that the wire was of suitable size and strength, and that it was properly fastened at irregular intervals from 15 to 50 feet apart. *Held*, that judgment for defendant will be affirmed, as the findings must be accepted as true, the evidence not having been brought up.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDON, Judge.

A. Waitz and R. H. Taylor, for appellant.
Pillsbury & Blanding, for respondent.

HAYNE, C. This was an action against the owner of a mine for damages for injuries received from a broken bell-wire while being hoisted up the shaft of the mine. Judgment was given for the defendant, and the plaintiff appeals. The evidence is not brought up, and therefore the findings must be accepted as true. The negligence set forth in the complaint consists in the use of defective machinery. The allegation is as follows: "That one of said wires was composed of such poor material that the same broke on the 2d of October, 1881, at or near the 300-foot level of said mine, and by the negligence and carelessness of said defendants, its agents and servants, in the selection of said wire, and in fastening the same to the timbers of said mine, at such long distances apart, to-wit, about one hundred feet apart, that said broken wire became coiled in the middle of said shaft, and while plaintiff was being hauled to the surface of the earth, through said shaft, on said 2d of October, 1881, at the close of his day's work, on said bucket, said wire coiled around the right leg of plaintiff just below the knee," whereby he was injured. It will be seen from this that the complaint set forth two circumstances of negligence, viz.: *First*, that there was negligence in the selection of the wire; and, *second*, that there was negligence in having the fastenings of this wire so far apart as 100 feet. Both these charges are negatived by the findings. In relation to the first, the court finds that "there were two bell-ropes, one to each division of the shaft, each composed of three galvanized wires twisted together, making a wire of suitable size and strength for the purpose, but with a tendency to twist." If the wire was of suitable size and strength, the defendant could not have been guilty of negligence in its selection. In the second place the findings negative the allegation that fastenings were 100 feet apart. The court finds that "the fastenings to the timber were at irregular intervals from fifteen to thirty, and even fifty, feet apart." And in its conclusions of law it states that the wires were "properly adjusted

and fastened to the mine." It is not alleged that from 15 to 30 and even 50 feet apart was an improper distance for the fastenings, and there is nothing in the record to lead us to suppose that it was. Thus it appears that the circumstances of negligence charged in the complaint are negatived by the findings; and this being so, and the truth of the findings not being questioned, the judgment must be affirmed, and the objections made to the findings as to contributory negligence become immaterial. We therefore advise that the judgment be affirmed.

We concur: GIBSON, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(83 Cal. 574)

LUCK v. LUCK. (No. 18,567.)

(Supreme Court of California. April 24, 1890.)

SERVICE OF NOTICE BY MAIL—FINAL ORDER—DIVORCE.

1. Notice of appeal served by mail from any place, whether it be the residence or office of the person serving it or not, which has regular mail communication with the place where the notice is to be sent, is sufficient under Code Civil Proc. Cal. §§ 1012, 1013, providing that service by mail may be made where the person making it and the person on whom it is to be made reside or have their offices in different places, between which there is regular mail communication, and that the paper must be deposited in the post-office, postage paid, addressed to the person on whom it is to be served at his residence or place of business. *Reed v. Allison*, 61 Cal. 461, and *Murdoch v. Clarke*, 78 Cal. 25, 14 Pac. Rep. 385, overruled.

2. In divorce, a judgment denying plaintiff's prayer, and awarding the custody of the children to defendant, is final, and appeal lies from any part of the decree.

In bank. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

F. J. Kierce, for appellant. Chase & Chase, for respondent.

PATERSON, J. This is an action for divorce. The prayer of the plaintiff was denied, and the custody of the children was awarded to the defendant. Plaintiff appealed from that portion of the judgment giving the care, custody, and control of the children to the defendant. Respondent moves to dismiss the appeal on the following grounds: That the portion of the judgment appealed from is not appealable; that the notice of appeal was not served as required by sections 1012, 1013, Code Civil Proc.; that the notice of appeal was served by an attorney (Kierce) who had no authority to sign or serve it.

1. The right to the care, custody, and control of the children was an issue in the case. Judging from the nature of the appeal, it was the issue upon which the parties made their chief efforts. Plaintiff alleged that defendant was not a fit person to have the care of the children. Defendant denied the allegation, and countered with a similar accusation against the plaintiff. The portion of the judgment appealed from is a part of the

final decree, and an appeal may be taken from any final decree, whatever its nature, and from any part thereof. The fact that the court below may modify the decree so far as the children are concerned does not deprive the defeated party of her right to have this court say whether the judgment of the court below is correct. Such party is not bound to wait for the court below to change its judgment. The cases cited upon the proposition that the appellate court will not disturb the action of the court below in exercising its discretion in such matters have no bearing on the question as to whether the order is appealable.

2. The attorney who served the notice of appeal resided and has his office in the city of San Francisco, and the attorneys for respondent reside in Martinez, Contra Costa county. The notice was served by depositing it in the post-office at Oakland, with postage prepaid, and addressed to the attorneys for respondent at Martinez. It is claimed that the service was ineffectual, because the notice was not mailed at San Francisco, and the case of *Reed v. Allison*, 61 Cal. 461, is relied on in support of the contention. That case had been tried in the city of San José, and the attorney for appellant, being in that place on business, served the notice of appeal personally on the respondents residing there, and mailed notices to the other respondents. The attorney for appellant resided at San Rafael, Marin county. The court held that the attempted service upon the respondents residing at Redwood City, San Francisco, and other places, except at San José, was void; and, it being an action of partition, and necessary to have all the parties before the court, the appeal was dismissed. We think that case and *Murdock v. Clarke*, 73 Cal. 25, 14 Pac. Rep. 385, which followed it in department, should be overruled. The decision in *Reed v. Allison* was based upon a construction of sections 1012 and 1013, Code Civil Proc., which in our opinion is not warranted by the language of those sections, and upon cases which do not support the conclusion reached. As was said in that case, "the conditions involved in the fact of service by mail are: (1) That the person making the service and the person on whom it is to be made reside or have their offices in different places; and (2) that there shall be a regular mail communication between the 'places.'" Those conditions existed in that case. The attorney for appellant and the respondents and their attorneys resided in different places, and there was regular mail communication between all of the places. The statute does not in terms require the notice to be deposited in the post-office at any particular place, the essential things being simply residence in different places, (if the parties reside in the same place the service should and must be personal,) and the fact of regular mail communication between the place where it is mailed and the place to which it is sent. "In case of service by mail, the notice or other

paper must be deposited in the post-office, addressed to the person on whom it is to be served," is the language of the section (1013) which directs how service by mail is to be made. There is nothing in the language of this or any other statute indicating an intention on the part of the legislature to require the party making the service to deposit the paper in any particular one of the post-offices of this state having regular mail communication with the place to which the paper is to be sent. There can be no good reason assigned for such a construction, or for such a provision. The fact that under the construction which we give to the section the paper may be sent from a place in the central part of the state to one end of the state, and there mailed to the party to be served living in the other end of the state, is a thing not at all likely to occur, and could not prejudice the rights of the respondent if service should be made in that way. It is provided that "the service is complete at the time of the deposit, but if, within a given number of days after such service, a right may be exercised or an act be done by the adverse party, the time within which such right may be exercised or act be done is extended one day for every twenty-five miles distance between the place of deposit and the place of address." The rights of respondent are thus carefully preserved against any abuse by the moving party of the privilege given him. On the other hand, it may often happen, as it did in *Reed v. Allison*, that the attorney for appellant is engaged in preparing his appeal at a place other than his residence or office. What good reason can be given for requiring him to mail the notice from the place in which he resides, especially where such place is further from the place to which the notice is to be sent than the place where he is engaged at the time? This case was tried in Oakland, and the notice was deposited in the post-office at that place, which is nearer Martinez than San Francisco is. It would be an absurd requirement which would compel the person making the service to perform the act in San Francisco, which could be done as effectually, and with more convenience and expedition and less risk, in Oakland. But it is sufficient to say that the statute does not require that the deposit should be made in the place where the party making the service resides. The cases of *Corning v. Gillman*, 1 Barb. Ch. 649, and *Moore v. Besse*, 35 Cal. 184, do not sustain the reasoning in *Reed v. Allison*, supra, so far as the question before us was involved. In *Corning v. Gillman* the decision was upon the ground that the fourteenth rule of the court required the notice to be deposited in the post-office where the moving party resided. The rule is not reported. In *Moore v. Besse* the court decided that a party relying upon substitute service by mail must show that he and the person upon whom service is made reside in different places. They may have resided in the same place, in which event personal service was necessary;

and no presumption arises from the fact that a case is tried in a particular place that the attorney of the moving party resides there. That is all the court decided in that case which bears on the question before us.

There is no merit in the contention that Kierce was not substituted as an attorney for appellant in the place of her former attorney, Smith, and that the notice and service are without authority and void. The substitution was duly made, and notice thereof given to the attorneys for respondent. Motion denied.

We concur: BEATTY, C. J.; MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.

(34 Cal. 221)

THOMAS v. BLACK. (No. 12,635.)

(Supreme Court of California. May 31, 1890.)

REPLEVIN—EVIDENCE—CONTINUANCE.

1. In an action against a sheriff to recover personal property levied on in plaintiff's hands as having been fraudulently conveyed to him by a defendant in divorce proceedings to evade the payment of a judgment therein, evidence of ill treatment and abuse of his wife, which was the ground of the divorce, is inadmissible, as irrelevant and as having a tendency to prejudice plaintiff's case.

2. On the granting of a continuance, the testimony of witnesses in attendance, taken by the judge in the form of a deposition, under Code Civil Proc. § 598, and reduced to writing by a stenographer, but not read over to, corrected, or signed by the witnesses, nor certified by the judge, does not constitute a deposition, within the requirements of section 2082.

Appeal from superior court, San Benito county; JAMES F. BREEN, Judge.

Hudner & Dooling and *Montgomery & Scott*, (T. H. Campbell, of counsel,) for appellant. *N. C. Briggs*, for respondent.

MCFARLAND, J. This is an action to recover certain personal property, or its value, alleged to have been purchased by plaintiff from one Joaquin S. Serpa. Maria L. Serpa, former wife of said Joaquin, had obtained a divorce from the latter, and a judgment for \$290, as costs, attorney's fees, etc. On this judgment an execution had issued, and the original defendant, Ross, (now deceased,) as sheriff, had, under said execution, levied on said personal property as the property of said Joaquin, when this action was commenced by plaintiff, and the property replevied from the sheriff. Defendant averred that the property was the property of said Joaquin, and that the attempted sale from Joaquin to plaintiff was fraudulent, and for the purpose of hindering and defrauding said Maria, etc. The verdict and judgment were for defendant, and plaintiff appeals from the judgment, and from an order denying a new trial. In the mean time, Ross died, and his administrator was substituted as defendant.

The respondent was allowed, over the objection of appellant, to prove by three different witnesses that, when Joaquin Serpa was married to his wife, Maria, he had a loathsome private disease; that he married her for

the purpose of curing himself, by transmitting the disease to her; that such was the result of the marriage; and also that during the marriage he cursed, kicked, and struck his wife. It is quite evident that the allowance of this testimony was error. It had no bearing on the question whether the alleged sale from Joaquin to plaintiff was valid, and it clearly prejudiced plaintiff's case by inflaming the minds of the jury against his asserted grantor. For this reason a new trial must be granted.

There are one or two other questions to be noticed. Appellant contends that the answer does not contain a sufficient statement of the facts which constitute the fraud, and the hindering the creditor, and, particularly, that it does not state that the property in question was the only property of Joaquin out of which the execution might have been satisfied. But no question of that kind was raised in the court below; and both parties introduced evidence, without objection, on the issue of fraud, and as to the point whether Joaquin had other property. Under these circumstances, we would not reverse the judgment for this objection to the answer, raised here for the first time.

Some declarations of Joaquin made after the sale were improperly admitted.

The testimony of the witnesses M. V. Silva and Frank Martin was improperly admitted. The case had been set for trial for March 23d; but on March 21st the court, at plaintiff's instance, made another order, setting it for April 6th. On March 23d the defendant came into court with the witnesses Silva and Martin, and insisted that the trial should proceed, and that if it should be continued the testimony of the said witnesses should be taken in the form of depositions, because the real defendant was poor, and could not get the witnesses there again. Thereupon the court set aside the order resetting the trial for April 6th, and ordered that the case be continued until April 6th, and that, as a condition of the continuance, the testimony of said two witnesses "be taken at this time, by and before the court, in the form of a deposition, by questions and answers, and that the evidence be taken by the short-hand reporter." To all of this, plaintiff objected. The testimony of the two witnesses was then taken by the short-hand reporter, but was not read over to the witnesses, or corrected or signed by them. On the trial of the case, which was before a jury, a transcript of this testimony, or what purported to be such a transcript, but not certified by the reporter, or by any other person, was offered in evidence and admitted over plaintiff's objections that it had not been read to the witnesses, nor subscribed by them, nor certified by the officer taking the depositions as required by the Code, nor certified by the report as a correct transcript of his notes. There no doubt can be a valid condition to a continuance that the testimony of witnesses in attendance shall be taken, but this must be done in the

manner prescribed by the Code; and the Code (section 596, Code Civil Proc.) provides that the testimony must be taken "by deposition, before a judge or clerk of the court in which the case is pending, or before such notary public as the court may indicate." In the case at bar the transcript admitted in evidence lacked the essential elements of a "deposition," as defined by the Code. It was not certified or authenticated in any way whatever, and the witnesses had no opportunity to correct it. The jury before whom the case was afterwards tried did not see the witnesses, and could have no assurance that the document presented contained a true statement of their testimony; and we can see no tenable ground upon which the document could have been admitted. The testimony of these witnesses was not taken as part of the trial, which was not commenced until April 6th, and was had before a jury which was not impaneled until the latter date. Judgment and order reversed, and cause remanded for a new trial.

We concur: SHARPSTEIN, J.; FOX, J.

(43 Kan. 666)

RICH v. LAPPIN.

(Supreme Court of Kansas. May 10, 1890.)

TRIAL—INSTRUCTIONS—WRITING—DICTATION.

The district court must give its instructions to the jury in writing, when requested so to do by either party; and the giving of them orally, and having them taken down by a stenographer, and after the jury has retired having them written out by the stenographer, is not sufficient.

(Syllabus by the Court.)

Error from district court, Comanche county; C. W. ELLIS, Judge.

Denton & Jones, for plaintiff in error. W. A. Taylor and C. E. Elliott, for defendant in error.

VALENTINE, J. This was an action brought before a justice of the peace of Comanche county by J. C. Lappin against H. H. Rich, to recover \$60, which the plaintiff alleges he had to pay to the defendant to procure the release from the sheriff of the county of two mules in which the plaintiff had an interest, and which had been wrongfully seized by the sheriff at the instance of the defendant. After judgment in the justice's court, and an appeal to the district court, the case was tried before the district court with a jury, and at the conclusion of the plaintiff's evidence the defendant demurred to both the plaintiff's bill of particulars and the evidence, upon the ground that neither disclosed facts sufficient to constitute a cause of action, which demurrer the court overruled; and then the defendant requested the court to give written instructions to the jury, which the court refused. The record upon this subject, so far as it is necessary to quote it, reads as follows: "Whereupon the defendant requested the court to give written instructions to the jury in said cause;

whereupon the court delivered his instructions orally, the stenographer taking them down and writing them out after the jury had retired; to all of which the defendant duly objected and excepted at the time." We think the court below erred. Section 275 of the Civil Code, so far as it is necessary to quote it, reads as follows: "The court shall give general instructions to the jury, which shall be in writing, and be numbered and signed by the judge, if required by either party. * * * All instructions given by the court must be signed by the judge, and filed together with those asked for by the parties as a part of the record." In this connection see the following cases: *State v. Potter*, 15 Kan. 303; *City of Atchison v. Jansen*, 21 Kan. 560. There are other errors assigned, but we do not think that the court below committed any error, except in refusing to give to the jury written instructions. For this error the judgment of the court below will be reversed, and cause remanded for a new trial. All the justices concurring.

(43 Kan. 676)

BOARD COUNTY COM'RS LYON CO. v. CO-MAN *et al.*

(Supreme Court of Kansas. May 10, 1890.)

HIGHWAYS—LOCATION—DAMAGES—PARTIES.

In the trial of an action for damages for the location of a public highway, on appeal from the board of county commissioners, when an objection is first made, after the trial has commenced, that the action could not be maintained by the plaintiffs jointly, *held*, that the objection comes too late, that a defect of parties must be taken advantage of by demurrer or answer.

(Syllabus by the Court.)

Commissioners' decision. Error from district court, Lyon county; CHARLES B. GRAVES, Judge.

J. Jay Buck and A. M. Flory, for plaintiff in error. Kellogg & Sedgwick, for defendants in error.

GREEN, C. This was an appeal to the district court of Lyon county from an allowance made by the board of county commissioners for damages awarded by reason of the location of a road through the land of the plaintiffs below. The defendants in error presented their claim for damages to the viewers, and were allowed \$190.50. This allowance was reduced by the board of county commissioners to \$100, on a hearing before the board as to the amount the plaintiffs below were entitled to recover. The order of allowance was made to the plaintiffs below jointly, and from this allowance they appealed to the district court. Upon the trial the defendant below objected to the introduction of any evidence, because the plaintiffs had no joint interest in the subject-matter of the action, and were improperly joined. This objection was overruled. The plaintiffs then introduced their evidence, and the defendants moved to dismiss the case, for the reason that the action was improperly

brought, and because the plaintiffs had no joint interest in the subject-matter of the action, and were improperly joined as parties plaintiff and defendant. This objection was also overruled and excepted to, and the defendant then asked the following instruction, which was refused and excepted to: "If you believe from the evidence that previous to the laying out of the road in question, and ever since, Mary M. Coman owned one of the quarter sections, and C. W. Coman owned the other, and the road is laid out partly on each, then each one would have a right to sue for damages, if damaged in fact, but they cannot maintain a joint action." These are the only errors complained of. We think the defendant below has mistaken its remedy. No objection was made to the plaintiffs' claim, on account of there being a defect of parties, until the case was on trial in the district court. They presented their joint claim for damages to road-viewers, and had it considered, and, upon the report of the viewers being accepted by the board of county commissioners, had the same considered there, without objection, and allowed to them jointly. While no pleadings are necessary in an action of this kind, we think the defect of parties should have been raised by proper pleadings, before the case was on trial. The plaintiffs' claim for damages could be regarded as a petition, and, if there was a defect of parties, it could have been raised by demurrer or answer. Failing to do that, the defendant below waived the question. Section 91 of the Code provides: "When any of the defects enumerated in section eighty-nine do not appear upon the face of the petition the objection may be taken by answer; and if no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action." If the position of the defendant below be correct, then it would have been but fair to the plaintiffs to have raised the question at the proper time, and, if sustained, the court could have permitted the plaintiffs to amend by filing separate petitions, under section 92 of the Code, which reads: "When a demurrer is sustained, on the ground of misjoinder of several causes of action, the court, on motion of the plaintiff, shall allow him, with or without costs, in its discretion, to file several petitions, each including such of said causes of action as might have been joined; and an action shall be docketed for each of said petitions, and the same shall be proceeded in without further service." All of the objections made by the defendant below came too late. It is well settled by numerous decisions of this court that a misjoinder or a defect of parties is waived, if not taken advantage of by demurrer or answer. *Simpson v. Greeley*, 8 Kan. 586; *Parker v. Wiggins*, 10 Kan. 420; *Thomas v. Reynolds*, 29 Kan. 304; *Woodman*

v. Davis, 32 Kan. 344, 4 Pac. Rep. 262. The question properly triable in this case was the amount of damages the plaintiffs had sustained, and this question was fairly submitted to the jury. We therefore recommend that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 750)

UNION PAC. RY. CO. v. FRAY.

(*Supreme Court of Kansas*. May 10, 1890.)

MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE MACHINERY.

1. A railway company is liable to a laborer, working at a derrick of the company, assisting in hoisting stone and giving signals, for injuries caused by the negligence of the foreman, whose duty it was to direct repairs and keep the derrick in safe condition, if such laborer is without fault.

2. As between a railway company and its employees, the railway company is required to exercise reasonable and ordinary care and diligence in furnishing to its employees reasonably safe machinery and instrumentalities for the operation of the work in which they are engaged.

3. As between a railway company and its employees, the company is negligent in the use of unsafe or defective machinery, where it has notice of the defect, and fails to exercise reasonable and ordinary care in remedying such defect.

4. Findings of fact, if supported by sufficient evidence, will be construed so as to support the verdict, if such a construction can be fairly given, and all findings are to be harmonized, so far as possible.

(*Syllabus by the Court.*)

Error from district court, Wyandotte county; O. L. MILLER, Judge.

On the 2d day of February, 1888, William Fray brought his action against the Union Pacific Railway Company for damages for personal injuries. Trial had again on the 14th day of December, 1887, before the court with a jury. The jury returned a verdict for Fray, and assessed his damages at \$2,000.

The following interrogatories were asked, and answered by the jury: "(1) Who was the foreman controlling the men at the derrick? A. William Ulrich. (2) On the day of the accident, and before it occurred, did Nelson tell Ulrich that the brake rope was unsafe? A. Yes. (3) How far down had the rock that broke the rope descended from the platform when the rope broke? A. From seven to ten feet. (4) How far was it from the platform to the bottom of the pit where the rock was being placed? A. About forty-two feet. (5) Was it the duty of Fray to give signals when the rock was being lowered? A. Yes. (6) If Fray was to give signals when the rock was being lowered, who assigned him the duty? A. Wm. Ulrich. (7) Did the wear and the use of the brake rope for too long a time cause it to break, or tend to do so? A. It did. (8) On the day of the accident, did Ulrich tell Nelson to go on with the brake rope after being told by him that it was unsafe? A. Yes.

(9) Where was Fray at the time of the accident, and what was he doing? A. On the platform, giving signals."

Upon the request of the railway company, the jury answered the following questions: "(1) Did Samuel Mallison, for the defendant, have the control and direction of the work, the way and manner of its performance, including the derrick and its apparatus, where the plaintiff was injured? A. He did. (2) Was not William Ulrich foreman of the work under Samuel Mallison? A. He was. (3) Was the plaintiff, either by himself or others, informed by Mr. Mallison, acting for the defendant, that there was danger of the brake rope burning in letting the rock down into place, if the rope was not kept wet? A. No. (4) Was the plaintiff, either by himself or with others, informed by William Ulrich that there was danger of the brake rope burning in letting down the rock into place, if the rope was not kept wet? A. No. (5) Did not Samuel Mallison, at or about the commencement of the work for the defendant, ask the plaintiff to get a bucket of water to be used in watering the brake rope? A. Yes. (6) Did not Samuel Mallison, at or about the commencement of the work on this bridge, direct the plaintiff to pour water on the brake rope so as to keep it wet while rock were being lowered? A. No. (7) If the brake rope had been kept wet where it wound around the shaft, would it have burned? A. No. (8) Did the plaintiff obey the directions of Mallison in respect to keeping the rope wet? A. No. (9) Was not the plaintiff warned by Samuel Mallison to be careful, and see that the brake rope was kept wet while rock was being lowered by the derrick to the work below? A. No. (10) Was not the plaintiff warned by William Ulrich to be careful and see that the brake rope was kept wet while rock was being lowered by the derrick to the work below? A. No. (11) Was not the injury to the plaintiff caused by the burning of the brake rope? A. Yes; in part. (12) Would the brake rope have burned if it had been kept wet? A. No. (13) Did any one for the defendant direct the plaintiff not to observe the directions given him by Mallison in respect to keeping the rope wet? A. No. (14) If you answer the preceding question in the affirmative, name the person who gave such direction, and state what he said? A. (No answer.) (15) Was not the plaintiff provided with a bucket of water to be used in wetting the brake rope? A. Not proven that he was. (16) Was he not supplied with a proper vessel for applying water to the brake rope? A. Not proven that he was. (17) Was not water flowing near by which the plaintiff could get to wet the rope? A. Not proven. (18) Was not the brake rope put on new the day of the accident or the day before? A. No. (19) Was not the brake rope of size and strength sufficient for the purpose of controlling the lowering of the rock by the derrick? A. It was large and strong enough when new. (20) Had not the

defendant close at hand upon the work a large quantity of new rope from which brake ropes were to be taken as often as necessary? A. Yes. (21) Did not Fray, upon one or more occasions, on other days prior to the accident, pour water on the brake rope while rock was being lowered? A. Not while rock was being lowered. (22) Did not Nelson, upon one or more occasions, upon other days prior to the accident, while rock was being lowered, before plaintiff was injured, pour water on the brake rope? A. No; not while rock was being lowered. (23) Did not Owens, upon one or more occasions, upon other days prior to the accident, while rock was being lowered, before plaintiff was injured, pour water on the brake rope? A. Owens did on one occasion pour water on rope, but it is not shown that it was done while rock was being lowered. (24) Was not Fray present when Nelson poured water on the brake rope? A. We have no such evidence. (25) Was not Fray present when Owens poured water on the brake rope? A. He was on the platform. (26) For what purpose did Fray pour water upon the brake rope when rock was being lowered? A. He did not pour water while rock was being lowered. (27) Was not the plaintiff, Fray, either by himself or with others, warned by Mallison that it was unsafe for rock to be lowered upon this work, the distance it was necessary to lower it, if the brake rope was not kept wet? A. No. 28 and 29 withdrawn. (30) Was not the brake rope perfectly dry at the time of the injury? A. Yes. (31) Were not four or five stones lowered after dinner on the day plaintiff was injured, and before he was injured, with the same brake rope that afterwards broke, without said brake rope being wet? A. Several stones were lowered, and no evidence that rope was wet. (32) Was not the breaking of the brake rope caused by the burning of it from friction with the journal around which it was wound? A. The breaking was caused by the burning and wearing. (33) How long would a new brake rope last upon the work in question if it was kept wet? A. Probably three or four days. (34) Was it safe to lower rock the distance it had to be lowered on this work without keeping the brake rope wet? A. Yes; if rope were changed before becoming dangerous. (36) Was not the rock to be lowered on the work in question lifted from a car on a side track south of the main track with hooks suspended on a rope and chain from the end of the boom? A. It was. (37) Was not the rock which fell so lifted? A. It was. (38) Was not the rock, after being lifted from the car, swung round, suspended from the end of the boom until it reached the point where it was to descend? A. It was. (39) About how far—how many feet—was it swung round before it started to descend? A. About forty feet. (40) Did not plaintiff know that it was dangerous to use the brake rope if it was not kept wet? A. No."

The railway company filed its motion for a

new trial, which was overruled. Thereupon the court rendered judgment in favor of Fray against the company for \$2,000 and costs. The railway company excepted, and brings the case here.

Charles Monroe and A. L. Williams, for plaintiff in error. P. P. Clark and Nathan Cree, for defendant in error.

HORTON, C. J., (*after stating the facts as above.*) This was an action in the court below by William Fray against the Union Pacific Railway Company to recover damages for personal injuries received by him through the alleged negligence of the railway company in failing to properly maintain and safely operate a derrick at Deep Hollow bridge, near a station on the line of the railroad called "Tiblow," now known as "Bonner Springs." Fray was injured on the 17th day of November, 1882, while engaged as a laborer at a derrick. This action was commenced on the 2d day of February, 1883, and has been in the courts over seven years. It has been here twice before. 31 Kan. 739, 3 Pac. Rep. 550; 35 Kan. 700, 12 Pac. Rep. 98. When it was first here, the case was reversed on account of irrelevant instructions, and the evasive and untrue answers of the jury. The second time it was here it was reversed on account of incompetent evidence, erroneous instructions, and the failure of the jury to answer questions, submitted to them, in an intelligent manner. Upon the first trial the damages allowed by the jury were \$2,000; upon the second trial, \$4,000; and upon the third trial, \$2,000. It is unnecessary to give a full description of the derrick, the ropes, and other appliances connected with it, as they are already set forth at length in the reports referred to. In operating the derrick, a rope called a "brake rope" was used. A portion of this was wound around the pinion shaft. The rope was of sea-grass, and an inch and a half or two inches in size. While the derrick was being used in moving a large stone, the rope broke, the derrick went to pieces, a portion striking Fray on his face, and injuring him severely. The jury, among other findings, found especially that the breaking of the rope was caused by wearing and the burning from friction with the journal or pinion shaft; that the rope was perfectly dry at the time it broke; and that if it had been kept wet where it was wound around the pinion shaft it would not have burned.

Samuel Mallison was the general superintendent of the construction. William Ulrich was the overseer or foreman of the work. John Nelson, one of the laborers handling the derrick, testified that about 11 o'clock in the forenoon of the day that Fray was injured he told Ulrich "this brake rope is about worn in two, and I will have to have more rope." Ulrich answered: "Jack, you are using too much rope; let the rope go." Nelson also testified that at 1 o'clock in the afternoon of the same day, about an hour before Fray was

hurt, he said to Ulrich: "Well, I told you I wanted more new rope." Ulrich said: "Go ahead with the rope you have; you are using too much rope. By God, we expect to kill a man in this place before we are through with it." R. P. Seagraves testified that on the day of the breaking of the derrick he was working for the railway company, under the direction of Ulrich, at the Deep Hollow bridge; that he heard the conversation between Nelson and Ulrich in the afternoon of the day that the derrick broke; that Nelson said to Ulrich: "We will have to have some new rope; this rope is about played out." Ulrich replied: "You go ahead with that rope; you are using too much rope." Nelson answered, "It will break the first thing you know, and there will be somebody killed." Ulrich said: "He didn't give a ———; there would have to be somebody killed before the work was finished, anyway." James Barrett testified that he heard the conversation between Nelson and Ulrich just before the rope broke, and stated it substantially the same as Nelson and Seagraves. The contention of the railway company is that Fray was directed by Mallison and Ulrich to keep the brake rope and pinion shaft wet, and that the rope broke because of his negligence. Fray denies that he had any such directions, and claimed that his sole duty at the derrick was to help hoist stone, receive and give signals. The jury specially found that it was the duty of Fray to give signals when rock was being lowered by the derrick; that at the time of the accident Fray was on the platform giving signals; that neither Mallison nor Ulrich ordered or directed Fray to pour water on the brake rope, so as to keep it wet; that neither Mallison nor Ulrich warned him that there was danger of the brake rope burning, while rock was being let down, if the rope was not wet, and that Fray was never informed by any one that there was danger of the brake rope burning, if not kept wet.

Upon the trial Fray testified: "Question. Who put you to work upon the derrick? Answer. Mr. Ulrich did. Q. What did he tell you to do? A. He told me to help hoist stone and receive signals and give signals. Q. What else, if anything at all? A. That was all he ever gave me any orders for. Q. To help hoist stone and give signals? A. Yes, sir. Q. Were you at work on the platform? A. I was. Q. Whom did you receive orders from during the work? A. From Mr. Ulrich, the foreman. Q. Was he the foreman controlling that work on the 17th of November, 1882? A. Yes, sir, he was. Q. What were you doing on that day,—what part of the work were you engaged in? A. Well, just on that day I was helping hoist stone, receiving signals, and giving signals. Q. How long had you been at work there? A. I disremember just about what time it was,—somewhere in September, 1882, when I first commenced work at that place. Q. Did you see Mr. Mallison there? A. I would see Mr. Mallison pass along sometimes. He would

stop there on the work. I saw Mallison come around there several different times. Q. Where did you first see him there, do you recollect? A. Well, no, I can't recollect just the first time. Q. Was he there often during the time you were at work? A. He would be around there sometimes. He would be there about three times a week, and sometimes less. Q. What orders did you hear him give, if any? A. I never heard him give any orders. Q. Of any character whatever? A. No, sir; I never heard him give any orders around in my presence. Q. You don't recollect of ever having heard him give any orders in your presence? A. No, sir. Q. Who gave you your orders? A. Mr. Ulrich. Q. Did you ever receive any orders from Mr. Mallison at all? A. No, sir; he never did give me any orders. Q. Do you recollect the orders given you by Ulrich prior to the happening of this, at the time you were there? A. All the orders he ever gave me was to help hoist the stone out of the cars, and to watch for signals, and never leave the platform. Q. Do you recollect any other besides them? A. No, sir; he never did,—never gave me any other orders. Q. No other directions or no other duties were assigned to you but what you have mentioned? A. No, sir; never did."

There was other evidence tending to support the statements of Fray, and, as there was sufficient evidence to sustain the verdict and findings of the jury, we cannot disturb either. Mallison and Ulrich contradicted Fray and his witnesses. If the jury had accepted their evidence as satisfactory, the verdict and many of the material findings would have been favorable to the railway company. This court has repeatedly stated that, if the findings or verdict of a jury be contrary to the judgment of its members, they will not be set aside, if approved by the trial court, unless there is a total want of evidence. Further complaint is made that, if Fray was not directed by Mallison or Ulrich to pour water on the brake rope, he must have known it was dangerous to use the rope without being kept wet, and therefore that the finding of the jury to the contrary is without any support. There is very much in the evidence tending to show that Fray did know, or ought to have known, that it was dangerous to use the rope if not wet, and it is the opinion of the writer that the finding of the jury upon this point is against the preponderance of the evidence. All the evidence, however, was before the jury, and submitted to them under proper instructions, and we are unable to say that the finding is wholly without support.

Nelson's testimony, although very unsatisfactory to the writer, goes to the full length of this finding of the jury. There is the presumption that Fray did not purposely incur danger to himself, or put his life in peril. It is possible that, although he may have thought the rope unsafe for those below the derrick, he did not think it dangerous to himself.

The breaking of the rope seems to have been more disastrous to the derrick, the cog-wheels, pulleys, etc., than might have been expected. Where there is evidence competent to be considered by a jury, and the court submits it for their consideration, a finding or verdict thereon will not be set aside, although the appellate court may be of opinion that the evidence was insufficient to support the finding. *Railway Co. v. Kunkle*, 17 Kan. 145; *Gafford v. Hall*, 39 Kan. 166, 17 Pac. Rep. 851.

Counsel for the railway company refer to the opinions of this court upon the former hearings, and strenuously insist that the language of those opinions apply with full force to the case as now presented. In this decision we cannot go outside of the record before us. A portion of the evidence introduced upon the former trials was used as impeaching evidence at the last trial, and is contained in the record, but all of the testimony of the former trials is not before us. When this case was here for review at the January term for 1884, and at the July term for 1886, the writer of those opinions, in view of the reversal of those judgments for manifest and manifold errors, made comments upon the evidence which it was not really necessary to make, and which would not have been made but for the other errors then appearing. The special findings of the jury are criticised as evasive and conflicting. Under the prior decisions of this court, findings of fact, if supported by sufficient evidence, will be construed so as to sustain the verdict, if such a construction can be fairly given, and all findings are to be harmonized, as far as possible. *Simpson v. Greeley*, 8 Kan. 586; *Railroad Co. v. Phillibert*, 25 Kan. 583; *Railway Co. v. Holley*, 30 Kan. 465, 1 Pac. Rep. 130; *Railway Co. v. Ritz*, 38 Kan. 404, 6 Pac. Rep. 533; *Clark v. Railway Co.*, 35 Kan. 350, 11 Pac. Rep. 134; *Insurance Co. v. Smelker*, 38 Kan. 285, 16 Pac. Rep. 735.

There was no material error in refusing the instruction about the revocation of the order of Mallison to Fray to wet the rope, because the jury found that no such order was ever given. The instruction for the jury to find the facts according to the testimony of Mallison was properly refused, because his evidence conflicted with that of Fray and his witnesses. As to the liability of the railway company upon the verdict and findings, we refer to *Railroad Co. v. Salmon*, 14 Kan. 524; *Railroad Co. v. Holt*, 29 Kan. 152; *Railroad Co. v. Moore*, Id. 633; *Railway Co. v. Fox*, 31 Kan. 586, 3 Pac. Rep. 320; *Railway Co. v. Mackey*, 33 Kan. 298, 6 Pac. Rep. 291; *Railroad Co. v. Wagner*, 33 Kan. 660, 7 Pac. Rep. 204; *Railway Co. v. Weaver*, 35 Kan. 412, 11 Pac. Rep. 408; *Railroad Co. v. Dwyer*, 36 Kan. 58, 12 Pac. Rep. 352; *Railroad Co. v. McKee*, 37 Kan. 592, 15 Pac. Rep. 484; Paragraphs 1250, 1251, Gen. St. 1889, and the cases there cited. The judgment of the district court will be affirmed. All the justices concurring.

(43 Kan. 667)

SCHERMERHORN v. PECK *et al.*

(Supreme Court of Kansas. May 10, 1890.)

CONDEMNATION OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEE.

A right of way for a railroad company was condemned through land that was mortgaged. The mortgagor appealed from the award, after which a proceeding to foreclose the mortgage was begun; and both actions were pending in the same court at the same time. After the condemnation proceeding was tried, and the award made and paid, it was found that the proceeds of the foreclosure sale were insufficient to discharge the mortgage debt. A motion was made by the mortgagee in the foreclosure action to have the amount of the award brought into court, and applied in satisfaction of the mortgage indebtedness; but no supplemental pleading was filed by the mortgagee, and neither the railroad company, nor the parties to whom the award had been paid, were made parties in the foreclosure action, and no effort of any kind was made in either case to control or reach the fund until some time after the money had been awarded and paid. The motion was refused. *Held*, that the condemnation money was not a fund within the jurisdiction and control of the court in the foreclosure action, and that the motion was rightly denied.

(Syllabus by the Court.)

Error from district court, Cowley county; A. J. PYBURN, Judge.

S. D. Pryor, for plaintiff in error. *Peckham & Henderson* and W. E. White, for defendant in error.

JOHNSTON, J. The order sought to be reversed in this proceeding was made in a foreclosure action brought by R. M. Peck on the 18th day of May, 1886, to foreclose a mortgage previously given by Joseph C. McKibben, now deceased, and his wife, Martha J. McKibben, upon certain real estate in Cowley county. Cornelia H. Douglas and S. E. Schermerhorn each held a subsequent mortgage upon the same real estate, and they were made parties defendant with the heirs and administrator of Joseph C. McKibben, deceased. On the 4th day of August, 1886, Cornelia H. Douglas filed an answer and cross-petition for the foreclosure of her mortgage; and on the 19th day of August, 1886, S. E. Schermerhorn filed an answer and cross-petition for the foreclosure of her mortgage, and Inez A. McKibben, by her guardian *ad litem*, filed an answer in the action on the 6th day of January, 1887. On January 15, 1887, the action was tried by the court without a jury, all the parties being present except Martha J. McKibben and the administrator of Joseph C. McKibben, deceased, who were both in default. All of the mortgages were declared to be liens upon the real estate, and the priorities were determined in favor of Peck, Douglas, and Schermerhorn, in the order stated. There was found to be due on Peck's mortgage, \$1,521.34; on that given to Douglas, \$2,030.18; and to Schermerhorn, \$884.20. It was ordered and decreed that the real estate should be sold to satisfy the mortgage liens in accordance with the priorities; and on the 29th of August, 1887, in pursuance of the judgment, and upon due notice, the real estate was sold to the defend-

ant Schermerhorn, and on October 17, 1887, the court, on motion of Schermerhorn, confirmed the sale, and directed the sheriff to execute a deed in favor of the purchaser. The proceeds of the sale were sufficient to satisfy the costs and taxes, the judgment in favor of Peck, and the judgment in favor of the defendant Douglas, and the sum of \$116 remained to apply on the judgment of Schermerhorn; leaving a balance due Schermerhorn of \$768.20, with interest thereon at 12 per cent. per annum from January 15, 1887. It appears that on April 23, 1886, a strip of land through the mortgaged premises was condemned for a right of way for the Florence, El Dorado & Walnut Valley Railroad, and the commissioners appointed for that purpose assessed the value of the land taken at \$90.50, and the damages to the land not taken at \$150, making a total of \$240.50. On May 1, 1886, Martha J. McKibben and Inez A. McKibben, who were the sole heirs of Joseph C. McKibben, deceased, appealed from the award of damages to the district court of Cowley county, and on April 12, 1887, a judgment was rendered in the district court in favor of the appellants, and against the railroad company, for \$600 and costs; and it is stated that on May 10, 1887, this amount was paid to Messrs. Jennings & Troup, who were the attorneys of the McKibbens in the appeal case. On the 24th of May, 1887, the plaintiff in error filed her motion in the foreclosure action to require that the money which had been paid on the judgment in the condemnation proceeding to the attorneys of the McKibbens should be applied on the mortgage liens decreed against the real estate; and subsequently, on January 30, 1888, a supplementary motion was filed in the foreclosure proceeding by Schermerhorn, asking that Jennings & Troup be required to pay over the condemnation money alleged to be in their hands, less their fees of \$60, to be applied on the balance still due upon the judgment in favor of Schermerhorn. A notice of this latter motion was served on one of the attorneys of the railroad company on the 7th day of November, 1887; and at a hearing of said motion had on the 4th day of February, 1888, the application of Schermerhorn was denied.

There was no error in the ruling of the court, and we reach this conclusion without determining whether or not it was the privilege and duty of the mortgagee to appeal from the award made in the condemnation proceeding. The money sought to be reached was not a fund within the jurisdiction of the court in the foreclosure proceeding. Neither the railroad company from which it was due, nor the persons to whom it was subsequently paid, have been made parties to that proceeding. The money awarded as damages for right of way was received and paid to Jennings & Troup several months before the supplementary motion was made. There was no effort by Schermerhorn to interplead in the condemnation case; nor did she, by

any pleading in the foreclosure action, ask that the money awarded or to be awarded in the condemnation case should be paid in or held as a fund for the satisfaction of the mortgage. Doubtless the mortgagee could have filed a supplemental pleading in the foreclosure case, bringing all the parties directly connected with the award made or to be made into court, setting forth the facts respecting the condemnation proceeding, and the necessity that the money paid for right of way should be held as a fund for the satisfaction of the mortgage, and thus have reached the end sought in this motion. This might also have been accomplished by an independent action. But the service of the motion upon an attorney of the railroad company did not bring the company into court in the foreclosure action, and there was no attempt to make the persons to whom the money was paid parties to that action. The fact that they were attorneys for one of the parties in the condemnation proceeding does not alter the case. The two proceedings were entirely independent of each other, and neither the parties nor funds in one proceeding are within the jurisdiction of the court in the other unless proper steps for that purpose are taken. No effort of any kind in any case was made to control or reach the fund until some time after the money had been awarded and paid. The steps taken were ineffectual. It was not a fund within the jurisdiction of the court in the foreclosure action, and the court rightly denied the motion. Its judgment will be affirmed. All the justices concurring.

(43 Kan. 650)

KANSAS CITY, F. S. & G. R. CO. v. CRAVENS
et al.

(Supreme Court of Kansas. May 10, 1890.)

RAILROAD COMPANIES—KILLING STOCK—DEMURRER
TO EVIDENCE.

A demurrer to the evidence of the plaintiff admits every fact most favorable to him that the evidence tends to prove, and in its consideration the court is not called upon or authorized to weigh the evidence; and, if there is any evidence tending to establish the issues made by the pleadings, such demurrer should be overruled.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Miami county; J. P. HINDMAN, Judge.

Wallace Pratt and *C. W. Blair*, for plaintiff in error. *W. H. Browne*, for defendants in error.

SIMPSON, C. This case was tried in the Miami county district court on the 1st day of July, 1887, and the plaintiff below obtained a judgment for \$125. The action was brought to recover the value of a certain bay mare alleged to have been killed by the negligence of the railroad company. The company brings the case here for review. At the conclusion of the plaintiff's (below) evidence, the railroad company interposed a demurrer thereto, on the ground that the same failed to estab-

lish a cause of action. Two propositions are contended for by the counsel for plaintiff in error, and the *first* is, substantially, that no negligence was shown by not sounding the whistle, and, *secondly*, it was not shown that the presence of the mare on the track was seen in time to stop the train and avoid the damage. These are questions of fact, but presented in such shape that we are compelled to see if there is some evidence tending to show negligence on the part of the railroad company. The mare was killed on the crossing of a public highway over the track of the railroad. It is fairly established by the evidence that the train was behind time, and running faster than usual; it was going at the rate of 18 or 20 miles per hour. The rate of speed of the train was such, that when it struck the mare, it knocked and dragged her 150 feet. It was growing dark when the mare was struck, it being about 8:15 o'clock in the evening of May 22, 1886. There was the usual whistling post at the statutory distance from the crossing at which the mare was struck. Most of the witnesses for the plaintiff below at the trial swore that the train whistled at the post; two swore that it whistled but once. Conceding that the evidence of the others could be construed to mean three times, might it not be fairly said, from the evidence of the two, that there was but one whistle at the station? We must view this in the same light as the jury would. There is some evidence of negligence, then, at the whistling post.

A demurrer to the evidence admits every fact most favorable to the other side which the evidence tends to prove. *Christie v. Barnes*, 33 Kan. 317, 6 Pac. Rep. 599. In considering a demurrer to evidence, the court cannot weigh evidence. *Merket v. Smith*, 33 Kan. 66, 5 Pac. Rep. 394; *Wolf v. Washer*, 32 Kan. 583, 4 Pac. Rep. 1036. Applying the rules announced in these two cases to the contention of counsel for plaintiff in error, and admitting that the five witnesses, Walker, Turner, Bowman, Elden Walker, and Morris, testified that the train whistled three times at the whistling post, while the record shows that Brown and Cravens say that they only heard it whistle once, and the negligence relied on is not whistling at the post, as in the case of *Railway Co. v. Stevens*, 35 Kan. 622, 12 Pac. Rep. 25, it seems that there is such a state of the evidence that we would have to weigh the testimony of these five witnesses against the two, and to determine from their localities, and the degree of attention paid by each to the approaching train, in order to decide which statement should govern. This we are not required to do.

The next inquiry is, does the plaintiff's evidence show the want of ordinary care on the part of the railroad company to avoid the killing of the mare after she was seen on or near the track? It seems clear from the evidence of Walker, who testified for the plaintiff, that the train was not whistling or ringing the bell as it approached the animal, and

the reasonable inference from this is that the train men did not see the animal as they approached it. Then it would be a matter very largely of inference whether or not, by the exercise of ordinary care, they could have seen the mare if they had been keeping a good lookout ahead. Again, their rate of speed was such that it might have prevented a close inspection of the track ahead, as well as to have prevented the stopping in time. All these things, we think, were matters for the jury, and we are not clear but that the demurrer ought to have been overruled. At least, there is not that entire lack of evidence about ordinary care that would compel us to say that the demurrer to the evidence of the plaintiff ought to have been sustained, and that it was error in the trial court to overrule it. Of course, it could not be expected that we should attempt to reconcile the conflicting statements of the witnesses after the demurrer to the evidence had been overruled and the railroad company had produced its evidence. The jury concluded that there was not displayed by the railroad company that ordinary degree of care required in the operation of the road. They may have founded their opinion on the extra speed of the train, taken in connection with the most favorable aspects as presented by those who testified on behalf of the plaintiff below. So far as the question of contributory negligence on the part of the plaintiff below is concerned, by permitting the mare to run at large, with no one in charge of her, and no precaution taken, we think the case of *Railway Co. v. Wilson*, 28 Kan. 637, is decisive. It is recommended that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 663)

BRIGGS *et al.* v. McCLAIN *et al.*

(Supreme Court of Kansas. May 10, 1890.)

INDIANS—ALLOTTEE OF LANDS—DEATH BEFORE PATENT.

Under Act Cong. Aug. 4, 1886, § 3, (24 St. at Large, 219,) which provides that, on the death of an allottee of land under the treaty of June 28, 1862, with the Kickapoo Indians, leaving heirs, and without having obtained a patent, the secretary of the interior shall cause a patent in fee-simple to issue in the name of the original allottee, the title passes from the government to the heirs of the deceased allottee.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Brown county; R. C. BASSETT, Judge.

James Falloon, for plaintiffs in error. W. W. & W. F. Guthrie, for defendants in error.

GREEN, C. This is an action to quiet title to the S. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 32, township 4, range 17, Brown county. The allegations of the petition are that on August 10, 1886, the plaintiffs became the owners in

fee-simple of the land in controversy; that said land was a part of the Kickapoo reservation, and, by the terms of the treaty between the government and the Kickapoo tribe of Indians, made June 28, 1862, and proclaimed May 28, 1863, was set off to the members of the tribe, and that the land above described was allotted to one Ke-o-tick, an adult male member of the tribe; that he took possession of said land, and erected a house thereon, and otherwise improved it; that Ke-o-tick died in Brown county, in December, 1875, without having received a patent for said land, and without having made proof to the United States district court of his ability to manage his affairs; that Ke-o-tick had been married to a citizen Pottawatomie woman by the name of Gooslin, and by her he had a son named Ah-twine Gooslin; that Ke-o-tick died intestate, leaving as his sole heir Ah-twine Gooslin, being a citizen Pottawatomie Indian; that on August 10, 1886, Ah-twine Gooslin, with his wife, for a valuable consideration, deeded said land to the plaintiffs Briggs and Leston, who afterwards conveyed an interest to the defendant Linn, and said conveyances had been duly filed for record in Brown county. The petition further alleges that the defendants make claim to said land through a deed obtained September 11 and September 23, 1886, from Wy-tos-see and Kom-so-qua, brother and sister of the deceased Ke-o-tick. The defendants McClain and Roach demurred to this petition on the ground that the petition did not state facts sufficient to constitute a cause of action, which was sustained by the court below, and the plaintiffs elected to stand upon the petition; and judgment was accordingly rendered for the defendants; and upon this judgment of the court below, in sustaining said demurrer, the plaintiffs below prosecute this proceeding in error.

The determination of the question raised by the pleadings involves the construction of the treaty between the United States and the Kickapoo tribe of Indians, and the act of congress made in pursuance of said treaty. The treaty of June 28, 1862, provides that the whole Kickapoo reservation should be surveyed, and such members of the tribe as adopt the customs of the whites, and desired to have separate tracts of land, should have them allotted to them in severalty, and that upon said assignment being made the commissioner of Indian affairs should issue a certificate to the allottee; that the tract was set apart for the perpetual and exclusive use and benefit of such allottee and his heirs, and should only be disposed of to the United States, or to the Indian members of the tribe, by permission of the president, and on issuing the certificate the allottee shall be deemed to have waived all right to allotted lands, and to other lands retained in common. The treaty further provides that, when the president of the United States becomes satisfied that any adult male allottee, being the head of a family, is sufficiently intelligent and prudent to control his affairs and interests, he

might, at the request of such person, cause the land severally held to be allotted by patent in fee-simple, with power of alienation. In 1886, to carry out the provisions of this treaty, congress passed an act to provide for the settlement of the estates of deceased Kickapoo Indians in the state of Kansas, and for other purposes. Section 2 of said act reads as follows: "That, where allottees under the aforesaid treaty shall have died, or shall hereafter decease, leaving heirs surviving them, and without having obtained patents for lands allotted to them in accordance with the provisions of said treaty, the secretary of the interior shall cause patents in fee-simple to issue for the lands so allotted, in the names of the original allottees, and such allottees shall be regarded, for the purpose of a careful and just settlement of their estates, as citizens of the United States and of the state of Kansas; and it shall be competent for the proper courts to take charge of the settlement of their estates under all the forms, and in accordance with the laws of the state of Kansas, as in the case of other citizens deceased; and, where there are children of allottees left orphans, guardians for such orphans may be appointed by the probate court of the county in which such orphans may reside, and such guardians shall give bonds, to be approved by the said court, for the proper care of the person and property of such orphans as provided by law." Under this act of congress the right to a patent became complete in the allottee. Nothing more remained to be done but the ministerial duty of the proper officer of the government to issue a patent, and by this act this duty was made imperative.

Mr. Justice FIELD, in the case of *Stark v. Starrs*, 6 Wall. 418, says: "The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When in fact the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants." We think, under this treaty and the act of congress of 1886, the title to the land in controversy was fixed in the heirs of Ke-o-tick, the deceased allottee, whoever they may be. In the case of *Langlean v. Hanes*, 21 Wall. 530, the court says: "A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectually as a grant or quitclaim from the government. * * * If the claim be to land with defined boundaries, or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title." This same doctrine was enunciated in the case of *Oliver v. Forbes*, 17 Kan. 124; and this treaty, and the act of congress under consideration, have received the construction which we have adopted in the case of *Briggs v. Wash-puk-qua*, 37 Fed. Rep. 135, by the United States circuit court for the district of Kansas. The court below erred in sustaining the demurrer to the plaintiffs' pe-

tition, and we therefore recommend that the judgment be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 741)

ST. PAUL FIRE & MARINE INS. CO. v. KELLY.

(Supreme Court of Kansas. May 10, 1890.)

INSURANCE—GOODS HELD ON COMMISSION.

Where an agricultural implement dealer, having in his possession a stock of goods, some of which are his own, and some are held by him for sale on commission, obtains insurance thereon in his own name, and no fraudulent concealment or other fraudulent intent is alleged, the policy is not necessarily void; and, under the circumstances of this case, he may recover the value of his own goods destroyed by fire, not exceeding the amount of his policy.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Marshall county; E. HUTCHINSON, Judge.

Calderhead & Patterson, for plaintiff in error. *J. A. Broughten*, for defendant in error.

STRANG, C. March 13, 1886, T. C. Kelly was engaged in selling agricultural implements, wagons, buggies, and other articles usually kept and sold in connection therewith, at Marysville, Marshall county, and on that day obtained from the plaintiff a policy of insurance indemnifying him against loss or damage by fire on his stock of goods, in the sum of \$1,500. He had other insurance, of \$1,000, on said stock, and also \$500 on his building in which his business was carried on, and his goods stored. December 2, 1886, his building and stock were destroyed by fire. December 30, 1886, Kelly made and served his proof of loss upon the company, and, on its refusal to pay his loss, on May 11, 1887, commenced his action in the court below to recover the amount of his policy. September 21st thereafter, his petition was amended, and on October 28th the company answered by general denial, and on the 28th day of December thereafter the case was tried by the court and a jury. Verdict for the plaintiff for the face of said policy and interest, amounting to \$1,587.50. Motion to set aside the verdict and judgment, and for a new trial. Motion overruled, and exceptions saved by the defendant below, who brings the case here, and assigns the following errors for reversal: "(1) Court erred in overruling the demurrer of the defendant below to the petition of the plaintiff below; (2) court erred in overruling the demurrer to the evidence of the plaintiff below; (3) court erred in overruling the motion of the defendant below for leave to amend its answer to conform to the facts proven; (4) court erred in refusing to give to the jury the instruction asked by defendant below; (5) court erred in refusing to set aside the verdict of the jury on the ground that the

amount of the judgment recovered was too great; (6) court erred in refusing to set aside the verdict of the jury on the ground of the gross misconduct of the jury and the prevailing party; (7) court erred in submitting to the jury, in the second instruction, the question of the legal effect of the evidence as to the contract of Deere, Mansur & Co."

It is alleged in support of the objection to the petition that the plaintiff therein pleads—*First*, ownership in the property destroyed; and, *secondly*, a special insurable interest therein. The allegation in the petition is that the plaintiff is the owner of the goods insured, destroyed by the fire, and had an insurable interest therein. Plaintiff claims that the clause, "and had an insurable interest therein," modifies the former allegation of ownership, leaving the petition, in legal effect, with but the allegation that the plaintiff had an insurable interest in the goods destroyed, and then argues that such an allegation is but a legal conclusion, and therefore the plaintiff states no fact which shows he had a right to recover for the loss of the goods destroyed. We do not think that a fair construction of the petition. There is nothing upon the face of the petition that indicates that the plaintiff intended to assert distinct kinds or degrees of interest in the property destroyed, as ownership, and an insurable interest less than ownership. Having alleged ownership, it was useless to allege, as an incident of such ownership, an insurable interest, because ownership carries with it insurable interest; and yet that is all that the plaintiff seems to have intended. We look upon the words "and had an insurable interest therein" as mere surplusage. This conclusion answers the next objection, that if, with the words "and had an insurable interest therein," in said petition, it states any interest by the plaintiff in the property insured, such interest so alleged is an interest less than ownership; and as the policy, which is a part of the petition, does not assume to insure any interest in said property less than ownership, the petition, therefore, does not state a cause of action.

The next assignment asserts that the court erred in overruling the demurrer of the defendant below to the evidence of the plaintiff below. The ground of this assignment is that the testimony offered by plaintiff below proved that the property insured was not the property of T. C. Kelly, but was the property of several distinct firms, and consigned to him for sale on commission. An examination of the evidence in the record discloses that four witnesses produced by the plaintiff below—Kelly himself; Fuller, a member of the firm of Deere, Mansur & Co., and manager thereof; their book-keeper, George A. Parker; and their salesman, P. H. Brace—all testified that the goods obtained from Deere, Mansur & Co. were purchased by Kelly, and were his goods. The books of Deere, Mansur & Co., which were produced in evidence, show the goods shipped by them

to Kelly were sold and charged to Kelly. The bulk of all the goods in the Kelly stock at the time of the fire were from this company; and the goods charged up as destroyed in the proof of loss of plaintiff below were nearly all Deere, Mansur & Co. goods. It follows from the testimony of the witnesses named that there was evidence, and a good deal of it, tending to prove that the goods insured, and for the loss of which Kelly claimed the right to recover, were his property. It is true there is something in the evidence looking in the other direction, and tending, perhaps, to prove that the goods were commission goods.

It is the law of this court that, on a demurrer to the evidence of the plaintiff, the trial court cannot weigh conflicting testimony; that being the province of the jury. *Bequillard v. Bartlett*, 19 Kan. 382; *Wolf v. Washer*, 32 Kan. 533, 4 Pac. Rep. 1036. Where the testimony tends to support all the material allegations arising under the pleadings, it is the duty of the court to overrule a demurrer to the evidence. *Railway Co. v. Couse*, 17 Kan. 571; *Jansen v. City of Atchison*, 16 Kan. 358; *Waterson v. Rogers*, 21 Kan. 529. But the plaintiff alleges that, if a portion of the goods covered by an insurance policy is not the property of the insured, though some of them are, the policy is fraudulent and void *in toto*; that at least some of the goods covered by the policy in this case, and included in the proof of loss, were commission goods, and not the property of the insured; and therefore the policy was void, and the demurrer ought to have been sustained. There was no written application for insurance in this case. There is no allegation or proof of any fraudulent concealment, or other fraudulent intention, on the part of the insured, when he obtained his insurance. He had a stock of goods in his possession, the most of which were his own, but a part of them were held for sale on commission. He made an oral application for insurance, and nothing was said about the ownership of the goods except in a general way, by asking for insurance on his stock. On the trial of the case the plaintiff below made no claim for any goods held by him on commission. The fact that Kelly held some goods for sale on commission could not interfere with his right to insure his own goods. The character of the goods rendered it an easy matter to distinguish between his own and those held for sale on commission. Nor do we think, in the absence of any fraudulent intention in connection therewith, the fact that a small amount of commission goods were included in Kelly's proof of loss should affect his right of recovery for his own goods lost, up to the amount of the policy. Under the circumstances of this case as disclosed by the evidence, we do not think anything existed that rendered the policy void.

Third, the plaintiff says the court erred in not permitting it to amend its answer to conform to the facts proven. The allegation of error in this assignment is based upon the

idea that the evidence showed the goods insured to be commission goods. The verdict of the jury settled this error when they found that the goods were the property of Kelly. With such a finding, the object of the amendment asked for was done away with, and so there is no error in this assignment.

Fourth, the court erred in refusing to give to the jury the instruction asked by the defendant. Our remarks in relation to the allegation of error by the court in overruling the demurrer of the defendant to the plaintiff's evidence also apply to this assignment. We do not think, under the circumstances of this case, the court would have been justified in giving the instruction asked by the defendant; and therefore the refusal to give it is not error.

Fifth, the court erred in refusing to set aside the verdict of the jury on the ground that the amount of the judgment recovered by the plaintiff below was too great. Whether the judgment, under the evidence in the case, was too great, was a question for the jury. The jury found that the plaintiff's loss, for which he had not been paid by the other company having a risk on the same goods, was the full amount of the policy in suit. We think such a finding could be made under the evidence, and therefore we may not say it was error on the part of the court to approve such finding, and refuse to set the verdict aside.

Plaintiff alleges that the court erred in refusing to set aside the verdict of the jury on the ground of misconduct of the jury. It is said by counsel for plaintiff below that the evidence on the question heard on the motion for new trial is not all here. We think there is enough here to show that the alleged misconduct of the jury did not in any way prejudice the defendant. The meeting between the jurors and Kelly at the Catholic fair was a mere casual coming together. It was not by design. Kelly did not invite the jurors into the building where the fair was being held. One of the jurors invited him and others, and when in there it was a juror that set up the drinks. There were but two glasses of beer taken by any one, and that was 24 hours before the jury retired to consider the case. There was nothing said about the case by any one at the time. It was not even mentioned, and the jurors make affidavits that they did not even think of the case while together at the fair. The jurors also make affidavit that the fact of their taking a glass or two of beer with Kelly in no wise affected their judgment or decision in the case. We therefore think the court committed no error in refusing to set aside the verdict of the jury on this ground.

Lastly, the plaintiff says the court erred in submitting to the jury, in the second instruction, the question of the legal effect of the evidence as to the contract with Deere, Mansur & Co. The court instructed the jury that the contracts between Kelly and Deere, Mansur & Co. were in form contracts of ab-

solute purchase and sale, but informed the jury that whether there was an absolute sale of the goods by Deere, Mansur & Co. depended upon the intention of the parties to said contracts, and left the jury to determine the intention of the parties from all the evidence. We see no error in this. We recommend that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 656)

FLINT v. BOARD COUNTY COM'RS JACKSON COUNTY.

(Supreme Court of Kansas. May 10, 1890.)

TAX-SALES—FORFEITED SCHOOL LANDS.

School land sold in 1869, to be paid for in 10 annual installments, followed by default in 1873, became, at once, *ipso facto* forfeited to the state, and a sale thereof for taxes in 1874 was void; and, when the illegality of such sale was ascertained, the purchaser at said tax-sale had a right to have such purchase money and taxes paid subsequently, but, before ascertaining the invalidity of such sale, refunded, with interest thereon.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Jackson county; ROBERT CROZIER, Judge.

Fabius M. Clarke and *James H. Lowell*, for plaintiff in error. *R. G. Robinson*, for defendant in error.

STRANG, C. November 10, 1869, L. 1. Hubbard purchased from the state the N. W. $\frac{1}{4}$ of section 36, township 6, range 13, Jackson county, Kan., to be paid for in ten annual payments, and made three annual payments thereon, after which he ceased to meet the payments, and was in default from November 10, 1873. After the sale to Hubbard, the land was assessed for taxation, and the tax of 1873 not having been paid, the land was sold in May, 1874, for the taxes of 1873, and the plaintiff became the owner of the tax-sale certificate. The plaintiff paid the taxes on said land for 1874, '75, '76, and '77, in addition to the taxes of 1873, paid by purchase of the tax-sale certificate. In 1878 he failed to pay the taxes, and in 1879 the land was again sold for taxes, and the plaintiff again became the purchaser of the tax-sale certificate. After this it was discovered that the land was the property of the state during all the time the plaintiff had been paying taxes thereon, and was not, therefore, properly taxable, and the plaintiff got no title at the several tax-sales. He then presented a bill of the taxes paid by him, with interest thereon, to the board of county commissioners, and asked them to refund him the amount thereof, under section 146, Tax Law, (Comp. Laws 1885,) tendering a quitclaim deed at the same time for the land. The commissioners refused to return the money to plaintiff, and from their judgment or refusal he appealed to the district court, where the case was tried, and a judgment rendered

in his favor for the sum of \$22.55, with interest from September 2, 1879, at 10 per cent., and the further sum of \$2.45, and interest at 10 per cent. from June 11, 1883, being the amount of taxes for 1878, with interest, and the costs of tax-deed made June 11, 1883, and interest on same; but refusing to allow the plaintiff anything for the taxes of 1873, '74, '75, '76, and '77. From such judgment the plaintiff, who was plaintiff below, comes here, seeking to have the judgment of the court below reversed; and alleges as error that the court erred, under the pleadings and evidence, in not giving him judgment for the taxes of 1873, '74, '75, '76, and '77, and interest thereon.

We think the plaintiff is right in his contention. He paid such taxes under the mistaken belief that he acquired some interest in said land by his purchase at tax-sale in 1874, and, when it was discovered that he got nothing under said sale, section 146, above mentioned, authorized and required the board of county commissioners to refund to him the money paid, with interest thereon. The defendant alleges that the plaintiff should not recover the money back because by his purchase at the tax-sale he became subrogated to the rights of Hubbard, and as a consequence could have paid the amount unpaid on Hubbard's certificate of purchase, and demanded a patent for the land; and not having done so, and thus protected himself, he cannot ask the taxes refunded to him; and cites section 14, c. 94, Gen. St. 1868, and other authorities. We do not think the section applies. Hubbard made default in November, 1873. His entire interest in the land was immediately forfeited. The title to the land at once, by operation of law, again became vested in the state. Section 16, c. 94, Gen. St. 1868; *State v. Emmert*, 19 Kan. 546. That being the case, there were no existing rights in Hubbard in relation to said land to which the plaintiff could be subrogated. If Hubbard had not defaulted in his payments to the state, but had failed to pay the taxes on the land, and the land had been sold for taxes, and the plaintiff had become the purchaser at the tax-sale, then the plaintiff would have been subrogated to the rights of Hubbard; and under section 14, c. 94, Gen. St. 1868, the plaintiff, subject to the conditions of the original certificate of purchase and the bond of said purchaser, could have completed the payments of the original purchaser, and demanded a patent. In such case there would be no question of forfeiture. And section 14, above referred to, never contemplated any forfeiture. That section simply provides against waste; for the taxation of the land when sold; and for the sale of the land for taxes; and then provides for the protection of the state in case the land is sold for taxes, by declaring that the purchaser at tax-sale shall be subject to the conditions of the original certificate of sale and purchase, and the bond given by the purchaser in connection with the purchase. It will be

seen none of these provisions are for the protection of the purchaser at tax-sale, but solely for the protection of the state. It may be conceded, however, that, under the law in relation to tax-sales, the purchaser at such a tax-sale gets all the interest, and is subrogated to all the rights, of the original purchaser. When, however, as in this case, the original purchaser has made default, and the land, with all his rights thereto, is forfeited under section 16 of said chapter 94, Gen. St. 1868, and a tax-sale of said land occurs afterwards, there is nothing left in the original purchaser for the tax-sale purchaser to succeed to, and nothing upon which he can base a right to pay out on the original sale certificate and demand a patent. The land is absolutely forfeited to the state, and the state has a right, and it is its duty, to appraise and sell it anew.

We have examined the position of the defendant in relation to a waiver on the part of the state of the forfeiture of the land by Hubbard, and the cases cited in support of such position. We do not think there was a waiver in this case, nor do we think there is anything in the cases cited that supports the theory of waiver claimed in this case. Hubbard purchased in 1869. He defaulted in his payments November, 1873. Such default, by force of the statute, *ipso facto* worked a forfeiture of the land, and the statute does not authorize a waiver. The land then belonged to the state from that time on until reappraised and sold. Being the land of the state, the tax for which it was sold in 1884 was illegal, and the sale thereon invalid. The plaintiff should have the purchase money at such tax-sale refunded; and, having paid the taxes for 1874, '75, '76, and '77, upon the strength of the said sale and tax-sale certificate thus obtained, those taxes should also be refunded to him. We therefore recommend that the case be remanded to the trial court, with instructions to modify the judgment for the plaintiff by adding thereto the amount paid by plaintiff on the tax-sale of 1874, and interest thereon; the cost of the tax-deed of 1877, and interest thereon; and the amount of the taxes paid in 1874, '75, '76, and '77, and interest thereon.

PER CURIAM. It is so ordered; all the justices concurring.

(48 Kan. 718)

PULSIFER *et al.* v. PADDOCK *et al.*

(Supreme Court of Kansas. May 10, 1890.)

DEEDS—CANCELLATION—UNDUE INFLUENCE—EVIDENCE.

1. R., a widower, nearly 70 years of age, having several grown-up sons and daughters, and being possessed of \$1,100 of personal property, and a tract of land of the value of \$4,000 to \$5,000, executed a will directing, upon his death, that his real and personal property be converted into money, and, after the payment of his funeral charges, expenses, etc., the proceeds be divided among his children, share and share alike, with the exception that his oldest daughter should receive \$400 in addition to her share, and a grandson to receive \$120.

About two years afterwards, while staying with Mrs. P., one of his married daughters, he was taken sick, and in a few weeks died. Before his death, but while he was sick, and physically and mentally in a feeble condition, he executed a conveyance of all of his real estate to Mrs. P., his daughter, for the nominal consideration of \$3,500, but no money or other consideration was paid; and the daughter claims the land was intended to be a gift to her from her father. Soon after the death of her father, Mrs. P. conveyed the land without consideration to Mrs. B., her own daughter, with the understanding that she would convey the land to any person she requested. *Held* that, in an action brought by the executor and the other children of R. against Mrs. P. to cancel the deed from the father, the burden of proof was upon the daughter, Mrs. P., to clearly establish the perfect good faith of the transaction.

2. An examination of the record in this case shows sufficient testimony to sustain the judgment of the trial court canceling the deed from R., the father, to Mrs. P., the daughter, upon the ground that it was obtained fraudulently.

(*Syllabus by the Court.*)

Error from district court, Cloud county; E. HUTCHINSON, Judge.

On the 11th day of February, 1886, Park B. Pulsifer, as administrator with the will annexed of David Robertson, deceased, John Robertson, Isabel Temple, and Mattie Ellis, filed their petition against Mary J. Paddock and Alice Bourgeois, Anna Mealey, Margaret Reid, David Robertson, and Jesse Snowey, which, omitting caption, is as follows: "Plaintiffs say that on the 11th day of February, 1886, the plaintiff Park B. Pulsifer was duly appointed and qualified, and letters of administration were granted to him, as administrator with the will annexed of the estate of David Robertson, theretofore deceased, by the probate court of Cloud county, Kan. That said David Robertson was the owner during his life-time of the north-west quarter of section thirty-two, (32,) township five (5) south, range one (1) west, in Cloud county, Kan. That on or about the 25th day of November, 1885, the defendant Mary J. Paddock, by fraud, misrepresentation, undue influence, and deceit, obtained from said David Robertson what purports to be a warranty deed of the aforesaid premises to her. That, at the time of the execution of the pretended deed as aforesaid, said David Robertson was in failing health of body, and was in such a feeble and weak state of mind as to be utterly incapable of transacting business, and that said pretended deed was obtained without any consideration whatever being paid therefor, and without the consent of said David Robertson. On or about the 5th day of February, 1886, defendant Mary J. Paddock, and Thomas Paddock, her husband, pretended to convey to defendant Alice Bourgeois the aforesaid land by deed recorded in the office of the register of deeds of said county on February 8, 1886; but the plaintiffs allege that said Alice Bourgeois took said deed without any consideration whatever being paid by her, or anyone for her, well knowing all the facts herein set forth as to the invalidity of the title of the defendant Mary J. Paddock; and such pretended sale and conveyance to said Alice Bourgeois is a sham, intended only for the pur-

pose of aiding said Mary J. Paddock to defraud the plaintiffs out of their rights in the aforesaid land. That said David Robertson died on or about the 10th day of January, 1886, after having made a will which was duly probated by the probate judge of said county on the 10th day of February, 1886, and in which it is provided that the executor thereof shall sell all of the real estate of the defendant, and convert the same into money. Wherefore, plaintiffs pray judgment that said pretended deed be set aside, and for such other and further relief as they may be entitled to." On March 16, 1886, the defendants filed an answer containing a general denial only. Trial was had at the October term of the court for 1887, without a jury. The court made a general finding in favor of the plaintiffs that the deed from David Robertson to Mary J. Paddock, and the deed from Mary J. Paddock and Thomas Paddock to Alice Bourgeois, for the land in controversy, be annulled, canceled, and held for naught. Subsequently judgment was rendered in favor of the plaintiffs and against the defendants upon the general finding. The defendants Mary J. Paddock and Alice Bourgeois excepted, and bring the case here.

B. R. Anderson and J. W. Sheafor, for plaintiffs in error. *Kennett & Peck, L. J. Crans, and Hugh Alexander*, for defendants in error.

HORTON, C. J., (*after stating the facts as above.*) David Robertson died at the home of his married daughter, Mrs. Mary J. Paddock, in Cloud county, in this state, on January 10, 1886, aged about 70. His wife died many years before. He had been suffering from paralysis nearly two years. He left surviving him several children. At the time of his death, he owned \$1,100 of notes. A few weeks before his death, he had the legal title to, and was in the possession of, the N. W. $\frac{1}{4}$ of section 32, township 5, range 1, in Cloud county. Robertson executed a will on the 22d day of October, 1883. It was admitted to probate on the 9th of February, 1886. He directed in his will that his real and personal property be converted into money, and, after the payment of his funeral charges, expenses, etc., the proceeds to be divided among his children, share and share alike, with the exception that his oldest daughter, Mrs. Isabel Temple, should receive \$400 in addition to her share, and the grandson, David Reid, should receive \$120. During the years of 1883, 1884, and a part of 1885, he lived in Cloud county most of the time, with Mrs. Isabel Temple, as one of the family. Some time in the summer or fall of 1885, he left Mrs. Temple's, and went to Mrs. Mary J. Paddock's. Before leaving Mrs. Temple's, he told her he was going down to his farm, to set out some shade trees, and stay with his daughter Mary. Early in November, 1885, he was taken sick, and never recovered. Mrs. Temple called at her sister's every two or three weeks to see her father. When she called he was very feeble. He could not work,

and was not able to help or take care of himself. During his sickness it was thought necessary, on account of his sufferings, to administer to him large quantities of whisky and morphine.

On the 25th of November, 1885, David Robertson executed to his daughter Mrs. Mary J. Paddock a deed for the tract of land in dispute; and on the 5th of February, 1886, Mrs. Paddock and her husband conveyed the land to her daughter, Mrs. Alice Bourgeois. The land is worth from \$4,000 to \$5,000. No consideration was paid by Mrs. Paddock to her father for the conveyance. When Mrs. Bourgeois received the deed, she agreed to convey the land to any person her mother should request. In order that it might appear that a money consideration passed for the deed from Mrs. Paddock to Mrs. Bourgeois, Dr. Bourgeois, her husband, obtained the use of \$500 for a few days from a bank. This was handed to Mrs. Paddock, but soon after returned to Dr. Bourgeois, and by him to the bank again. Mrs. Paddock claims that she sold the land to Mrs. Bourgeois for \$2,600, and was paid that sum for it; but, upon the finding of the court, we must assume that this is not true. In the brief for defendants below, it seems to be conceded that Mrs. Bourgeois was not a *bona fide* purchaser of the land. The brief states: "If it is a fact that Mrs. Paddock, after being frightened by the soundings of these people, at last made a sham sale to Mrs. Bourgeois of the farm, this is an evidence of weakness rather than of fraud." This action was brought to set aside and cancel the two deeds, —one from David Robertson to his daughter Mrs. Mary J. Paddock, and the other from Mrs. Paddock and her husband to Mrs. Bourgeois. The contention is that there was no evidence before the trial court tending to show the deed to Mrs. Paddock was procured by fraud, and, as the court canceled the deed upon the ground that it was obtained fraudulently, that the judgment is wholly unsupported by any evidence.

In such a case as this, the burden of establishing the perfect fairness and equity of the conveyance to Mrs. Paddock was thrown upon her, in view of her father's age, sickness, and feebleness of mind, and the close relation of the parties. Confidence was necessarily reposed in Mrs. Paddock. If that confidence was abused in procuring the deed, the trial court very justly set it aside. The deed purports upon its face to have been executed for \$2,500 "cash in hand paid." This is much less than the value of the land. It is admitted by Mrs. Paddock that she paid nothing for the deed; and, if she obtained it from her father upon the promise to pay \$2,500 in money or in notes, without intending to pay for the same, or if she did not have the means of paying what she agreed to pay, this would be indicative of actual fraud upon her part. She claims, however, that her father gave her the land, and intended to give her the land, without any con-

sideration being paid. If this were true, Mrs. Paddock should have clearly established the perfect good faith of the transaction. Story states the rule thus: "All contracts and conveyances whereby benefits are secured by children to their parents are objects of jealousy; and, if they are not entered into with scrupulous good faith, and are not reasonable under the circumstances, they will be set aside, unless third persons have acquired an interest under them, especially where the original purposes for which they have been obtained are perverted or used as a mere cover." 1 Story, Eq. Jur. § 309. The father, David Robertson, at the date of the deed, was in his second childhood. Therefore the entire relation of the parties was reversed; the father had become the child, and the daughter had control of the father. Considering the influence and infirmities under which Robertson labored; the fact that Mrs. Paddock had his entire confidence; that the deed transferred to her, without any consideration, all of his real estate, and thereby deprived his other children of any possible interest therein,—there is ample evidence to sustain the judgment. Certainly, we cannot disturb it upon the ground that it is not supported by any evidence.

In Tracey v. Sacket, 1 Ohio St. 54, it is said: "Actual fraud * * * was not essentially necessary in order to set aside the contract in equity. * * * The acts and contracts of persons who are of weak understandings, and who are therefore liable to imposition, will be held void * * * if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning, artifice, or undue influence." In Jacox v. Jacox, 40 Mich. 473, it is decided that "an equitable wardship arises where a son takes charge of his father's affairs in the belief that the latter is incompetent to manage them, and the father passively submits." In Highbarger v. Stiffler, 21 Md. 338, it is held that where a parent, through extreme age and infirmity, has become childish, and depends upon her son for advice in all her affairs, contracts made by her in his favor are subject to the same strict scrutiny given to contracts of children in favor of their parents. "In such cases it is not necessary to prove the actual exercise of overweening influence, misrepresentation, importunity, or fraud *aliunde* the act complained of." In Martin v. Martin, 1 Helsk. 644, Chief Justice NICHOLSON, in delivering the opinion, used the following language: "But when to this is added that the father was far advanced in years, was greatly enfeebled in body and mind, actually verging upon mental incapacity, and was greatly troubled and uneasy in his mind, and that the son and agent uses his influence in procuring a deed which secures to himself more than two-thirds of his father's entire estate, and to his brother the residue, to the total exclusion of two sisters

and several grandchildren, the law raises the presumption of fraud; and this presumption can only be overturned by clear and satisfactory proof that the son and agent dealt with entire fairness and good faith in the transaction. It is incumbent on him to show affirmatively that his father comprehended fully the purport and effect of the conveyances, and that he executed them freely and understandingly, knowing that he thereby divested himself of the absolute title of the lands." See, also, *Tracey v. Sacket*, 59 Amer. Dec. 615, and the cases cited; *Yeamans v. James*, 27 Kan. 195; *Wills v. Wood*, 28 Kan. 400; 2 Pom. Eq. Jur. § 951.

Complaint is made because the deposition of Thomas Paddock was permitted to be read in evidence. Paddock was the divorced husband of Mrs. Mary J. Paddock. The objections to this deposition are not tenable. It was taken in New York city while the district court of Cloud county was in session. This is not a sufficient reason for rejecting a deposition. *Northrup v. Hottenstein*, 38 Kan. 263, 16 Pac. Rep. 445; *Railway Co. v. Morse*, 38 Kan. 271, 16 Pac. Rep. 452. The deposition was offered as testimony against Mrs. Alice Bourgeois only. It was competent as to her, if incompetent against Mrs. Paddock. The deposition recited that Thomas Paddock was formerly the husband of Mrs. Mary J. Paddock, hence there was no error in rejecting the evidence offered to prove this fact. Again, the motion to suppress and the objections to the deposition were made jointly by Mrs. Paddock and Mrs. Bourgeois. Their motions were for the exclusion of the whole of the deposition. If any portion of a deposition objected to is competent, the court is not obliged, upon a motion to exclude the whole, to separate and exclude the part that is incompetent only. *Greer v. Higgins*, 20 Kan. 420; *Gano v. Wells*, 36 Kan. 688, 14 Pac. Rep. 251; *Smythe v. Parsons*, 37 Kan. 79, 14 Pac. Rep. 444. The evidence offered to impeach Mr. Paddock was properly rejected, because no foundation was laid by calling his attention to the matters attempted to be proved. *Greer v. Higgins*, supra. The judgment of the district court will be affirmed.

All the justices concurring.

(43 Kan. 684)

DEATHERAGE et al. v. HENDERSON et al.

(Supreme Court of Kansas. May 10, 1890.)

MECHANICS' LIENS—SUBCONTRACTORS—STATEMENT—SERVICE ON OWNER.

1. A judgment rendered upon the special findings of a jury, which are inconsistent and conflicting, and against the great preponderance of the evidence, is erroneous.

2. The mere fact that lumber used in a building is furnished to the contractor on his credit is not a waiver or an extinguishment of the subcontractor's lien therefor.

3. Under section 631 of the Civil Code, in force in 1885, the subcontractor had a reasonable time, after the filing of his statement for a mechanic's lien, within which to furnish a copy thereof to the owner or agent of the premises, and such copy need not necessarily have been furnished within 60 days after the completion of the building, but

the subcontractor must have exercised diligence, after filing his statement, in serving a copy thereof on the owner or agent. What would be a reasonable time for the service of the notice must be determined by the court or jury trying the case, considering all of the attending circumstances.

4. Where an agent is authorized by his principal to collect an account, he has no authority to accept in payment an old claim due from himself to the debtor.

(Syllabus by the Court.)

Error from district court, Wabaunsee county; R. B. SPILLMAN, Judge.

On the 26th day of August, 1885, Charles P. Deatherage and William I. Ewart, under the firm name of Deatherage & Ewart, commenced their action against Eli Henderson et al., upon an account for lumber and building materials, and also to enforce their alleged lien. On December 16, 1885, a trial was had by the court, and judgment given in favor of Henderson, denying plaintiffs' lien. This judgment was reversed at the July term of this court for 1887, and the cause remanded for a new trial. 37 Kan. 63, 14 Pac. Rep. 474. The new trial was had on October 22, 1887. The jury returned the following special findings of fact: "Was the lumber for which plaintiffs claim a lien sold by them on the general credit of George A. Woods alone, without intending to obtain any security by virtue of a mechanic's lien, if their claim should not be paid by Woods? Answer. Yes. (2) Was George A. Woods the agent of plaintiffs for the purpose of collecting the amount due for the lumber? A. Yes."

The court made and filed the following findings of fact: "(1) That in the month of March, 1885, defendant George A. Woods agreed with defendant Eli Henderson to furnish him certain lumber to be used by Henderson in the erection of a building on lots owned by Henderson in Harveyville, Kan. (2) That said Woods purchased said lumber, which he had agreed to furnish to Henderson, from the plaintiff, at Kansas City, Mo., and said lumber was shipped by plaintiffs to said Woods on a car with other lumber, but in a separate lot, marked 'E. H.' and that plaintiffs were general lumber merchants at Kansas City, Mo. (3) That the value of said lumber so sold by plaintiffs to said Woods was at the time of shipment, April, 1885, \$144.91, and the same has not been paid to plaintiff by said Woods or any other person. (4) That said Henderson took said lumber from the car on which it was shipped at Harveyville, Kan., on the 10th day of April, 1885, and afterwards used all of it in the erection of a building on lots 7 and 8, in block 5, in Harveyville, Kan., the same being the building he was intending to erect for which said Woods agreed to furnish the lumber. (5) That said building was completed on the 16th day of May, 1885. (6) That Henderson paid Woods in full for said lumber at the time he received it, to-wit, April 10, 1885, by giving Woods credit for the amount of the bill on an account owing by Woods to him, commencing in December,

1888. (7) That on the 14th day of July, 1885, plaintiffs filed in the office of the clerk of the district court of Wabaunsee county a statement for a subcontractor's lien according to law against said Henderson, and said building and lots on which it was erected. (8) That on the 25th day of July, 1885, plaintiffs caused to be delivered to Henderson personally a copy of said statement for a subcontractor's lien. (9) That when Woods agreed to furnish said lumber to Henderson he knew that Woods would procure same from some other person and place, and that when plaintiffs sold said lumber to Woods they knew and understood that it was being procured by Woods to be used by some other person on the erection of a building on or near Harveyville, Kan. (10) That, at the time of the purchase of said lumber from George A. Woods, Henderson did not know where the lumber was to be procured by Woods, nor from whom."

Subsequently the court made and filed the following conclusions of law: "(1) That plaintiffs are entitled to recover from George A. Woods the sum of one hundred and forty-four dollars and ninety-one cents, (\$144.91,) with interest thereon from the 20th day of March, 1885. (2) That plaintiffs are not entitled to a lien upon the real estate described in the petition and the building erected thereon by Henderson." Judgment was entered upon the conclusions of law in favor of Henderson and against the plaintiffs, again denying plaintiffs' claim for any lien. The plaintiffs excepted, and bring the case here.

Batford & Williams, for plaintiffs in error.
Hazen & Isenhardt, for defendant in error.

HORTON, C. J., (*after stating the facts as above.*) This was an action in the court below by Deatherage & Ewart to recover \$144.91 for lumber, and to enforce a subcontractor's lien for the same. They claim that George A. Woods was the contractor, and Eli Henderson the owner, of the building and premises. The lumber was purchased in April, 1885, and used by Henderson in the erection of a building on lots 7 and 8, in block 5, in Harveyville, in this state. The building was completed on the 16th day of May, 1885. A statement for a subcontractor's lien was filed on the 14th day of July, 1885. A copy of the statement was furnished to Henderson, the owner of the premises, on the 25th of July, 1885. In determining whether Deatherage & Ewart are entitled to a lien, the provisions of the Civil Code relating to liens of mechanics and others, in force in 1885, control. Comp. Laws 1885, art. 27, p. 685. The trial court rendered judgment against George A. Woods for the sum of \$144.91, with interest, but decided that the plaintiffs were not entitled to a lien upon the building and premises owned by Henderson. This case has been to this court before, and is reported in 37 Kan. 63, 14 Pac. Rep. 474. The only question involved upon the former hearing was whether the plaintiffs' statement for a mechanic's

lien was sufficient. This court held the statement sufficient, and therefore ordered a new trial. Upon the second trial, the following questions were submitted to the jury: "(1) Was the lumber for which plaintiffs claim a lien sold by them on the general credit of George A. Woods alone, without intending to obtain any security by virtue of a mechanic's lien, if their claim should not be paid by Woods? Answer. Yes. (2) Was George A. Woods the agent of plaintiffs for the purpose of collecting the amount due for the lumber? A. Yes."

It is clearly apparent that the trial court decided against the lien of plaintiffs on account of these findings. But for the findings of the jury, a judgment enforcing the lien of plaintiffs should have been entered upon the findings of fact of the trial judge. The findings, however, of the jury, do not justify any judgment. They are conflicting with each other, and the evidence to sustain them is wholly unsatisfactory. Ewart, one of the plaintiffs, testified that in making all sales, both in Missouri and in Kansas, on bills of this kind, his firm did so with the knowledge that they had the right to a mechanic's lien, provided the parties were not good. Where materials are furnished and placed in a building, if there be nothing showing a different intention, a jury would be warranted in finding that they were furnished to be used in such building. So, if it appear that materials furnished were used in the erection of the building on which a lien is claimed, unless it is shown that they were intended for another purpose, it will be presumed that they had been contracted for to be used in the building. *Power v. McCord*, 36 Ill. 214; *Martin v. Eversal*, Id. 222. Under the statute, the mere fact that the materials were furnished on the credit of Woods would not be an extinguishment or waiver of the plaintiff's lien. *Sodini v. Winter*, 32 Md. 130. But it was decided by this court in *Weaver v. Sells*, 10 Kan. 609, that if a material-man furnished lumber to a person with the understanding that it should be sold again as merchandise; if he should furnish it upon the personal credit of the vendee alone, without intending or expecting to obtain any security by virtue of a mechanic's lien,—it would hardly be claimed that a mechanic's lien would be created, even though the vendee might afterwards use the lumber in erecting a building. The right to the lien must be created at the time or before the material is furnished. It cannot be created afterwards. It is the furnishing of the material under a contract, with the intention and understanding that it shall be used in erecting the building, that creates the lien. If the plaintiffs furnished the lumber exclusively on the credit of Woods, and without intending to have any lien, then, of course, Woods was not their agent in selling the lumber to Henderson, nor could he be their agent for the purpose of collecting from Henderson the amount due plaintiffs for the lumber. In

view of the conflicting findings, all that we can do is to reverse the judgment, and order a new trial. Section 559, Civil Code.

Counsel for the defendant claim that, as the copy of the lien was not served until after the expiration of 60 days from the completion of the building, plaintiffs have no lien. They say "that the lien must not only be filed within the sixty days, but the copy of the lien must be served within the sixty days; that all things necessary to be done to perfect the lien must be done within the sixty days; that the serving of the copy of the lien is as imperative as the filing; that, under the mechanic's lien law, the party claiming the lien must show he has complied with all the requirements of the statute, and within the time fixed; that at the end of sixty days his lien must be completed in all respects, for after that time he can do nothing to perfect his lien; in other words, that the validity of the lien must be determined at the end of the sixty days, and, if anything is left undone at that time, then no valid lien exists." We do not concur in these views. Section 631, art. 27, p. 685, Comp. Laws 1885, reads: "Any person who shall furnish any such material or perform such labor under a subcontract with the contractor, wishing to avail himself of the act, shall file a statement of the amount due him from such contractor for the labor performed, or the material, fixtures, or machinery furnished, and a description of the property upon [to] which the same were done, [applied,] within sixty days after the completion of the buildings, improvements, or repairs, or the furnishing or putting up of fixtures or machinery, or the performing of such labor, in a book kept by the clerk of the district court for that purpose, and furnish a copy thereof to the owner or agent of the premises, which book shall be ruled off into separate columns, with heads as follows: 'When Filed,' 'Name of Contractor,' 'Name of Claimant,' 'Amount Claimed,' and 'Description of Property;' and the proper entry shall be made under each of such heads; and the district clerk shall be entitled to a fee of twenty-five cents for making such entries; and, if the contractor does not pay such person or subcontractor for the same, such subcontractor or person shall have a lien for the amount due, for such labor or material, on such lot or lots, from the same time, and to the same extent, and in the same manner, and to the same extent, as such original contractor."

Statutes relating to liens for mechanics and material-men should be liberally construed so as to protect, as far as possible, within the terms of the statute, the rights and equities of such persons. If the construction be given as contended for, in many cases the liens of mechanics and material-men could not be perfected. The statute in force in 1885 gave a subcontractor, furnishing material or performing labor, 60 days after the completion of the building to file his statement for a lien. If such a contractor had all of the 60

days within which to file his statement, it would have been impossible for him, in many cases, to furnish a copy thereof to the owner or agent of the premises within the 60 days, if his statement was not filed until the last day. A more reasonable construction of the statute would be to give the subcontractor a reasonable time, after filing his lien, to furnish a copy thereof to the owner or agent of the premises. What would be a reasonable time must be determined by the court or jury trying the case under the attending circumstances. But the subcontractor must be diligent in serving his notice after filing his lien. Sections 630, 631, 633, and 636 of the Civil Code, relating to mechanics' liens, in 1885, were repealed by chapter 168, Sess. Laws 1889; and section 632 of the Civil Code, as now in force, gives express directions for the mode of the service of a subcontractor's notice upon the owner of the premises. Gen. St. 1889, par. 4735.

One other matter deserves a word of comment. The court committed error in permitting Henderson to prove that he paid Woods for the lumber by giving credit on an old account due from Woods to him. If it were the intention of the plaintiffs to sell their lumber to Woods upon his personal credit exclusively, and without any lien, then this evidence had nothing to do with the case. If the plaintiffs have, under the statute, a lien for their material, then Henderson had no power to satisfy their claim by giving Woods credit on an old account due from him, even if Woods was the agent of plaintiffs for the purpose of collecting their bill for the lumber. *Scully v. Dodge*, 40 Kan. 395, 19 Pac. Rep. 807; *Organ Co. v. Lasley*, 40 Kan. 521, 20 Pac. Rep. 228. The judgment of the district court will be reversed, and the cause remanded for a new trial. All the justices concurring.

(43 Kan. 691)

DEATHERAGE et al. v. HOWENSTEIN.

(Supreme Court of Kansas. May 10, 1890.)

Error from district court, Wabaunsee county; R. B. SPILLMAN, Judge.

Bottsford & Williams, for plaintiffs in error. *Hazen & Isenhardt*, for defendant in error.

HORTON, C. J. This case was submitted to this court at the same time of the case of *Deatherage v. Henderson*, ante, 1053, (just decided.) All the questions involved in this case were also involved in that case. Therefore, upon the authority of that case, the judgment of the district court will be reversed, and the cause remanded for a new trial. All the justices concurring.

(44 Kan. 43)

STATE ex rel. ATTORNEY GENERAL v. SULLIVAN et al.

(Supreme Court of Kansas. May 10, 1890.)

COUNTY SEAT—LOCATION—ELECTION—CORRUPTION.

In an election for the permanent location of a county seat, when the evidence discloses the fact that a large number of the votes cast for the successful candidate were procured through bribery, fraud, and corruption of the partisans of such candidate, said votes should be rejected, if they can

be ascertained, and deducted from the entire poll, and the total vote of said candidate.

(Syllabus by Green, C.)

Commissioners' decision. *Mandamus.*

L. B. Kellogg, Atty. Gen., Taylor, Jones & Taylor, and Rhoades, McCartney & Wise, for the State. W. E. Hutchinson and Webb & Webb, for defendants.

GREEN, C. This is an original action, commenced in this court by the attorney general, in the name of the state, to compel the defendants, who are county officers of Grant county, to remove their offices from the city of Ulysses to Appomattox, on the ground that the latter place received a majority of the legal votes cast at an election held in said county, for the permanent location of the county-seat, on the 16th day of October, 1888. The pleadings show, in this case, that the county of Grant was duly organized and apportioned into five townships, in which election precincts were designated in each township, said townships being named, respectively, Lincoln, Sherman, Sheridan, Howard, and Thomas; that Ulysses was the temporary county-seat; that on the 16th day of October, 1888, an election was held in each of the precincts in said county for the election of certain county and township officers, and for the permanent location of the county-seat of said county; that returns were duly made to the board of county commissioners, and on the 19th day of October, 1888, said returns were canvassed, with the following result as to the location of the county-seat in each of the townships named:

Township Voting.					
	For Ulysses.	For Appomattox	For Shockey.	For Golden.	For Spurgeon.
Lincoln.....	318	118			436
Sherman.....	23	78	41		142
Sheridan.....	64	32			96
Howard.....	108	7			115
Thomas.....	65	38		81	129
Totals.....	578	268	41	81	2 920

—That the board of county commissioners then and there declared Ulysses elected and chosen as the permanent county-seat of Grant county. It is charged by the relator that the town of Ulysses was not at such election legally chosen as such permanent county-seat of said county by the legal, affirmative votes of a majority of the qualified voters of said county voting at said election; that, in the election precinct of Lincoln, 211 voters who cast their ballot at said election for the location of the permanent county-seat at Ulysses were bribed; that 133 votes cast at said election in Lincoln township were fraudulent and void, having been cast by persons not *bona fide* residents of the county; that, in the precinct of Sherman, in said county, 19 voters who cast their ballots at said election for Ulysses were bribed and paid; that, in the voting precinct of Sheridan, 39 voters who cast their ballots for Ulysses as the permanent county-

seat were bribed and paid to cast their ballots; that, in the voting precinct of Howard, 93 voters who cast their ballots for Ulysses as the permanent county-seat were bribed; that, in the voting precinct of Thomas, in said county, 49 voters were bribed to cast their ballots for Ulysses as the permanent county-seat. And, further, that 12 votes cast in favor of Ulysses as the permanent county-seat in Thomas township were cast by persons not *bona fide* residents of said county; that, in the township of Sherman, 41 of the registered voters of the county banded and organized themselves together, with officers and written rules, for the express purpose of casting their ballots, as a unit, for the town for permanent county-seat which, through its citizens or otherwise, would pay and give them the largest property consideration, and they, being unable to sell or dispose of their votes, cast their votes for the town of Shockey, in said county, to the number of 41. It is further charged that in the township of Thomas, in said county, a large number of the registered voters, to the number of 31, banded and organized themselves together for the same purpose, and, being unable to sell said organization, voted for Golden, in said county, as the permanent county-seat. The relator further charges that the town of Ulysses, through its legally-constituted officers, and a body of persons who owned large property interests in said town, bribed a large number of voters for the purpose of locating the said county-seat at said town; that the town of Appomattox received a majority of all the legal votes cast at the election as permanent county-seat of Grant county.

To determine the various questions involved in this case, and the validity of the vote cast in the several precincts, we shall consider the election in each of the townships named.

1. Lincoln township cast 318 votes for Ulysses, and 118 votes for Appomattox. In this township the two rival towns were situated about three miles and one-half apart. The evidence shows that, during the months of July, August, and September, 1888, parties commenced coming to Ulysses and Appomattox from different portions of the country, and remained there until after the election; that they lodged in houses furnished by parties interested in Ulysses, and a large number of them were supported without expense to themselves; these people came apparently for no other purpose than to participate in this county-seat election; that, during their stay there, they had no regular employment, and that rations were issued to them almost daily up to the date of the election; that efforts were made to sell their votes to the rival town companies, but without apparent success until the day of the election; that, on the morning of the election in question, the election board was organized by placing one judge friendly to Appomattox on the board, and two friendly to Ulysses. The evidence shows that a large number of depu-

ty-sheriffs were placed around the polls, and on the opposite side of the street a building was occupied by armed men, with a barricade constructed in front. The voting in the fore part of the day was very light. Different clubs, known as the "Jones Club," the "Gamblers' Club," the "Stevens County Club," the "Palmer Club," and the "Farmers' Club," were organized and holding meetings, and carrying on negotiations with the officers of the town companies. The primary object of these various associations seems to have been to realize the most that they could out of this county-seat contest.

A. J. Hoisington was the active partisan of Ulysses at this precinct, and had in his employ Frank Donahoe, A. J. Jook, and others. With regard to the employment of these men, Mr. Hoisington says: "Question. Mr. Hoisington, you may tell in your own way the arrangements between Mr. Heber and yourself and Mr. Donahoe, and his gang of followers. Tell it as briefly as you can, and as quick as you can. Answer. Briefly, when I arrived in Ulysses, I was told that Mr. Donahoe, and some parties of whom it was said he was the leader, were in town, expecting to take some part in the county-seat fight, upon one side or the other. Frequently friends of Ulysses came to me, and urged me to see Mr. Donahoe, and make some arrangement to secure him in the interest of Ulysses. In answer, I told them that I wasn't ready to talk with anybody; that I didn't understand the situation. I met Mr. Donahoe, and some of those whom it was stated he represented, occasionally, in town, simply bidding them good day, and passing on. About four days or five days before the 16th of October, Mr. Donahoe and I met near the post-office in Ulysses, and subsequently Mr. Donahoe remarked that, if I had anything to say, I would better say it pretty soon; that the boys were getting uneasy; that they had offers from the Appomattox town; and that some of the boys were making arrangements, and had already gone over there, and were staying there. He stated: 'If you have anything to say to me, you had better be saying it quick.' I remarked to him, in answer, that I didn't understand the situation very well, and couldn't talk to him. I then asked him how he felt towards Ulysses. He says: 'You know I have always been in these county-seat fights, and it is a matter of business with me.' I says: 'That is the size of it.' I then passed on with the remark that he would better talk with some of the other boys. During the day, parties friendly to Ulysses, and residents of Ulysses, came to me, and wanted to know what I meant by standing Donahoe off. I told them I meant just what I had done; that I wasn't ready to talk to anybody upon any such proposition as I understood Mr. Donahoe wanted to talk with me on. I think the next day I met Mr. Donahoe, and he abruptly asked me: 'What are you going to do?' I told him I wasn't ready to do anything yet. 'Well,' he

says, 'you had better be damn quick about it.' And I got away from him as easy as I could. About Friday or Saturday morning, I think, through the instigation of some parties whose names I don't now remember, he came to Mr. Heber and me, in the Grant County Bank, and had a talk with us, to the effect that, if we wanted to do anything, he was ready to close, otherwise he would go elsewhere,—meaning, as I understood it, to the other town. After a consultation between Mr. Heber and myself and Mr. Donahoe, and a general canvassing of the matter, it wound up in an agreement to the effect that, if Mr. Donahoe, as well as his friends, would stay with Ulysses, and not go upon the other side, and have nothing to do with the campaign on the other side, and would remain friendly with us until the election was all over, that we would give the crowd fifteen hundred dollars. He kicked for much more, and said he was offered much more on the other side, and parleyed over it a good deal. But finally that amount was agreed to be paid to him and to his followers. I believe that is the substance of the negotiation."

Donahoe's statement with reference to his duties upon that occasion, and what transpired, are stated in his own language: "Question. Then, after the organization of the polls, what took place then? In what manner was the voting conducted for some time? Answer. From the opening of the polls until the afternoon, about four o'clock, the voting was very slow. They all understood that they were to get money, and nobody seemed spending up to that time a dollar; and it was nearly four o'clock, or about that time. It was between the hours of half past three and five, positively. I goes to Mr. Hoisington and looks him up myself, and I says: 'You have got to start the ball rolling.' He had been to me previous to that time. I says, 'We'll start the ball rolling now;' and he says: 'Come to the printing-office, and the men will be paid off at ten dollars a man for every man that votes for Ulysses. A man will stand at the polls, and will carry you the list of the names to the pay-room.' And he mentioned the boy's name that worked in the bank. I don't know his name. He says: 'He will be there to pay off the boys. You bring the list, and record the boys for payment, and they will get their money.' Q. Where was this printing-office located, with reference to the polling place? A. We had only the street, from thirty to sixty feet. We passed around the corner, and then went to the rear, and I should judge that we came within a door or two of the polling place at the rear. It may or might not have been the first or next door to it. Q. Well, what then? A. I had pretty strong hold on an organization of forty, and they were uneasy about their money, and all uneasy; and I went to them, and told them they would get ten dollars a man if they voted for Ulysses, and if they voted for Cincinnati they wouldn't get a cent, and that their votes would be

watched, and they couldn't vote wrong, and the first man that voted wrong, he was liable to get himself into trouble if he came around and tried to get money, and that he would get no money, either. Q. State right here your connection with this organization you speak of,—in what manner you connected yourself with it. A. Well, as soon as I was promised the fifteen hundred dollars, I went and brought my seven men, besides myself, together; and we all joined the organization, in order to break her up, if necessary, and throw her solid, if we couldn't. Q. Well, what reply did this organization make to you, as a member of it, when you told them they could get their ten dollars? A. They was suspicious of us as members. They thought we belonged to the 'Hoisington outfit,' as they called it. But they admitted us as members, and swore us in. They hadn't at that time elected any officers. We gave the crowd the president and secretary, and, as they supposed, everything connected with it. But we had made up our minds that, by giving them their officers, we could have such a hold on the organization, by the time it came around, that, when it came to negotiating between Hoisington and ourselves, we would go there, and assist Mr. Hoisington to break up the organization by bringing word from Mr. Hoisington that perhaps he never sent. Q. Well, following out that, did you, or did you not, obtain any position in that organization? A. Mr. Jones and a man from Garden City, (I forget his name. I did know it, but I have forgotten it,) they were appointed. Jones and myself were chums, and we made an agreement to break boodle in this thing,—what we made out of it. I nominated Mr. Jones as one of the committee to see Mr. Hoisington. They were also given power to go and see Mr. Grayson, at Cincinnati, to see if he had any boodle, and to see what his bid would be for our organization. Mr. Jones, he went to see Mr. Hoisington, or was supposed to, but didn't. I don't think he went near the man. And he came back, and said: 'Not a cent. Hoisington won't pay no boodle.' And they came to see Mr. Grayson, and Mr. Grayson said the same. He actually said it. That I know. I was present during the conversation. In coming to see Mr. Grayson, we had banked that Mr. Grayson hadn't the money to do the business. We were at that time true blue to Mr. Hoisington. We brought this other man from Garden City with us to see Mr. Grayson,—the gentleman that I have frequently mentioned that I have forgotten his name. Grayson says: 'Boys, we are all right. We are friends. But, God help us, we have no money.' We went back, and gave the report to the organization, and we had them in suspense from that time till the day of the election, about four o'clock in the afternoon; and I carried word to each individual as I caught them, and I says: 'Boys, you'll get ten dollars. That's the most you are offered.' I instructed them to hold back their votes,

and not vote till I told them. They were every one true to their pledge, and not one attempted to vote until half past three to five o'clock; and in the mean time, as I previously stated, I told Mr. Hoisington that all was ready,—that was about half past three o'clock; and he told me what to do with those men. And he says: 'Drive them to the polls, and vote them for Ulysses. There will be a man there to take the names, and he will pass you the lists; and you carry that list to the rear of the printing-office, and they will get ten dollars a man. That is all we can afford to pay.' They was to be paid for their votes for voting for Ulysses. Q. How soon after that before the voting began of this contingent? A. As fast as I could pull them into that line; and in half an hour—it was between the hours of half past three and half past four—I had perhaps twenty-five waiting to poll their votes at ten dollars, and by half past five I had perhaps seventy-five, and had already voted twenty-five; and from that on to six o'clock, and the closing of the polls, there were anywhere from fifty to seventy-five men in line continually, and anxious to get in line, for their ten-dollar note for their vote. Q. Now, this organization of forty, did you see them after that,—after the voting began as an organization? A. Just previous to the first voting, at half past three o'clock, I got to that organization as fast as I could, to prevent any disturbance, and told them about the ten-dollar note, and told them where to get the ten-dollar note, if they voted for Ulysses; that the other side had no money, and they had better crop out their ten-dollar note than not get any money at all,—for I knew most of them were hungry, and were there for that purpose. Q. Were they together when you made that statement? A. We couldn't get them together. I told them to get together as fast as possible in that room, and we got in all twenty-five or thirty, and had a great deal of work, and got back on the street as quick as I could. I went to the building behind the barricade, and instructed the men on the inside, and said: 'If there is any trouble to-day, it will be within the next hour. Get back there, and, if any man gets after me, I will throw up my hands, and draw him out of the crowd; and, if he draws a gun on me, kill him.' Q. Did you see any of this organization vote there? A. Some of them voted. Some got left in line at the polls. We rolled the ball a little too late in the afternoon to get them all to vote. They couldn't crowd into line fast enough. Q. After getting them into line, and getting the line full, what were your principal duties then? A. To take the list from the man there at the polls. They told me, but I don't remember, the man's name. He was some county officer at that time. To take the list from him, and carry that list to the rear of the building that I mentioned, and give it to the clerk there,—he had a bundle of currency in front of him,—and tell him this list was all right, and to give them

their ten dollars; that they had voted for Ulysses. Q. And, in doing that, that caused you to remain near the polls. How far was this man with the list from the polls? A. He was right at the polls, with the first man that voted, all the time. Q. In what manner did he get the names that were put on the list? A. He heard their names; and, the same time they gave their names, he gave them a ballot for Ulysses. Q. He took the name, and handed them a Ulysses ballot, just as he reached the polls? A. Yes, sir; and he run out of ballots, and fell back in line, and gave every man a ballot for Ulysses. Q. Well, the names were taken down, as I understand, as they were called out and voted; as the names were put in, he put the name down on this list; and, as the list was filled, you would take it from him? A. I took it from him, and carried it to the place that I have stated. Q. How many of these lists did you carry to the back part of the printing-office, where the paying was going on? A. There was not less than ten on any paper that I carried back; and I kept tally of my trips, and I made fourteen trips. I swear, positively, not less than one hundred and forty; and I estimate—I don't think that I am overdoing it—two hundred. Q. This list that was made there comprised the names of persons who had voted the Ulysses ticket, did it? A. It did. We were careful to see that they didn't vote any other. Q. It comprised, also, the names of men who were to receive pay for casting their vote for Ulysses? A. It did. Nobody else was to receive a cent, and we were to watch to see nobody else rung in. That was part of my work there, and I received four hundred and fifty dollars for my one day's work. Q. Do you know whether the men whose names were placed on that list by that man who was checking, and whose names you carried back to this office, were paid at the office? A. I was afraid at the time, or after the polls were closed, that there was some few left outside, but they have all been paid; and I looked at the line after the currency had all run out, as they said, and I think there was about twenty-five men in line; and Hoisington told me to 'quiet those men, and we will give them checks, and the checks are good.' Q. What instructions were given to the men who voted there as to where and how they should get their ten dollars? A. They were to go to the rear of the printing-office. As I think, it's the rear of the next two or three doors, or perhaps the first door, from the polls. I can't say positive. It was just around the corner, and a few steps from the polls. Q. Was that the same place designated by Mr. Hoisington? A. It was the same place,—the same place that Mr. Hoisington told me to take the list of names. Q. When you told them where to go, what did you tell them? Where did you tell them this? A. I told them on the street, when I had time. It was a very busy day for me. Q. You told them as you could find them? A. Yes, sir;

and, when I thought they were backward about getting in line, I rushed around, and told them to get in line; that Hoisington would pay them ten dollars a vote. I mentioned Hoisington's name because we looked to Hoisington for our pay. Q. In what manner did these men, after they had voted, go to this place for their pay? A. They couldn't pay them off as fast as they came, and they had to take their chances in line, like men at a post-office, after letters, who had no box. Q. Now who, if any one, had charge of that line back where they were being paid off? A. I looked out to keep them in line, and, when they became quarrelsome and trying to get ahead, I told them to keep quiet, and take their turns. I had free access to the cashier's office, and, if I saw a man raising a disturbance, I would push him ahead of the crowd, and say: 'This is my friend. Step back, and let him in,—if I was afraid he would raise a disturbance; and I would see that these men kept in line; and, if I rushed a man in as I stated, I would say: 'This man is all right for Ulysses. He is in a hurry. Pay him off.' Q. Do you know what amount of money was paid out there to men on these lists? A. I can not positively state. It was not less than fourteen hundred dollars; and I estimate—and carefully estimate—it at two thousand."

While the evidence shows that this man was a disreputable character, and his evidence has been challenged by a number of witnesses, his statements as to what transpired that day are in a measure corroborated by a number of witnesses. C. H. Lawyer, a member of the Farmers' Club, says: "As a member of committee of club, saw Hoisington. I said I wanted twenty dollars each for club,—about forty. He said: 'If they are all Ulysses men, I will give them twenty dollars for their work.' We reported. Club talked it awhile, and then went and voted. Met, after we voted, at the bank. Hoisington there, and thirty or forty of club. I voted for Ulysses. Hoisington gave checks for twenty dollars." Jacob Elliot testified: "Committee of Farmers' Club, Mr. Lawyer, and others told me they had fifty or sixty. They could sell to the town that would pay the highest money." Ludwig Ommundson said: "Belonged to organization to vote one way,—the Farmers. Number members, fifty-five. Rathbone one of committee. Object to see how much money we could get for so many votes for county-seat on day of election. Committee reported we could get twenty dollars. Club accepted. Went to vote. We took Ulysses tickets. Had a man on outside, and we had to fold tickets with Ulysses on outside, and show him name on the ticket. All the club voted. I voted for Ulysses. Got check for twenty dollars. Hoisington there." Charles Miller states: "My neighbors in club were to get twenty dollars to vote for Ulysses. I voted for Ulysses. Got check." Loderick Mathews, one of the judges of the election, says: "One man handed me his ticket, and wouldn't let

loose. Said he wanted to know where to go to get his money. He said they told him they would give him ten dollars for his vote, and he said: 'I don't want to vote till I get it.' Ed Short took hold of him and said, 'That is all right,' and he went away."

It was stated by a number of witnesses, in connection with these negotiations which had been carried on, that different sums had been offered to secure the vote of the club or clubs, and these propositions had been declined until a proposition had been accepted upon the part of the Jones Club, numbering about 31 men, to cast their votes for the sum of \$10 apiece. One of the members of this club stated that each received \$10 in consideration of voting for Ulysses for the permanent county-seat on the 16th of October, 1888; and another one stated that they were there for boodle. These clubs were conducted to the polls by the leader, with tickets placed in their hands in such a manner that parties standing at the polls could see the way in which they voted, and their names were taken down, and afterwards conducted to some convenient place for payment; the paymaster checking the names from the lists furnished by the parties making them at the polls. In this manner other clubs, known and styled the "Gamblers' Club," numbering 12; the "Stevens County Club," of 57; the "Palmer Club," of 40; and the "Farmers' Club," of 55,—voted later in the day, receiving, as the testimony shows, different sums, ranging from \$10 to \$20, for their votes. The evidence further shows that about an hour before the closing of the polls the challenger in the interest of Appomattox had been removed from the polls, which greatly facilitated the voting of these various clubs. The evidence, as we have examined it, of the number belonging to the various clubs, and who were paid for casting their votes, as well as the individuals not connected with any of these organizations who received money in like manner, establishes the fact that at least 195 persons belonging to these various organizations, and individuals not belonging to any clubs, received either money or checks in consideration of their votes; that these various sums were paid by parties interested in, and active partisans of, Ulysses. The evidence shows that A. J. Hoisington gave checks on the Grant County Bank, for \$20 each, to the members of what was known as the "Farmers' Club," in Lincoln township, in consideration of their voting for Ulysses. The evidence further shows that parties who attempted to pass along the wire leading to the polls with other than Ulysses tickets had their tickets taken from them, and torn up, and given others, or shoved out of the line, and under the wire, away from the polls. We are satisfied, from an examination of all the evidence in relation to votes cast at this precinct, that at least 195 votes cast at said precinct for the town of Ulysses for permanent county-seat were so tainted with fraud and corruption by reason of the bribery of

the voters that said votes should not be counted.

2. As to the township of Howard, 115 votes were polled,—108 for Ulysses, and 7 for Appomattox. A. H. Heber, James Buckles, and a party by the name of Larkin, were present in this township, and were active workers for Ulysses. As to the method of voting at this precinct, Matthew Duty testified: "Question. What was Mr. Heber doing? Answer. Well, as near as I could tell, he was writing down names. There was a big crowd around, and I couldn't get next to him. Q. Now, state whether or not he took down your name. A. Well, I think he did. Q. On the way to the polls, was it necessary for you to show your ticket to any one, or did you show your ticket so it could be seen? A. Yes, sir; I held it so it could be seen. Q. Who was it that was examining tickets that way? A. Well, I think Monroe Cover was the one that looked at my ticket. Whether he was intending to do anything with it or not, I — Q. Did Mr. Cover have any list of names? A. I think he did. Q. How long after you voted was it that you received this twenty-dollar check from Towler? A. The night after the election." E. F. Towler had a club of 30, including himself, which he voted at this precinct. C. L. W. Green had another club, which voted at this precinct, numbering 29; and a party by the name of Messmer had another club, numbering 27,—all voting for Ulysses, and were afterwards paid in sums ranging from \$15 to \$20 each. One witness testified that he saw money paid after night by Towler; that there was a list on the table; and that, when a party was paid, a pencil mark was drawn through his name. One of the judges of the election at this precinct stated that the votes were scattering until 4 or 5 o'clock, when the rush began, and that three-fourths of the votes were cast from 5 P. M. on. As to the distribution of the tickets at this precinct, C. T. Melloan testified as follows: "Question. State what Heber did during that day,—what you saw him do and say. Answer. He distributed tickets during that day, and registered each man's name as he voted. Q. State the manner in which he distributed Ulysses tickets? A. He distributed Ulysses tickets. He had a bunch in his hand, with the blank side out, and he would write the voter's name on the blank side. He kept his list on the blank side of a ticket, and as he would write the name he would hand the ticket to the voter. He would hand a ticket from under the bottom. The tickets were held in that way [illustrating] in his hand, leaving the one he was writing on on top. Q. What was he writing on the top ticket? A. He was writing the names of the men as they voted. Q. Where was he at the time he distributed those tickets and wrote the names? A. The voting was going on on the east side of the window, and he stood right by the window jamb until I raised an objection; and then he went to the wire fence, and stood there, right

by the building. They had a wire stretched to keep the crowd away from the window. Q. How would he obtain the name, as you say, of the voter? A. By some one of these three men mentioned—Green, Towler, or Messmer—standing by his side, and telling who the man was as he went to vote. Q. How long was that method continued? Q. Until the voting was all in, except, I believe, one vote." Seven other voters cast their ballots for Ulysses at this precinct, and were afterwards paid by different parties. The evidence shows that at this precinct 94 votes were cast for Ulysses for which the parties were afterwards paid different sums of money or checks, and should not be counted.

3. Thomas township cast 65 votes for Ulysses, 33 votes for Appomattox, and 31 votes for Golden. George Earp, the mayor of Ulysses, was present at this precinct on the day of the election; and the evidence discloses the fact that 6 of the electors were paid the sum of \$10 each for voting for Ulysses by him, and that C. C. Pell paid for 2 others at this precinct,—making 8 votes which should not be counted for Ulysses.

4. Sherman township; voting place, Shockeyville: A party by the name of Corp was present at this precinct in the interest of Ulysses; and the evidence discloses the fact that 12 of the persons voting at this precinct for Ulysses received the sum of \$10 each for their votes.

5. Sheridan township; voting place, Spurgeon: The same object seemed to inspire the voters of this township, to place their ballots where they could realize the greatest sum of ready capital for them; and purchasers were in the market. Clubs were organized here, as well as elsewhere, to sell to the highest bidder. There were captains representing clubs numbering 6, 8, and 24 voters. William Horn testified, in relation to the election at this precinct, "that there were seven deputy-sheriffs at this precinct in favor of Ulysses, and, when these boodle voters came, others had to stand back from the window; that thirty men, jammed at the window who had their names on the petition to vote for ten dollars, and they were rushing to the window, the deputy-sheriffs keeping the others back, away from the window; that prior to that, before these voters came up, we had all had access to the window and house, but when this band came we had access to neither window nor the house." This witness says he saw a list of 30 names agreeing to vote for Ulysses at \$10,—these were under Green and Scott; that, after voting, Scott said: "Boys, all of you who are on my list for ten dollars, get into line." They did so. He counted them, then went behind the stable, got some money, and told them to come into the light. I followed the gang to the store. They called for a light. A deputy-sheriff called the roll, and Scott paid the money." Conrad S. Scott, the captain of one of these organizations, testified: "Question. Did you see any number of voters gotten together,

and put in line, and counted? Answer. Well, I did during that evening, after the election was over. Q. What number? A. There was twenty-four, I believe, I listed. Q. For what purpose were they brought together? After they were brought together, what was done? A. Well, that means you want me to get right down to business, I suppose. Q. Yes, sir. For what purpose were they brought together? A. For the purpose of getting some money that had been left there for them. Q. Did they get it? A. Yes, I think they did. Q. What amount? A. They got ten dollars for the man. Q. In what manner was it paid to them? A. Well, their names were called, and the money paid to them, and their names canceled off, as long as there was money. I said there was twenty-four men listed. There was twenty-three of them paid. Q. Who called the list? A. A young man by the name of Nicholson. Q. Whose money was this that was paid out? A. Well, I don't know. I received it from a man by the name of Mr. Larkin. That is as near as I can give his name. Q. You may state what he requested it to be paid out for. A. He told me that it was for work. Q. What work did he refer to when he spoke of work? A. Well, I didn't think he defined himself very explicitly, or that he did at all. Q. Who called them up in line, and called their names, before they were paid? A. Well, I think Mr. Nicholson called them up in line, and I counted them. Q. Did you pay twenty-four? A. No, sir; twenty-three,—ten dollars each. I received two hundred and thirty-five dollars in all. The balance was promised to be paid, but wasn't." Thirty-six men belonging to the different organizations at this precinct cast their ballots for Ulysses as the permanent county-seat, and were compensated in the manner indicated by the evidence quoted.

6. It is claimed upon the part of the relator that the 41 votes cast by Sherman township for Shockey, the 2 votes cast by Sheridan township for Spurgeon, and the 31 votes cast by Thomas township for Golden, should be eliminated from the poll. We do not think this is correct. These parties had the undoubted right to cast their ballots for any point in the county for the permanent county-seat where they saw fit, and there is nothing in the evidence to show that these voters were bribed or corrupted; and we are not at liberty to reject them.

7. The official canvass of this election shows a total vote of 920 cast for the permanent location of the county-seat of this county. Three hundred and forty-five of these votes, as the evidence shows, are to be rejected from the entire poll, and from the total vote cast for Ulysses, on account of bribery, fraud, and corruption through the partisans of Ulysses. This leaves a total vote of 575, of which 268 should be counted for Appomattox, 233 for Ulysses, 41 for Shockey, 31 for Golden, and 2 for Spurgeon, which shows that no candidate for the permanent county-

seat received a majority of all the honest votes cast at said election. It is to be regretted that another election is necessary in this county; but, from a careful examination of the evidence as it has presented itself to our notice, those votes so corrupted by fraud and bribery should not be counted.

The evidence discloses the fact that a large number of persons, who have been characterized as "killers," were imported into this county to take part in this county-seat election,—men who had figured in other elections of a similar character in south-west Kansas; and it would be well for the citizens of this county to take the advice given by this court, through Mr. Commissioner SIMPSON, in the case of *State v. Malo*, 22 Pac. Rep. 360, which is as follows: "The importation of such men causes a very strong presumption that they are employed for purposes connected with these elections that all ordinary men would hesitate to perform. Their employment is a reflection on the courage and honesty of the community that suffers such an outrage to be perpetrated, and causes their own acts to be regarded with some degree of suspicion. Their presence in a county that is cursed with a county-seat contest is a constant menace to the lives of many quiet and innocent people. One of the best indications that people desire an honest and peaceable election is their refusal to employ a horde of these conscienceless scoundrels, while, on the other hand, their presence at the polls irresistibly leads to the conclusion that they are hired for criminal purposes." It is recommended that the temporary writ of *mandamus*, as prayed for by the relator, be denied.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 731)

KANSAS HOME INS. CO. v. WILDER, Superintendent of Insurance, (two cases.)

(Supreme Court of Kansas. May 10, 1890.)

MUTUAL FIRE COMPANIES—CERTIFICATE—ORGANIZATION.

1. The determination of the superintendent of insurance in granting, refusing, or revoking authority to a mutual fire insurance company to do business, on account of insolvency or non-compliance with the laws of the state, is not final, but his action in that regard is subject to inquiry and control by the court.

2. A mutual fire insurance company organized under chapter 132 of the Laws of 1885, and which has no guaranty fund for the protection of its policy-holders, cannot legally issue policies of insurance on property situate outside of the state.

(Syllabus by the Court.)

Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

Two cases were brought in the district court of Shawnee county by the Kansas Home Insurance Company against D. W. Wilder, as superintendent of insurance of the state of Kansas,—one to enjoin the superintendent from revoking a certificate which had been issued by him to the company, authorizing it to do business as an insurance company in

the state of Kansas; and the other was an application for a writ of *mandamus* to compel the superintendent to issue to the agents of the company throughout the state the licenses contemplated by the statutes, authorizing them to solicit insurance, and to transact the business of the company. In the one case a temporary injunction was allowed, and in the other an alternative writ of *mandamus* was issued. The cases were tried together in the district court upon an agreed statement of facts, which is as follows: "It is hereby stipulated that the substantial questions at issue in both of the above entitled actions are as follows, to-wit: *First*. Whether or not the court has the jurisdiction and authority to control the acts of the defendant as superintendent of insurance of the state of Kansas, and by *mandamus* compel him in the one case to issue the certificates to the agents of the plaintiff, prayed for in the petition, and in the other case, by injunction, to perpetually restrain and prevent the defendant from revoking the certificate of authority issued by him to the plaintiff on March 12, 1889. *Second*. Whether or not the plaintiff, as a mutual fire insurance company, organized under chapter 132 of the laws of 1885 of the state of Kansas, has the legal right, under said laws and under the certificate of authority issued to it on March 12, 1889, to insure property, and to issue policies of insurance upon property situated outside of the state of Kansas. It is further stipulated that both of said actions be submitted to the court for the determination of said questions at issue therein, upon said questions and the following statement of facts, which is hereby agreed to: The plaintiff is, and for more than one year last past has been, a mutual fire insurance company, organized under chapter 132, Laws 1885, of the state of Kansas, having its principal office and place of business in the city of Topeka, Shawnee county, state of Kansas; that the defendant is, and for more than one year last past has been, the duly-appointed, qualified, and acting superintendent of insurance of the state of Kansas; that on the 12th day of March, 1889, the defendant, as such superintendent of insurance, issued to the plaintiff a certificate of authority to transact business as such insurance company under section 5 of said chapter 132 of the Laws of 1885. After the issuance of said certificate of authority, and before the commencement of the *mandamus* suit aforesaid, No. —, the defendant, as superintendent of insurance, declined, and decided not to issue any certificate of authority to the agents of plaintiff under section 27 of said chapter 132, Laws 1885, although proper demand was made therefor by plaintiff, and fees tendered; that the plaintiff has not now, nor has it ever had, any guaranty fund, as provided by chapter 130 of the Laws of 1885, or any other laws of the state of Kansas providing for any guaranty fund; that the plaintiff, since the issuing to it of the certificate of authority of

March 12, 1889, has transacted business and issued policies of insurance upon property situated outside of the state of Kansas, and owned by non-residents of the state of Kansas, to-wit, in the following named states and territories: The Indian Territory, Illinois, Missouri, and other states; and claims the right to do so. But, in insuring property and the writing of policies upon property situated outside of the state of Kansas, the plaintiff has established no agencies and appointed no agents outside of the state of Kansas. Applications for insurance upon such property have been sent in to plaintiff at its principal offices, at Topeka, Kan., and there passed upon, and the policies there executed; and sent from there to the applicants, who forwarded the money therefor to the said home office, at Topeka. That plaintiff has issued no policy upon property outside of the state of Kansas to run for a longer time than one year, and that it has taken cash only in payment for such policies, and has at no time taken premium notes or other evidence of indebtedness therefor. That all of said policies on property outside of the state of Kansas were upon property of the second class, as designated by said chapter 132 of the laws of 1885. That this business has come to plaintiff through brokers and others not appointed by plaintiff. That plaintiff sought this business in other states through letters, circulars, and advertising cards, the same as they sought business in Kansas. That plaintiff has issued such policies of insurance upon property outside of the state of Kansas since the issuance to it of the certificate of authority of March 12, 1889, mentioned in plaintiff's petitions. That defendant, as such superintendent of insurance, because of the facts herein stated, claims the right to, and proposes to, revoke said certificate of authority of March 12, 1889. That both of these cases are to be tried and determined by the court upon the questions and facts herein stated, and such other matters as may be contained in the pleadings are not to be regarded."

Upon this stipulation the district court refused the injunction, and denied the application for the temporary writ of *mandamus* prayed for, and gave judgment for costs in both cases in favor of the defendant. Exceptions were taken to the rulings and judgment of the court, and the cases were removed to the supreme court by the insurance company for review.

Overmyer & Safford, for plaintiff in error.
L. B. Kellogg, Atty. Gen., for defendant in error.

JOHNSTON, J., (after stating the facts as above.) Two cases between the same parties are submitted together upon a single statement of facts, and according to the stipulation of the parties only two legal propositions are presented for decision. The first one of these is whether the courts can inquire into and control the superintendent of insur-

ance in the exercise of his official duties in granting, refusing, or revoking a certificate of authority to a mutual fire insurance company organized under chapter 132 of the Laws of 1885. Prior to the legislative session of 1889, the finding and judgment of the superintendent in respect to the solvency of an insurance company, and its compliance with the requirements of law, could not be controlled, and when he had exercised his discretion and judgment it could not be reviewed, nor the motives which actuated him inquired into by the courts. *Insurance Co. v. Wilder*, 40 Kan. 561, 20 Pac. Rep. 265. The decision in the cited case, construing the statute with reference to the power and discretion of the superintendent, was given in January, 1889, and the legislature, which convened in the same month, materially modified the statute, prescribing the power and duties of the superintendent in dealing with mutual fire insurance companies. In section 24, c. 132, Laws 1885, provision was made that, whenever it should appear to the superintendent of insurance that the solvency of a mutual fire insurance company was impaired, or that the insurance laws of the state were being violated, he should immediately make an examination, and for that purpose should have access to all the books and papers of the company, and have power to administer oaths and examine witnesses. It then proceeds: "If the superintendent of insurance shall find, upon such examination, that the solvency of the company has been impaired, or that the laws of the state have been violated, he shall immediately suspend the certificate of authority until the laws of the state have been fully complied with, or the solvency of the company restored; or, if in his judgment the public safety require it, he may revoke the certificate of authority, and cause the company to be enjoined from further insuring of property." This section was amended by chapter 159 of the Laws of 1889, which, after providing for reports and examinations substantially as in the original section, the provision above quoted is changed so as to read as follows: "If the solvency of such company has been impaired, or the laws of the state have been violated, by the company, the superintendent of insurance shall immediately suspend the certificate of authority until the laws of the state have been fully complied with, or the solvency of the company restored; and he also may in such a case revoke the certificate of authority, and cause the company, upon proper proceedings instituted against it, to be enjoined from further insuring of property. Provisos are then added which, in substance, state that the superintendent cannot refuse an insurance company a certificate of authority to do business in the state, or revoke or suspend a certificate already granted to such a company, if it is solvent, and has complied and is complying with the laws of the state. And the provisos further recognize that actions may be brought against the superintendent of in-

insurance in the county where his office is located, to compel him to issue certificates of authority to an insurance company, and to restrain him from revoking or suspending a certificate of authority which had been theretofore granted. The language in the statute of 1885 which we have italicized was omitted in the amendment of 1889. In the earlier provision, the license or certificate of authority might be suspended on the mere finding of the superintendent that the solvency of the company had been impaired, and it might be revoked solely upon his judgment that the public safety required it. The language authorizing the suspension or revocation of a certificate of authority upon the mere finding and discretion of the superintendent is carefully excluded from the later provision. These changes, together with the provisions forbidding the refusal, revocation, or suspension of a certificate of authority by the superintendent, where the company is solvent, and has complied with all the laws of the state, as well as the proviso which recognizes that an action of *mandamus* may be brought to compel the superintendent to issue certificates of authority, and an action of injunction may be brought against him to enjoin him from revoking or suspending certificates of authority, indicate quite clearly the legislative purpose that, in the future, the determination and action of the superintendent should not be final and conclusive, so far as mutual fire insurance companies are concerned. The fact that the law was amended so soon after a judicial construction had been placed upon it is not to be overlooked in ascertaining the object of the legislature in enacting the amended law. By changing the language of the statute, the legislature has indicated a purpose to change the rule of the former statute, and that the new is to have a different construction than had already been placed upon the old one. This circumstance, and the changes in the phraseology that were made, manifest a legislative purpose to make the determination of the superintendent, as to the right of a mutual fire insurance company to begin or continue business, subject to judicial inquiry and control. If this was not the effect, then the amendment was for no purpose; and it is contended here that no actual change was made or intended by the amendment. But we cannot presume that the "legislature intended to go through the form and time and expense of legislation to accomplish nothing, or to do that already fully and completely done." *City of Emporia v. Norton*, 16 Kan. 236. The first question presented must therefore be decided in the affirmative.

The second proposition submitted is whether a mutual fire insurance company organized under the laws of Kansas, having no guaranty fund, may legally transact business and issue policies of insurance on property situate outside of the state. No question has been raised in these proceedings regarding the solvency of the company, but it

is conceded that it has sought business outside of the state, and has issued policies of insurance on property owned by non-residents and situate in the Indian Territory, and also in Illinois, Missouri, and other states. If this course is in violation of the law, the action of the superintendent must be upheld, and the decision of the district court affirmed. The company is organized under chapter 132 of the Laws of 1885, and an examination of the provisions of that act, and the other statutes relating to mutual fire insurance companies, leads us to the opinion that the legislature intended to confine the business of mutual fire insurance companies of the class to which the plaintiff belongs to the transaction of business within the state. It is true, as contended, that a corporation organized under the laws of the state would ordinarily be regarded as having authority to transact business, wherever it might find it convenient or profitable, beyond the limits of the state, unless restricted by some provision of its charter or statute of the state. In behalf of the defendant, however, it is urged that the provisions of chapter 132 alone manifest a legislative intention to restrict the business of such a company within the limits of the state. The attorney general first refers to section 1 of the act, where it is provided that the company shall be organized exclusively from residents of the state. By section 10 of the act, it is provided that every person who effects insurance in the company under the provisions of the act shall thereby become members of the corporation. Only persons holding a policy of \$500 are eligible to the office of director, and the president, vice-president, and treasurer are to be selected from among the directors. It is argued that the meetings of the company must be within the state, and that the corporators, directors, and officers must be residents of the state. Attention is also called to section 12 of the act, which provides that suits against the members for any assessment are to be brought before a justice of the peace of the county in which the insured resides. In this connection it is urged that the legislature certainly did not design that its acts should operate on officers and courts beyond the territorial limits of the state. It could not enact a statute having extraterritorial force, and the presumption will be that the legislature did not intend to exceed its jurisdiction by attempting to regulate the power and duties of justices of the peace in other states. As against this contention, it is argued that, under the provisions of section 9, the premiums for a single year may be paid in cash, and hence the provisions of section 12, with reference to the collection of notes, would not apply. On the other hand, it is said that only part of the premium is to be paid in cash, and that the general scheme is that the premium notes shall be taken; because under section 4 the company has no power to issue policies until applications in good faith have been received

for insurance in one class to the amount of at least \$100,000, and premium notes have been received in advance for the sum. The argument is that, as the general plan provides for the reception and collection of premium notes, the provision of section 12 fairly indicates that all members are to be residents of the state, and that, even if an exception exists allowing one-year premiums to be paid in cash, the purpose derived from the general scheme is none the less manifest that the membership and business must be confined within the state. A reference is also made to section 14, which provides that the premium notes taken by the company shall become a lien upon the property insured by filing an abstract in the office of the register of deeds of the county in which the property is situate, giving the name of the maker, date, amount, and maturity of the note, and also the date of the expiration of the policy of insurance, together with a description of the property insured. It is obvious that the legislature in this provision was prescribing rules for Kansas alone, and is not to be understood as attempting to provide for establishing liens on real estate beyond the limits of Kansas. This is cited as another strong evidence that the business of the companies was to be restricted within the limits of the state. Then, again, it is contended that, under the general plan and policy of such companies, where there is no guaranty fund for the protection of the insured, the public safety requires and the legislature intended that the officers and members and the business done shall be under the inspection and supervision of the insurance department, and that this safety would not be afforded if such companies were permitted to do business in places beyond the jurisdiction of the department. All these matters are entitled to consideration, and to a greater or less extent furnish a guide for determining the legislative intention. But a weightier and stronger reason for the view taken by the district court is the provision found in section 4 of chapter 130 of the Laws of 1885, which in terms provides that such mutual fire insurance companies as have a guaranty fund of \$100,000 may do business outside of the state of Kansas. This statute was enacted at the same session, and was approved one day earlier than was chapter 132, under the provisions of which the plaintiff is acting. Both relate to the same general subject, and the several acts provide a general system, and for the purposes of construction are to be considered together, and construed as a single act. The system embraces companies organized from residents of the state, whose business is divided into two classes, each of which is to be conducted separately and independently of the other. Laws 1885, c. 132. When any such company has done business for a certain length of time, and to a sufficient amount, it may create a guaranty fund to the amount of \$25,000, and may then issue policies, within certain limitations, on property situate in the

state of Kansas. Laws 1885, c. 130, §§ 1-4. When such a company provides a guaranty fund of not less than \$50,000, it may advertise for and do business in that class of the system within certain other limitations. Laws 1889, c. 160. And then when the company reaches the stage of having a guaranty fund of \$100,000, it may do business either in or out of the state. Laws 1885, c. 130, § 4. When these provisions are taken together, and considered in the light of each other, they indicate an intent on the part of the legislature that only such companies as secure their policy-holders by a guaranty fund of \$100,000 may insure property beyond the limits of the state of Kansas. The language employed in the first part of section 4 of chapter 130 indicates that companies having a guaranty fund of only \$25,000 are confined to business within the state, and it could hardly be intended that companies having less than that amount might go beyond the limits of the state. There is nothing in the act of 1889 which militates against the view taken. While the language employed is not as explicit and clear as it might have been, and the proposition under consideration not wholly free from doubt, yet, when all the provisions of the legislature relative to mutual fire insurance companies are read together, it is reasonably clear that the legislature intended that such companies as have no guaranty fund can issue policies only on property situate in Kansas. It follows that the judgment of the district court must be affirmed. All the justices concurring.

(43 Kan. 760)

CHICAGO, K. & W. R. CO. v. HARRIS, Commissioner, *et al.*

(Supreme Court of Kansas. May 10, 1890.)

RAILROAD COMPANIES—MUNICIPAL AID—ELECTION.

Where an election is ordered in a county under the provisions of chapter 107 of the Laws of 1876, and the amendments thereto, including chapter 142 of the Laws of 1877, for the purpose of authorizing the county to subscribe to the capital stock of a railroad company, and to issue the bonds of the county in payment for such stock, and such election is ordered upon a petition presented to the county board, which does not contain the names and is not the petition of two-fifths of the resident tax-payers of the county, but the county board declares it to be sufficient, and the election is held, the returns canvassed, and the result declared in favor of subscribing for the stock and issuing the bonds, and the county clerk is ordered by the county board to make the subscription, and he does so, *held*, that upon these facts the election must be deemed to be void, because of a want of a sufficient petition.

(Syllabus by the Court.)

Mandamus. Motion to quash portion of amended answer.

This is an action of *mandamus* commenced originally in this court by the Chicago, Kansas & Western Railroad Company against the board of county commissioners and the county clerk of Chase county to compel the defendant to issue to the plaintiff certain county bonds. The right of the railroad company

to these bonds, as alleged in the alternative writ, is founded upon a certain election hereafter described. It is alleged in the alternative writ, among other things, that on October 12, 1886, a petition of more than two-fifths of the resident tax-payers of Chase county was presented to the board of county commissioners, praying that an election be ordered to authorize the county to subscribe to the capital stock of the railroad company in the sum of \$80,000, and to issue to the railroad company an equal amount of the bonds of the county in payment for such stock; that the election was ordered to be held on November 16, 1886; that it was so held; that the returns thereof were duly canvassed on November 19, 1886; that the result thereof was declared to be in favor of making the subscription and of issuing the bonds; that the county clerk then, by order of the county board, made the subscription; that the railroad company complied with all the terms and conditions of the proposition submitted to the electors at such election, and in accordance with such terms and conditions completed its railroad before June 1, 1887; and it is also alleged that the railroad company is now entitled to such bonds. The defendants filed a return and an amended return to the alternative writ, which amended return, omitting title and signature, reads as follows:

"The defendants, William Harris, C. S. Ford, and W. H. Holsinger, as the board of county commissioners of the county of Chase, state of Kansas, and J. S. Stanley, county clerk of said county, for amended answer to the alternative writ of *mandamus* issued herein, and returned herewith, say:

"(1) These defendants deny every allegation contained in said writ that is not hereinafter expressly admitted to be true.

"(2) These defendants admit that the plaintiff, the Chicago, Kansas & Western Railroad Company, is a railroad corporation created and organized under the laws of the state of Kansas for the purpose of constructing, among other things, a line of railroad through the county of Chase, in the state of Kansas, and which these defendants aver is the line of railroad hereinafter mentioned.

"(3) These defendants further state that on the 12th day of October, 1886, there was presented to the board of county commissioners of Chase county a petition requesting said board to submit to the qualified electors of said county a proposition to vote aid to the plaintiff, a copy of which petition, omitting the names pretended to be signed thereto, is hereto attached, marked 'Exhibit A,' and is referred to and made a part of this amended answer; but these defendants aver and charge the fact to be that said petition was not signed by at least two-fifths of the resident tax-payers of Chase county; that the said petition was not the petition of at least two-fifths of the resident tax-payers of said Chase county, nor did two-fifths of the resident tax-payers of said county give authority for their

signatures to be signed thereto; that, at the time of the presentation of said petition, there were then at least two thousand resident tax-payers in said county of Chase, and that said petition did not contain the names of more than four hundred resident tax-payers of said county; and these defendants further aver and charge the same to be true that, by reason of said petition not being the petition of, nor containing the names of, two-fifths of the resident tax-payers of said county, the said petition was illegal and void, and it conferred and gave to the said board of county commissioners of Chase county no jurisdiction, authority, power, or right to call the special election hereinafter alleged, and that said special election so held, and all acts of said board based thereon, were and are, by reason thereof, illegal and void.

"(4) That the said board of county commissioners of Chase county, on the date aforesaid, by its determination and finding, declared that it did contain and was the petition of two-fifths of the resident tax-payers of said county, and did thereupon order a special election to be held at the various voting places in said county of Chase, on November 16, 1886, at which said election said proposition was to be submitted for adoption or rejection.

"(5) That notice was given of said election, and on the day last aforesaid the said election was held in the various voting precincts of said Chase county.

"(6) That afterwards, on the 19th day of November, 1886, the said board of county commissioners of Chase county canvassed the returns of said election, and declared that the said proposition had been carried by a majority of 155 votes, and directed the county clerk of said county to make subscription in the name of the county of Chase, in the sum of eighty thousand dollars, (\$80,000,) to the capital stock of the plaintiff, according to and upon the terms embraced in said proposition.

"(7) That immediately afterwards, and without interval, on the date last aforesaid, the county clerk, on the request and suggestion of the plaintiff, made such subscription.

"(8) These defendants further state that after the subscription of said stock, and continuously thereafter, until and long after the 4th day of July, 1887, neither the plaintiff, nor any of its representatives, officers, or agents, ever appeared before said board of county commissioners, or otherwise gave the said board, or any one else in authority for said board, any notice or information that it had accepted said subscription, and would build, or proceed to build, or was proceeding to build, said road on the faith of said subscription; and these defendants further aver that at no time prior to or on said date did the plaintiff accept said proposition, or authorize any of its officers so to do.

"(9) These defendants further state that the plaintiff ought not to have or further maintain this action, for the reason that no demand has at any time ever been made of

or on the defendants, the board of county commissioners of the said county of Chase, for said bonds, or any of them, by the plaintiff, or any one for it or in its behalf.

"(10) These defendants further state that the plaintiff ought not to have or further maintain this action, for the further reason that no delivery of the said shares of the capital stock of the plaintiff was ever made to the treasurer of said county, nor to any one else on behalf of and for the said county of Chase, and no tender of said shares of stock was ever made to said treasurer or any of these defendants, as was required by the terms of said proposition before it was entitled to have or receive said bonds or sue for the same.

"(11) These defendants further state that the plaintiff did not accept said subscription of stock, that it did not build its railroad on the faith of such subscription, and that it did not comply with and perform the terms and conditions to be performed by it in said proposition; that it did not build, complete, and have in operation its line of railroad from connection with the Ellinor extension of that company to the north line of Chase county on or before the 1st day of June, 1887; that it did not build its said railroad of standard gauge, completing the same, and have the same in operation, by lease or otherwise, from a connection with the Ellinor extension of the said Chicago, Kansas & Western Railroad Company at any favorable or other point in the valley of the south fork of the Cottonwood river, in the county of Chase, in the state of Kansas, to the north line of Chase county, via Diamond Creek valley, in Chase county, by the 1st day of June, 1887, nor by or at any other time; and that it had wholly failed and neglected to build, complete, or operate any portion of its grade, bridges, road-bed, or telegraph line, or procure any right of way therefor, for about three miles of its route from about Strong City to Evans, by the 1st day of June, 1887, and for many months thereafter; and that it did not establish and maintain a division terminus, with division facilities, as was or might be necessary for the operation of its railroad between the city of Strong City and Cottonwood Falls, Chase county, Kan., by the 1st day of June, 1887, as it was required to do by the terms of said proposition; and that it was not delayed or hindered in the construction of the said line of railroad by labor strikes, legal proceedings, or extraordinary action of the elements. These defendants further say that, by reason of the facts hereinbefore alleged, they should be dismissed, with their reasonable costs."

The plaintiff moved to quash the third paragraph of the amended return, which motion reads as follows: "Comes now the plaintiff, and moves the court to quash the third paragraph contained in the amended answer, and return of the defendants, on the ground and for the reasons that said paragraph does not by itself, or in connection with any other

matter alleged in said amended answer, state facts sufficient to constitute any defense to the alternative writ."

Geo. R. Peck, A. A. Hurd, and C. N. Sterry, for plaintiff. *F. P. Cochran, J. G. Waters, and Madden Bros.*, for defendants.

VALENTINE, J., (*after stating the facts as above.*) We have already decided several questions involved in or connected with the controversy now set forth in this present action. On two occasions we delivered written opinions. *Railroad Co. v. Evans*, 41 Kan. 94, 21 Pac. Rep. 216; *Chicago, K. & W. R. Co. v. Commissioners of Chase Co.*, 42 Kan. 223, 21 Pac. Rep. 1071. On the other occasions we delivered only oral opinions, which have not been and will not be published. We now deliver another written opinion, although the decision of the question now presented cannot determine the case, nor be of much importance in the case. The question arises upon a motion by the plaintiff to quash the third paragraph of the defendants' answer to the alternative writ, and the question presented is substantially whether an election held in and by a county under the provisions of chapter 107 of the Laws of 1876, and the amendments thereto, including chapter 142 of the Laws of 1877, where the petition presented to the county board, asking such board to order the election, was not the petition of two-fifths of the resident tax-payers of the county, is valid. The said third paragraph alleges that the aforesaid petition was not signed by and was not the petition of two-fifths of the resident tax-payers of the county, as required by the statutes above cited, and the plaintiff moves to quash said third paragraph upon the ground that it does not state facts sufficient to constitute any defense to the plaintiff's action, and virtually upon the ground that it makes no difference whether the petition was a petition of two-fifths of the resident tax-payers of the county or not. The decision of this question is unimportant, under the claims of the parties, respectively, for the following reasons: The plaintiff claims that the petition was a petition of at least two-fifths of the resident tax-payers of the county, and that such fact can be established by the evidence; while the defendants claim that even if such fact were established, still that the railroad company would not be entitled to the bonds which they demand, for the reason that the railroad company did not comply with the terms and conditions of the proposition submitted by the county board to the electors of the county at such election. Notwithstanding the fact that the question is unimportant, we shall nevertheless deliver our decision in writing.

The plaintiff, the railroad company, desires to compel the defendants, the board of county commissioners and the county clerk of Chase county, to issue to the plaintiff the bonds of the county in the amount of \$80,000, and it founds its right of action upon a certain election held in Chase county on No-

vember 16, 1886, under the provisions of chapter 107 of the Laws of 1876, and the amendments thereto, including chapter 142 of the Laws of 1877, and upon the subsequent acts of the parties in pursuance of such election, and the plaintiff in the alternative writ has set forth a *prima facie* cause of action. The defendants, however, in the third paragraph of their answer to this writ, allege that the election was void for the reason that the petition presented to the county board for the election was not a petition of two-fifths of the resident tax-payers of the county, as is required by the statutes above cited. The plaintiff moves to quash this third paragraph, upon the ground that it does not set forth facts sufficient to constitute any defense to the plaintiff's action. Upon the pleadings and the motion to quash, it must be taken as an admitted fact that two-fifths of the resident tax-payers of Chase county did not petition for the aforesaid election. This certainly renders the election void, and also renders void everything founded upon the election, unless something has since transpired that would cure this defect in the petition, or estop the defendants from urging the invalidity of the petition and of the election. Of course, if anything of such a character has since transpired, it devolves upon the party that is benefited thereby to show it. In other words, if anything has transpired that would cure the defective petition, or render the election valid, or estop the county of Chase, or the officers thereof, from claiming that the election is void, it devolves upon the plaintiff in this action to show such thing. The plaintiff, however, for this purpose, may use all the admissions made by the defendants in their answer to the alternative writ. The admissions of the defendants beneficial to the plaintiff, and contained in their answer, seem to be substantially as follows: They admit that the railroad company is and was a duly-organized railroad corporation, with power to build their railroad as contemplated by the terms and conditions of the proposition submitted to the electors of Chase county. They admit that a petition was presented to the board of county commissioners for the election, defective only in not containing the names and in not being the petition of two-fifths of the resident tax-payers of the county. They admit that the county board examined the petition, and declared it to be sufficient, and to be the petition of two-fifths of the resident tax-payers of Chase county; that upon such petition the election was ordered, was held, the returns thereof canvassed, the result declared in favor of the subscription for the stock, and in favor of the issuing of the bonds; and that the county board ordered such subscription, and that the county clerk made the subscription; but this, we think, is as far as the admissions extend. How many votes were

cast at the election we cannot know. Whether two-fifths of the legal voters of Chase county voted for the bonds or not we cannot know; but, even if two-fifths of the legal voters of Chase county did so vote, it is not shown that they, or any portion of them, were resident tax-payers of the county. From anything appearing in the case, those of the resident tax-payers who voted may have all voted against the bonds, and only such persons as were not tax-payers may have voted for them. Besides, many of the resident tax-payers of Chase county may not have voted at all. Indeed, many of them may not have had any right to vote; for many of them may have been women or minors or other persons who had no right to vote at such election. Evidently the legislature intended that no bonds should be issued to a railroad company in payment for the stock of the company unless at least two-fifths of the resident tax-payers of the county should first express a willingness that the same might be done; and this expression of willingness should be given before the calling of the election, and as a foundation for the election. Whether the consent of two-fifths of the resident tax-payers of the county that the bonds might be issued can be shown in any other manner than that they petitioned for the election for that purpose, as that they voted for the bonds at the election, or that they acquiesced in the vote afterwards, or that by some act or want of action they ratified the election or the subscription, or estopped themselves from claiming that the election or the subscription was invalid, need not be decided in this case; for nothing has been shown in this case that would tend to show that two-fifths of the resident tax-payers of the county have ever in any manner consented that the bonds should be issued. And nothing has been shown in this case that would constitute a ratification on the part of, or an estoppel against, the county as a *quasi* corporation or otherwise, or its officers, or the inhabitants of the county. All the allegations of the alternative writ are denied, except such as are expressly admitted by the answer; and the answer, among other things, alleges that the railroad company never accepted the terms and conditions upon which the bonds were voted to be issued; that it never complied with such terms and conditions; that it did not build its railroad upon the faith of that election or of the subscription; that it did not build its railroad on or before June 1, 1887, as it was required to do by the terms and conditions of the proposition voted upon at that election; and, indeed, it is alleged that the railroad company never built the railroad that was contemplated by the election and subscription at all. The motion to quash the third paragraph of the defendant's answer and return will be overruled. All the justices concurring.

(43 Kan. 725)

BURLINGTON WATER-WORKS CO. v. CITY OF BURLINGTON.

(Supreme Court of Kansas. May 10, 1890.)

WATER COMPANIES—MUNICIPAL ORDINANCE—FRAUD—BONA FIDE PURCHASER.

1. A city of the second class has the right and the power to provide for supplying itself and its inhabitants with water.

2. Where an ordinance of a city of the second class was passed giving the right and the privilege to an individual to furnish water to the city and its inhabitants, the city agreeing to rent and pay for a number of hydrants, and the ordinance was passed irregularly, and was procured to be passed by this individual bribing certain members of the city council, but everything appeared to be regular, and the minutes of the meeting were subsequently approved at a regular meeting of the city council by all the members, and afterwards all the rights and privileges granted to this individual were transferred by him to a water-works company, a corporation which was an innocent and bona fide purchaser, and this corporation afterwards innocently expended thousands of dollars in the construction of the water-works in the city, and the water-works were afterwards accepted by the city, and the city afterwards had the use of the hydrants agreed upon for about a year, held, that the city cannot after that time, and as against such innocent purchaser, repudiate its agreement, and refuse to pay for the rent of the hydrants, merely because of the original fraud and conspiracy entered into and consummated by the original party and the city's officers.

3. Where a water-works company, under an agreement with a city, furnishes to the city and its inhabitants water, and to the city the use of certain hydrants, and the water appears to be good, and is believed to be good, and is received by the city and its inhabitants without objection for about a year, when the city is sued for the rent of the hydrants, held, that the city cannot then set up, as a full, complete, and absolute defense to the action, that the water furnished by the company was not good.

(Syllabus by the Court.)

Error from district court, Woodson county; L. STILLWELL, Judge.

C. N. Sterry and G. E. Manchester, for plaintiff in error. E. N. Connal, A. Bergen, and David Overmyer, for defendant in error.

VALENTINE, J. What the real facts of this case are we do not know, for the real facts have not been agreed upon by the parties, nor found by the court below, nor has the case even been tried by the court below, or any court, except upon demurrers to the pleadings. The court below overruled a demurrer to the plaintiff's petition; overruled a demurrer to the second, third, and fourth defenses of the defendant's answer; overruled a demurrer to the third paragraph of the plaintiff's reply; sustained a demurrer to the second, fourth, fifth, and sixth paragraphs of the plaintiff's reply; and overruled a demurrer to the sixth amended and substituted paragraph of the plaintiff's reply. The plaintiff, the Burlington Water-Works Company, as plaintiff in error, has brought the case to this court, assigning for error all the rulings of the court below made against it, and the defendant, the city of Burlington, as defendant in error, has filed a cross-petition in error, assigning for error all the rulings of the court below made against it.

The principal facts of the case, as deduced

from the pleadings, though they may not be, and probably are not, strictly the real facts of the case, seem to be substantially as follows: On July 14, 1886, the city of Burlington, a city of the second class, passed an ordinance which took effect on July 16, 1886, giving to J. A. O'Neil, and to his successors and assigns, the right to construct and operate water-works in the city of Burlington for a period of 20 years, the city, however, having the option to purchase the water-works at their appraised value at the end of each five years; and the city also, in the mean time, agreeing to rent and pay for a number of hydrants. On July 17, 1886, O'Neil accepted the provisions of the ordinance. On July 26, 1886, an additional ordinance was passed amending section 7 of the original ordinance, which additional ordinance took effect on July 30, 1886. On July 27, 1886, O'Neil assigned all his rights under these ordinances, and all his right, title, and interest in and to the contemplated water-works, to the Burlington Water-Works Company, a corporation organized under the laws of Kansas. Afterwards the Burlington Water-Works Company constructed the contemplated water-works, expending in their construction a large amount of money, about \$75,000, and also issued its negotiable bonds to the amount of \$60,000, secured by a mortgage on the water-works, and sold these bonds in the market. On February 22, 1887, in pursuance of a notice previously given, the water-works were tested by the company and by the city of Burlington through its engineer, who had full authority therefor, and the water-works were found to be sufficient, and on the same day they were accepted by the mayor and council of the city. From that time on the water-works company furnished water to the city, and to the inhabitants thereof, and the city had the use of the hydrants agreed upon, about 70 in number. The aforesaid ordinances were passed irregularly, and were also procured to be passed by the fraud of O'Neil in bribing some of the members of the city council, but everything appeared to be regular, and the minutes of the meetings at which these ordinances were passed were afterwards approved by the entire council, and the water-works company seems to have been an innocent purchaser and an innocent party, acting all the time in good faith. The city, after having received the benefit of the use of the hydrants, refused to pay for the same, and the water-works company on May 12, 1888, commenced this action in the district court of Coffey county to recover the sum of \$3,101.38, with interest, the alleged agreed price and the value of the use of the hydrants. The case was afterwards removed to Woodson county, where the aforesaid demurrers were respectively sustained and overruled.

We think the plaintiff's petition states facts sufficient to constitute a cause of action in favor of the plaintiff, and against the defendant, and therefore the court below did

not err in overruling the demurrer to the petition. In our opinion, cities of the second class have the right and the power to provide for supplying themselves and the inhabitants of such cities with water in the manner in which such right and power were exercised in the present case, and in various other ways. Gen. St. 1889, pars. 787, 817, 1401, 1402, 7185-7190; Wood v. Water-Works Co., 33 Kan. 590, 597, 7 Pac. Rep. 233.

The second defense in the defendant's answer alleges, among other things, that the ordinances were procured to be passed by O'Neil by bribing four of the members of the city council, one of whom was the acting mayor, and also by bribing the city clerk. And this second defense also alleges that the meetings at which these ordinances were passed were special meetings, not legally called, and that two of the members of the city council were not present. The council was composed of six members. No claim of fraud or wrong-doing, however, nor any notice of any fraud or wrong-doing, seems to be charged in this defense against the water-works company, hence it would seem that this defense is not sufficient. The plaintiff in its pleadings alleges that everything appeared to be regular and valid, and that the minutes of these meetings were afterwards approved when all the members of the city council were present. It does not appear that any one ever claimed that any fraud or bribery had ever been resorted to for the purpose of procuring the passage of these ordinances until long after the water-works were constructed, and from anything appearing in the defense which we are now considering, or in plaintiff's pleadings, the water-works company was absolutely an innocent and *bona fide* purchaser, and innocently expended all the money necessary to be expended in the construction of its water-works. It is true that after the purchase O'Neil was employed by the water-works company, and possibly, in the construction of the water-works, he acted as the company's general agent or general manager; but that can make no difference, provided the water-works company was an innocent and *bona fide* purchaser of the franchise, and as an innocent party expended its money in constructing the water-works. Wickersham v. Zinc Co., 18 Kan. 481. We shall assume, for the purposes of this case,—but without deciding the question,—that, if this were an action between O'Neil and the city of Burlington, the city might plead the alleged fraud and bribery participated in by O'Neil and the city council; but, this not being such an action, it would be extremely unjust to permit the city to plead the alleged fraud and bribery as against an innocent party. After a city, through its officers, and another have united in carrying on and consummating a fraud and conspiracy, whereby they have induced an innocent third person to expend large sums of money for the benefit

of the city and its inhabitants, and upon an agreement that such city would pay for a certain named portion of such benefit to be received by it, may the city then, after it has received the contemplated benefit, and as against such innocent third person, repudiate the agreement, and refuse to pay for any portion of such benefit, merely because of the original fraud and conspiracy entered into and consummated by itself or its officers and the other original party? We would think not. We think the court below erred in overruling the plaintiff's demurrer to the second defense of the defendant's answer.

For the same reasons, and others, we think the court below also erred in sustaining the defendant's demurrer to the second paragraph of the plaintiff's reply. The plaintiff certainly had the right to prove that whatever was attempted to be done by the city authorities, and was done, though done irregularly, was afterwards ratified and cured by a more perfect action on the part of the city authorities; that all the irregularities in the passage of the ordinances or elsewhere were afterwards cured by subsequent action; and the plaintiff also had the right to prove what it had in fact innocently done in the way of constructing its water-works, expending large sums of money therefor, and issuing and selling its negotiable bonds, etc., for the purpose of estopping the city from interposing as a defense the aforesaid frauds and irregularities, brought about by its officers and O'Neil.

The court perhaps ruled correctly in sustaining the defendant's demurrer to the fourth paragraph of the plaintiff's reply, for while the city had the right, under the ordinance, to declare the franchise or privilege granted to O'Neil, and to his successors and assigns, forfeited for any failure on their part to properly perform the contract, yet the city was not and is not bound to declare such a forfeiture. It may resort to other remedies. But, of course, the remedy of declaring a forfeiture would be the best for the city and its inhabitants if the company, after receiving notice, should persist in violating its contract to the injury of the health, and possibly the lives, of the inhabitants. Neither do we think that the court below erred in sustaining the defendant's demurrer to the fifth paragraph of the plaintiff's reply. The plaintiff was bound to perform its part of the contract, whether the city informed it how to do so or not.

We cannot say that the court below erred in overruling the defendant's demurrer to the third paragraph of the plaintiff's reply, although it is probable that, when the real facts are shown, that paragraph will be of but little value to the plaintiff.

We do not think that the court below erred in overruling the defendant's demurrer to the substituted sixth paragraph of the plaintiff's reply. If everything else were regular, except that the water furnished to the city and its inhabitants was not the kind of water

which the plaintiff was required to furnish, and if the water appeared to be good and the plaintiff believed it to be such as it had contracted to furnish, and it was accepted by the city and its inhabitants, and was used by them for about a year without objection, the city certainly cannot now, for the reason that the water was not good, set up such a reason as a full, complete, and absolute defense to the plaintiff's entire action, and refuse to pay anything for the rent of the hydrants. It seems strange, however, if the water furnished by the company was really as bad as the city now claims that it was, that the city did not then complain, and then, if the company still persisted in furnishing bad water, to declare a forfeiture of the company's franchise. We hope that, if this case is ever again brought to this court, it will be brought here upon an agreed statement of the facts, or upon special findings of the facts made by the court, or a referee or jury, and that the facts will be given to us in full and in detail. We can then decide the case intelligently. For the errors of the court below in overruling the plaintiff's demurrer to the second defense in the defendant's answer, and in sustaining the defendant's demurrer to the second paragraph of the plaintiff's reply, the judgment of the court below will be reversed, and the cause remanded for further proceedings. All the justices concurring.

(43 Kan. 641)

STATE v. BEARDSLEY.

(Supreme Court of Kansas. May 10, 1890.)

INTOXICATING LIQUORS—ILLEGAL SALE—NEW TRIAL.

Where a defendant is found guilty of the offense of selling intoxicating liquors in violation of law, upon evidence which tended to show that he made several sales of such liquors to various persons and at different times, newly-discovered evidence, tending to show that one of such sales was made by a person other than the defendant, is not sufficient to authorize the granting of a new trial.

(Syllabus by the Court.)

Appeal from district court, Butler county; J. A. LELAND, Judge.

Clogston, Fuller, Hamilton & Cubbison, for appellant. L. B. Kellogg, Atty. Gen., and E. H. Hutchins, for the State.

VALENTINE, J. This was a criminal prosecution upon indictment in which the defendant was charged with selling intoxicating liquors in violation of law. A trial was had before the court and a jury, and the jury found the defendant guilty as charged in the first count of the indictment, and he was sentenced to pay a fine of \$100, and to be imprisoned in the county jail for 30 days, and from this sentence he now appeals to the supreme court. The only question presented to the supreme court is whether the court below erred in overruling the defendant's motion for a new trial founded upon the ground of newly-discovered evidence. The newly-discovered evidence is the testimony of one Oliver Rand. Upon the trial it appeared that

the defendant at one time had sold beer to William Holloway, and that on several occasions Holloway had purchased beer at the defendant's house. The newly-discovered evidence tended to show that "Bill Holloway" came to the defendant's house at one time, and that Rand, who was then there in the employment of the defendant as a teamster, sold beer to Holloway. This is wholly immaterial, as the evidence tended to show that the defendant himself not only sold beer to Holloway, but also sold beer on several occasions to Arthur Reams, and that Frank Daniels had also on three different occasions purchased beer at the defendant's house. As to which one of these sales the jury found the defendant guilty we cannot tell. They may have found him guilty of making the sales to Reams. We do not think that the newly-discovered evidence is sufficient to require or even to authorize the granting of a new trial. The judgment of the court below will therefore be affirmed. All the justices concurring.

(43 Kan. 636)

STATE v. BAIN.

(Supreme Court of Kansas. May 10, 1890.)

LIQUOR NUISANCE—DESCRIPTION OF PLACE—VARIANCE.

The defendant was charged in a criminal action with keeping and maintaining a common nuisance "in a building known and designated as house No. 116, North Water street, in the city of Wichita, Sedgwick county, Kan." The house or building in which the nuisance was kept and maintained answered to the above description in every particular, except that it had two numbers, one 116 and the other 118. There was a partition between the two parts of the house, but there were doors in the partition leading from one part of the house into the other, and the two parts were occupied and used by the defendant as one house or one building. The principal entrance to the house was into that part numbered 116, but the nuisance was actually kept and maintained in the other part, numbered 118. Held, that the variance between the charge and the proof was not fatal, and the verdict of the jury finding that the defendant was "guilty of keeping and maintaining a common nuisance as charged," and a judgment of the trial court in accordance with such verdict, may be sustained.

(Syllabus by the Court.)

Error from superior court, Sedgwick county; JACOB M. BALDERSTON, Judge.

Martin & Eckstein, for appellant. L. B. Kellogg, Atty. Gen., and W. S. Morris, for the State.

VALENTINE, J. This is a criminal prosecution upon information filed in the common pleas court of Sedgwick county, in which the defendants, Ralph Bain and Henry Billman, were charged with keeping and maintaining a common nuisance, by keeping for sale and selling, and permitting persons to resort for the purpose of drinking, intoxicating liquors, "in a building known and designated as house number 116, North Water street, in the city of Wichita, Sedgwick county, Kan.," in violation of section 13 of the prohibitory liquor law, as amended by section 4, c. 165, Laws 1887, (Gen. St. 1889, par. 2533.) The

defendants were found guilty, and the defendant Bain was sentenced to pay a fine of \$300, and to be imprisoned in the county jail of Sedgwick county for 60 days, and he alone appeals to this court. It appears from the evidence that the defendants occupied and used a certain frame house or building on the east side of North Water street, in the city of Wichita, which was numbered both 116 and 118. The south part was numbered 116 and the north part 118. Immediately south of the building is an alley, and immediately north of it is a vacant lot. The north part of the building was removed from another part of the city, and placed where it now stands; and the south part was afterwards built as an addition to the north part. There is a partition between the two parts, but there are doors in this partition leading from one part of the house into the other, and the two parts are occupied and used as one house or one building. The portion in which the intoxicating liquors were kept and sold was the back room of the north part, or, in other words, it was the back room of that part which was numbered 118; and the only question now presented is whether the defendant Bain could be found guilty upon these facts, and under the charge in the information. In other words, does the evidence prove the offense charged? It does not appear that any intoxicating liquor was kept for sale or sold in that part of the building numbered 116. But, in order to pass from the front of the building to the place where the liquors were kept for sale and sold, it was necessary to enter the door of that part numbered 116, as the front door of that part numbered 118 was kept closed and locked.

The court below gave to the jury, among others, the following instructions: "In order to sustain a conviction in this case, it is incumbent upon the state to show beyond a reasonable doubt that the defendants, at the time of the filing of the information in this case, were the keepers, owners, or proprietors of the kind of place as described in the information herein. The court further instructs you that, in order to convict the defendants of the offense charged in the information, there must be evidence that satisfies you beyond a reasonable doubt that the place described in the information is a place owned or kept by the defendants for the prohibited purpose mentioned in the information. Before the defendants can be convicted of this charge, the state must prove beyond a reasonable doubt that the defendants were the keepers or owners of the particular place described in the information. If you find from the evidence in the case that the building referred to in the evidence in this case is one building, and the rooms in said building connected by doors, and that said building at the time of the commission of the offense charged in the information in this case was occupied and controlled by these defendants or either of them, then said building will be

considered by you as one building, although different numbers were placed over the front doors of said building. In determining whether part of the building in question was numbered 116, and another part numbered 118, you may consider the fact that there are two separate numbers on said building in determining whether they have been treated and known as two separate buildings." The jury rendered a general verdict, which, omitting title and signature, reads as follows: "We, the jury impaneled in the above-entitled cause, do, upon our oaths, find the defendants, Henry Billman and Ralph Bain, guilty of keeping and maintaining a common nuisance, as charged in the information." It will be seen, from the foregoing instructions of the court and the verdict of the jury, that it was the opinion of the court below and the jury that the building in question was one building,—one house,—and although it was numbered both 116 and 118, and the nuisance was carried on and maintained only in that part of the building or house which was numbered 118, yet that the description of the building or house as set out in the information, when taken all together, is not such a fatal misdescription of the place where the nuisance was kept and maintained as to render the information bad. In other words, it was thought in the court below that there was no fatal variance between the allegations contained in the information and the proof introduced on the trial. We cannot say that the court below or the jury erred. The judgment of the court below will be affirmed.

All the justices concurring.

(43 Kan. 660)

VAN NATTA-LYNDS DRUG CO. v. GERSON
et al.

(*Supreme Court of Kansas. May 10, 1890.*)

MORTGAGE—FORECLOSURE—INJUNCTION—REMEDY
AT LAW.

Where a plaintiff has a full and ample remedy for the protection of all his rights by garnishment proceedings, which he has already instituted in the district court against the defendant, he is not entitled, for his further protection, to a temporary injunction either in the district or supreme court.

(*Syllabus by the Court.*)

Error from district court, Kingman county.

On the 26th of November, 1889, and long prior to that time, George Gerson and Isaac Levy, partners under the firm name of George Gerson & Co., were engaged in the drug business in the city of Kingman, in this state, and had been indebted to plaintiffs and other parties on account of goods, wares, and merchandise sold and delivered to them. On the 26th day of November, George Gerson & Co. executed two promissory notes to Joseph Gerson for the sum of \$1,600 each, due and payable in three and six months, which notes, it is claimed, were partly, if not wholly, without consideration. At the same time, Gerson & Co. executed and delivered to Joseph Gerson a chattel mortgage upon their entire stock of drugs, liquors, etc. This was not then filed,

and no information thereof was given to the creditors or other parties. Joseph Gerson, the mortgagee, had a friend living in Newton by the name of George W. Rogers. He had become the owner of two notes against Gerson & Co.,—one for the sum of \$200, the other for the sum of \$500. These notes were both dated in July, 1889; the \$200 note maturing in October. The other note matured November 26, 1889. Each of these notes was signed by George Gerson & Co., and payable to Joseph Gerson. The \$200 note, Joseph Gerson had sold and indorsed to George W. Rogers. The \$500 note he had sold and indorsed to the Citizens' Bank of Newton, of which Rogers was cashier. On November 26, 1889, and at the time the chattel mortgage was given to Joseph Gerson, George Gerson & Co. made a deed to all their real estate to A. Cole, of Newton, a brother-in-law of George Gerson, and the son-in-law of Joseph Gerson. A. Cole, being at Kingman with Joseph Gerson on November 26th, carried his deed to Newton without recording it. This deed, it is claimed, was wholly without consideration, and in fraud of creditors. Joseph Gerson, having returned to Newton, on November 27th had an interview with George W. Rogers regarding the notes which Rogers and the Citizens' Bank held against George Gerson & Co. Thereafter, on November 27th, George W. Rogers took up from the Citizens' Bank, as he claims, the \$500 note against George Gerson & Co., and which had matured the day before, and thereby became, as he claims, the owner of both notes. On December 17, 1889, Joseph Gerson and George W. Rogers took the early morning train at Newton for Kingman, Gerson carrying with him his chattel mortgage, and also the deed to A. Cole, and Rogers carrying with him the two notes—one for \$200 and the other for \$500—against George Gerson & Co. The train was a little late, and they arrived in Kingman about half past 11 A. M. Upon arriving at Kingman they separated. Rogers, going to the drug-store of Gerson & Co., and seeing George Gerson, told him he wanted his money; that he must have it right away, and could not wait any longer. With this brief interview he departed for the hotel, where he registered, got his dinner, etc. As soon as Rogers was out of the store, Joseph Gerson went in, took possession under his chattel mortgage, and locked it up, and put a notice on the door that it had been closed by Joseph Gerson under a chattel mortgage, and went to the hotel for his dinner,—arriving at the hotel at 1 o'clock; entering the dining-room just as George W. Rogers came out. George W. went down to the store, and found it locked, with a notice on the door that it had been closed by Joseph Gerson under a chattel mortgage. He procured an attachment, which was levied upon the entire stock of George Gerson & Co., worth about \$6,500. Joseph Gerson at once began a replevin suit against the sheriff of Kingman county for the possession of the

goods, claiming title under his chattel mortgage. No redelivery bond was given, and the goods were turned over to him. Plaintiff and other creditors of George Gerson & Co. then began actions against Gerson & Co., and procured orders of attachment, and caused the same to be levied upon a portion of the stock of goods of George Gerson & Co. These are the goods in controversy in this action. Plaintiff also commenced garnishment proceedings against Joseph Gerson, to which he filed his answer on December 30, 1889, admitting possession of all the goods and accounts formerly owned and held by Gerson & Co. As soon as the attachments were levied, Joseph Gerson filed motions in the district court of Kingman county, in the cases brought by plaintiff and the other creditors against George Gerson & Co., to discharge the goods from the attachments on the ground that the goods had been attached by Rogers and replevied by Gerson, and were therefore *in custodia legis*, and not subject to attachment. Thereupon the plaintiff in error commenced a new action in the district court of Kingman county, in which plaintiff in error is plaintiff, and George Gerson & Co., Joseph Gerson, George W. Rogers, J. C. McClelland, sheriff of Kingman county, and the First National Bank of Kingman, and other attaching creditors of George Gerson & Co., are parties defendant. This new case sets up all the foregoing facts. The plaintiff made an application to the district judge of Kingman county for the appointment of a receiver in the action, and for a temporary injunction to restrain the sale and disposition of the goods in question, and also to restrain and postpone any and all further proceedings upon the motion by Joseph Gerson to discharge the goods from the attachment of plaintiff. The district judge refused to appoint a receiver, and refused to grant any injunction or restraining order. On January 7, 1890, proceedings in error were commenced in this court for the purpose of reviewing and reversing the orders of the district judge. On the same day a motion was filed in this court asking for a temporary injunction, pending the proceedings in error, to prevent any sale or disposition of the property in dispute, and also to prevent the defendants from proceeding further in their actions in the district court of Kingman county.

Vandever & Martin, for plaintiff in error.
W. E. Brown, for defendant in error.

HORTON, C. J., (*after stating the facts as above.*) Upon the application of the plaintiff for a temporary injunction to restrain the sale and disposition of the stock of goods in controversy during the pendency of the proceedings in error, this court granted a restraining order against the defendants until it had time to examine the record and affidavits on file. The only question for us now to pass upon is whether the restraining order heretofore granted shall be set aside, or be continued until the final hearing of the

case. On account of the overburdened docket of this court, this case will not be called for hearing, in its regular order, for nearly two years. The property in dispute ought not to be tied up for so great a length of time unless it is absolutely necessary so to do to protect the rights of the plaintiff. The district court refused to grant a temporary injunction.

A temporary injunction is not a matter of strict right. Its issue rests with the sound discretion of the judge. If the rights of a plaintiff are not prejudiced by a refusal of the temporary injunction, it ought to be denied. *Akin v. Davis*, 14 Kan. 143; *Conley v. Fleming*, Id. 381; *Olmstead v. Koester*, Id. 463. It was said in *Wood v. Millsbaugh*, 15 Kan. 14, that "the district courts, and the judges thereof, have considerable discretion in allowing and disallowing, and in sustaining or vacating, temporary injunctions; and therefore, when the reasons urged for and against a temporary injunction are very nearly equally balanced, the supreme court will not reverse an order of the district court, or a judge thereof, vacating a temporary injunction." If the plaintiff has not a full and complete remedy without the appointment of a receiver, or the granting of a temporary injunction in the action brought by him against Joseph Gerson and others, to attack their collusive proceedings in placing the goods in dispute *in custodia legis*, to defraud the creditors of Gerson & Co., then, we think, he has a sufficient remedy against Joseph Gerson under the garnishment proceedings already instituted. In this connection it is pertinent to state that the petition of the plaintiff alleges that Joseph Gerson "is quite wealthy, and the possessor and owner of large and valuable properties, both real and personal." The plaintiff's claim against George Gerson & Co. is only \$400, with interest. Therefore, it is clearly evident, from the showing made by plaintiff, that Joseph Gerson is amply able to respond to any judgment that the plaintiff may be entitled to recover. The statute provides that, "from the time of the service of the summons upon the garnishee, he shall stand liable to the plaintiff to the amount of the property, moneys, credits, and effects in his possession, or under his control, belonging to the defendant, or in which he shall be interested, to the extent of his right or interest therein, and of all debts due, or to become due, to the defendant, except such as may be by law exempt from execution. Any property, moneys, credits, and effects held by a conveyance or title void as to the creditors of the defendant shall be embraced in such liability." Paragraph 4296, p. 1297, 2 Gen. St. 1889. The statute further provides that "the proceedings against a garnishee shall be deemed an action by the plaintiff against the garnishee and defendant as parties defendant, and all the provisions for enforcing judgments shall be applicable thereto; but, when the garnishment is not in aid of an execution, no trial shall be had of the garnishee action

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until the plaintiff shall have judgment in the principal action, and if the defendant have judgment the garnishee action shall be dismissed, with costs." Paragraph 4293, p. 1296, Id.

On the part of the plaintiff it is claimed, however, that, as George W. Rogers and J. C. McClelland, the sheriff of Kingman county, are not parties in the garnishment proceedings against Joseph Gerson, a full investigation of the collusive proceedings of Joseph Gerson with the other parties cannot be had. It appears from the record and affidavits submitted that Joseph Gerson was the moving party in the alleged fraudulent proceedings. He has all of the property in his possession. He is charged with fraudulent practices in attempting to hold it, under the forms of law, to hinder, delay, and defraud the creditors of George Gerson & Co. In such a case the courts will investigate very fully the conduct and acts of the party attempting to consummate the fraud, and we perceive no difficulty whatever in fully protecting the rights of the plaintiff in the garnishment action. If Joseph Gerson's chattel mortgage was executed without consideration, it can be shown in the garnishment proceedings. Therefore, if his chattel mortgage is void as to creditors, it will not protect him. Neither George W. Rogers nor J. C. McClelland, the sheriff, have the possession of the property sought to be appropriated to the payment of plaintiff's claim. The pendency of the proceedings in error in this case will not prevent the prosecution of the action of plaintiff against Gerson & Co., Joseph Gerson, and others, in the district court; nor will the proceedings in error prevent the prosecution of the garnishment action brought by plaintiff. If the attachment proceedings of plaintiff against Gerson & Co. were prematurely brought, of course plaintiff can, if he so desires, obtain a new order of attachment. The restraining order will be set aside at the cost of the plaintiff. A temporary injunction will be refused. All the justices concurring.

(44 Kan. 71)

CITY OF JUNCTION CITY v. WEBB.

(Supreme Court of Kansas. May 10, 1890.)

INTOXICATING LIQUORS—RE-ENACTMENT OF ORDINANCE PENDING PROSECUTION—RECORD.

1. The general ordinances of a city were revised and consolidated for publication in book form, and were thus adopted and re-enacted. An ordinance under which a prosecution had been begun was re-enacted in substantially the same language, without any words of repeal, or any clause saving pending prosecutions. *Held*, that the effect of the re-enactment was to continue uninterruptedly in force the provisions of the original ordinance, and that the pending prosecution was not thereby abated or affected.

2. In a prosecution under such ordinance for selling intoxicating liquor without a permit, and contrary to law, it is not necessary that the complaint should allege the names of the persons to whom the liquors were sold.

3. The complaint filed before the police court, as well as the orders and judgments of that court,

are part of the record, without being incorporated in a bill of exceptions.

(*Syllabus by the Court.*)

Appeal from district court, Geary county; M. B. NICHOLSON, Judge.

Humphrey & Humphrey, for appellant. *McClure & Marshall* and *Thomas Dever*, for appellee.

JOHNSTON, J. M. D. Webb was prosecuted before the police court of Junction City upon a charge of selling intoxicating liquors in violation of a city ordinance. The complaint was filed on September 3, 1889, and on October 5, 1889, he was convicted, and adjudged to pay a fine of \$50, together with the costs of the prosecution, from which judgment he appealed to the district court. When the case reached the district court, Webb moved for a dismissal of the complaint, and that he be discharged from custody, for the reasons—*First*, that no offense was charged against him; *second*, that the transcript from the police court did not disclose the offense with which he had been charged, and of which he had been convicted; and, *third*, that the ordinance under which he had been prosecuted and convicted had been repealed and superseded by another, which took effect on October 5, 1889, which was long after the offense was committed and the prosecution instituted. It appears that the ordinance under which the prosecution was begun was enacted May 20, 1887. Subsequently, and in 1889, the mayor and council authorized and instructed James V. Humphrey to revise and prepare for publication in book form the general ordinances of Junction City. In pursuance of this authority, a revision and compilation of the general ordinances was prepared and submitted to the mayor and council, and on October 5, 1889, the revision and compilation was approved and adopted by the mayor and council, and, in pursuance of the resolution, was published in pamphlet form. The ordinance under which the prosecution was commenced was re-enacted and included in the revision in substantially the same language, and with the same title, as the original ordinance enacted in 1887. There was no repealing clause in the ordinance, nor any repealing ordinance, general or special, in the revision; neither was there any saving clause in the ordinance as published, nor any general saving ordinance which expressly saved or continued pending prosecutions. The district court sustained the motion, and the city appeals.

The principal question presented for decision is whether the action of the city council in revising the ordinances of the city for publication in convenient form, and in re-enacting the ordinance in question in the same language, operates as a repeal of the original ordinance, or is to be construed as a continuation of the same. The general rule is that the repeal of an ordinance or statute pending a prosecution under it operates to release the

defendant, unless it is otherwise provided in the ordinance or statute, or unless there is some general ordinance or statute saving such prosecution. In the present case, however, there was no express repeal, and manifestly there was no intention on the part of the city council to repeal the ordinance. The purpose, as is evident from the resolution authorizing the revision, was to consolidate the general ordinances of the city, putting them in convenient form for publication and use. The ordinance in question introduced no new rule, nor did it in any way modify the offenses defined or the penalties imposed in the original ordinance. There was no language indicating a purpose to repeal the former ordinance, and it is obvious that the mayor and council intended that the new ordinance should stand as a continuation of the former one, rather than a repeal of the same. It is a well-recognized principle, of frequent application, that the mere re-enactment of an existing law, in the same or substantially the same language, without a specific repeal, or any manifest intention to change such law, will not necessarily operate as a repeal of the law, but will be construed as a continuation of the same. This rule is alike applicable to statutes and ordinances. It has even been applied to criminal statutes, where a new law expressly repealed the one re-enacted, the re-enactment being construed to continue in force the uninterrupted operation of the old law. *State v. Gumber*, 37 Wis. 298; *State v. Wish*, 15 Neb. 448, 19 N. W. Rep. 686. See, also, *Kesler v. Smith*, 66 N. C. 154; *Fullerton v. Spring*, 3 Wis. 667; *Sheffelt v. Tabert*, 46 Wis. 439, 1 N. W. Rep. 156; *Cheezem v. State*, 2 Ind. 149; *Martindale v. Martindale*, 10 Ind. 566; *Cordell v. State*, 22 Ind. 1; *State v. Baldwin*, 45 Conn. 134; *Middleton v. Railroad Co.*, 26 N. J. Eq. 269; *Association v. Benshimol*, 130 Mass. 325; *Lisbon v. Clark*, 18 N. H. 234; *End. Interp. St.* § 490, and cases cited.

It is true, as contended, that every enactment is by implication a repeal of all prior laws, so far as it is contrary and repugnant thereto, although there may be no repealing clause. But there was no change in the law as we have seen, nor any words of repeal, and the re-enactment of the new was simultaneous with the repeal of the old, and, under the authorities cited, the ordinances continued uninterruptedly in force, although there was no saving clause; and hence the pending prosecutions under the ordinance were not affected by the revision.

It is next contended that the complaint is insufficient because it does not state the name of the person to whom the liquor was sold. We think the offense was sufficiently described in the complaint without designating the name of the person to whom the liquor was sold. This is the rule prescribed by the legislature in the prohibitory law, where the penalties imposed for like offenses are much more severe than those imposed by the ordinance in question.

The objection that the complaint is not properly a part of the record without being incorporated in the bill of exceptions must be overruled. *State v. Nickerson*, 30 Kan. 545, 2 Pac. Rep. 654. Neither the complaint nor the orders and judgments of the police judge could have been properly included in the bill of exceptions, and together they clearly show the offense with which the defendant was charged, and of which he was convicted.

The judgment of the district court will be reversed, and the cause remanded for further proceedings. All the justices concurring.

(43 Kan. 671)

SWIFT v. CITY OF TOPEKA.

(*Supreme Court of Kansas. May 10, 1890.*)

ORDINANCE—CONSTRUCTION—RIDING BICYCLE ON SIDEWALK.

1. A person who rides on his bicycle across that part of the Kansas river bridge that is used for the passage of street-cars, carriages, and other vehicles does not violate section 17 of the city ordinance No. 861 of the city of Topeka, that reads as follows: "It shall be unlawful for any person to ride on any bicycle or velocipede upon any sidewalk in the city of Topeka, or across the Kansas river bridge. Any person violating this section shall, upon conviction thereof, be fined in a sum not less than one dollar, nor more than ten dollars, for each offense."

2. Whenever a city ordinance can be so construed and applied as to give it force and validity, this will be done by the courts, although the construction so put upon it may not be the most obvious and natural one, or the literal one.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

Johnson, Martin & Keeler, for plaintiff in error. *S. B. Isenhardt*, for defendant in error.

SIMPSON, C. W. E. Swift was convicted in the police court of the city of Topeka of violating section 17 of the ordinance of said city No. 861, and fined the sum of one dollar and costs. From this conviction he appealed to the district court of Shawnee county, where a jury was waived, and a trial had by the court that resulted in his conviction, and a fine of one dollar and costs imposed. He brings the case here for review, and alleges the invalidity of the ordinance as a cause for reversal. Section 17 of the ordinance in question reads as follows: "It shall be unlawful for any person to ride on any bicycle or velocipede upon any sidewalk in the city of Topeka, or across the Kansas river bridge. Any person violating this section shall, upon conviction thereof, be fined in a sum not less than one dollar, nor more than ten dollars, for each offense." It was admitted at the trial that the defendant, W. E. Swift, on the 21st day of June, 1889, was riding upon a bicycle across the Kansas river bridge, situated on Kansas avenue, within the corporate limits of the city of Topeka; that he was engaged in riding his bicycle across the said bridge when he was arrested, which bridge is 900 feet long, and spans the Kansas river be-

tween North and South Topeka; that the main part of said bridge is constructed wide enough for teams to pass each other, going in opposite directions, being about 17 feet in the clear; that on each side of the wagon road there is a passage-way for foot-passengers, and that the defendant was riding his bicycle, at the time named in the complaint, on that part of the bridge used for wagons, carriages, and other vehicles; that the bridge just described is the only bridge on the Kansas river between North and South Topeka, and is the only means of communication between those points; that it is used and occupied with a double track by the Topeka City Railway Company, that continually runs its street-cars between the two points named; that there is a large travel across said bridge, between the two parts of the city of Topeka, by vehicles drawn by horses and otherwise, and that teams and other vehicles are constantly passing over said bridge each way. It is further shown by the evidence that a bicycle can be driven at the rate from 2 to 20 miles per hour; that the ordinary and usual rate of speed is 8 miles per hour; that they can be stopped within from 10 to 20 feet, when being driven at the rate of 10 miles per hour, the limit within which they can be stopped depending somewhat on the kind of bicycle and the experience of the rider; that bicycles have been in use in this city for several years, and at the time of this arrest that there were more than 100 in constant use in the city. These are the substantial and material facts that are shown by the record.

It will be seen, by an ordinary inspection of the record, that the ordinance only prohibits the use of a bicycle or velocipede upon any sidewalk in the city of Topeka, or across the Kansas river bridge. It does not, either in express terms or by fair implication, forbid riding upon a bicycle on the road-way, or that part of any of the public streets that are devoted to the use of carriages, wagons, and other vehicles, and, while the ordinance is subject to the construction that it was only along or across the foot passage-way or sidewalk of the Kansas river bridge that persons were forbidden to ride on bicycles, yet for the present we shall adopt the construction necessarily adhered to by the trial court, that the ordinance intended to forbid all riding upon bicycles across any part of the Kansas river bridge. It is an admitted fact in this case that at the time of the arrest Swift was riding his bicycle on that part of the bridge used for wagons, carriages, and other vehicles. A "bicycle" is defined by lexicographers, and by the courts of England and of this country, to be a carriage. *Webst. Dict.*; *Taylor v. Goodwin*, 40 Law T. (N. S.) 458; *Mercer v. Corbin*, 117 Ind. 450, 20 N. E. Rep. 132; 2 Amer. & Eng. Cyclop. Law, 191; *State v. Collins*, 17 Atl. Rep. 131, (decided by supreme court of Rhode Island in December, 1888.) A bridge in the city of Topeka is a part of the public street. *City of Eudora v.*

Miller, 30 Kan. 494, 2 Pac. Rep. 685. The exact question, then, is, have the authorities of the city of Topeka, by an ordinance, the power to forbid Swift riding upon his carriage on that part of a public street of the city devoted to the use of vehicles? This statement of the question necessarily assumes that the power of the city could be exercised to prevent the use of bicycles along the sidewalks of the public streets (and these sidewalks will include the footways across the bridge) to the same extent as the use of all other kind of vehicles, no matter how propelled, could be prevented. Public streets are highways, and every citizen has a right to use them. Both the sidewalks and roadways must remain unobstructed, so that people can walk along one without interruption or danger, or drive along the other without delay or apprehension. One of the most imperative duties of city governments in this country is to keep their public streets in such a condition that citizens can travel along them with safety, and without any unnecessary delay. Each citizen has the absolute right to choose for himself the mode of conveyance he desires, whether it be by wagon or carriage, by horse, motor or electric car, or by bicycle, or astride of a horse, subject to the sole condition that he will observe all those requirements that are known as the "law of the road." This right of the people to the use of the public streets of a city is so well established and so universally recognized in this country that it has become a part of the alphabet of fundamental rights of the citizen. While the tyranny of the American system of government very largely consists in the action of the municipal authorities, this right has not yet been questioned or attempted to be abridged. There can be no question, then, but what a citizen riding on a bicycle in that part of the street devoted to the passage of vehicles is but exercising his legal right to its use, and a city ordinance that attempted to forbid such use of that part of a public street would be held void, as against common right.

It may be said of bicycles with greater force, as was said of the first use by railroads of public streets, that they are not an obstruction to, or an unreasonable use of, the public streets of a city, but rather a new and improved method of using the same, and germane to their principal object as a passageway. Mills, Em. Dom. (2d Ed.) § 201; Briggs v. Railway Co., 79 Me. 363, 10 Atl. Rep. 47; Slatern v. Railway Co., 29 Iowa, 149. So that, if the construction necessarily given to this ordinance of the city of Topeka should prevail, we would be compelled to say that the part of the ordinance that forbids a citizen riding across any part of the Kansas river bridge was of no validity. But, if a statute or a city ordinance is susceptible of two different constructions, that one must prevail that will preserve the validity of the ordinance in preference to a construction that will render it invalid, and this must be done,

although the construction adopted may not be the most obvious or natural one, or the literal one. Newland v. Marsh, 19 Ill. 376; Homestead Co. v. Webster Co., 21 Iowa, 221; Roosevelt v. Godard, 52 Barb. 533; Colwell v. Water-Power Co., 19 N. J. Eq. 245; Bigelow v. Railroad Co., 27 Wis. 478; Dow v. Norris, 4 N. H. 17; Cooley, Const. Lim. 184; Inkster v. Carver, 16 Mich. 484.

Hence we say that the true intent and meaning of section 17 of the city ordinance in question is that all persons are forbidden to ride on bicycles upon any sidewalk in the city, or the sidewalks or footways of the Kansas river bridge. Sidewalks are intended, constructed, and used solely by pedestrians, and not for the use of vehicles. It is presumably true that every organized town or city in this country forbids the use of its sidewalks to vehicles of every description. A bicycle, being a carriage, can properly be excluded from the use of sidewalks, and persons riding on them should be forbidden to occupy the sidewalks and footways of the public streets, at least longitudinally along such sidewalks or footways. They should be permitted to go across them at such public places as other vehicles are permitted. With this construction of the ordinance, it is plain that Swift has not violated its provisions, and his conviction was wrongful. The judgment of the district court is reversed, and the cause remanded, with instructions to dismiss the prosecution and discharge the appellant.

PER CURIAM. It is so ordered; all the justices concurring.

(43 Kan. 636)

STATE v. RIECK.

(Supreme Court of Kansas. May 10, 1890.)

IMPEACHMENT OF WITNESS—COLLATERAL ISSUE.

1. The general rule is that when a witness makes statements on cross-examination collateral to the examination or issue, they are to be taken as conclusive, and it is not admissible to contradict him by showing the statements to be false.

2. A defendant was charged with keeping and maintaining a common nuisance, where intoxicating liquors were unlawfully sold by him. Upon cross-examination, he admitted that he gave intoxicating liquors to a witness to drink, who testified against him, but stated that he treated the witness at a drug-store, where he obtained the liquor, without making or giving any statement prescribed by the statute. Upon rebuttal, the prosecution proved that his evidence in regard to the statement was false. Held, that the admission of this evidence was not sufficient, under the facts disclosed, to reverse the conviction.

(Syllabus by the Court.)

Appeal from district court, Geary county; M. B. NICHOLSON, Judge.

Humphrey & Ketner, for appellant. L. B. Kellogg, Atty. Gen., W. J. Franklin, and Thomas Dever, for the State.

HORTON, C. J. Herman Rieck was charged in seven counts of an information with having unlawfully sold intoxicating liquors in Junction City without having any permit, during the months of September, November,

and December, 1889, and January, 1890; also, in the eighth count, with having kept and maintained at the same place, between the 20th of November, 1889, and the 5th of January, 1890, a common nuisance, where intoxicating liquors were unlawfully sold by him. The jury returned a verdict against the defendant of guilty on the second, third, and eighth counts, as charged in the information, and not guilty as to the first, fourth, fifth, and sixth counts. Upon the verdict of the jury the defendant was sentenced to pay fines amounting to \$300, and the costs of the prosecution; also to be imprisoned in the county jail of Geary county for 90 days. Rieck appeals from the judgment.

It is claimed that the trial court committed error in permitting collateral statements, elicited on the cross-examination of Rieck, to be contradicted by witnesses produced upon the part of the state in rebuttal. George McCullough, a witness for the state, testified that he obtained whisky at Rieck's place of business; that he paid for part he drank there and a part was given him. He also testified that on the 15th of October, 1889, after he had been a witness against Rieck in the district court of Gray county, Rieck gave him whisky to drink in his place of business. Rieck was a witness in his own behalf, and testified that his business in 1889 was running a lunch-room in Junction City; that he sold ginger ale and extract of malt, but never sold any intoxicating liquors. His evidence further tended to show that he did not keep whisky or other intoxicating liquors in his room. Upon cross-examination he was asked: "Question. Is it not a fact that at the last term of this court, after Mr. McCullough testified in the case against you, (October 15, 1889,) you asked him over to your place of business, and gave him some beer or whisky? Answer. When the testimony was over, I took Mr. McCullough and another witness,—I don't remember, now, his name,—and went to the drug-store, and bought a pint of whisky. I went over there to the store, and treated them. From there I took them over to Charlie Schweise's. They wanted something to eat, and I treated them to a lunch there. Then I left them. Q. You bought whisky at the drug-store? A. Yes, sir; in the drug-store, and I treated them with it. Q. Did you make a statement for that liquor? A. What liquor? Q. The liquor you bought at the drug-store. A. No, sir; I didn't make any statement." Upon rebuttal, the state produced Miller, Harvey, and Holzschuder, and proved by them that Miller did not, on the 15th of October, 1889, sell to Rieck any whisky, without making the usual statement or affidavit. The general rule is that when a witness makes statements on cross-examination, collateral to the investigation, the same are to be taken as conclusive, and it is not admissible to contradict him to show such statements to be false. If the testimony upon rebuttal be construed as tending to contradict Rieck as to making no statement

when he purchased whisky at the drug-store, it is not very material; not sufficient, at least, to reverse the judgment. If, however, the answers of Rieck upon cross-examination tended to impress the jury that he did not have or keep intoxicating liquors at his lunch-room, and this was the probable effect of his evidence, then it belonged to the subject-matter under investigation. In order to convict Rieck upon the eighth count of the information, it was necessary for the state to prove that he kept intoxicating liquors at his lunch-room, and that he unlawfully sold these liquors. After he testified, upon cross-examination, that the liquors given to McCullough were obtained at the drug-store, in order to show that he kept no intoxicating liquors, it was competent to prove he did not treat McCullough there, or obtain any liquors without a statement. The tendency of such evidence was not merely to bear upon the credit of the defendant, but upon a material fact involved in the issue. A more liberal rule applies to the contradiction of the declarations of a defendant made upon cross-examination than to the statements of a witness only. There was no error in the ruling of the trial court sufficient to require a new trial. *State v. McKinney*, 31 Kan. 570, 3 Pac. Rep. 356; *Howe v. Thayer*, 17 Pick. 91. The judgment of the district court will be affirmed. All the justices concurring.

(43 Kan. 643)

FIRST NAT. BANK OF MEDICINE LODGE v. PECK, County Treasurer.

(*Supreme Court of Kansas. May 10, 1890.*)

DEPOSIT OF PUBLIC MONIES—AUTHORITY OF COUNTY COMMISSIONERS.

No authority is given by chapter 189 of the Laws of 1889 to the board of county commissioners to designate a bank or banks for the deposit of the public moneys for a definite period of time; nor can the board make any order or make any contract with the depository that will prevent the designation of a different depository whenever the board in its discretion determines that the public interest will be best subserved by such a change.

(*Syllabus by the Court.*)

Original proceedings in *mandamus*.

H. C. Sluss, John A. Eaton, E. Sample, and C. I. Long, for plaintiff. *R. A. Cameron and A. J. Jones*, for defendants.

JOHNSTON, J. In the alternative writ of *mandamus* heretofore allowed it is stated that on November 10, 1888, the board of county commissioners of Barber county, Kan., designated the First National Bank of Medicine Lodge as the bank in which to deposit the public moneys of Barber county, and required the bank to execute a bond in the sum of \$100,000, and also to pay 2 per cent. per annum on the average daily balances of the deposit, and to credit the same monthly to the account of the county treasurer. This bond was executed by the bank and accepted by the county board, and the county treasurer thereafter, in compliance with the order, deposited

the public moneys with the plaintiff, and the bank paid interest on the average daily balances, as required by the designation, until the 1st day of January, 1890. On the 8th day of November, 1889, the board of county commissioners entered an order designating the bank as the place of deposit for all public moneys for a period of three years next succeeding January 1, 1890, and the bank was required to give a bond in the sum of \$100,000, and to pay 2 per cent. per annum on the average daily balances of the deposit. The bond was executed in behalf of the bank on the same day, which was approved by the county board, and it is alleged that from the 1st day of January, 1890, until the 13th day of February, 1890, the bank continued to allow interest on the deposit made by the county treasurer at the rate of 2 per cent. per annum. On the 15th day of January, 1890, an order was made by the board of county commissioners, directing the county treasurer to immediately withdraw from the First National Bank all the public moneys in the bank belonging to the county, and place the same in the vault in the office of the county treasurer until the further order of the board. Afterwards, on February 13, 1890, the board of county commissioners, at an adjourned meeting, designated the Citizens' National Bank of Medicine Lodge as the depository of public moneys, and required that the bank give a bond in the sum of \$125,000, and to pay 5 per cent. per annum on the average daily deposits; and directed the county treasurer to withdraw all the public funds from the First National Bank, and deposit the same in the Citizens' National Bank. This designation was to remain in force only until the further order of the county commissioners. In pursuance of this order, the county treasurer demanded from the First National Bank the funds in its possession, with a view of depositing them in the Citizens' National Bank, and \$10,000 of the public moneys were given to the county treasurer under protest, in obedience to his demand, and the county treasurer is insisting on the balance of the moneys in the hands of the plaintiff, for the purpose of placing the same on deposit with the other bank. The county treasurer has ceased and now refuses, to deposit the public moneys of the county of Barber with the plaintiff, and this proceeding is brought to compel him to deposit all public moneys that may come into his hands as treasurer of the county, or that are now in his hands, with the plaintiff, and also to withdraw from the Citizens' National Bank all moneys which he deposited there as treasurer of the county, and place the same on deposit with the plaintiff, in compliance with the order of November 8, 1889. It is further stated in the writ that the bank is solvent, has executed a sufficient bond, and that no reason exists for believing that the bank is not a proper and safe depository for the public funds of the county. The defendant moves to quash the alternative writ on the

ground that the facts stated are insufficient to constitute either a cause of action or ground of relief in favor of the plaintiff.

Several questions are raised and discussed on this motion, but the real point in controversy between the parties, and the only one that we need to consider, is whether it was within the power of the board of county commissioners to make the order of November 8, 1889, designating the plaintiff bank as the depository of public moneys for a fixed period of three years, and thus prevent the county board, as then constituted, or as it may be reorganized from year to year, from designating other and different banks as the safety of the public moneys may seem to require. The election of 1889 changed the membership of the county board. As soon as the result of this election was ascertained, two members of the county board who were about to pass out of office undertook to bind the county and their successors to hold the public funds in the First National Bank for a period of three years. That bank was already the public depository, and by the terms of the first designation was to continue as such until the order was revoked; yet the county commissioners who were going out of office in a few days made a new order and designation; but neither the amount of the bond to be given nor the interest required to be paid to the county on the deposits was changed. The purpose of these retiring commissioners in making the second order is easily seen. Passing over the questions as to the form of the action and other technical matters discussed, we will consider whether the retiring commissioners effected their purpose, and tied the hands of their successors, by the order of November 8, 1889. The only statute authorizing the board to designate a bank for the deposit of the funds of Barber county is found in chapter 189 of the Laws of 1889, which provides "that, in all counties having a population of less than twenty-five thousand inhabitants, the county treasurer shall deposit daily all public money in some responsible bank or banks located at the county-seat, to be designated by the board of county commissioners, in the name of said treasurer, as such officer, which bank shall pay such interest on average daily balances, as may be agreed upon by the board of county county commissioners; and such bank or banks shall credit the same monthly to the account of said treasurer; and before making such deposits the said board shall take from such bank or banks a good and sufficient bond, in a sum double the largest approximate amount that may be on deposit at any one time, conditioned that such deposits shall be promptly paid on the check or draft of the treasurer of said county; and such bank or banks shall on the first Monday of each month file with the county clerk a statement of the amount of money on hand at the close of business each day during the previous month, and the amount of interest accrued thereon to said date."

Assuming that the statute is valid and compulsory, no questions of that kind being raised, we still think that it does not warrant the action that was taken. It is true, as contended by the plaintiff, that the board is a continuing body, and that any contract made by it with authority is inviolable and binding upon the county; but we are of opinion that in this case the board exceeded its power. No express authority is found in the statute giving the county commissioners authority to designate a bank for any definite period of time, and they have only such powers in that respect as are given them by statute. The legislature does not require that the board shall ask for bids, nor that it shall designate the bank offering the highest rate of interest. The conditions imposed by the statute are that only responsible banks shall be designated, and that good and sufficient bonds shall be required. No limits as to the rate of interest nor as to the number of banks which a board may designate are prescribed. There is no provision that the board shall negotiate or enter into a contract of any kind with banks. It simply is required to exercise its judgment and discretion in the selection of one or more banks, and, instead of negotiating with or receiving bids from them as to rates of interest, the statute expressly provides that such rate shall be paid as may be agreed or determined upon by the board. The county commissioners determine the rate of interest to be paid, the bond to be given, and then make the designation. If the bank designated refuses to accept the funds upon the required conditions, another designation is to be made; and, if it accepts, the bond is given, the funds deposited, and interest is paid on the average daily balance of deposits for such length of time as the county board may keep the account of public funds in the bank. If it had been the purpose of the legislature that county commissioners might tie their hands and those of their successors, and bind the county to retain the funds in a certain bank through several changes in the membership of the board, or for any stated time, it would surely have made it clear in the statute enacted. The public interest will be best subserved by leaving the board free to change the depository whenever in the judgment of the commissioners the safety of the public moneys and the good of the county requires such change. If the other policy was pursued, and an unsound depository should deny its unsoundness, and refuse to surrender the funds, it would be necessary for the county to enter into a litigation with the bank to show that it was insecure and irresponsible; and meantime the interests of the county might be still further imperiled and possibly sacrificed. Even if the bond given by the bank was ever so good, yet the funds would be tied up during the controversy, and until an action on the bond was successfully prosecuted to judgment. If the controversy should be long continued, the security might

become greatly impaired, and the public suffer a heavy loss. Whatever might be the result, the litigation and the locking up of the public funds would seriously embarrass the public business. All of these objections and risks were evidently foreseen by the legislature, and hence in providing for a deposit of the public funds no power was given to the board to designate a depository, or to surrender the control of the public funds for a definite period of time. If the board might tie its hands and bind the county in this respect for one year or three years, why might it not, under like circumstances, extend the period to six, eight, or even ten years? This would be injurious to the public interest, and therefore contrary to public policy, and, in the absence of express legislative sanction, no such purpose should be inferred. The prime consideration is the safety of the public funds, and the manifest purpose of the law-makers was that the board should be wholly free to change the depository whenever it had reason to believe that the public interest would be best subserved by such a course. It follows that the peremptory writ of *mandamus* must be denied. All the justices concurring.

(48 Kan. 648)

FIRST NAT BANK OF MEDICINE LODGE v.
STRANATHAN *et al.*

(Supreme Court of Kansas. May 10, 1890.)

DEPOSIT OF PUBLIC MONEY—COUNTY COMMISSIONERS—INJUNCTION.

A board of county commissioners cannot be prevented by an action of injunction from changing the depository of the public moneys of a county, when in the discretion and judgment of the board it is deemed best that a change should be made. *Bank v. Peck*, ante, 1077.

(Syllabus by the Court.)

Error from district court, Barber county; C. W. ELLIS, Judge.

Chester I. Long, John A. Eaton, H. C. Sluss, and E. Sample, for plaintiff in error. R. A. Cameron and A. J. Jones, for defendants in error.

JOHNSTON, J. This was an action brought in the district court of Barber county by the First National Bank of Medicine Lodge against the county commissioners and county treasurer of Barber county, to obtain an order of injunction. It was alleged that on the 8th day of November, 1889, the board of county commissioners of Barber county entered into a contract with the plaintiff, by which it was agreed that the public moneys of the county of Barber should be deposited in the First National Bank of Medicine Lodge for a period of three years, and that, although the bank was solvent, and had complied with all the conditions of the contract, the board of county commissioners and county treasurer were threatening to remove the county funds from the custody of the plaintiff, and deposit the same in another bank, and that the plaintiff would thereby sustain irreparable injury and loss, which could not be compensated by an

action of damages against the defendants. The prayer of the petition was that the board should be enjoined from violating the contract, and from receiving bids from other banks, or from making any orders relating to a change of the public money, and also to restrain the county treasurer from removing the funds now in plaintiff's possession as a bank of deposit, and to prohibit the county treasurer from depositing the county funds in any other bank than with the plaintiff. Upon a hearing, in which it was shown that the board of county commissioners had ordered that the funds of Barber county should be withdrawn from the First National Bank of Medicine Lodge, and placed on deposit with the Citizens' National Bank of Medicine Lodge, a temporary injunction was denied, and this ruling is assigned as error.

The conclusion which we have reached in *Bank v. Peck*, ante, 1077, (just decided,) determines the merits of this action against the plaintiff in error. This being so, the questions of practice that have been discussed become immaterial, and the judgment of the district court will be affirmed. All the justices concurring.

(43 Kan. 475)

WEBSTER v. FILLEY et al.

(Supreme Court of Kansas. April 4, 1890.)

EJECTMENT—JUDGMENT—RIGHTS OF PURCHASER NOT A PARTY.

After judgment in an action of ejectment between tax-title holders, the successful claimant makes a motion for an *alias* writ of restitution against a purchaser from the original owner, who is then in possession, but who was not a party to the action, and the court makes an order against him, determining adversely his right of possession in favor of the successful claimant, *held*, that the purchaser can bring the case here for review, and the trial court erred in determining, in effect, his title and right to possession on such motion.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Jefferson county; ROBERT CROZIER, Judge.

Johnson, Martin & Keeler, for plaintiff in error. *Case & Moss*, for defendant in error.

SIMPSON, C. The defendants in error brought an action against I. C. Webster to recover the possession of a tract of land situate in Jefferson county. They had a tax-title on the land in controversy. I. C. Webster had a tax-title, and was in possession. One John M. Cowan was the original owner, and had a patent from the government. While this suit was pending, W. B. Webster obtained Cowan's title, and, with the consent of I. C. Webster, took possession of the land, and has held it ever since. Soon after W. B. Webster took possession, the district court of Jefferson county rendered a judgment in the action against I. C. Webster, and in favor of defendants in error, for the possession of the land. A writ of restitution was issued commanding the sheriff to deliver possession of the land to defendants in error. The officer returned the writ executed. Afterwards the

defendants in error showed to the court that W. B. Webster was in the possession of said land, and claimed to be the owner, and that he was there with the consent and aid of his father, I. C. Webster, and that he kept possession by force, and asked the court for an *alias* writ of restitution, and that the sheriff be directed to remove I. C. Webster and W. B. Webster, or any person claiming through or by them. Due notice was given to W. B. Webster of the application for an *alias* writ, and of the time when such application would be heard. W. B. Webster was present at the hearing, in person and by attorneys. Evidence was introduced by both sides, and all the facts are embraced in the order of the court entered on the journals of the court, and are as follows: The court finds that on May 20th, 1884, W. B. Webster knew of the pendency of this action, and of the object thereof. That on said day he purchased the patent title to the land in controversy herein from John M. Cowan, and obtained from Cowan a quitclaim deed for the consideration of \$275, only \$75 of which has ever been paid. Neither the plaintiffs nor the defendant in this action claim said land under the patent title. They claim under tax-titles. That, immediately after obtaining said quitclaim deed, W. B. Webster took possession of said land, with the consent of his father, I. C. Webster, and is now in possession. On these findings it is adjudged that an *alias* writ issue; that the defendants in error be placed in possession of the land; that W. B. Webster and I. C. Webster, and all others holding possession by or through them, be removed from the land; and that I. C. Webster pay the costs of this motion. To all of which W. B. Webster excepts, and he is allowed time to make a case for this court. He brings the case here, and seeks to reverse the order for an *alias* writ, so far as it affects him. We are met by the contention of the defendants in error that he is without standing in this court. It is true that he is not a party to this action. He does not seek to reverse the judgment, or any intermediate order that involves the merits of the action, or any portion thereof. All he claims is that, in the attempt to enforce the judgment for possession against I. C. Webster, he may not be disturbed in the possession he acquired by virtue of his purchase from Cowan. He is brought into court by a summary application after judgment, at the instance of Filley, and an order is made that determines his right of possession, as between him and Filley, adversely to him. We think he is entitled to a review of that order in this court, as it is in the nature of a final order as to his possession. Whether he is a purchaser *pendente lite*, or whether he is in collusion with his father on the question of possession, or whether he is entitled to the possession of the land by reason of holding the legal title thereto by purchase from Cowan, are questions that ought not to be determined on a motion made subsequent to a judgment in

an action to which he was not a party. His right to possession by virtue of his title must be made the issue in an action of ejectment, and be determined, before it can be said to be an adjudication. We recommend that so much of the order of the trial court that undertakes to determine his right of possession be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

(84 Cal. 201)

**GRANGERS' BUSINESS ASS'N OF CALIFORNIA
v. CLARK. (No. 12,677.)**

(Supreme Court of California. May 31, 1890.)

PLEADING—REPLY—EVIDENCE—ATTORNEY'S FEE.

1. Defendant secured an indebtedness to plaintiff by a mortgage on real estate and a chattel mortgage on growing wheat. Thereafter plaintiff loaned other money to defendant. The wheat when harvested was placed in a warehouse, and receipts therefor obtained in plaintiff's name, and delivered to him. He sold the wheat, and applied the proceeds to the unsecured debt. In an action to foreclose the real estate mortgage, defendant answered that the crop mortgage was given at the same time to secure the same debt, and that, in accordance with its terms, the wheat was harvested and delivered to plaintiff, to be applied on the debt secured thereby. *Held* that, under Code Civil Proc. Cal. § 462, providing that "the statement of any new matter in the answer, in avoidance or constituting a defense or counter-claim, must, on the trial, be deemed controverted by the opposite party," plaintiff could introduce evidence of a verbal agreement with defendant that the wheat, when harvested and delivered to plaintiff, should be held as security for the new indebtedness, and the proceeds thereof applied, first, to such indebtedness, and then to the mortgage debt, though this was not pleaded.

2. As the verbal agreement related to the wheat "when it should be harvested and delivered," and Civil Code Cal. § 2955, specifying what personal property may be mortgaged, does not mention grain except as "growing crops," the agreement was not the creation of a verbal mortgage, in violation of section 2922.

3. It was competent for the parties to agree that the wheat should be diverted from the satisfaction of the mortgage debt, and converted into a pledge to secure the subsequent indebtedness.

4. A mortgage provided for an attorney's fee, in case of foreclosure, not exceeding \$500, and 10 per cent. on the amount found due. The mortgage was originally for \$5,135, but about \$1,300 had been paid on it. The court allowed \$1,000. *Held* that, under act Cal. March 27, 1874, § 1, (St. 1873-74, p. 707,) providing that the attorney's fee shall be fixed by the court in which the proceedings of foreclosure are had, any stipulation in the mortgage to the contrary notwithstanding, \$600 being a reasonable amount, the sum allowed would be reduced \$400.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Mich. Mullany and Wm. Grant, for appellant. *Estee, Wilson & McCutchen*, for the State.

GIBSON, C. Defendant appeals from a judgment and order denying a new trial in an action to foreclose a mortgage on real estate. The defendant, on the 19th of March, 1880, being indebted to the plaintiff corporation in the sum of \$5,135, for money loaned to and expended for him, gave to plaintiff

his note for that amount, payable one day after date, bearing interest at the rate of 1 per cent. per month from date, payable quarterly, and, if not so paid, to be compounded quarterly. To secure this note he executed and delivered to plaintiff, on the same date with that of the note, two mortgages,—one upon 160 acres of land in Alameda county, and the other a chattel mortgage upon a certain crop of wheat then growing upon about 480 acres of land, also in the same county. At divers times from the same day this transaction was had until July 1, 1881, the plaintiff loaned to and advanced for defendant other amounts of money, aggregating the sum of \$3,407.06. Previous to the execution of the note and mortgages, the defendant had delivered a lot of hay, worth \$703, to the plaintiff that it had not accounted for to him, and it was agreed that the amount should be credited upon the note. Plaintiff, however, first deducted \$30 that had been advanced to the defendant, and credited the remainder upon the note. The crop of wheat described in the chattel mortgage was by the defendant harvested prior to October, 1880, and placed in a warehouse at Livermore, and receipts therefor obtained in the name of the plaintiff, which were delivered to it. On a sale of this wheat by the plaintiff, on July 1, 1881, it realized the sum of \$4,061.99. This amount the plaintiff applied to the payment of defendant's indebtedness of \$3,407.06, which had, as above shown, accrued after the making of the note and mortgages, and the overplus was applied upon the said note. Defendant contends that the whole amount realized from the wheat should have been applied upon the note. This raises the principal question, upon the solution of which the case depends. Plaintiff, in its complaint, seeks to foreclose the mortgage upon the real estate, and admits therein that a certain amount has been paid upon the note, which is secured by the mortgage. The answer of defendant admits the making of the note and mortgage sued upon, and avers that the crop mortgage, above mentioned, was also made at the same time to secure the same note; and that in accordance with its terms the crop of wheat covered by it was duly harvested and delivered to plaintiff, to be applied to the payment of the note; and that the load of hay above mentioned was delivered to plaintiff for the same purpose.

Thus we perceive that the main issue tendered is whether the note was paid. To meet the affirmative matter set up in defendant's answer the plaintiff interposed a replication, which traverses such new matter, and, among other things, avers that the proceeds of the sale of the hay and wheat were applied to the payment of the loans and advances other than those included in the note, according to the agreement of the parties. This reply was unnecessary, and has no place in our system of pleading, because the Code of Civil Procedure provides, in section 462, that "the statement of any new matter in the answer, in avoid-

ance or constituting a defense or counter-claim, must, on the trial, be deemed controverted by the opposite party." Thus in *Curtiss v. Sprague*, 49 Cal. 301, this court, with respect to the same provision in the practice act said: "The counter-claim was barred by the statute of limitations, and, under the provisions of the practice act, the plaintiff must be considered to have pleaded the statute by way of replication to the counter-claim." So, in the present case, the plaintiff must be deemed to have pleaded the verbal agreement between itself and defendant, whereby the grain covered by the chattel mortgage, when the same was harvested and delivered to it, should be held as security for the advances made, and to be made, to and for the defendant, and the proceeds of the sale of the grain should be applied, first, to the payment of such advances, and the remainder, if any, to the payment of the note; and it was proper for the court to receive evidence in support of such agreement. Although the two mortgages are separate and distinct from each other, they were given for the sole purpose of securing the same note, a copy of which is set forth in each of them. This is found as a fact by the court, and is not disputed; and it is also found that at or about the time the note and mortgages were made, and at different times until July 1, 1881, "the defendant orally, but not in writing, promised and agreed, in consideration of said advances and loans being made, and to be made, from time to time by plaintiff to defendant, that the plaintiff should have and hold, as fast as the same could be delivered, all produce raised by the defendant, including the wheat mentioned in defendant's answer, as security for the payment of all moneys so loaned, paid out, and advanced by plaintiff to defendant in excess of the note described in the complaint;" and that all the proceeds of the sale of such produce should be applied by plaintiff to the payment of moneys advanced, and the remainder, if any, to the payment of the note.

The evidence in support of the finding as to the verbal agreement is not as satisfactory as it might be, but the testimony of the defendant to the contrary presents such a conflict as to preclude us, under the settled rule in this regard, from disturbing it. But it is earnestly urged by counsel for appellant that, even if the evidence relevant to the issue involving the verbal agreement was properly received, and is sufficient to support the finding respecting it, such an agreement in effect created a chattel mortgage contrary to section 2922 of the Civil Code, which provides that "a mortgage can be created, renewed, or extended only by writing executed with the formalities required in the case of a grant of real property." A complete answer to this is, the finding shows the verbal agreement related to the grain, when it should be harvested and delivered, and such grain could

not be made the subject of a chattel mortgage, under section 2955 of the Civil Code, in which the only personal property capable of being mortgaged is specified. But we think it was perfectly competent for them by agreement to divert the grain from the satisfaction of the debt for which it was first agreed, in the chattel mortgage, it should be security for, and convert it into a pledge to secure the payment of defendant's other and subsequent indebtedness. This, it is true, affected the written mortgage, but, instead of it being modified or changed by such verbal agreement, it was extinguished when such agreement was executed.

The mortgage on the real estate provides that, in the event of a suit being brought to foreclose the mortgage, an attorney's fee, not exceeding \$500, and 10 per cent. upon the amount found due to plaintiff on the note and mortgage, shall be allowed. At the trial the counsel for the respective parties agreed to leave the amount of such fee to the court, and the court thereupon found and allowed \$1,000 as a reasonable attorney's fee. Defendant's counsel now claim—*First*, that no attorney's fee should be allowed in view of an offer they made to permit judgment to pass against the defendant for the amount due upon the note after deducting the payments claimed to have been made thereon; and, *second*, that the amount allowed is unreasonable and excessive. The offer referred to was made upon the theory that plaintiff could not prove and recover upon the verbal agreement above mentioned, which, as we have seen, it was properly permitted to do.

In view of the record here, we are constrained to say that the amount fixed by the court appears to be too great, and that \$600 would, in our opinion, be a fair and reasonable compensation for plaintiff's counsel. The stipulation in the mortgage is not controlling, as the law provides: "In all cases of foreclosure of mortgage the attorney's fee shall be fixed by the court in which the proceedings of foreclosure are had; any stipulation in said mortgage to the contrary notwithstanding." Act March 27, 1874, § 1, St. 1873-74, p. 707. And when on appeal the sum fixed by the trial court exceeds a reasonable amount, it will be corrected by this court. *Mascarel v. Raffour*, 51 Cal. 242. We therefore advise that the judgment be modified by deducting \$400 from the sum allowed therein as an attorney's fee, and, as thus modified, it and the order denying a new trial be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is modified by deducting \$400 from the sum allowed therein as an attorney's fee, and, as thus modified, it and the order denying a new trial are affirmed.

(83 Cal. 633)

KIRSCH v. KIRSCH. (No. 12,668.)

(Supreme Court of California. May 2, 1890.)

APPEAL—OBJECTIONS NOT RAISED BELOW.

Where, with plaintiff's consent, defendant in divorce files an amended cross-complaint setting up adultery committed by plaintiff since the beginning of the action, plaintiff, after going to trial on the issues raised thereby, cannot object for the first time on appeal that the amended cross-complaint contained no prayer for affirmative relief.

Department 2. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Fisher Ames and George D. Collins, for appellant. *William C. Flint and F. Wm. Reade*, for respondent.

MCFARLAND, J. Action for divorce. Judgment for defendant, and plaintiff appeals from the judgment upon the judgment roll alone. The ground of divorce set up in the complaint was extreme cruelty. Defendant filed an "answer and cross-complaint" in which he denied the alleged acts of cruelty, and set up affirmatively extreme cruelty by plaintiff and prayed for a divorce on the latter ground. Plaintiff answered the cross-complaint, denying its averments as to cruelty. The amended complaint was filed September 26, 1886. Afterward, on January 10, 1887, defendant, "by consent of plaintiff, and by leave of court," filed "amendment to answer and supplemental cross-complaint," in which he averred that, "on divers days and times between the 3d day of September, 1886, and the 1st day of January, 1887, and particularly on the 30th day of November, 1886, the plaintiff herein committed adultery with" a certain person named at a certain named place. The plaintiff made no objection whatever to this last-named pleading, but answered it, calling it in her answer "Defendant's Supplemental Cross-Complaint," and denied the averments of adultery. Afterwards plaintiff herself filed a supplemental complaint, averring additional acts of cruelty committed since the commencement of the action, viz., on January 13, 1887. Defendant answered, denying its averments. The parties went to trial on the issues raised by these last-named pleadings, as well as upon other issues; and the court found against all the averments of cruelty, but found, also, "that, on divers days and times between the 8d day of September, 1886, and the 1st day January, 1887, and particularly on the 30th day of November, 1886, the plaintiff committed adultery with" the person and at the place stated in said so-called "supplemental cross-complaint." No motion for a new trial was made, no evidence is brought here by bill of exceptions, and the record does not show any objection or exception whatever.

Appellant now asks a reversal of the judgment on the sole ground that the so-called "supplemental cross-complaint" of defendant was insufficient; that it must be regarded as only a defense; that it sets up a new cause of action accruing after the commencement of

the action; that there is no prayer for relief, etc. But the case comes clearly within the rule that, where a case is tried upon the theory that the issues are properly joined in the trial court, and no objection or exception is taken there, it is too late to raise such objections here. *Hiatt v. Board*, 65 Cal. 481, 4 Pac. Rep. 464; *Spiers v. Duane*, 54 Cal. 176; *Cave v. Crafts*, 53 Cal. 141; *Van Maren v. Johnson*, 15 Cal. 313. The judgment is affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

(83 Cal. 501)

PEOPLE v. RAISCHKE. (No. 20,518.)

(Supreme Court of California. March 31, 1890.)

LARCENY—WEIGHT OF EVIDENCE.

On a prosecution for larceny the evidence was that defendant, by previous arrangement with two persons alleged to be his partners, tried to buy the goods; that the owner was willing to sell, provided the title should remain in him until they were paid for, and that, with this understanding, they were delivered to the alleged partners, defendant having at the commencement of the negotiations proposed to purchase the goods, to be used in a legitimate business to be carried on by the three jointly; that the goods were first taken to the premises where the three were represented to, and supposed by, the owner to have gone into business; that the owner took a note for the price from the other two; that thereafter some of the goods were found buried on defendant's land, and secreted in various places on his premises, after he had denied having any of the goods there; that defendant did not deny that the goods were to remain the property of the owner until they were paid for; that an expressman was hired by said pretended partners to, and did, take certain goods, similar, at least, to those in question, from the place where they were first delivered to defendant's place at 5 o'clock in the morning. *Held*, that a verdict of guilty would not be disturbed.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

R. Percy Wright, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

FOOTE, C. The defendant was convicted of grand larceny. From the judgment rendered against him, and an order denying a new trial, he appeals. The case has been here before. 78 Cal. 378, 15 Pac. Rep. 13. The defendant was then awarded a new trial because of an erroneous instruction granted by the court below. It was contended on that appeal that there was no evidence of any larceny of the goods charged to have been stolen by the defendant, and the same point is made now. Upon that contention the appellate court determined adversely to the defendant.

We have carefully examined and compared the evidence as set out in the transcript of both appeals, and find no material difference, so far as the main points of the evidence are affected. That which was testified to by Bernard, the owner of the goods alleged to have been taken and stolen, as it appears in the present record, is not so full in some particulars as on the former trial. Bernard was alive at the time, but died before the second

trial was had; and his evidence was introduced at the later period in the form of a long-hand transcription of the reporter's notes of his evidence taken before the police court on the preliminary examination of the defendant, properly certified and filed. This evidence indicates that the defendant, by preconcerted arrangement with two other persons claimed to be his partners, endeavored to buy the goods in question in the first instance; that Bernard, the owner, was willing to sell them, provided the title to the articles should remain, as it then was, vested in him, until they were paid for, and with this understanding he delivered the goods to the two other persons, Lewandowsky and Furlong, the alleged partners of the defendant, the latter having in the beginning of the negotiation proposed to purchase the goods to be used, as he represented, in a legitimate business to be carried on by the three jointly; that the goods were first taken to the premises whereon these three persons were together represented to, and supposed by, Bernard, to have set themselves up in business; and that Bernard took a note for the price of the goods from Lewandowsky and Furlong. A short time after this delivery of the goods, having his suspicions aroused to the effect that a swindle had been perpetrated upon him, Bernard sought the aid of the police with a search-warrant; and, after Raischke, the defendant, had denied having any of the goods on his premises, some of them were found thereon, secreted in various places,—a portion of them in a potato-patch, buried 9 or 10 inches in the earth. This witness was corroborated by his daughter in his statement that he told the defendant the title to the property remained in him until it should be paid for, and by Mr. Rogers, a police officer; the last witness further stating that, when he and Bernard went to Raischke's to hunt for the goods, Bernard said: "Raischke, I told you the goods were mine until you paid for them; and I haven't got my goods, and you say you haven't got them. You took them away." "He told him a dozen times that he continued to own the goods. Raischke never denied anything of the kind, except that he hadn't the goods, or any of them, about the premises." O'Brien, an expressman, testified to having been employed by Furlong, one of the alleged partners of the defendant, to haul away from the place of business of the defendants Furlong and Lewandowsky certain articles of glassware, etc., which were similar to those obtained from Bernard; that he took these things, "boxed up," to Raischke's place, about 5 o'clock in the morning.

The appellate court on the former appeal (73 Cal. 382, 15 Pac. Rep. 14,) laid down the rule of law as applicable to cases of larceny of the kind of which this is contended by the people to be in this language: "That where, notwithstanding a delivery by the owner in

fact, the legal possession remains exclusively in him, larceny may be committed exactly the same as if no delivery had been made. (2) That where, by the delivery, a special property, and consequently a legal possession, apart from any felonious intent, would be transferred, if it be found that such delivery were fraudulently procured, with a felonious intent to convert the property so acquired, then, also, the taking amounts to larceny." The evidence quoted, as well as some circumstances in the record, as we think, tend to show that the defendant and his two alleged partners bought these goods under pretense that they intended to use them in a legitimate business; that they did not intend so to use, or in good faith to pay for, them, but, after taking them to the place where they were claiming to carry on business, they had them removed to the premises of Raischke, who converted them to his use with the intent, feloniously, to deprive the owner of them. Under these circumstances, no reason is apparent for disturbing the verdict of the jury. We therefore advise that the judgment and order be affirmed.

We concur: **BELOHER, C. C.; HAYNE, C.**

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(83 Cal. 618)

LANGAN v. LANGAN. (No. 13,620.)

(*Supreme Court of California.* April 30, 1900.)

In bank. Appeal from superior court, city and county of San Francisco; **WALTER H. LEVY, Judge.**

Wickliffe Matthews, for appellant. *John E. Lundstrom* and *Manuel Eyre*, for respondent.

McFARLAND, J. The record in this case shows that an action for divorce between the parties herein is pending and undetermined in the superior court; that the court made an order that defendant pay to plaintiff \$25 per month alimony; and that afterwards, the court made another order that defendant pay to plaintiff \$150 counsel fees. Defendant takes a separate appeal from each of said orders, and respondent moves to dismiss the appeal from the order allowing the counsel fees. (As respondent does not move to dismiss the appeal from the order allowing alimony, that question is not before us.) The appeal from the order allowing \$150 counsel fees must be dismissed, because the amount in dispute is too small to give the court jurisdiction. The appeal from the order allowing counsel fees is dismissed.

We concur: **BEATTY, C. J.; FOX, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.**

(83 Cal. 622)

CITY OF EUREKA v. ARMSTRONG. (No. 12,565.)

(Supreme Court of California. May 1, 1890.)
DEDICATION.

The sale of land described as bounded on a certain street is at least an offer of dedication of the street, which is sufficiently accepted by a resolution of the city council accepting as public streets all streets which have been dedicated by the owners thereof. Affirming 22 Pac. Rep. 928.

In bank. On rehearing. For former report, see 22 Pac. Rep. 928.

McQuaid & Wheeler, for appellant. J. H. G. Weaver, for respondent.

McFARLAND, J. In this case there was a decision in department affirming the judgment. A hearing in bank was ordered mainly because a number of cases, involving the doctrine of the dedication of streets to the public, were either then under advisement, or had recently been decided, and it was thought best to again carefully compare the case at bar with the others. After further consideration, we are satisfied with the opinion delivered in department. There is nothing in that opinion inconsistent with *People v. Reed*, (No. 11,769,) 81 Cal. 70, 22 Pac. Rep. 474, or *City of Eureka v. Croghan*, (No. 11,695,) 81 Cal. 524, 22 Pac. Rep. 693. The sale of land described as bounding on a certain street is at least an offer of dedication of the street; and we think, as stated in the opinion of department 2, that the resolution of the city council was an acceptance before any attempt at revocation. Judgment and order affirmed.

We concur: THORNTON, J.; Fox, J.; SHARPSTEIN, J.

I dissent: BEATTY, C. J.

(84 Cal. 159)

TOGNAZZINI v. MORGANTI *et al.* (No. 13,363.)

(Supreme Court of California. May 16, 1890.)

BOUNDARIES—COURSES AND DISTANCES—MONUMENTS.

Where a patent of land is issued with boundaries as described in a survey and map made by a government surveyor, who has also made field-notes giving not only courses and distances, but also monuments and the various topographical features of the country, the calls for monuments will control the courses and distances in relocating the boundaries of the patent. THORNTON, J., dissenting.

In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Geo. A. Rankin, for appellant. Cross & Simonds and P. F. Denson, for respondents.

BEATTY, C. J. This is an action to recover a tract of land in Santa Barbara county. Defendants had judgment in the superior court, from which, and from an order denying a new trial, plaintiff appeals, assigning errors in the rulings of the court, and con-

tending that the findings are contrary to the evidence.

Plaintiff is owner of a Mexican grant, known as the "Casmalia Rancho." This rancho was patented to his grantors in 1861, with boundaries as described and delineated in a survey and map made in 1860 by a deputy United States surveyor named Terrell. Terrell's survey commenced at the north-west corner of the rancho, and ran a certain distance easterly to the north-east corner, designated as "C. No. 2," the location of which is known and undisputed. His next course was S., 50 deg. E., 395.55 chains, to corner No. 3, which was also corner No. 5 of an adjoining rancho, called "Todos Santos;" and the stake set at this corner at that time was marked "T. S. No. 5, and C. No. 3." After some years this stake disappeared, and the government, desiring to connect the surveys of public lands with the north-east boundary of the Casmalia rancho, the line between "C. 2" and "C. 3 T. S. 5," caused several surveys to be made for the purpose of re-establishing the lost corner. In 1868 Thompson, who had accompanied Terrell in the capacity of chainman, in the original survey of the Casmalia rancho, re-established the common corner ("C. 3 T. S. 5") of that and the Todos Santos. This, however, was done in a survey of Todos Santos, and it is not clear that it was done by direction of the government. But, in 1880, Von Schmidt, starting from C. 2, and running the course and distance called for by the patent and Terrell's field-notes, (S., 50 deg. E., 395.55 chains,) established C. 3 at a point 20.30 chains easterly from the stake, (C. 3 T. S. 5,) established by Thompson. This survey of Von Schmidt was rejected by the government, and another surveyor (Minto) was directed to run a correct line, and to obliterate Von Schmidt's work. Minto, after a careful survey, established a straight line running from C. 2 to Thompson's stake (C. 3 T. S. 5) as the correct boundary. The result was to exclude from the Casmalia rancho, as surveyed by Von Schmidt, a triangle having its apex at C. 2, and for its base a line 20.20 chains in length extending from Von Schmidt's C. 3 to Thompson's and Minto's C. 3 T. S. 5, and for its sides the Von Schmidt line on the east, and the Minto line on the west. This triangle is the tract in dispute. After the Minto survey, it was sectionized and subdivided according to the government system of surveys, and occupied by the defendants as pre-emptioners or homestead claimants. But plaintiff, claiming that the Minto survey was wrong, and that the Von Schmidt survey correctly re-established the line as run by Terrell, and as called for by the patent, sues to recover the triangle above described.

The rights of the respective parties, of course, depend upon a correct relocation of the Terrell line; and the claim of the plaintiff is that, since the stake set by Terrell is lost, and no living witness can testify to the

place where it stood, the only means of re-establishing the line is to start from the admitted location of C. 2, and run according to the calls of Terrell's survey, S. 50 deg. E. 895.55 chains, and fix the corner at the end of the line so run. If this proposition is correct, there is no doubt that the superior court erred in rejecting the Von Schmidt line, which was run in conformity to it. But we think there were other and more important considerations to be attended to in relocating the line. Terrell not only made a map of his survey, but field-notes showing the various topographical features of the country over which his lines extended. The material part of these field-notes reads as follows: "Two hundred and six chains to a post marked 'C. No. 2' station; thence descending ridge south, fifty degrees east, eighty-eight chains and fifty links, enter Canada; thence down through same one hundred and fifty-five chains, leaving Canada bearing south-east; thence over low rolling hills three hundred and ninety-four chains and fifty links, leaving hills and crosses road course south-west and north-east, three hundred and ninety-five chains and fifty-five links to old post in the entrance of Canada Verde, marked 'T. S. No. 5 and C. No. 3;' thence down through the Canada Verde Chamisal Hills, being to the left of line, south, fifty-three degrees west, fifty-six chains, old adobe house, bears west two chains distant at one hundred and eleven chains, new house in Canada de 'Casmalia.'" The Von Schmidt line has the sole merit of conforming in course and distance to these calls of the Terrell survey. It does not in any other particular tally with the field-notes. It enters and departs from the Canada at too short a distance from C. 2. It does not terminate at the entrance of the Canada Verde. It does cross a road near its southern extremity, but not the road delineated on Terrell's map. The road it crosses is a road running north and south, while the road called for in Terrell's field-notes, and delineated on his map, runs nearly east and west.

But the strongest argument against the correctness of the Von Schmidt line is furnished by the fact that his C. 3 is a full quarter of a mile further east from the adobe houses than Terrell's C. 3 T. S. 5 was. (The adobe houses are located by the field-notes of Terrell's line running west from C. 3 T. S. 5.) The Minto survey conforms to the field-notes in every respect except as to the course of the disputed lines. His line, instead of running S., 50 deg. E., runs S., 46 deg. E. We think this call for the course surveyed is much less certain and trustworthy than the calls for the entrance to and exit from the Canada, the crossing of the road running east and west, the entrance to the Canada Verde, all of which sustain the Minto survey. In short, we think that the findings of the superior court, so far from being unsupported by any testimony, are in conformity to the decided preponderance of the testimony. We

cannot, indeed, see how the decision could have been in favor of the Von Schmidt survey.

If there was any error in the refusal of the court to strike out the answers of the witness Minto to the questions asked him by defendants on his redirect examination, the error was trivial and unimportant. What he stated was that the Cooper (Von Schmidt) line was wrong because, among other things, it produced a conflict—over-lapping—between the Casmalia rancho and the Laguna and Todos Santos ranchos. It is by no means clear that Minto was not entirely competent to testify as to the location of these ranchos; but, whether he was or not, their location was shown in some of the exhibits put in evidence by plaintiff, and all that Minto stated with reference to this point was merely in elucidation of matters called out on his cross-examination by the plaintiff. We find no error in the record. Judgment and order affirmed.

We concur: WORKS, J.; SHARPSTEIN, J.; FOX, J.; MCFARLAND, J.; PATERSON, J.

THORNTON, J., dissents, and may file an opinion hereafter.

(84 Cal. 154)

BARBIERI v. RAMELLI *et al.* (No. 12,816.)
(Supreme Court of California. May 15, 1890.)

MORTGAGES—MONEY LENT—ACTIONS.

1. Code Civil Proc. Cal. § 726, which provides that "there can be but one action for the recovery of any debt * * * secured by mortgage upon real estate or personal property," and that it shall be by foreclosure, is imperative, and a creditor holding a mortgage given as security must bring his action of foreclosure; and, though the security proves valueless, he cannot waive it, and bring an action on the debt.

2. Code Civil Proc. Cal. § 537, which allows an attachment to issue where the security for a debt has become valueless without any act of the plaintiff or the person to whom the security was given, applies only to cases where the security has so depreciated, since it was taken, as to become valueless. It does not permit one who has taken a mortgage on land to evade the provisions of section 726 without showing that the land has in fact depreciated in value.

Department 2. Appeal from superior court, San Mateo county; E. F. HEAD, Judge.

Geo. C. Ross, for appellants. Jos. F. Cagnano, for respondent.

THORNTON, J. This is an action to recover \$700, money lent, and interest thereon, and comes before this court on an appeal from the judgment. The question to be considered arises on the judgment-roll.

It appears from the findings that on the 18th of November, 1885, the plaintiff lent to defendants, at their request, the sum of \$700, who on the same day executed a mortgage on a tract of land to secure its payment. On this tract of land there were, at the time that the money was lent and the mortgage to plaintiff executed, two mortgages, one executed by defendants' grantor, Gottardo Turri, to the

Savings & Loan Society of the City of San Francisco to secure the payment of the mortgagor's promissory note for \$11,384, and another by the defendants to Turri to secure the payment of three promissory notes of defendants, aggregating in amount the sum of \$14,500. Both of these mortgages were recorded in the proper county, but when so recorded does not appear in the findings. The court finds that there was due, of principal and interest on the mortgage executed by Turri, the sum of \$13,297.12, and on the mortgage by defendants to Turri the sum of \$14,525.83. It is further found that at the time of the commencement of this action the mortgage was valueless as a security to the plaintiff; that is to say, that the market value of the land, and the improvements put on it by defendants since their purchase, was not equal in amount to the sums due on the indebtedness secured by the prior mortgages. The court gave judgment in favor of plaintiff against defendants for the sum of \$700, with interest at the legal rate from the date of the loan.

It is contended here on the part of the defendants (appellants) that the action cannot be maintained, for the reason that it is prohibited by section 726 of the Code of Civil Procedure. That section, so far as it bears on this case, reads as follows: "There can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property."¹ We are of opinion that the point is well taken. The statute is imperative. The word "secured" in the section does not mean that the security shall be adequate, or that, in case prior liens upon it would exhaust the money derived from the land conveyed as security on a sale of it, that then the plaintiff is relieved from bringing the action to foreclose. The proper construction of the language of the statute is that, if the mortgage on its face purports to be a security to the plaintiff, then he must bring his action for foreclosure. This word has reference only to the purport of the mortgage, as it appears on its face. The interpretation of it is not proper when its meaning is sought in something outside of the mortgage instrument. The plaintiff is not authorized to waive the security, and bring an action on the indebtedness, and the court erred in so holding, as it did in effect, and rendering judgment for plaintiff. The cases cited by counsel for plaintiff, to-wit: Ladd v. Ruggles, 23 Cal. 233; Mascarel v. Raffour, 51 Cal. 242; Ould v. Stoddard, 54 Cal. 613; and Bartlett v. Cottle, 63 Cal. 366,—have no application to the case before the court, as will be seen by reading them.

The head-note in Bartlett v. Cottle is incorrect and misleading. It represents this

court as holding that, where a mortgage is given to secure the payment of a promissory note, an action cannot be maintained on the note alone, unless the security is valueless. The court did not decide, nor did it intend to decide, any such point. In fact, the point was not involved in the case. The court below had found that the security was of no value, and rendered judgment for the plaintiff. This court merely said that the court erred, in that the value of the houses on the property had been omitted in the calculation. It only decided that the security was not valueless, and did not hold that in such a case an action could be brought on the indebtedness alone.

Nor does section 537, Code Civil Proc., affect this case, as contended by plaintiff. That section allows an attachment to issue where the debt is secured by a mortgage upon real or personal property, and, if originally so secured, such security, without any act of the plaintiff or the person to whom the security was given, has become valueless. It does not appear what the value of the land was when the security was given, or that it has depreciated in value at all since that time. *Non constat* that the land was any more valuable when it was accepted as security than it was when the case was tried in the court below. The plaintiff was satisfied with it when he received his mortgage; that must be presumed. Should he be allowed to say at a subsequent day, to get rid of a mandate of the statute, (section 726, Code Civil Proc.,) that it had become valueless? Section 537 refers to a case where the security has changed in the value it had when originally taken, and has so depreciated as to become of no value. It has no reference to a case where there has been no change in value. Having elected to take the security at the value it possessed when the mortgage was originally executed, no change in value having since occurred, he cannot be allowed to urge, to evade a compliance with the provisions of section 726, that it has become valueless. We are of opinion that the plaintiff is bound by the law to pursue the remedy pointed out by the statute. The land may sell under execution on a decree of foreclosure for enough to pay all the indebtedness secured by the various mortgages. But, whether this be so or not, we are of opinion that the court erred in rendering judgment for the plaintiff, and that the judgment must be reversed and the cause remanded, with directions to the court below to dismiss the action. Ordered accordingly.

I concur: SHARFSTEIN, J.

McFARLAND, J. (*concurring*.) I concur in the judgment, upon the ground that the rule that an independent action cannot be maintained on a debt secured by mortgage, without foreclosing the mortgage, has been settled by several decisions of this court, and that there is no sufficient reason for over-

¹ Section 726 further provides that this "action must be in accordance with the provisions of this chapter," which prescribes the procedure for the foreclosure of mortgages.

turning the line of decisions on the subject. If the question were an open one I would come to a different conclusion.

(84 Cal. 41)

SACRY v. LOBBEE. (No. 12,066.)

(*Supreme Court of California.* May 8, 1890.)

FRAUDULENT CONVEYANCE—INSOLVENCY.

In an action by an assignee for the benefit of creditors to set aside an alleged fraudulent transfer of property made by the debtor about two weeks before the filing of the petition in insolvency, the debtor testified that when he made the transfer he did not know that he was owing more than he could pay, but that he did know that more money was due than he could have paid if his creditors had demanded immediate payment, and that he did not have money enough in his hands to pay his debts as they became due, but that he had merchandise. *Held* that, under Civil Code Cal. § 3450, defining an "insolvent" as one who is unable to pay his debts from his own "means" as they become due, this was not such a distinct confession of insolvency as would warrant the supreme court in setting aside a finding that the debtor was solvent when the transfer was made. *BEATTY, C. J.*, and *THORNTON, J.*, dissenting.

Commissioners' decision. In bank. Appeal from superior court, Lake county; *RODNEY J. HUDSON, Judge.*

Crauford & Tabor and J. H. Shankland, for appellant. *E. W. Britt and F. E. Johnston*, for respondent.

BELCHER, C. C. Action to recover certain real and personal property alleged to have been transferred by an insolvent debtor to defendant in violation of the provisions of the insolvent act. The complaint states, in substance, that on the 30th day of April, 1886, certain creditors of one Leon Lobe filed a petition in the superior court of Lake county wherein they averred that he had permitted his property to remain under attachment for four days, and was insolvent; that, on the 18th of May, 1886, Lobe was by an order of the court adjudged an insolvent debtor, and thereafter the plaintiff was duly appointed assignee of his estate; that, on the 12th of April, 1886, and for some years prior thereto, Lobe had been carrying on business as a merchant at the town of Middletown, in Lake county, and was then insolvent, and unable to pay his debts; that, on the said 12th of April, Lobe conveyed to defendant certain real property, and assigned to him certain books, notes, papers, and accounts; that the conveyance and assignment were made, received, and accepted with a view to pay defendant before and in preference to all other creditors, and to prevent the assets of Lobe from coming to the possession of his assignee, and being ratably distributed among his creditors, and that defendant had at that time reasonable cause to believe that Lobe was insolvent; that the value of the real property was \$500 or thereabouts, and the value of the personal property \$2,000 or thereabouts; and that defendant had collected upon the accounts a sum exceeding \$300. The answer denies that, at the time the conveyance and assignment were made, Lobe was

insolvent, or unable to pay his debts; denies that defendant, when he received and accepted the conveyance and assignment, had reasonable cause, or any cause, to believe, or did believe, that Lobe was insolvent, or unable to pay his debts; denies that the conveyance and assignment were made, received, or accepted with a view to pay defendant in preference to all or any other creditors of Lobe, or with any view or design to prevent the assets of Lobe from coming to the possession of his assignee, or being ratably distributed among his creditors, or with any intent to hinder, impede, delay, or defeat the object or due operation of the insolvent act.

The court below found the facts to be as follows: "(1) That on the 12th day of April, 1886, the said Leon Lobe was justly and legally indebted to said defendant in the sum of \$2,500, as evidenced by his promissory note then held by said defendant for that amount; that said note included as part of the sum due thereon, and not otherwise secured, the purchase price of the lot of land described in plaintiff's complaint, and which was conveyed by defendant to said Leon Lobe, January 28, 1882, for the agreed consideration of \$600; that, on said 12th day of April, 1886, said Lobe conveyed the said lot of land, and also transferred all his outstanding mercantile book-accounts, to the said defendant, in satisfaction of the said promissory note, which defendant thereupon surrendered to him, (said Lobe;) that such conveyance of the said land, and the transfer of said book-accounts, constitute the whole of the transactions complained of by plaintiff in this action. (2) That at the time of such conveyance and transfer the said Leon Lobe was not insolvent, or unable to pay his just debts; that said defendant did not then have reasonable cause to believe, and did not in fact believe, that said Lobe was insolvent, or unable to pay his debts; that such conveyance and transfer were not made by said Lobe in contemplation of insolvency, nor with a view to pay defendant in preference to his other creditors, nor with any design to prevent his assets from coming to the possession of the assignee, or of being ratably distributed among his creditors, nor with any intent to impede or delay or defeat the object of the act of the legislature of this state, entitled, 'An act for the relief of insolvent debtors,' or any other statute or law. (3) That defendant did not take, receive, or agree to said conveyance and transfer with any view to obtaining payment of his demand against said Lobe in preference to other creditors of the latter, nor with any view to prevent the assets of said Lobe from coming to the possession of the assignee, or being distributed ratably among his creditors, or with any intent to defeat or impede, or at all interfere with, the object or due operation of the insolvent act aforesaid, or any other law. (4) That said conveyance and transfer were made by said Lobe, and received by defendant, in good faith, to discharge the said promissory

note, and not with any intent to give or receive any fraudulent preference, or to defraud any other creditor of said Lobe. (5) That said defendant has collected upon said book-accounts the sum of \$350, and no more, but that neither the estate of said insolvent, nor the plaintiff as assignee thereof, has any interest in the amount so collected or received by defendant." Upon the findings, judgment was entered that the plaintiff take nothing. A motion for a new trial was then made, and denied, and thereupon plaintiff appealed from the order.

It is contended for appellant that the findings were not justified by the evidence, and that a new trial should therefore be granted. The first question to be determined is, was Lobe shown to be insolvent, or in contemplation of insolvency, when he made the transfers complained of? At the trial, no evidence was introduced by the plaintiff showing, or tending to show, that Lobe was insolvent, or in contemplation of insolvency, when the transfers were made; but, to establish the fact, he appears to have relied then, and his counsel rely now, entirely upon the testimony given by Lobe himself when called as a witness for defendant. The material parts of that testimony are as follows: "I am the person who made the conveyance and assignment to the defendant on April 12, 1886. I was in the mercantile business at the time, and had no intention of going into insolvency. Within a month before this, I had paid on account of my debts \$1,109.70, to different creditors, in varying amounts. * * * On the 12th of April, I was doing business in the usual way, buying and selling. I did not intend to go into insolvency. I did not want to. I considered I was solvent. I was carrying about \$6,000 or \$7,000 stock, beside the book-accounts. No creditors had at that time intimated to me the intention of petitioning the court to declare me an insolvent. I had not the least intimation or suspicion of such a thing. I was indebted to Lobree on the 12th of April to the amount of \$2,500 on a note, with interest from 1883. * * * Only a portion of my property was attached. The attachments were for \$140, I think,—one for \$80 and one for \$60. I had no intention of preventing my property from going into the hands of an assignee. Lobree came to me, and told me I was attached, and he wanted security for his debt; and I secured him with whatever I had. I had no more money. The last I had I sent to Crawford & Tabor, \$80, on same day said attachments were levied. I might have had \$15 or \$20. I think the account of Murphy, Grant & Co. held by Crawford & Tabor was \$160. I was owing them at the time. Their debt was then due. I could have paid them in a few days. I was not able then to pay it. I can't say whether I owed any other creditors whom I was unable to pay as their accounts became due or not. * * * I did not pay my bills as they became due, because I did not have the money. I had no bank account. I was

attached at 9:30 o'clock Saturday night, and I made the assignment and conveyance to Lobree about 8 o'clock Monday morning. The keeper was in charge then of those goods that had been attached. At the time I made the assignment and conveyance, I did not know that I was owing more money than I could pay, but I knew that I could not pay all at once what I owed then. There was more money due my creditors then than I could have paid if they had demanded immediate payment. I did not have money enough in my hands to pay my debts as they became due. I had merchandise. Only one side of the store was attached. * * * I had property enough to pay everybody, and I wanted to pay everybody. I did not have money enough at the time to pay them. I had made no proposition to my creditors for a settlement." It is claimed that this testimony shows "a clear and distinct confession of insolvency," but we do not think that this claim can be maintained. It has been held, under the United States bankrupt act, that a trader is insolvent when he is unable to pay his debts as they become due in the ordinary course of business. *Toof v. Martin*, 13 Wall. 40; *Wager v. Hall*, 16 Wall. 599. In the case first cited the district judge had ruled that, "if the bankrupts could not pay their debts in the ordinary course of business,—that is, in money as they fell due,—they were insolvent." Speaking of this, the supreme court, by Mr. Justice FIELD, said: "The rule thus laid down may not be strictly correct as applied to all bankrupts. The term 'insolvency' is not always used in the same sense. It is sometimes used to denote the insufficiency of the entire property and assets of an individual to pay his debts. This is its general and popular meaning. But it is also used, in a more restricted sense, to express the inability of a party to pay his debts as they become due in the ordinary course of business. It is in this latter sense that the term is used when traders and merchants are said to be insolvent; and, as applied to them, it is the sense intended by the act of congress. It was of the bankrupts as traders that the district judge was speaking when he used the language which is the subject of criticism by counsel. With reference to other persons not engaged in trade or commerce, the term may perhaps have a less restricted meaning. The bankrupt act does not define what shall constitute insolvency, or the evidence of insolvency, in every case." It was further said: "In the present case, the bankrupts were insolvent, in both senses of the term, at the time the conveyances in controversy were made."

In Bump's Law and Practice of Bankruptcy (5th Ed.) p. 469, it is said: "Perhaps no precise rule can be laid down which will be applicable to all cases, inasmuch as the determination of each case rests largely upon its own peculiar facts. It is generally held by the bankrupt courts that a trader who is not able to pay all his debts in the usual

and ordinary course of business, as persons carrying on trade usually do, is insolvent, within the meaning of the bankrupt law; and there is no better general rule to govern courts when they are considering the facts of a case. It is neither too broad nor too narrow, while it would be quite too narrow and restricted to hold that failure to pay someone debt when due is evidence of insolvency in all cases, under the act. Whether a single instance of non-payment of a debt at maturity would be evidence, in a given case of insolvency, depends somewhat upon the magnitude of the debt, the locality of the debtor, and what is the ordinary course of business and custom, in that respect, of the locality where the debtor resides, and upon such other facts and circumstances as will bear upon the question of insolvency. * * * The question is whether the debtor or trader is able to pay his debts, in the ordinary course, as persons carrying on trade there usually do. Hence it may be, and undoubtedly is, true that insolvency in commercial centers is not insolvency in small country towns. In the former places, if the debtor's paper is dishonored, his credit is gone, and he is *prima facie* insolvent, whereas in the latter localities it is not so. Insolvency is a fact, and not a matter of definition or rule of law; and what is evidence of insolvency in London or Paris or New York is not evidence of insolvency everywhere." Citing cases.

The insolvent act of this state provides that a debtor may be put into involuntary insolvency, if he, "being insolvent, has suffered his property to remain under attachment or legal process for four days," (section 8;) but it nowhere defines what shall constitute insolvency. The Civil Code, however, in the title in regard to assignments for the benefit of creditors, (section 3450,) says: "A debtor is insolvent within the meaning of this title, when he is unable to pay his debts from his own means as they become due." And it has been held that this is the correct definition of insolvency under the insolvent act of 1880. *Washburn v. Huntington*, 78 Cal. 573, 21 Pac. Rep. 305. What is meant by the words "from his own means?" The definition of the word "means," as given by Webster, is "resources of income." But "resources" does not necessarily mean money in hand. A debtor may have ample resources to pay all his debts as they become due, and yet have no money in his pocket or in bank. Is such a debtor insolvent? Suppose a wheat buyer should have 1,000 tons of wheat in a warehouse, worth \$25,000, which he is holding for better prices, and is indebted in the sum of \$1,000. Is he insolvent unless he sells the wheat at whatever price he can get, and pays the debt as it becomes due? We do not think he is, under the insolvent law of this state. In *Bell v. Ellis*, 33 Cal. 620, it was held that a trader is insolvent when he is not in a condition to meet his engagements, or to pay his debts in the usual and ordinary course of business; but he is not so merely

because his assets at a given date may not satisfy all the demands against him due, and to become due. The court said: "The test question is not, will his effects realize enough to pay his debts due and to become due? but, are his affairs in such a condition as to enable him, in the usual and ordinary course of his business, to make his payments as they fall due? and the question is to be answered by the jury in view of all the circumstances affecting the business of the trader, including the value of his effects, the extent and character of his business, the manner in which it was being conducted,—whether upon a speculative or legitimate and safe basis; the amount of his profits; the extent of his liabilities,—whether kept within a safe limit; and, generally, his credit, accompanied by the benefit or advantage which he has, outside of the mere value of his property and the debts due him, arising from the good-will of the business."

In the light of the authorities, we cannot say, therefore, that the finding "that, at the time of such conveyance and transfer, the said Leon Lobe was not insolvent, or unable to pay his just debts," was contrary to, and not justified by, the evidence. This being so, it is unnecessary to consider the other findings complained of. We advise that the order be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

BEATTY, C. J., and THORNTON, J., dissenting.

PEOPLE v. BACHMAN. (No. 20,523.)

(Supreme Court of California. March 31, 1890.)

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; D. J. TWOHY, Judge.

Carrol Cook, for appellant. George A. Johnson, Atty. Gen., for the People.

BELCHER, C. C. The defendant was convicted of the crime of arson in the first degree, and this appeal is from the judgment entered against him. The transcript was filed in this court on the 6th of March, 1889, and, by stipulation with the attorney general filed August 21st, appellant was to have until and including September 1st to serve and file his brief. The case was submitted for decision on the 21st of February without any oral argument. No brief has been filed for or on behalf of appellant, and under these circumstances the judgment should be affirmed.

We concur: FOOTE, C; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(84 Cal. 61)

ASTON v. DASHAWAY ASS'N *et al.* (No. 12,069.)(Supreme Court of California. May 3, 1890.)
CORPORATIONS—MISAPPROPRIATION OF PROPERTY—
ACTIONS BY MEMBERS.

1. A temperance society, owning improved land, was incorporated, without capital stock, "for the purpose of promoting the cause of temperance," under Hitt. Gen. Laws Cal. § 1024 *et seq.*, providing for the incorporation of "religious, social, benevolent, and learned associations." Some years afterwards, the membership having greatly decreased, a resolution was passed that the trustees sell the property, pay off some outstanding indebtedness, and "purchase other cheaper property suitable for the uses and purposes of the association." A petition asking for leave to sell, and stating, among other things, that the corporation was "purely and solely for the benevolent and laudable purpose of aiding and promoting the cause of temperance, and not pecuniary profit," was accordingly filed in the superior court, which granted the prayer of the petition, reciting the resolution in its order of sale. The property was sold, and a portion of the proceeds divided among a part of the members, including the trustees, pursuant to a motion "that the association donate to each member in good standing the sum of \$1,500 for past services, on signing a receipt for the same;" but it was admitted on the trial that no services had been rendered other than being good and efficient members of the organization. *Held*, a misappropriation of corporate funds, and that any member not a party thereto could maintain a suit to compel a restoration.

2. Where trustees misappropriate corporate funds, claiming the right so to do, a member may institute proceedings for their restoration without demand on the trustees to take action in the matter.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDON, Judge.

S. Heydenfeldt, Jr., and *Joseph P. Kelly*, for appellant. *Tilden & Tilden*, for respondent.

SHARPSTEIN, J. This appeal was heard in department 2, which reversed the judgment and order of the court below. An opinion was filed November 22, 1889. 22 Pac. Rep. 660. Afterwards a petition that the cause be heard in bank was filed and granted, and the case has been argued in bank, but the argument has failed to convince us that the decision of the department was erroneous; and, for the reasons stated in the opinion of the department, the judgment and order appealed from are reversed.

We concur: WORKS, J.; THORNTON, J.; PATERSON, J.

(84 Cal. 12)

SPANGLER v. CITY AND COUNTY OF SAN FRANCISCO. (No. 11,958.)

(Supreme Court of California. March 3, 1890.)
MUNICIPAL CORPORATIONS—DEFECTIVE SEWERS—
NEGLECT.

1. In an action against a city for injuries to adjacent property caused by the overflow of a sewer which it has knowingly permitted to become obstructed and out of repair, it is no defense that the flow was unusual where it appears that the sewer would have carried off all the water if it had been kept in repair.

2. Where the overflow of a sewer is caused by a dam which the superintendent of streets know-

ingly permits to be placed therein, the city will be liable for injuries caused by the flooding of adjacent property. Nor is it material that the property injured is below the grade of the street.

3. It is not necessary to present a claim for damages resulting from defective sewers to the board of supervisors of the city and county before instituting suit upon it.

In bank. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

George Flournoy, Jr., City and Co. Atty., for appellant. *Wm. H. Bodfish* and *W. C. & I. G. Burnett*, for respondent.

THORNTON, J. This is an action to recover of the city and county of San Francisco damages for neglect in keeping a sewer in repair, whereby the plaintiff was injured. At the time that the injury occurred, and for some years before, the plaintiff was the owner of a lot of land situate at the south-westerly corner of Eighteenth and Fair Oaks streets,—27 feet on Eighteenth street, and 101 feet on Fair Oaks street; the lot lying east of Fair Oaks, and constituting a parallelogram of 27x101 feet, on which he had, in 1877, built a house.

The material facts are found by the court as follows: "That prior to October 19, 1883, defendant had authorized and caused a public street in said city and county of San Francisco, called 'Eighteenth Street,' along and near the line of which a natural stream of water had been accustomed to flow and run, and many other streets crossing Eighteenth street, to be graded greatly above the natural level of the ground there, from Folsom street westerly as far as Douglass street; and thereby the waters of said natural stream were prevented from flowing in the bed of said stream, and said bed filled with earth in many places, and the waters flowing from a large water-shed to the westerly of Church street intercepted and prevented from reaching said bed as they had been accustomed to do; and had authorized and caused a sewer to be constructed and laid down along Eighteenth street, from Folsom to Douglass streets, and other sewers along the streets crossing Eighteenth street, and that by means thereof the waters that formerly flowed in said natural stream and from said water-shed were, until the time of the acts of negligence hereinafter referred to, received into and conducted in said sewer in Eighteenth street, and conveyed therein to a point at Folsom street, and from thence said waters found their way into Mission bay and the bay of San Francisco, and that said waters would have continued to be so conveyed and to find their way until after the injuries herein mentioned but for the acts of the defendant, and of her servants and agents, as hereinafter mentioned. That plaintiff, after October 19, 1883, and before the time of the injuries hereinafter mentioned, erected upon said lot of land a dwelling-house and carpenter shop, and had improved said lot by grading it, and at the time of such injuries had

on said premises, and was the owner of, the lumber, tools, paints, oils, finishing lumber, mouldings, doors, windows, material, rails, and property hereinafter mentioned, which tools constituted a chest of carpenters' tools, and said material included casings, among other things; and, at the time of said injuries, plaintiff was conducting business at his trade as a carpenter in said shop, and was residing on said premises with his family. That the foundation and shop floor mentioned in the fourth paragraph of the first count of the complaint constituted part of the dwelling-house and shop aforesaid. That there were no outhouses on said land. That within two years before the commencement of this cause, and up to the time of the injuries hereinafter mentioned, said sewer in Eighteenth street to the westerly of Guerrero street, through the negligence of the defendant, and carelessness of the defendant, in omitting to clear or repair the same, became, and, until and including the times when such injuries occurred, continued to be obstructed, insecure, broken, and, with said sewers in said streets crossing Eighteenth street to the westerly of Guerrero street, incapable of conveying away the waters, drainage, and sewage received into the same; and thereby large volumes of water and sewage collected in said sewers westerly from Guerrero street were conducted to, and discharged with great and increased violence upon, the said land and premises of the plaintiff, between March 1, 1884, and at divers times between said dates,—that is to say, on the 7th, 8th, and 9th days of March, 1884, and on the 11th and 12th days of April, 1884. Whereby said water and sewage greatly devastated and injured the said land, dwelling-house, and shop during the period last aforesaid, and injured said building and shop, and caused said building to settle and become out of plumb, and saturated the soil of said lot, and partially filled the basement of said house and shop with water, and broke said house, and the other property hereinafter mentioned was wetted and injured and damaged. By means whereof the said dwelling-house and carpenter shop, and the foundations thereof, and said land, were damaged in the sum of \$500, and other property then on said premises damaged,—that is to say, 5,000 feet of lumber to the amount of \$120; paints and oils to the amount of \$50, finishing lumber, cases, and mouldings to the amount of \$100; doors, windows, and blinds to the amount of \$70; one ton of nails to the amount of \$100; carpenter tools in carpenter shop to the amount of \$150. That said injuries were in part caused by the washing of sewage and earth into and upon said lot, and into said house and shop, by and with said water. That the amounts above mentioned include the values of all the injuries to the plaintiff's said property by means of the facts herein stated. That defendant at all times, and during the whole period herein referred to, had notice of the then condition of said Eighteenth street, and the sew-

er therein, and of the streets crossing said street, and of the sewers therein, as hereinbefore shown, and that such notice was also given to, and possessed by, and the knowledge of such condition had by, the defendant's board of supervisors and mayor, and her superintendent of public streets, highways, and squares, at all said times and during said period. That there was no necessity for causing said discharge of waters or of said sewage or of said earth upon the land of plaintiff; but, by a proper repair and claiming [cleaning] of said sewers, the whole thereof could easily have been conducted past the land of the plaintiff, and discharged into Mission bay and the bay of San Francisco, without doing any damage to plaintiff's said property. That the damage, loss, and injury hereinbefore mentioned was not, nor any part thereof, caused by the negligence of the plaintiff, and that plaintiff was not negligent in any particular in the premises."

It is urged that there was no proof that there was such a water-course as is alleged and found. The evidence is ample to bring it within the definition as given by all the cases. It is not necessary that the water shall run in the bed or channel of the stream all the year. There is evidence of bad breaks, and water flowing in the bed. But, whether the water that did the damage came from a water-course or from the surface, the liability would be the same. The liability here rests in the duty of the city to keep the sewers in repair, which duty, after ample knowledge of it, was grossly neglected. It is the duty of the city, when it does provide water-ways, to provide such as are sufficient to carry off the water that might reasonably be expected to accumulate. The rule is so laid down in *Damour v. Lyons City*, 44 Iowa, 282, approved and followed in *Powers v. City of Council Bluffs*, 50 Iowa, 201, 202. See *Mayor, etc., v. Bailey*, 2 Denio, 433. We think the rule above stated correct, and approve it.

But it is said that the precipitation which caused the injury herein was extraordinary and unusual,—could not reasonably have been expected,—and therefore the defendant is not liable. This might be true if the sewers had not been of sufficient size to carry off all the water which was so extraordinarily and unusually precipitated, but the evidence is clear and direct that the sewers, if they had been kept in order, were of a capacity to carry off all the water which did fall. This shows that the agents and servants by whom the city acted in constructing the sewer anticipated that large sewers would be required to carry off the rain-falls which might be looked for, and it could not be allowed the defendant to invoke this defense when it had in advance made provision for the very event that did occur. It could not harmonize with reason and justice to allow such defense for negligence. The contention would amount to this: Though the sewers were made large enough to carry off all the water, though the extraordinary rain-falls were anticipated,

yet, inasmuch as the fall of water was unusual and extraordinary, the defendant is not liable. Sufficient provision having been made in advance for anticipated events, it would be inconsistent with all just and sound reason, and the settled principles of law, to hold one excused when the provision has become insufficient by reason of indifference to monitions and inexcusable neglect. The plaintiff had a right to assume that the agents of the city would attend to duty, and repair the broken and dilapidated sewer. He had a right to act on this assumption. Certainly there was no duty on him to remove the obstructions from the sewer, and repair it himself, or be chargeable with negligence if he did not do so. It would have cost a considerable sum of money to have put the sewer in a proper condition,—may be more than his property was worth.

The evidence shows that the foundation of the house was below the grade of Eighteenth street. The floor of the basement was four feet six inches below the level of the sidewalk on Eighteenth street, on which the house fronted. The plaintiff moved into the house in January, 1884, though it was not completed until the month of March following. The lot was graded in October, 1883, about three feet higher than the former level. The front of the house was set back about five feet from the edge of the sidewalk on Eighteenth street, and was reached by steps going up from the sidewalk to the front door. Though the lot was below grade, still the sewer, when in proper condition and unbroken, would have carried off the water which did the injury. Plaintiff was guilty of no negligence in building where he did, and his right to recover would not be impaired. When the plaintiff built his house, in 1883 and 1884, he had, as said above, a right to act on the assumption that the city authorities would keep the sewer in good repair. The sewer being sufficient in capacity to carry all the water, the plaintiff might well consider that he could remain securely on the land where he had built his house, and would not be guilty of negligence which would bar a recovery. On this subject see *White Lead Co. v. Rochester*, 3 N. Y. 463; *Barton v. Syracuse*, 37 Barb. 292, 36 N. Y. 54; *Ashley v. Port Huron*, 35 Mich. 299, and cases there cited. Dillon states that "there is a municipal liability where the property of private persons is flooded, either directly or by water or sewage being set back, when this is the result of the negligent execution of the plan adopted for the construction of gutters, drains, culverts, or sewers, or of the negligent failure to keep the same in repair and free from obstruction; and this whether the lots are below the grade of the streets or not. The cases support this proposition with great unanimity." 2 Dill. Mun. Corp. 1335. Counsel for defendant urges that, if the damages to plaintiff had resulted from the natural flow from the adjoining high ground, he cannot recover. He further says: "It does not

appear that this was not so." The evidence on the point urged was before the court below, and it held that the damage was caused by the water which flowed from the broken sewer, and not from the adjoining higher ground. There is evidence to sustain the finding, and we do not feel at liberty to disturb it.

It is urged that the injury was caused by certain parties, who had been constructing a sewer, who built a dam which diverted the water, and caused it to flood plaintiff's land. Sewers are built under the direction of the city authorities; and, if the parties building it are so negligently conducting their work as to cause loss and injury to a third person, the city is liable. It is no excuse to the city that a dam thus built caused the damage. If there was such a dam, there is evidence which shows that the superintendent of streets had knowledge of it. There was a contractor building a sewer on Eighteenth street in February, 1884, and, if he constructed any dam there, the city authorities had an opportunity of seeing and knowing it; for the uncontradicted evidence shows that the superintendent or his deputy was there, when the sewer was being constructed, every morning. The only person building a sewer was a contractor, McDonald, who was a witness in the case, and, if any such dam was built, he or his employes built it; and he testifies that the superintendent of streets or his deputy was there every morning to inspect the work. The superintendent, thus knowing of the dam, must have known it would have diverted the water in the rainy season. Knowing it, he should have caused it to be removed. His failure to remove it was negligence of duty; and the city, under the circumstances, should not be relieved, in consequence of this dam, of its responsibility in this case. Further, the dam being on the east side of Eighteenth street, it does not appear with sufficient clearness that it caused the damage to authorize this court to regard its existence as impairing plaintiff's right to recover herein.

It was not requisite to present the claim sued on herein to the board of supervisors of the city and county before instituting suit upon it. *Bloom v. City and County of San Francisco*, 64 Cal. 503, 3 Pac. Rep. 129; *Lehn v. City and County of San Francisco*, 66 Cal. 76, 4 Pac. Rep. 965.

A stipulation appears in the record in this case to the effect that all the evidence and findings appearing in the statement of the case in the action of *A. O. Cook v. the City and County of San Francisco*, now here on appeal, that may be pertinent herein, shall be considered in this cause upon the appeal from the order denying defendant's new trial as though the same were embodied in the statement on motion for a new trial in this case. Under this mode of bringing a case here on appeal, the work of counsel is imposed on this court. This court is called on to read two transcripts in different cases,

to decide and determine what evidence is pertinent in one case, but not in the other, and what is not. This labor should be performed by counsel, and not by the court. Counsel should not turn over their work to be performed by the court. The transcript, in every case, should contain in it all the matter on which it is to be determined; and the court ought not to be called on to read two transcripts to determine one case, and find out and cull from one transcript what would be pertinent in the case under consideration. Certainly counsel should recollect the amount of labor imposed on this court, and do everything incumbent upon them to lighten it. This court might well have refused to consider this cause, and have affirmed the judgment and order without consideration, by reason of the facts just set forth. In its consideration, more time has been consumed on account of the unusual mode of presenting the case in the record. Though this case has been determined, another may not be treated in the same way.

The evidence is sufficient to justify the findings. We find no error in the record. Judgment and order affirmed.

We concur: BEATTY, C. J.; FOX, J.; SHARPSTEIN, J.

I concur in the judgment: MCFARLAND, J.

COOK v. CITY AND COUNTY OF SAN FRANCISCO.
(No. 11,950.)

(*Supreme Court of California.* May 3, 1890.)

In bank. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge. George Flournoy, Jr., City and Co. Atty., for appellant. Wm. H. Bodfish and W. C. & I. G. Burnett, for respondent.

PER CURIAM. This case turns on the same questions presented in Spangler v. the same defendant, ante, 1091, just determined. It must be decided in the same way. Judgment and order affirmed.

(84 Cal. 197)

GRANT v. SHEERIN. (No. 12,749.)

(*Supreme Court of California.* May 31, 1890.)

PLEADING—BREACH OF CONTRACT—GENERAL AND SPECIAL DEMURRER.

The complaint alleged that plaintiff's testator intrusted a certain monument to defendant to sell, and that "since the sale of said monument, and the receipt by defendant of the purchase price thereof, plaintiff, as such executrix, has demanded an accounting of said sale, and the payment to her of the purchase price of said monument, and defendant has refused, and still refuses, to account for or pay the same, or any part thereof." Held, that there was not an entire failure to state the fact of non-payment, but that the averment was simply uncertain and defective, and that this defect could be reached, not by general demurrer, but by special demurrer only.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

M. C. Hassett and Jas. F. Teclin, for appellant. Mich. Mullany, for respondent.

BELCHER, C. C. This is an action for an accounting, and to recover money alleged to be due the plaintiff. The complaint alleges that one John Grant, the plaintiff's testator, was the owner of a certain marble monument of great value, and that, for the purpose of effecting a sale thereof, he placed the monument in the possession of the defendant, with authority to sell it; that defendant accepted the monument for and on account of said Grant, and took and held the same until some time in May, 1885, when, under the authority so given, he sold it, as plaintiff is informed and believes, for the sum of \$1,000 or thereabout, and received the purchase price thereof; and that "since the sale of said monument, and the receipt by defendant of the purchase price thereof, plaintiff, as such executrix, has demanded from defendant an accounting of said sale, and the payment to her of the purchase price of said monument, and defendant has refused, and still refuses, to account for or pay the same, or any part thereof." The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and his demurrer was "overruled for want of prosecution, and five days allowed to answer." Within the time allowed, an answer was filed, which admitted "that the said John Grant placed the said monument in the possession of defendant, with authority to sell the same," and that "the said monument was sold in the year 1885," but denied that it "was sold for any other or greater sum than the sum of about \$550," or "that defendant ever refused or failed to account to plaintiff for any moneys which she is or might be entitled to receive from the defendant." The answer then set up that between the years 1870 and 1878 the said Grant requested defendant to take certain marble monuments, among which was the one mentioned in the complaint, and to do work and labor thereon, and add thereto such other marble work as would make them more valuable and easy of sale; that defendant received the monuments, and did work and labor upon the same, and added a large amount of material thereto, and made the same of greater value and easy of sale; that the defendant from time to time sold all of the said monuments except one; that the net amount of all money received from such sales, "exclusive of defendant's material furnished as aforesaid, expenses of sale, and work and labor done thereon by defendant, was the sum of \$1,041.80;" that, while the monuments were in the possession of defendant, he advanced to Grant the sum of \$1,235 upon the agreement and understanding between them that, whenever defendant could dispose of the monuments, he should pay himself, out of the proceeds of the sale, all moneys so advanced; that the defendant had not received from the sales the full amount advanced; and that there was still due him a balance, which, with interest, amounted to more than \$1,000. Upon the issues framed the case was tried

by the court, and judgment given for plaintiff "for the sum of \$441.92, and legal interest thereon from the 1st day of June, 1885, viz., for the sum of \$524.34 and costs." From this judgment the defendant appealed, and has brought the case here on the judgment roll.

1. The first point made is that the complaint failed to state facts sufficient to constitute a cause of action, because there was no sufficient averment of non-payment; and, in support of this position, *Scroufe v. Clay*, 71 Cal. 123, 11 Pac. Rep. 882, is cited. In that case the action was upon a promissory note, and the complaint averred that the defendant "has refused, and still refuses, to pay" the principal or interest of the note, or any part thereof, and "that there is now due" the sum, etc. The complaint was demurred to on the ground that there was no allegation of non-payment, and the demurrer was overruled. It was held in this court that the demurrer should have been sustained, the court saying: "The averments of the complaint are not equivalent to an averment of non-payment. 'The failure to pay constitutes the breach, and must be alleged.'" It has been held in numerous cases that a party suing upon a contract to pay money must show a breach of the contract,—that is, must allege the non-payment of the money which he seeks to recover,—or his complaint states no cause of action, and may be assailed by a general demurrer. In *Richards v. Insurance Co.*, 80 Cal. 506, 22 Pac. Rep. 939, the last case in which this rule is declared, it is said: "The complaint was fatally defective in this respect. It contained no allegation of non-payment, nor is there any allegation from which such non-payment can be implied." But there is a plain distinction between an entire failure to state essential facts, and a statement of such facts imperfectly or defectively. In the one case the defect can be reached by a general demurrer, while in the other it can only be reached by a special demurrer. The rule upon this subject is thus stated in *Harnish v. Bramer*, 71 Cal. 158, 11 Pac. Rep. 888: "If a complaint fails to state any fact or facts essential to a recovery, the defect may be reached by a general demurrer. If, however, it states all the essential facts, but states them improperly or defectively, the defect can only be reached by a special demurrer particularly designating the specific point at which it is aimed;" and see *Tehama Co. v. Bryan*, 68 Cal. 59, 8 Pac. Rep. 673. In *Scroufe v. Clay*, *supra*, there was not an entire failure to state in the complaint the fact of non-payment, but the averment was simply uncertain and defective; and the same is true of this case. But in the former case the demurrer was special, while here it was general. In our opinion, the complaint in this case stated a cause of action, and was sufficient when tested only by a general demurrer. Besides, the court found that no part of the money for which judgment was entered had been paid; and the Code provides

that "the court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect." Code Civil Proc. § 475.

2. It is next claimed that the findings do not meet all the issues raised by the answer, and for that reason that the judgment should be reversed. But, in answer to this objection, we think it enough to say that, while the findings may be open to some criticism, still they were, in our opinion, intended to, and in effect do, cover all the issues tendered, and should be held sufficient.

No other points are discussed by counsel, and we therefore advise that the judgment be affirmed.

We concur: VANCLEIF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(84 Cal. 193)

MENDENHALL v. PARIS *et al.* (No. 12,767.)

(Supreme Court of California. May 31, 1890.)

BOUNDARIES—SURVEY—MONUMENTS AND COURSES.

In an action to quiet title to a strip of land 4.62 chains wide at the eastern end, and running to a point at the west end at the distance of $3\frac{1}{4}$ miles, it appeared that it lay immediately south of a certain survey, P.; and the question was whether the strip was included in a subsequent survey, J., south of P., or lay between the two. This depended upon the location of the north-east corner of J. The description in the survey of J., commencing at a point in the eastern line, was thence due north 458.50 chains to a certain post, V, "station at intersection of line" with the survey of P.; "thence along said line" N., 51 deg. 45 min. W., a certain distance to the "old corner" of P. The course of the southern boundary of P. was N., 51 deg. 45 min. W. The post, V, was destroyed, but a line drawn due north from the starting point in the east line of J., 458.50 chains, would not reach the southern boundary of P. by 4.62 chains. The post, V, was also described in the survey of J. as 2.25 chains north of a certain creek, while the southern line of P. was at this point nearly 7 chains north of the creek. Held, that the evident purpose was to make the two grants join, and that these facts make out a *prima facie* case, at least, that the strip was included in the survey, J.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Jas. C. Martin and R. A. Redman, for appellants. J. W. Harding, for respondents.

BELCHER, C. C. This is an appeal from a judgment of nonsuit in an action to quiet title to 51.20 acres of land in Alameda county. The land in controversy is described as a strip three and one-half miles long, 4.62 chains wide at one end, and running to a point at the other end. The plaintiff alleged in his complaint that the strip was a part of a Mexican grant called the "Rancho El Valle de San José," which was patented by the United States to Antonio Sunol and others on the 15th of March, 1865. The defendants

denied that the strip constituted any part of the rancho named, or that plaintiff had any title thereto. It is admitted that plaintiff proved at the trial, by mesne conveyances from the patentees, that he had sufficient interest in the strip to entitle him to have judgment entered in his favor, provided it was shown to be included within the patented lines of the grant; and whether it was so shown or not—that is to say, sufficiently to make a *prima facie* case—is the only question discussed by counsel, and presented for decision.

The strip lies along the south-westerly side of a Mexican grant called "Rancho Las Pocitas," the preliminary survey of which was made in 1854 by one Lewis. The survey of the patented land which is involved in this case was made some 10 years later by one La Croze. At the time of the trial, Lewis and La Croze were both dead. The dispute is as to whether or not the north-easterly line surveyed by La Croze is the same as the south-westerly line surveyed by Lewis, and the question depends upon the true location of what is called station 25. To determine this question, it is only necessary to look at two lines described in the patent,—the easterly and north-easterly. The first begins at station 24, and runs due north 458 chains and 75 links "to a post marked 'V S J 25,' station at intersection of line with the preliminary survey of the rancho Las Pocitas." It is described as crossing the Arroyo Mocho at 456 chains and 50 links, or 2 chains and 25 links south of the station. The second line begins at station 25, and runs "thence along said line" N., 51 deg. 45 min. W., 279 chains "to an oak tree 3 feet in diameter, marked 'V S J 26,' station, and old corner of the rancho Las Pocitas." Stations 24 and 26 are still found, clearly marked on the ground, and there is no controversy as to their true location. The Lewis line was retraced in 1874 by one Carlton, a United States deputy surveyor, under an appointment by the surveyor general, "to examine and verify the line and establish the boundary of the El Valle de San José rancho, running from station 24 to station 25;" and it is admitted that the line was correctly retraced and located. It was found to run from station 26 south, 51 deg. and 49 min. east, thus varying 4 minutes from the corresponding line described in the patent; and it met the line running north from station 24 about 7 chains north of the Arroyo Mocho. There was nothing on the ground to indicate, and no evidence was offered to show, where station 25 was actually located by La Croze. It was relocated by Carlton at the point where the two lines last mentioned met. The Lewis line was again retraced by one Nusbaumer, the county surveyor of Alameda county, in 1882. He testified: "The course of the line of the preliminary survey of the Las Pocitas, as called for in the pat-

ent, is 51 deg. 45 min., while the course of this line, as called for by the survey made by Lewis, is 51 deg. and 50 min., which is 5 min. more." And again. "If you run due north from station 24 till you get 2 chains and 25 links north of the Arroyo Mocho, and then run to station 26, the course would be 51 deg. 4 min. east, which would make a difference of about three-quarters of a degree from the call of the course in the patent." He further testified: "If I run from station 24, the distance called for by the patent will place that corner [25] 2 chains and 30 links beyond the creek. The patent fixes that corner 2 chains and 25 links north of the creek, according to distance; * * * but the line of the preliminary survey of the rancho Las Pocitas is at this point, as I measured it, 7 chains north of the Arroyo Mocho."

In view of the above, and some other slight discrepancies, it is argued for respondents that the Arroyo Mocho was a controlling monument, and that station 25, as fixed by La Croze, could not have been placed at a greater distance therefrom than 2 chains and 30 links, and that the preliminary survey of the Las Pocitas was an artificial or imaginary line only, and should be disregarded. It is undoubtedly true that courses and distances are controlled by monuments. But, while the arroyo was a fixed and visible monument, still it was at an intermediate point, and not at the end of the line. It cannot, therefore, be said to be entirely controlling.

In our opinion, the Lewis line, its true location being settled and undisputed, was a natural boundary or monument; and the fact that it met the line from station 24 at a point seven chains north of arroyo was not sufficient to cause it to be disregarded. Besides, in making the survey for the patent, the evident purpose was to make the two grants adjoin, and not to leave a narrow gore three and a half miles long between them. This is clearly shown by the calls "to station at intersection of line with the preliminary survey with the rancho Las Pocitas; thence along said line," etc. The discrepancies in the courses may be accounted for by the fact that the different surveys were made at different times, and by different instruments. We think the evidence tended to show that the strip in controversy was within the patented lines of the grant, and that it was sufficient to make at least a *prima facie* case for the plaintiff. This being so, the case should have been fully tried, and not terminated by a nonsuit. We therefore advise that the judgment be reversed, and the cause remanded for a new trial.

We concur: VANCLIEF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

(84 Cal. 181)

GRAHAM v. HARMON *et al.* (No. 12,698.)

(Supreme Court of California. May 31, 1890.)

ACCOUNT—EVIDENCE—BILL OF PARTICULARS.

1. Code Civil Proc. Cal. § 454, providing that a party need not set forth in a pleading the items of an account sued on, but he must deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof, does not prevent a party who has furnished a copy of the account from explaining it, and showing that some of the items in the account, from which the copy furnished was taken, were carried into it by mistake.

2. Where the evidence is conflicting, and is not wholly documentary, the findings of fact of the trial court will not be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; J. J. DE HAVEN, Judge.

McQuaid & Wheeler, for appellants. J. H. G. Weaver, for respondent.

GIBSON, C. Judgment passed for the respondent in this action for \$219.77, without costs, which sum consists of \$12.10 for services rendered by him to defendants between the 17th and 28th days of December, 1886, and the remainder for a balance due upon an account between them. The main question presented for consideration here is whether the findings of fact are supported by the evidence.

The defendants, who were engaged in the business of conducting a theater and skating rink in Eureka during November and December, 1886, employed the plaintiff as their manager, whose duty it was to sell tickets of admission to the entertainments and performances given by the defendants, and to pay all the expenses thereof. Before the trial, defendants, under section 454 of the Code of Civil Procedure,¹ demanded of and obtained from plaintiff a copy of the account sued upon, which showed that he had received \$1,250.78, and paid out \$1,797.68, being \$546.35 more than he received. Among the items charged to the defendants is one for \$32, for eight days' services, at \$4 per day, rendered by plaintiff to defendants. These services were declared upon as a separate cause of action in the complaint, to which defendants replied in their answer by denying that such services were worth any greater sum than \$1.50 per day, and averred that plaintiff agreed with them that, in consideration of the exclusive privilege of maintaining a stand in their theater for the sale of cigars, etc., he would render the services for which he seeks compensation in money. On the trial, plaintiff testified that he made no such agreement with the defendants; that he did not have a stand in the theater while he was manager, but only for a few nights, long prior to his engagement as manager; that there was no understanding or agreement re-

specting the amount he should receive for his services as manager, but that from four dollars to five dollars per day therefor would be reasonable. That portion of plaintiff's testimony in which he denies the agreement respecting the privilege of selling cigars, etc., in the theater was contradicted by defendant Harmon and one of his actresses, who testified that the only compensation he was to receive for his services was the privilege referred to. On this point the court found against the defendants, and in favor of plaintiff, to the extent of \$1.50 per day for eight days, as stated in the answer. The finding of the court, based on conflicting testimony, that the agreement contended for by defendants did not exist, must be regarded as conclusive here; and, as the value of the services testified to by plaintiff was uncontradicted, the court might well, and perhaps should, have found in his favor to the extent of four dollars per day for eight days' services. There is, therefore, not only evidence enough to support this finding, but one much more favorable to the plaintiff.

Upon the other cause of action, involving the account, the court found that between October 1, 1886, and the commencement of the suit, plaintiff paid defendants \$207.77 in excess of what he had received upon their account. It was developed by the testimony of the plaintiff in explanation of the account involved, which he kept himself, that he had but little knowledge of such matters and attempted to keep several accounts in one. "This account," says the learned judge who tried the case, "is made up in such a manner that it is very difficult to understand it, and it would seem that the plaintiff has blended therein his own personal account as treasurer with the accounts of the defendants with different members of the theatrical company, which plaintiff kept as a sort of manager and treasurer of the company; and in this way he charges himself with money and board accounts never received by him, nor properly charged to him, and to offset which he claims credit for board bills never paid by him, and money never paid out by him in person. Thus he claims credit for money which the account on its face, in some instances, shows was paid by defendants, and for other sums, paid to different persons, which he testifies were in fact paid by one or other of the defendants; his explanation being that, while such payments, for which he credits himself, were made by Harmon or McKay, he charged himself, as manager or treasurer, with having received this same money from them, and which, if true, would make the erroneous credit just offset the erroneous charge. That the bill of particulars was made up in this manner was not seriously disputed in the evidence." The defendants, one of whom was sworn and examined as a witness, made no attempt to disprove the explanation given by plaintiff as to the manner in which he had confused the several accounts; but they endeavored to show by two members of their

¹ Code Civil Proc. § 454, provides that "it is not necessary for a party to set forth in a pleading the items of an account therein alleged; but he must deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof."

troupe, who were interested in knowing what the receipts of the several entertainments were, that he, (plaintiff) had reported to them larger receipts than his account showed he had charged himself with, and that he had not charged himself with the receipts of the performances given upon November 15th, December 1st, 3d, 10th, and 22d. Respecting the items on the credit side of the account, they testified that many of them were not paid out by plaintiff, but by other persons, except certain of them which he paid out in part. The court, it seems, charged the plaintiff with \$168.50, the aggregate receipts of the first three of the five performances, which the last-mentioned witnesses said were not on the debit side of plaintiff's account; and, after this was deducted from the amount, it still appeared he had paid out \$207.77 in excess of what he had received, as found by the court. This finding, too, like the one first considered, it is clear, rests upon evidence sufficient to sustain it, and, as the evidence is conflicting as to most of the items of the account, the finding cannot be disturbed; for, where a review of the evidence, when it is not wholly documentary, shows it to be conflicting, we cannot, under the settled doctrine of this court, proceed further.

It was not error to permit the plaintiff to explain the items in the bill of particulars, or the copy of the account he furnished to defendants prior to the trial, pursuant to section 454, *supra*. The book or books from which it was taken were brought into court, and it is not disputed that the copy furnished was a correct one. That is all the plaintiff was required to do. The truth of the items of the account was the very point in issue, and his testimony in explanation of the items which he carried into his account by mistake was properly received as tending to show the true state of the account. The penalty of being precluded from giving evidence of the account provided for in said section only applies where the party of whom a copy of the account in controversy is demanded, in writing, refuses to furnish the same. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in foregoing opinion the judgment and order appealed from are affirmed.

(84 Cal. 104)

HIMMELMAN v. HENRY *et al.* (No. 11,659.)

(Supreme Court of California. May 7, 1890.)

TRIAL—FAILURE TO FIND.

A judgment will not be reversed for the want of a finding on an issue with respect to which there was no evidence, where the effect of such a finding would simply be to invalidate the judgment.

In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

For former hearing, see 21 Pac. Rep. 731.

J. H. Gove and Langhorne & Miller, for appellants. *J. B. Reinstein and J. M. Seawell*, for respondents.

BEATTY, C. J. The judgment appealed from in this case was affirmed by department 2 upon the grounds stated in the following opinion: "This is an action of ejectment. The answers, in addition to general denials, set up certain alleged special defenses. The court, trying the case without a jury, found that the plaintiff was the owner, and seised in fee, and entitled to the possession, of the premises in suit, and that defendants ousted plaintiff therefrom, and wrongfully and unlawfully withheld possession thereof; but there is no finding as to the alleged special defenses. Judgment went for plaintiff, and defendants appeal from the judgment upon the judgment roll alone. Appellants' main contention is that the judgment should be reversed because there is no finding on all the issues raised, or alleged to have been raised, by the pleadings. But a judgment will not be reversed for want of a finding on an issue with respect to which there is no evidence. In *Wise v. Burton*, 73 Cal. 175, 14 Pac. Rep. 683, this court say: 'This court will not reverse for want of a finding on an issue where there is no evidence in relation to such issue.' In the case at bar, which is brought here upon the judgment roll alone, we will not presume, against the correctness of the judgment, that there was evidence upon a point with respect to which there is no finding. This view of the case makes it unnecessary to consider the question whether or not the alleged special issues were material. We think the findings support the judgment. Judgment affirmed." 21 Pac. Rep. 731. Afterwards a rehearing in bank was ordered, because there appeared to be some conflict between the decision of *Wise v. Burton*, cited in the opinion of the department, and the later case of *Leviston v. Ryan*, 75 Cal. 293, 17 Pac. Rep. 239, and some earlier cases cited in the petition for rehearing.

A careful re-examination of all the decisions on this point has convinced us that there is no real conflict between the decision in *Wise v. Burton* and any of the earlier or later decisions. The proposition stated in *Wise v. Burton* is that this court will not reverse for want of a finding on an issue where there is no evidence in relation to such issue. This was a sufficiently accurate statement of the rule for the purpose of that case, in which the facts found fully supported the judgment, and the only issue undetermined arose upon an affirmative allegation of the answer. In the case of *Leviston v. Ryan* the plaintiff in ejectment relied upon a patent for the demanded premises, and the defense was that the patent was void. The facts found showed a valid patent, and there was no finding as to the fact alleged against its validity. But the court nevertheless held the patent invalid, and gave judgment for the defendant. The

judgment, being inconsistent with, and not supported by, the findings, was clearly erroneous, and was necessarily reversed. The author of the opinion, in response to a suggestion that it was impossible to make a finding on the point referred to, went on to remark that there is no question of fact material to the decision of a cause which cannot be settled by proof, or, in the absence of evidence, by presumption. This is perfectly true, but it is not in the slightest degree inconsistent with the point decided in *Wise v. Burton*. Undoubtedly the finding omitted in that case could have been made upon proof or presumption, and the want of it was not excused upon the ground that there was no evidence upon which the court could base a finding. The judgment was affirmed because every fact necessary to uphold it was found; and the complaint of the defendant and appellant that the court had failed to find upon the affirmative allegation in his answer setting up a fact inconsistent with the judgment was met by the proposition above stated,—that this court will not reverse for want of a finding upon an issue when there is no evidence in relation to that issue,—meaning, of course, an issue upon a point not necessary to sustain the judgment, but only sufficient, if proved, to invalidate the judgment. It will be found, we think, upon examination, that no decision in this court is inconsistent with this proposition.

The findings must be sufficient to support the judgment, and must contain nothing inconsistent with it; but a failure to find upon some issue, a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue. Judgment affirmed.

We concur: THORNTON, J.; FOX, J.; PATERSON, J.; MCFARLAND, J.

(84 Cal. 101)

WALSH v. WALSH. (No. 12,757.)

(*Supreme Court of California*. May 8, 1890.)

HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE.

Where, at the time of the marriage, the wife contributed to the business from her separate property all the stock and capital except a few goods put in by the husband, and the stock on hand at his death is less than the amount of her original investment, it is her separate property.

Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Geo. D. Collins, for appellant. *Mr. Sullivan*, for respondent.

MCFARLAND, J. The only question in this case is whether certain personal property was the separate property of the respondent, or community property of her deceased husband, James Walsh, and herself. The court found that it was respondent's separate prop-

erty, and appellant appeals from the judgment upon the judgment roll.

Respondent and James Walsh, deceased, intermarried in January, 1882. James Walsh had been carrying on a grocery business; but, at the time of the marriage, James was impecunious, and there was only \$20 worth of goods in the store. Respondent had, also, been conducting a store at another place; and she abandoned her own store, and put her stock of goods, amounting in value to \$500, in the store in which James had been doing business. She also put \$400 in money into the business. Upon this capital the two did business for three or four years, when James died. At the time of his death the stock of goods on hand, together with a little money and effects, the proceeds of the business, amounted to less than \$900, the amount originally invested in the business by respondent. James never put any money or goods into the business except the \$20 worth of goods above-mentioned. As the capital upon which the business was conducted was the separate property of respondent, we think that, although, of course, the particular goods were from time to time changed in the course of the business, still there is, under the circumstances, a sufficient tracing of the original capital to keep it impressed with the character of separate property. *Lewis v. Johns*, 24 Cal. 98. Judgment affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

(84 Cal. 279)

McMENOMY v. TALBOT *et al.* (No. 12,755.)

(*Supreme Court of California*. June 3, 1890.)

STATUTE OF FRAUDS—PLEADING—WEIGHT OF EVIDENCE.

1. In an action for the price of goods sold and delivered, it is not necessary that the complaint should show that the contract was not within the statute of frauds.

2. In an action for the price of beef sold and delivered, four persons to whom defendants had resold the beef testified that part of it was bad, and that defendants had had to make good the loss to them. Plaintiff and one of his employees testified that the beef was first-class, and in good condition, when sold, and was cured and packed under their supervision. *Held*, that a verdict for plaintiff would not be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Henry McCrea, for appellants. *John H. Dickinson*, for respondent.

HAYNE, C. This was an action for \$528.95 for goods sold and delivered. The defense was a breach of warranty of quality. The plaintiff had a verdict and judgment for the amount claimed, and the defendants appeal.

1. It is objected that the complaint does not allege that the contract was in writing, and that the contract was required to be in writing because the price was more than \$200. Even if the contract was required to be in writing, it was not necessary for the complaint to allege that it was written.

Wakefield v. Greenwood, 29 Cal. 599. But the contract was not required to be in writing, for the buyer accepted and received the goods; and, if it were otherwise, there is no specification of the insufficiency of the evidence in this regard.

2. It is claimed that the verdict is not supported by the evidence. The defendants admitted at the trial that the goods were sold and delivered as alleged, and that they had not been paid for; and the plaintiff agreed that, if they were of bad quality, he was not to recover for them. Thus the sole question submitted to the jury was as to the quality of the goods. In relation to this question the defendants introduced the depositions of four witnesses, to whom defendants had resold the beef, that part of it was bad and unfit for use, and proved by three witnesses that defendants had had to make good the loss. In opposition to this, the plaintiff testified as follows: "All the beef included in the bill of items, Exhibit A, was A No. 1, and in good condition at the time when I sold it to defendants; it was cured and packed, under my supervision, by my assistant, George B. Francisco, and myself." And it was admitted "that said George A. (?) Francisco, if present in court, would testify the same as plaintiff regarding the condition, quality, and packing of said beef." The jury evidently believed the plaintiff, and we think the case fairly within the rule as to conflict of evidence. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(84 Cal. 424)

SHARON v. SHARON. (No. 12,775.)

(Supreme Court of California. June 10, 1890.)

INJUNCTION—CONTEMPT—JURISDICTION.

Upon the hearing of a motion for alimony, it appeared that the decree of divorce was based upon a contract of marriage signed by the parties; that the divorce suit was still pending, an appeal having been taken from the decree entered therein; that before the present proceedings defendant sued plaintiff in the circuit court of the United States, and a decree was entered in such suit declaring said marriage contract fraudulent and void, and an order was entered perpetually enjoining the plaintiff from alleging the validity of the contract, and from making any use of the same in evidence or otherwise to support any claim under it. Upon interposing this decree on the hearing of the motion, the defendant asked the court to compel the plaintiff to obey said injunction. Held, that it was error to refuse this request and enter a judgment for alimony.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Wm. F. Herrin, for appellant. D. S. Terry, for respondent.

FOX, J. Upon the going down of the remittitur upon the appeal from the original

judgment granting a divorce in this cause, and from the order granting alimony and counsel fees, (75 Cal. 1, 16 Pac. Rep. 345.) plaintiff moved the court below for judgment against the present defendant, executor of the original defendant, and who had, pending the appeal, been substituted as sole defendant, for alimony under the said original order, as the same was modified by this court, and for the costs awarded by the original judgment of the court below, affirmed by this court. Defendant opposed this motion, and introduced certain evidence in support of his opposition, which need not here be repeated, but which presented the facts upon which his opposition was grounded. The court overruled all the objections made by defendant, and ordered judgment against him, and in favor of plaintiff, for \$6,614, as alimony, and \$825.25 as costs, from which judgment this appeal is taken.

1. The defendant made the point in the court below, and insists upon it here, that plaintiff was not entitled to such judgment, for that she had not presented or exhibited any claim for alimony or costs to the executor of William Sharon or to the judge of the probate court. While it is a general rule of statute law in this state that claims against the estates of deceased persons, upon money demands, whether in suit or in judgment, must be presented to the executor or administrator for approval or rejection before any action can be maintained thereon, the question of whether or not it would apply to this peculiar case is not free from doubt, and it is one entirely unnecessary to be determined on this appeal. There is another point in the case, now coming up for the first time squarely on the record, which determines the rights of the parties, not only upon this appeal, but which must govern the courts of this state in all future proceedings which may be attempted in the action out of which the judgment or order here appealed from has come. To that point we address ourselves as conclusive of the case.

2. From the record in this case, and upon this appeal, it appears that the original judgment, which was the basis of the judgment now appealed from, was based upon certain findings, which are given in the transcript; that among them was one to the effect that on the 25th day of August, 1880, the plaintiff and defendant, William Sharon, each signed a certain declaration of marriage, a copy of which is set out in the finding, and that this was the only written declaration, contract, or agreement of marriage ever entered into between the parties; and, as a conclusion of law, the court held that since the 25th of August, 1880, the parties have been and are husband and wife. The question of marriage or no marriage was the real subject of contest in this case,—the one bitterly contested question. Without a finding of marriage, the judgment must have been for the defendant, and there would have been no judgment for either costs or alimony.

A marriage being found, and it being further found that defendant had violated the obligations imposed upon him by the marriage relation, judgment for divorce, alimony, and costs followed. From that judgment two appeals were taken by the defendant,—one direct, on the judgment roll alone; the other from an order refusing to vacate the decision and grant a new trial. A reversal of the court below on either of these appeals was fatal to that judgment. Until both were disposed of the case was still pending. When Sharon died, and when this application for final judgment for alimony and costs was made, only one of those appeals had been disposed of; so that the case was then still pending.

Under these circumstances, and on the application for the judgment now appealed from, this defendant proved that nearly a month before the commencement of this action the original defendant, William Sharon, commenced an action against this plaintiff, by the name of Sarah Althea Hill, for the purpose of obtaining a decree canceling the identical contract which, by the court in this case, was found to be the only contract or agreement of marriage ever made by or subsisting between the parties, on the ground that the same was fabricated, false, and forged, and introduced the judgment roll in that case, showing the proceedings had therein, culminating in a final judgment, filed and entered January 15, 1886, as of September 29, 1885, adjudging and decreeing "that said instrument is false, counterfeited, fabricated, forged, and fraudulent, and is therefore utterly null and void," and "that the same be and is hereby canceled and utterly annulled." And it was "further ordered, adjudged, and decreed that the respondent herein, Sarah Althea Hill, [the plaintiff in this cause,] her heirs, executors, administrators, and all persons claiming any interest thereunder by or through said respondent, and her and their agents and attorneys, be, and they and each and all of them are hereby, perpetually enjoined from alleging the genuineness or validity of said instrument, and from making any use of the same, in evidence or otherwise, to support any right or claim under it, or making any claim, or setting up any right, interest, or claim of any kind, under or by virtue of said instrument or declaration of marriage, either as wife of complainant, or for any interest in property or right of any kind or nature against said complainant, his heirs, executors, administrators, or successors in interest, and that complainant recover his costs of suit."

The record shows that the circuit court of the United States (the court in which such action was brought) acquired jurisdiction of the persons and subject-matter before the commencement of this action. Consequently, no matter when its judgment was rendered, whether before or after the date of the judgment of any other tribunal subsequently acquiring jurisdiction over the same persons

and subject-matter, the final judgment in that case became binding and conclusive as to that subject-matter, upon all persons and upon all other courts and tribunals whatsoever. *Taylor v. Taintor*, 16 Wall. 370; *Shoemaker v. French*, Chase, 267; *Gaylord v. Railroad Co.*, 6 Biss. 286; *Union Mut. Life Ins. Co. v. University of Chicago*, 10 Biss. 191, 6 Fed. Rep. 443; *Mason v. Piggott*, 11 Ill. 88; *Bellows Falls Bank v. Rutland & B. R. Co.*, 28 Vt. 470; *Stearns v. Stearns*, 16 Mass. 170; *Insurance Co. v. Howell*, 24 N. J. Eq. 239; *Brooks v. Delaplaine*, 1 Md. Ch. 354; *Withers v. Denmead*, 22 Md. 146; *New Orleans v. Steam-Ship Co.*, 20 Wall. 393. The judgment of the court below for alimony and costs was essentially based upon this identical contract or instrument, for the court expressly finds that it was the only contract or agreement of marriage between the parties. There could be no marriage without a contract or agreement of the parties. Without marriage there could be no divorce, and without this judgment for divorce there would have been no judgment for alimony or costs. This judgment in the circuit court was and is the only final judgment on the question of the validity of the contract upon which this alleged marriage depends. Upon the application to have the judgment for alimony and costs entered up against this executor, he interposed this judgment of the circuit court, showing an adjudication, the legal effect of which was to determine that under this contract there had been no marriage, and consequently that there could be no divorce, and forever enjoining the plaintiff from asserting any marital or property rights under it, and asked that the court compel her in this action to obey said injunction. It was error in the court to deny this request. In *Engles v. Lubeck*, 4 Cal. 32, this question was fully considered and passed upon by this court. The action was ejectment, and the defendant moved for a stay of proceedings on the ground that he had commenced a suit in the fourth district court, (a court of co-ordinate jurisdiction,) and obtained an injunction against the plaintiffs, restraining them from disturbing his possession of the land in question. This court, in discussing the question, says: "It is said, however, that the injunction operates upon the party, and not upon the court, and that, therefore, the court of the seventh district was right not to regard it, and the defendant's remedy is by attachment for contempt in the fourth district. We prefer to lay down a different rule. The remedy suggested, for aught that we can see, may be fraught with difficulty, and involve the parties in needless expense. When a party obtains an injunction to restrain the prosecution of a suit, he acts upon the presumption that the process of the court will be respected, and it may reasonably be supposed that he declines to make the necessary preparation for the trial of his case. This ought certainly to be considered a good reason even for granting a continuance. But we think that

the propriety of the observance of the injunction, by the court to whose notice it is brought, may be properly placed upon higher grounds. The comity which one court owes to another of concurrent jurisdiction should always prevent the one from lending itself as an instrument in permitting a contempt of the process of the other. The one should regard the party attempting to proceed in defiance of the authority of the other as laboring under the same disability to ask for the action of the court as if he was an alien enemy, or under the ban of a decree of outlawry at common law. Such being the opinion we entertain upon this point, we cannot permit the judgment to stand." Page 33. To claim alimony and costs under a judgment based upon that alleged marriage contract was to make a claim under and by virtue of that writing, in violation of the injunction.

Several other points are made by the appellant on the record, but we do not deem it necessary to consider them. Attention is also called to the fact that, since the entry of the judgment appealed from, the appeal from the order refusing to vacate the original decision, and denying the motion for new trial, has been reversed by this court. This fact is not presented by the record, and it is claimed by the respondent that we cannot consider it on this appeal. We do not base our decision upon this appeal on that fact, or pass upon the question of whether or not it can be considered for that purpose; but this court is certainly bound to take judicial notice of its own decisions, and when, for any cause, it reverses any proceeding had in a court below, it may with propriety look into its own records for the purpose of ascertaining what instruction, if any, it is proper to give the court below. The legal effect of the reversal on said former appeal (79 Cal. 633, 22 Pac. Rep. 26, 131) was to vacate and set aside the judgment for divorce upon which this judgment for alimony and costs was based, and there is now no judgment whatever in favor of plaintiff, upon which to base the motion upon which this judgment was entered.

The judgment appealed from, being the judgment entered in this cause June 23, 1888, on the motion of plaintiff made May 5, 1888, is reversed, and the court below is directed to enter an order denying said motion.

We concur: WORKS, J.; PATERSON, J.

(84 Cal. 433)

SHARON v. SHARON. (No. 12,776.)

(Supreme Court of California. June 10, 1890.)

Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Wm. F. Herrin, for appellant. D. S. Terry, for respondent.

Fox, J. Tevis and Baldwin were the sureties on the undertaking given on the appeal from the judgment originally entered in this cause. (75 Cal. 1, 16 Pac. Rep. 345,) and when, on the 5th day of May, 1888, the plaintiff moved the court below for judgment against the present defendant, executor of

the will of the original defendant, for alimony and costs, she also moved that the judgment be entered up as a judgment against the sureties, as well as against said defendant, and in entering the judgment it was so done. From the judgment so entered against them the sureties appeal. So long as the plaintiff was not entitled to recover against the defendant, she could not recover against the sureties. Parnell v. Hancock, 48 Cal. 452. On the authority of that case, and of Sharon v. Sharon, ante, 1100, (No. 12,775, this day decided,) the judgment appealed from in this case, being the judgment entered in this cause against Lloyd Tevis and E. J. Baldwin, June 23, 1888, upon the motion of the plaintiff, made May 5, 1888, is reversed, and the court below is directed to enter an order denying plaintiff's said motion.

We concur: WORKS, J.; PATERSON, J.

(83 Cal. 589)

BULWER CON. MIN. CO. v. STANDARD CON. MIN. CO. (No. 13,192.)

(Supreme Court of California. April 30, 1890.)

QUIETING MINING TITLE—PLEADING—IMMATERIAL ISSUES.

1. Rev. St. U. S. § 2322, provides that the owner of a mining claim shall have the exclusive right to the possession of all veins, throughout their entire depth, the tops or apexes of which lie inside of the surface lines of his claim extended downward vertically, though such veins may so far depart from a perpendicular in their downward course as to extend outside the vertical side lines of the surface location. Held that, in action between two adjoining mine-owners to quiet title to a mining claim, where there is no dispute as to the surface boundaries, and each admits that the other is entitled to all veins, throughout their entire depth, having apexes within the vertical side lines of his claim, an allegation in the complaint that a vein known as the "Ralston No. 1" has its apex within the side lines of plaintiff's claim, and an allegation in the answer that a vein known as the "West Bullion" has its apex within defendant's claim, do not raise any material issues, in the absence of an averment that these two veins are identical.

2. When no material issues arise directly from the pleadings, the findings of fact in the case are also immaterial, though both parties go to trial without objection.

3. Under Code Civil Proc. Cal. § 739, which provides that, if defendant in an action to quiet title disclaims in his answer any interest or estate in the property, plaintiff cannot recover costs, it is immaterial whether or not a defendant who in his answer makes such a disclaimer has ever before claimed an interest in the property, as in either event plaintiff would be entitled to judgment without costs.

4. The object of an action to quiet title is to enable plaintiff to dispel whatever may be regarded, not only by defendant, but also by third persons, as a cloud on his title, depreciating its value; and therefore, though a formal allegation of adverse claim may be necessary in the complaint, under Code Civil Proc. Cal. § 738, providing that the action will lie to determine "adverse claims," it is immaterial whether or not defendant actually asserted such adverse claim before the commencement of the action.

Commissioners' decision. Department 1. Appeal from superior court, Mono county; O. F. HAKES, Judge.

Action to quiet title by the Bulwer Consolidated Mining Company against the Standard Consolidated Mining Company. There was a judgment in plaintiff's favor, and defendant appeals. Rev. St. U. S. § 2322, provides that the locators of mining locations "shall have the exclusive right of possession and enjoyment of all the surface included

within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location." Code Civil Proc. Cal. § 738, provides: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim." Section 739 provides: "If the defendant in such action disclaims in his answer any interest or estate in the property. * * * the plaintiff cannot recover costs."

P. Reddy and C. A. Schuman, for appellant. *Lloyd & Wood and Richard S. Miner*, for respondent.

VANCLIEF, C. Action to quiet title to a mining claim in Mono county, brought under section 738 of the Code of Civil Procedure. Each party is a California corporation. The complaint is in the usual form of complaints under said section, and describes a strip of land 1,188 feet in length, containing two acres, "known as the 'Ralston No. 1 North Mine or Vein,' * * * being mineral entry No. 48 in the series of the land-office at Bodie in said state, designated by the surveyor general as 'Lot No. 44,' " of which the plaintiff alleges that it is the owner and in possession, "with exclusive right of possession and enjoyment of all land included within the exterior lines of said survey, and of 1,188 linear feet of said Ralston No. 1 North mine or vein, lode or deposit, for the length hereinbefore described, throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges, or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior lines of said survey at the surface extended downward, vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey. That the defendant makes and asserts a claim adverse to the plaintiff for an estate and interest in said real property, mine, mining claim, and location. That the claim of the said defendant is without any right whatever, and that the said defendant has not any right, title, or interest whatever in said lands and premises, or any part thereof."

In its answer the defendant "admits that plaintiff is the owner and in possession, and entitled to the possession, of that certain mining claim and location described in said complaint, as the 'Ralston No. 1 North Mine or Vein,' but denies that plaintiff is or ever was the owner, or that it has or ever had the exclusive right of possession or enjoyment, of all or any of the land described in the complaint, except the surface included within the lines of said location, and all veins,

lodes, ledges, if any such there be, throughout their entire depth, the tops or apexes of which lie inside of such surface lines extended downward vertically." The answer then avers that the defendant owns and possesses a piece of land, being mineral entry No. 46 in the land-office at Bodie, and designated by the surveyor general as "Lot No. 46," being 1,500 feet in length, and containing 15.44 acres, "commonly known as 'West Bullion Lode,'" and describes the exterior boundaries thereof. The answer then further alleges that this last-mentioned claim "adjoins the mining claim of the plaintiff described in the complaint, and lies on the easterly side thereof," and that defendant has the exclusive right of possession and enjoyment of all the surface included within the lines of this last-described location, "and of all veins, lodes, and ledges throughout their entire depth, the tops or apexes of which lie inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular line in their course downward as to extend outside the vertical side lines of such surface location; * * * that within said West Bullion lode mining claim there is a vein commonly known and designated as the 'West Vein' of the West Bullion lode location, which vein lies near the western boundary line of said West Bullion lode mining claim, said boundary line being the west side line of said West Bullion lode location, and the east side line of said Ralston No. 1 North mining claim; that the top or apex of said west vein of the said West Bullion lode location lies inside the surface lines of said West Bullion lode location extended downward vertically. That said west vein of said West Bullion lode location, at some points thereon, so far departs from a perpendicular in its course downward as to extend outside the vertical side lines of defendant's said surface location, and to and within the vertical side lines of plaintiff's said surface location; that defendant claims the right to follow, work, possess, and enjoy the said west vein of said West Bullion lode location throughout its entire depth, and the right to follow, work, possess, and enjoy all veins, lodes, and ledges throughout their entire depth, the tops or apexes of which lie inside the surface lines of defendant's said location extended downward vertically, although such veins, lodes, or ledges may in their courses downward extend outside of the vertical side lines of defendant's said mining claim, and into the land and mining location described in plaintiff's complaint herein; that defendant does not make or assert, and has never made or asserted, any claim adverse to plaintiff for any estate or interest in the mine, mining claim, or location described in the complaint, or any claim of right to enter upon the surface of the same, or any claim of right to enter upon any portion thereof, except the right, hereinbefore alleged and claimed, to follow, work, possess, and enjoy the veins, lodes, and ledges so belonging to

defendant as aforesaid. And defendant denies that its said claim is without right, and denies that the defendant has not any right, title, or interest in the lands described in said complaint."

At the time of filing its answer the defendant also filed what it denominates a "cross-complaint," which is substantially the same as its answer in all respects, except the addition thereto of the following two paragraphs and the prayer, viz.: "That plaintiff makes and asserts a claim adverse to defendant for some estate or interest in said West Bullion lode location, and particularly in said west vein thereof, and claims and asserts that the same, or some part thereof, is part of the said mine or mining claim of plaintiff; that the claim of said plaintiff is without any right whatever, and the said plaintiff has no right, title, or interest whatever in said West Bullion lode mining claim, or in said West Vein lode of said West Bullion lode location, or any part thereof." Then follows the usual prayer in complaints to quiet title. In plaintiff's answer to the cross-complaint, it is admitted "that defendant is the owner and in possession of that certain mining claim and location described in said cross-complaint as the 'West Bullion Lode,' but denies that said defendant is or ever was the owner, or that it has or ever had the exclusive right of possession or enjoyment, of all or any of the land included within the exterior lines of the survey described in said cross-complaint, except the surface included within the lines of said location, and all veins, lodes, and ledges, if any such there be, throughout their entire depth, the tops or apexes of which lie inside of such surface lines extending downward vertically. Plaintiff denies that within said West Bullion lode mining claim there is a vein commonly known and designated as the 'West Vein' of the West Bullion lode location, or otherwise designated, which vein, or any vein, lies near the western boundary line of the said West Bullion lode mining claim. Plaintiff denies that the top or apex of said west vein of the said West Bullion lode location lies inside of the surface lines of said West Bullion lode location extending downward vertically." The answer to the cross-complaint then repeats the substance of the complaint as to plaintiff's right and title to the Ralston No. 1 North mine, and adds thereto the following: "That said Ralston No. 1 North mine or vein adjoins the mining claim of the defendant, described in said cross-complaint, and lies on the westerly side thereof. That, within the said Ralston No. 1 North mine or mining claim, there is a vein commonly known and designated as the 'East Vein' of the Ralston No. 1 North mine location, which vein lies near the eastern boundary line of said Ralston No. 1 North mine or mining claim, said boundary line being the east side line of said Ralston No. 1 North mining claim, and the west side of the said West Bullion lode location; that the top or apex of the said east vein of

the said Ralston No. 1 North mining claim lies inside of the surface lines of said Ralston No. 1 North mining claim location, extending downward vertically; that said east vein of said Ralston No. 1 North mining claim location, at some points thereon, so far departs from a perpendicular in its course downward as to extend outside of the vertical side lines of plaintiff's said surface location, and to and within the vertical side lines of defendant's said surface location; that plaintiff claims the right to follow, to work, to possess and enjoy the said east vein of said Ralston No. 1 North mining location throughout its entire depth, and the right to follow, work, possess, and enjoy all veins, lodes, and ledges throughout their entire depth, the tops or apexes of which lie inside of the surface lines of plaintiff's said location, extending downward vertically, although such veins or ledges may in their courses downward extend outside of the vertical side lines of plaintiff's said mining claim, and into the land and mining location described in defendant's cross-complaint herein; that plaintiff does not make or assert, and has never made or asserted, any claim adverse to defendant for any estate or interest in the mine, mining claim, or location described in the cross-complaint, or any claim of right to enter upon the surface of the same, or any claim of right to enter upon any portion thereof, except the right, hereinbefore alleged and claimed, to follow, work, or possess and enjoy the veins, lodes, and ledges so belonging to the plaintiff as aforesaid. And plaintiff denies that its said claim is without right, and denies that plaintiff has not any right, title, or interest in the lands described in said cross-complaint."

It is apparent from these pleadings that all the lands described therein are mineral lands containing veins and lodes of rock in place, and that such right and title as either party has thereto was acquired under and depend upon the provisions of chapter 6, tit. 32, of the Revised Statutes of the United States. Upon this assumption, it is clear that defendant's answer to the complaint neither raised nor tendered any material issue. It expressly admits that plaintiff is the owner, in possession, and entitled to the possession, of the land described in the complaint, and of all veins, lodes, and ledges throughout their entire depth, the tops or apexes of which lie inside of plaintiff's exterior surface lines extended downward vertically; and it expressly disclaims any estate or interest therein adverse to the plaintiff. It is true that it denies that it ever made any such adverse claim; but, in view of section 739 of the Code of Civil Procedure, this issue, in connection with the disclaimer by the defendant, is immaterial, since a decision of it either way would not affect the judgment. That is to say, when, in an action to quiet title to land, the defendant disclaims any interest or estate in the premises, it is immaterial whether or not he had ever before claimed an inter-

est or estate therein adversely to the plaintiff; for in either event the plaintiff would be entitled simply to a judgment quieting his title, without costs.

The new matter alleged in the answer relates solely to a distinctly different piece of land from that described in the complaint, and to a vein (the west vein) having its apex therein, and therefore being a part of it, and being no part of the land described in the complaint, although in its course downward it may pass through the vertical plane extended down from the east side line of plaintiff's land. Rev. St. U. S. § 2322. Conceding the truth of all this new matter, it does not conflict with any alleged right of the plaintiff, or constitute any defense or counter-claim to any matter of the complaint, and therefore might have been stricken from the answer as irrelevant. The cross-complaint of the defendant relates solely to the same land and west vein therein, which is the subject of the new matter in the answer, and is wholly inappropriate, for the following reasons: (1) The affirmative relief sought by it does not affect "the property to which the action [in which it is filed] relates," (Code Civil Proc. § 442,) as the action only relates to the ownership, and right to the possession, use, and enjoyment, of the surface of the land described in the complaint, and of all veins, lodes, ledges, and deposits throughout their entire depth, the tops or apexes of which lie inside the exterior surface lines extended downward vertically, although such veins, lodes, ledges, or deposits, in the downward course, may so far depart from a perpendicular as to extend outside the vertical planes of the side lines, and not to the land described in the cross-complaint, or to the west vein, or any other vein, lode, ledge, or deposit, the top or apex of which lies within vertical planes of the side lines of the land described in the complaint; (2) even if the defendant had claimed ownership of, or any less estate or interest in, the land, veins, lodes, or ledges described in the complaint, there would have been no proper occasion for a cross-complaint, (*Wilson v. Madison*, 55 Cal. 5; *Miller v. Luco*, 80 Cal. 257, 22 Pac. Rep. 195; *Association v. Wagner*, 61 Cal. 354;) and the learned counsel for the cross-complainant, in his reply brief, admits that "both the cross-complaint and answer thereto were unnecessary." It does not appear, however, that the plaintiff made any objection to the cross-complaint, or to the new matter pleaded in the answer.

Conceding that, under the circumstances, it was admissible to try the case made by the cross-complaint and answer thereto, it seems difficult to determine what were the material issues to be tried. Each party had expressly admitted the surface boundary lines of the land as claimed by the other. Each party expressly admitted that the other was entitled to all veins, lodes, and ledges throughout their entire depth, the tops or apexes of which lie within its vertical side lines, although in

their course downward they might pass through the vertical side lines of the land of the other party. Each party admitted that the land of the plaintiff and that of defendant adjoined each other on the surface. Each party expressly disclaimed any interest or estate in the surface of the land claimed by the other, or in any vein, lode, or ledge, the top or apex of which was within the vertical side lines of the land of the other, however far such veins, lodes, or ledges might pass outside of such vertical side lines, and into the space between the vertical side lines of the land of the other party. The cross-complaint alleges that within the land of the defendant, and near the western boundary side line thereof, there is a vein called and known as the "West Vein of the West Bullion Lode Location," the top or apex of which lies inside of the vertical side lines of defendant's land, which at some points below the apex extends outside of defendant's vertical side lines of the plaintiff's land, and that plaintiff claims this west vein, or some part thereof, adversely to the defendant. The answer of plaintiff denies all these allegations of the cross-complaint as to the "west vein of the West Bullion lode," and alleges that, within the plaintiff's land, and near the eastern boundary line thereof, there is a vein commonly known and designated as the "East Vein of the Ralston No. 1 North Mine Location," the top or apex of which lies inside of the surface lines of plaintiff's land, and which, at some points thereon in its course downward, extends outside of the vertical side lines, and within the vertical side lines of defendant's surface location. So far as any information is to be derived from the pleadings, it appears expressly that the "west vein of the West Bullion," and the east vein of the Ralston No. 1, are distinct veins; for they are designated by distinctly different names, and are described as being located in different places; there being no dispute as to the true location of the western boundary line of the Bullion location, or as to the eastern boundary line of the Ralston No. 1 on the surface. These lines are distinctly described in the pleadings of the respective parties by courses, distances, and monuments; and it is expressly agreed that they coincide,—that is, that the western boundary line of the West Bullion is the eastern boundary line of the Ralston No. 1. It is nowhere alleged or intimated in the pleadings of either party that these different names and descriptions are intended to designate the same vein. Why not as well contend that, by the different names and descriptions of the surface claims, the parties intended to designate the same land, since the names and descriptions of the veins are quite as distinct as those of the surface claims? The allegation of new affirmative matters in plaintiff's answer to defendant's cross-complaint is subject to the same objections as above stated to the new matter in defendant's answer to plaintiff's complaint.

It relates solely to a different lot of land, and to a different vein, from those described in the cross-complaint, and is not inconsistent with the cross-complaint; nor does it constitute a defense or counter-claim thereto. The express object of the cross-complaint is to quiet defendant's title to the land described therein, and particularly to the west vein, the apex of which is alleged to be within the side lines thereof. While the plaintiff admitted, and even stipulated, that the defendant owned the land described in the cross-complaint, and all veins having their apex within the vertical side lines thereof, of what consequence is it that plaintiff denied the location of the west vein as alleged and described in the cross-complaint, without alleging that its apex was within the side lines of plaintiff's land, or in some way claiming title to it? Suppose the court had rendered judgment for the defendant on the cross-complaint and the answer thereto, without evidence. Would the plaintiff have any just or lawful ground of complaint? If the west vein exists, and its apex is situated as alleged in the cross-complaint, the defendant's title to it is unquestionable on the pleadings, and would properly have been quieted by the supposed judgment; but if, on the other hand, no such vein exists, or, existing, has its apex within plaintiff's side lines, the supposed judgment would have had no effect upon it, or upon the plaintiff's title thereto. Had the plaintiff, in its answer to the cross-complaint, averred that the "east vein of the Ralston No. 1," therein described, was the same vein as that described in the cross-complaint as the "west vein of the West Bullion," in addition to the other averments therein, the answer might have raised the material issues (1) as to whether or not those different names and descriptions indicated the same vein; and, if so, (2) whether the apex of that vein was within the vertical side lines of West Bullion, or within the side lines of the Ralston No. 1,—upon the determination of which depended the decision of the ultimate question of law, as to whether that vein was the property of the plaintiff, or the property of the defendant.

The cases, upon the complaint and answer thereto, and upon the cross-complaint and answer thereto, appear to have been tried together by a jury called to assist the court, and to which the court submitted 17 special issues. Those special issues, and the jury's answers, are as follows: "(1) Is there a vein within the West Bullion mine location, commonly known and designated as the 'West Vein of the West Bullion Mine Location?' Answer. Yes; so designated. (2) If your answer to the last question be 'Yea,' then does the said west vein of the said West Bullion mine location lie near the boundary line of the said West Bullion location; and is the said west boundary line of the said West Bullion location the east side line of the Ralston No. 1 North mining claim? A. Yes. (3) Is the top or apex of the said west

vein of said West Bullion mine location within the surface lines of the said West Bullion mine location extended downward vertically? A. Taking the evidence and the inclination of the ledge, as far as developed, between upraise 3 and 4, yes. (4) Does the said west vein of the said West Bullion mine location, at any point or points thereon, so far depart from perpendicular in its course downward as to extend outside of the vertical side lines of the said West Bullion mine location, and to and within the vertical side lines of the Ralston No. 1 North mining claim? A. Yes. (5) Did the defendant ever before, or at the time of, the commencement of this action, or at any time, make or assert any claim adverse to the plaintiff for any estate or interest in the Ralston No. 1 North mining claim, or any ledge or lode, the apex of which lies within the surface lines of said Ralston No. 1 North mining claim extended downward vertically, or any claim of right to enter upon the surface of the same, or any claim of right to enter upon any portion thereof? A. No. (6) Did the defendant ever before, or at the time of the commencement of this action, make or assert any claim adverse to the plaintiff for any estate or interest in any lode, ledge, vein, or deposit, the apex of which lies inside of the surface lines of the said Ralston No. 1 North mining claim extended downward vertically? A. Yes; near upraises 3 and 4. (7) Did the plaintiff, prior to and at the time of the commencement of this action, assert a claim adverse to the defendant for some estate or interest in said west vein of said West Bullion mine location, if you find that such vein exists; and did the plaintiff before and at the time of the commencement of this action claim and assert that the top or apex of the said west vein of the said West Bullion mine location was within the surface lines of the said Ralston No. 1 North mining claim drawn downward vertically, and that it was the owner of the said west vein of said West Bullion mine location? A. Yes. (8) Is the vein described in the cross-complaint in this action as the 'West Vein of the West Bullion Mine Location' the same vein or lode which is described in the answer of the plaintiff to the cross-complaint in this action as the east vein of the Ralston No. 1 North mining location, and is the so-called west vein of the West Bullion mine location, and the east vein of the Ralston No. 1 North mining claim, the only vein or lode the right to the ownership of which is in dispute in this action; and is it the vein or lode claimed by both the plaintiff and the defendant in this action? A. Yes. (9) Is the top or apex of the vein or lode mentioned in the last question within the surface lines of the said West Bullion mine location drawn downward vertically? A. Taking the evidence and inclination of the ledges as far as developed between upraises 3 and 4, yes. (10) Is the top or apex of the vein last mentioned within the surface lines of Ralston No. 1 North

mining claim extended downward vertically? A. Yes; at upraise No. 6. (11) Is a line drawn from a post designated by the witnesses in this action as 'Post No. 5,' to the post designated by the witnesses in this action as the 'South-West Corner Post of the West Bullion Mine Location,' the west boundary line of said West Bullion mine location? A. Yes. (12) Is the line mentioned in the last question the east boundary line of Ralston No. 1 North Mining claim, so far as said Ralston No. 1 North mining claim extends along said line? A. Yes. (13) Is the boundary line between Ralston No. 1 and the West Bullion claim that part of the straight line from post No. 5 to the post on the ground which is claimed to be at the south-east corner of Ralston No. 2, which lies north of a straight line from the point of commencement of said Ralston No. 1, cutting the said straight line first above named, as surveyed by Mr. Westcott? A. No. (14) Is the boundary line between Ralston No. 1 and the West Bullion claim the straight line from post No. 5 to the post on the ground which is claimed to be at the south-west corner of the West Bullion claim? A. Yes. (15) Is there one continuous ledge on the 200 level of the Bulwer Company running from the south line of Ralston No. 1 to the end of the drift, ending at the point on plaintiff's map marked 'K'? A. According to the testimony and character and course of ledge as far as developed, yes. (16) Is the apex of such one continuous vein mentioned in the last question within the surface boundary lines of Ralston No. 1 extended downward vertically? If so, to what extent? A. Yes, at upraise No. 6. (17) Is the apex of such last-mentioned continuous vein found at any place within the surface boundary line of the West Bullion claim extended downward vertically? If so, at what place, and to what extent. A. Taking the evidence and inclination of the ledge as far as developed between upraises 3 and 4, yes."

The court adopted as its own findings of fact the entire verdict of the jury, except the verdict on the sixth special issue, which was rejected. In addition to the verdict as adopted, the court found the following facts: "That the West Bullion mine location exists and existed many years prior to the commencement of this action, and that the description of said West Bullion mine location set forth in the answer and cross-complaint in this action is correct, and that said West Bullion mine location was made, and the same existed, prior to the location of the Ralston No. 1 North mining claim; that the defendant was at the time of the commencement of this action, and for many years prior thereto, and now is, the owner of, and in the possession, and entitled to the possession, of the said West Bullion mine; that the said West Bullion mine was located upon veins or lodes of quartz or other rock in place bearing gold or silver, and that the defendant was at the time of the commencement of

this action, and for a long time prior thereto, and now is, entitled to the exclusive right of possession and enjoyment of all the surface included within the lines of its said location, and all veins, lodes, and ledges throughout their entire depth, the tops or apexes of which lie inside of said surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface location, and that the said West Bullion mine location adjoins the Ralston No. 1 North mining claim on the easterly side thereof; that the said Ralston No. 1 North mining claim was a location on a lode, ledge, or vein of quartz or other rock in place bearing gold or silver, and that the plaintiff was at the commencement of this action, and for a long time prior thereto, and now is, the owner of, and in the possession of, and entitled to the possession of, the said Ralston No. 1 North mining claim, described in the plaintiff's complaint. (18) In addition to the foregoing findings, the court finds that the one continuous ledge in the drift on the 200-foot level of the Bulwer Consolidated Mining Company's claims, mentioned and described in the foregoing finding No. 15, is the same ledge which is described in the evidence as existing in upraises 3, 4, 5, and 6, designated and shown on plaintiff's map, Exhibit H, and that defendant and cross-complainant make no claim to said ledge in said upraises Nos. 5 and 6; it having disclaimed at the trial all rights of ownership to said ledge in said upraises Nos. 5 and 6. (19) The court further finds that all that portion of the ledge described and referred to in the foregoing findings Nos. 15 and 18, lying north of said upraise No. 4, and the apex thereof, lies within the surface lines of said Ralston No. 1 mining claim extended downward vertically, and that defendant asserted an adverse claim to said ledge between upraises Nos. 4 and 5."

Thereupon the court adjudged and decreed, substantially, that the plaintiff is the owner in possession, and entitled to the exclusive right of possession and enjoyment, of all the surface of the land described in the complaint as the "Ralston No. 1 North Mine," and of all veins, lodes, and ledges, the tops or apexes of which lie inside of the surface boundary lines thereof extended downward vertically, etc., including that portion of the vein described in the answer to the cross-complaint as the "East Ledge of the Ralston No. 1 North Mining Claim," commencing at the north side of the upraise No. 4, lying partly within the surface boundary of Ralston No. 1 North mine, and partly within the surface boundary lines of the West Bullion mine; thence running in a northerly direction to the end of the drift marked "K" on the plaintiff's maps, Exhibits B and H,—being the extreme northerly drift on the 200-foot level in said Ralston No. 1 claim,—and further decreeing that all adverse claims of defendant

to the above described property are invalid, and that plaintiff's title thereto be quieted against all such adverse claims. The court further adjudged and decreed that the defendant is the owner in possession, and entitled to the exclusive right of possession and enjoyment, of all the surface included within the boundary lines of the West Bullion lode location, as described in the cross-complaint and in defendant's answer to plaintiff's complaint, and of all veins, lodes, and ledges, the tops or apexes of which lie inside of the surface boundary lines thereof extended downward vertically, etc., including that portion of the vein described in the cross-complaint as "the west vein" of the West Bullion location, lying between the north side of said upraise No. 4 and the boundary end line of said Ralston No. 1 North mine, being that portion of said vein commencing at the north side of said upraise No. 4, and thence running in a southerly direction to a vertical plane drawn downward through the southern end line of said Ralston No. 1 claim, and further decreeing that defendant's title to said West Bullion surface ground, and all veins, lodes, and ledges last above-mentioned, be quieted against all adverse claims of the plaintiff, and further ordered that each party pay its own costs.

The appeal by the defendant is from the whole and every part of the judgment, upon the judgment roll alone, from which it does not appear that there was any demurrer to any pleading, or any objection to the mode of trial.

1. Counsel for appellant claim that the findings of fact do not support the conclusions of law or the judgment, "in that there is no finding to the effect that the defendant asserted a claim adverse to plaintiff to any part of the property described in the complaint, or to the ledge in dispute, before the commencement of the action," and thence concludes that "the judgment should be against the plaintiff, and in favor of the defendant." But, as above shown, this conclusion does not follow, even if it is true that there is no such finding. Conceding that the averment of an adverse claim is necessary in a complaint to quiet title under section 738 of the Code of Civil Procedure, yet, if the defendant, in his answer, claim an adverse interest or estate in the land described in the complaint, a denial that he had made such adverse claim before the commencement of the action would be immaterial. If, on the other hand, the defendant, as here, expressly disclaim any estate or interest in the land described in the complaint, and at the same time deny that he ever made any such adverse claim, the plaintiff would still be entitled to a decree quieting his title, but without costs. This is implied in section 739 of the Code of Civil Procedure. The object of sections 738 and 739 is to enable the plaintiff in such action to dispel whatever may be regarded by third persons, as well as by the defendant, as a cloud upon his title; for, even though the

defendant makes no adverse claim, third persons may regard plaintiff's title as being subject to an adverse claim by the defendant, which would be a cloud upon plaintiff's title, depreciating its value, and which he would be entitled to have removed, by the decree of the court, so that his record title may appear perfect, not only to the defendant, but to all persons whom it may thereafter concern. The only purpose of the averment of an adverse claim is to notify the defendant of the nature of the action, and that he is required to set forth and litigate any adverse title he may claim to have, or to disclaim any such adverse title either expressly or by default. The case of *Pfister v. Dascey*, 65 Cal. 403, 4 Pac. Rep. 393, cited by appellant, is not in point. The point under consideration here was not presented in that case. The only material issues tendered by a complaint in this class of cases relate to the title of the real property described in the complaint. Therefore, there was no necessity for a finding upon the formal but immaterial issue as to whether the defendant had asserted an adverse title before the commencement of the action.

2. Counsel for appellant further contend that material findings of facts by the court are inconsistent with each other. If the findings referred to by counsel as being inconsistent are material, I think this point should be sustained; but it seems to me that all the findings of fact are immaterial, for the reason that no material issue arises upon the written pleadings. The answer of defendant admits every material, issuable averment of the complaint, as it only denies the averment that the defendant had made any adverse claim to an interest or estate in the real property described in the complaint. Its new matter, as above shown, relates solely to a different lot of land, and to a different vein, from those described in the complaint, and is not inconsistent with the complaint, and constitutes no defense nor counter-claim. It is admitted by appellant's counsel that there was no necessity for a cross-complaint; and, as above shown, it appears that a cross-complaint was wholly improper. But, conceding that material issues made by such a cross-complaint and answer thereto might have been properly tried by consent of the parties, yet no such material issues were made by the cross-complaint and answer thereto in this case. It is true that collateral issues, as to probative facts, subsidiary to the principal issues arising from the pleadings, often become material, but only in proportion to their evidentiary bearing upon the material issues arising directly from the pleadings, and therefore must be wholly immaterial where, as in this case, no material issue arises directly from the pleadings. To hold otherwise would be to substitute oral pleadings, of which there is no record, for the written pleadings required by law, necessarily resulting in the uncertainty and confusion of which this case furnishes a small example.

The first four special issues, except the last clause of the second, are identical with or subsidiary to only immaterial issues arising directly from the pleadings,—immaterial because the plaintiff claimed no estate or interest in the west vein of the West Bullion, and did not aver that its apex was within the vertical side lines of the Ralston No. 1, but only that it was not within the vertical side lines of the West Bullion. As to the second clause of No. 2, there was no necessity of a finding, because it was settled and agreed by the pleadings that the west line of the West Bullion and the east line of Ralston No. 1 are identical. The fifth and first part of the seventh special issues are immaterial, for reasons already stated, (the verdict on the sixth was not adopted,) and neither of the last two questions in the seventh is founded upon, or possibly subsidiary to, any issue made by the pleadings; for, as before remarked, it is not asserted in any pleading of either party that the "top or apex of the said west vein of the said West Bullion * * * was within the surface lines of the Ralston No. 1," nor that the plaintiff was the owner of said "west vein," or claimed any interest therein. The eighth special issue is neither founded upon nor applicable to any issue made by the pleadings. Both parties named and described the two veins therein mentioned as distinct veins located some distance apart from each other. If this issue resulted from any pleadings, such pleadings must have been oral. If so, which party asserted, and which denied, that these two veins named and described in the written pleadings as distinct are nevertheless identical? The issue itself implies such assertion by one party, and denial by the other. Besides, the jury is required to find what vein is in dispute. The ninth and tenth special issues grow out of and depend upon the eighth, besides being so ambiguous as not to admit of a certain answer, since two distinct veins are "mentioned in the last question." To which of these do the answers of the jury refer? Probably, but not certainly, to neither, as "mentioned in the last question," but to the one identical vein found by the jury to have been designated by the distinctly different names and descriptions thereof in the cross-complaint and the answer thereto. But it is enough to say of these issues that neither of them bears any material relation to the issues made by the written pleadings. The written pleadings fixed and agreed upon the location of the dividing line between the West Bullion and the Ralston No. 1 upon the surface with absolute certainty, as we have seen; therefore the court was not at liberty to find a different location of it, nor does it appear that either the court or the jury did so. This disposes of special issues 11 to 14, inclusive. If the facts involved in special issues numbered 15, 16, and 17 could have contributed in any degree to the solution of any material issue raised by the written pleadings, they would have been properly submitted to the jury;

but, as there was no such material issue upon the written pleadings, they were irrelevant and immaterial. They were the result of purely oral pleadings, framed without regard to the written pleadings. The findings by the court numbered 18 and 19 are subject to the same objection above made to the verdict on special issues 15, 16, and 17. They are not responsive or helpful to any material issue made by the written pleadings. The first four findings by the court, (not numbered,) founded upon the written stipulation of the parties, has no other effect than to adopt the verdict of the jury, except as to issue numbered 6, and to confirm the absence of any material issue upon the pleadings.

Assuming that the two distinct actions—one upon the complaint of the plaintiff, and the other upon the cross-complaint of the defendant—were tried together by consent of the parties, it would seem, though it is not necessary so to decide, that each party was entitled to a decree on the pleadings quieting its title to the real property described in its complaint, regarding the so-called "cross-complaint" as the complaint of the defendant relating to real property totally distinct and different from the property described in the complaint of the plaintiff. I think the judgment should be reversed, and the cause remanded for further proceedings, with leave to the parties to amend their pleadings, as they may be advised, within the limits allowed by law.

We concur: GIBSON, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for further proceedings, with leave to the parties to amend their pleadings, as they may be advised, within the limits allowed by law; the costs of appeal to be paid one-half by each party.

(32 Cal. 613)

BULWER CON. MIN. CO. v. STANDARD CON. MIN. CO. (Nos. 13,450, 13,451.)

(Supreme Court of California. April 30, 1890.)

QUIETING TITLE—PLEADING—CHANGE OF VENUE.

1. In an action to quiet title, an amendment of the complaint, by enlarging the boundaries of the land as originally described, cannot be prejudicial to a defendant which in its amended answer disclaims title to "any part" of the land described in the amended complaint.

2. Bias or prejudice by the trial judge against defendant and its president is no ground for change of venue, as Code Civil Proc. Cal. § 170, does not include either among the disqualifications preventing a judge from acting in a cause.

Commissioners' decision. Department 1. Appeal from superior court, Mono county; O. F. HAKES, Judge.

P. Reddy and C. A. Schuman, for appellant. Lloyd & Wood, Richards S. Miner, and R. M. Clarke, for respondent.

VANCLIEF, C. There are two appeals in this case—one from the final judgment, and

the other from an order denying defendant's motion to change the place of trial—presented upon bills of exception. The action is brought, under section 738 of the Code of Civil Procedure, for the purpose of determining the adverse title alleged to be claimed by the defendant to the mineral land, veins, lodes, and ledges described in the complaint, of which the plaintiff claims to be the owner. The parties to the action and to this appeal are the same as the parties to the appeal numbered 13,192, ante, 1102, (this day decided.). The original complaint, filed March 17, 1888, is in the usual form of complaints in this class of actions, and in the same form as that in No. 13,192, but describes a different lot of mineral land designated as "Mineral Entry No. 49 in the Bodie Land-Office," and called the "Ralston No. 2 Lode." To this complaint the defendant filed an answer and a cross-complaint, which are identical in form and substance with the answer and cross-complaint in No. 13,192, and claiming the same land, viz., the West Bullion lode and the west vein of the West Bullion lode location, and alleging that it adjoins the Ralston No. 2 lode. The answer of the plaintiff to this cross-complaint is the same in form and substance as its answer to the cross-complaint in No. 13,192, except that it claims the "Ralston No. 2," instead of "Ralston No. 1." On June 17, 1888, by leave of the court, the plaintiff filed an amended complaint. The amendments consist of the additions to the Ralston No. 2 lode of two other claims, called the "Homestake Lode Claim," and the "Stonewall Lode," which are alleged to adjoin the "Ralston No. 2," so that the three pieces of land described in the amended complaint form one consolidated piece of land, constituting a portion of plaintiff's entire mining claim and property known as and called the "Bulwer Mine."

The amendment of the complaint was opposed by the defendant, and it is urged here that the court erred in allowing it. The amendment did not change the nature of the action, nor state an entirely new cause of action, although it enlarged or added to the land described in the original complaint. But whether or not the allowance of such an amendment was within the discretionary power of the court need not be decided, since it appears that the defendant was not injured thereby, having in its answer disclaimed any estate or interest in any part of the land described in the amended complaint, and the judgment for plaintiff being without costs, as it must have been, without the amendments.

The defendant filed an answer, and afterwards an amended answer to the amended complaint. The original answer consisted of admissions and denials, and contained no averment of new matter; but the amended answer to the amended complaint admits that the plaintiff is the owner in possession, and entitled to the possession, of the claim described in the amended complaint as the "Ral-

ston No. 2" mining claim, subject to the right of the defendant to follow and mine, in their course downward, all veins and ledges, the tops or apexes of which lie within the vertical side lines of the West Bullion claim; but, for want of sufficient information or belief to enable it to answer, and upon that ground, it denies that plaintiff is entitled to any of the veins, lodes, or ledges alleged to be in or connected with the Ralston No. 2 claim, as described in the complaint, and in like manner denies all the material allegations of the amended complaint as to the Homestake lode and the Stonewall ledge, and in like manner denies that all the mines, mining claims, and veins, lodes, and ledges described in the amended complaint "are held, owned, or possessed by the plaintiff as an entire piece or parcel of mining property, or constitute or are a portion of the mine, mining claim, or property of the plaintiff known as or called the 'Bulwer Mine.'" The amended answer then alleges the defendant's right to the West Bullion lode claim, and to the west vein therein, substantially as the same is alleged in the answer to the original complaint, and also in the cross-complaint, and further alleges as follows: "That defendant does not make or assert, and has never made or asserted, any claim adverse to plaintiff for any estate or interest in the mines, mining claims, or locations described in the amended complaint, or any claim of right to enter upon the surface of the same, or any claim of right to enter upon any portion thereof, except the right hereinbefore alleged and claimed, to-wit, the right to follow, work, possess, and enjoy the veins, lodes, and ledges so belonging to defendant as aforesaid." The "veins, lodes, and ledges" referred to in the last-quoted paragraph are those whose tops or apexes lie within the vertical side lines of the West Bullion claim, the right "to follow, work, possess, and enjoy" which, do not, therefore, conflict with any right claimed by the plaintiff, since the plaintiff claims only the right to follow, work, possess, and enjoy all veins, lodes, and ledges, the tops or apexes of which lie within the vertical side lines of the claims described in the amended complaint as the "Ralston No. 2," the "Homestake," and the "Stonewall," in which the defendant disclaims any interest or estate whatever. There was some controversy as to whether the amended answer was filed by leave of the court, and it was stricken out by the court because no leave had been granted to file it; and after it was stricken out the court denied leave to file it upon the ground that it constituted no defense to the amended complaint. But, for the purposes of this appeal, it will be regarded as if it had been properly on file when the plaintiff moved for judgment on the pleadings. There was no cross-complaint to the amended complaint. On motion of plaintiff's attorneys the court gave judgment for plaintiff on the pleadings without evidence. The judgment recites that the defendant disclaims

any interest or estate in the real property described in the amended complaint, or in any part thereof, and in the usual form adjudges that the plaintiff is the owner thereof, and that the defendant has no estate or interest therein, and closes with the following paragraph: "Nothing in this judgment or decree shall be construed as affecting the rights of this defendant to any mine, mining claim, or location or veins to which it has title or right of possession; nor shall the same affect the right, if any it may have, of said defendant, to follow any vein or lode which it may own, or be entitled to the possession of, on the dip thereof, beneath or into the said mines, mining claims, or locations of the plaintiff." This judgment is without costs, and, according to the principles announced in *Bulwer, etc., Min. Co. v. Standard, etc., Min. Co.*, No. 13,192, ante 1102, (this day decided,) is clearly right. It does not touch or affect any property or right claimed by the defendant, and it gives to the plaintiff only what is disclaimed by defendant.

As to the appeal from the order denying defendant's motion to change the place of trial, it is to be observed that the only ground of the motion alleged or attempted to be proved was that the "judge of said court is disqualified from acting in said case on account of his bias and prejudice against the defendant and A. Pettibone, its president and resident manager," which is not one of the grounds of disqualification enumerated in section 170 of the Code of Civil Procedure, and therefore not a ground of disqualification. *McCauley v. Weller*, 12 Cal. 500; *People v. Williams*, 24 Cal. 31. Besides, the pleadings raised no issue of fact to be tried by any court or jury. I think the judgment and order should be affirmed.

We concur: GIBSON, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(83 Cal. 626)

PHELPS *et al.* v. PRUSCH. (No. 12,738.)

(*Supreme Court of California*. May 2, 1890.)

REAL-ESTATE AGENT—RIGHT TO COMMISSION.

A real-estate broker, employed to find a purchaser of land at a designated price, under an agreement whereby the owner is to furnish a perfect abstract of title on a deposit of 10 per cent. of the price by the purchaser, has earned his commission when he produces a purchaser willing to buy on the prescribed terms; and where the owner afterwards induces his title to be rejected for the purpose of defeating the sale, the broker's return of the deposit, in compliance with the contract of sale, though without the owner's knowledge, does not affect his right to his commission.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; FRs. E. SPENCER, Judge.

T. H. Laine, for appellant. A. S. Kittedge, for respondents.

HAYNE, C. This was an action to recover \$1,160.75 as broker's commissions for nego-

tiating a sale of real property. The trial court gave judgment for the plaintiffs, and the defendant appeals. The evidence is not brought up, and the findings must therefore be taken to correctly set forth the facts of the case, which are as follows: The defendant authorized one Dunn, the assignor of the plaintiffs, to sell a tract of land then possessed and claimed by defendant at a price not less than \$23,125, and promised in writing that he "should receive from defendant, as commissions for making such sale, the sum of 5 per cent. upon the full amount for which said property should be sold, and that, upon deposit of 10 per cent. of the purchase price by the purchasers, the defendant would furnish to him a complete and perfect abstract of title thereto." Dunn procured purchasers who were willing to take the property at \$23,215, and who deposited with him 10 per cent. of this amount, taking a written receipt containing the following clause: "Title to prove good, or no sale, and this deposit to be returned." The defendant "was immediately informed of said sale and its terms, and expressed himself as satisfied therewith, and acquiesced therein;" and an abstract of title was prepared, at the instance of Dunn, and given to the purchasers, who placed it in the hands of their attorney. A few days after the arrangement "the defendant became dissatisfied with the price at which the property had been sold, and exerted himself to cast suspicion upon, and to impeach and discredit, his title, in order to prevent a consummation of said sale." He first went to the plaintiff Smith, who had assisted Dunn in negotiating the sale, and offered to pay him the amount of the commission if he would break up the sale. Smith declined the proposition. The defendant then went to the attorney for the purchasers, who was examining the abstract of title, and gave him notice of certain matters which induced him to reject the title. The purchasers thereupon refused to complete the purchase, and demanded the return of their deposit, which was thereupon returned to them by Dunn without the knowledge or consent of the defendant.

Upon these facts, we think that the judgment in favor of the plaintiffs was clearly right. The contract of the parties was not that there should be an actual transfer of the title, or a valid contract for such transfer. It was merely that the broker should find a purchaser who was willing to buy upon certain terms. *Duffy v. Hobson*, 40 Cal. 244; *Armstrong v. Lowe*, 76 Cal. 616, 18 Pac. Rep. 758. This being the contract on the broker's part, it was performed when he produced purchasers who were willing to buy upon such terms. *Phelan v. Gardner*, 43 Cal. 311. It makes no difference whether the defendant had a good title or not. If he had not a good title, and the transaction failed in consequence, that was not the broker's fault, and is no reason why he should lose his commission. *Middleton v. Findla*, 25 Cal. 81. If he had a good title, but took measures to have

it rejected by the purchaser's attorney for the purpose of defeating the sale, it needs no argument or authority to show that the broker's right to a commission is not thereby defeated. It is immaterial that Dunn returned the deposit to the purchasers without the knowledge or consent of the defendant. The condition upon which he held it was that it should be returned if the title should not "prove good." If the title was not in fact good, it was the duty of the depository to make the return. If the title was good, but the defendant, for the purpose of defeating the sale, induced the purchasers to believe that it was bad, and to act upon such belief, he had no more right to have the deposit retained than he had to deprive the broker of his commission. It makes no difference upon whom the demand for a return of the deposit was made, or whether it was returned or not. The complaint was drawn with unusual precision, and the demurrer was properly overruled. We therefore advise that the judgment be affirmed.

We concur: GIBSON, C.; VANCELIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(84 Cal. 231)

THORNTON *et al.* v. HOGE, Judge. (No. 13,742.)

(Supreme Court of California. May 31, 1890.)

BILL OF EXCEPTIONS—SETTLEMENT—MANDAMUS.

Where, on the hearing of an alternative writ of mandate commanding a judge to show cause why he has not settled a bill of exceptions in a case, it appears that he has settled a bill, the supreme court will not order a reference to ascertain whether the bill as settled is correct, but will discharge the writ.

In bank. Application for mandamus.

Geo. H. Buck and Edward Fitzpatrick, for petitioners. Thos. M. Osmont, for respondent.

SHARPSTEIN, J. To an alternative writ of mandate, issued out of this court, commanding respondent to show cause, if any he may have, why he has failed, neglected, and refused, and still neglects and refuses, to allow, settle, certify, and sign the bill of exceptions, or other proper bill of exceptions, in the petition of the petitioners mentioned, the respondent has filed his answer, in which he denies that he has refused to sign or certify a correct bill of exceptions in the cause mentioned in said petition, and alleges that he has settled, certified, and filed a correct bill of exceptions in said cause. That he has settled, certified, and filed a bill of exceptions is not controverted by petitioners; but they insist that it is not a correct bill of exceptions, and ask this court to order a reference in order that evidence may be taken on that issue. We know of no precedent for such a proceeding. The writ has accomplished the purpose for which it was issued, and is there-

fore *functus officio*. There can be no further proceedings under it. Such being the case, the writ should be discharged. Writ discharged, and proceeding dismissed.

We concur: FOX, J.; McFARLAND, J.

PATERSON, J. I concur. The remedy after a bill has been settled is provided by section 652 of the Code of Civil Procedure. A judge may be compelled to act by mandate, but his discretion cannot be controlled thereby.

(83 Cal. 149)

PEOPLE *ex rel.* KERN COUNTY v. BAKER. (No. 13,542.)

(Supreme Court of California. March 23, 1890.)

In bank. On petition for rehearing. For former report, see ante, 364.

PER CURIAM. We do not think that the opinion heretofore filed in this case ought to be understood as requiring the order of the board of supervisors to state the number and denomination of the bonds to be issued for each particular purpose. All that was intended was that the amount of bonds for each purpose must be stated. Rehearing denied.

(84 Cal. 39; 3 Cal. Unrep. 260)

BERSON v. EWING *et al.* (No. 12,702.)

(Supreme Court of California. May 8, 1890.)

LIMITATIONS—MALICIOUS PROSECUTION—SURVIVING PARTNER.

1. In an action by a surviving partner, the complaint alleged that defendants maliciously prosecuted a claim against plaintiff's firm, knowing that it was fraudulent; that, to maliciously injure said firm, they caused an attachment to be levied on merchandise thereof; that the action resulted in a judgment for plaintiff. *Held*, that the main cause of action set out was the malicious prosecution, and that the determination of the action in plaintiff's favor, and not the levy of the attachment, which was a mere incident, fixed the date from which the statute ran against the present action. Distinguishing *McCusker v. Walker*, 77 Cal. 208, 19 Pac. Rep. 382.

2. Under Civil Code Cal. § 2461, providing that "a partner authorized to act in liquidation may collect, compromise, or release any debts due to the partnership, pay or compromise any claims against it, and dispose of the partnership property," a surviving partner may sue for damages to the partnership estate by reason of a malicious prosecution of a claim; the words "debts" and "claims" being here used synonymously.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Royce & Crimmins, for appellant. Lloyd & Wood and E. F. Preston, for respondents.

GIBSON, C. This is an action brought by plaintiff, as the surviving partner of the firm of A. Berson & Son, against all the defendants except R. E. Corson, as partners under the firm name of Ewing, Plum & O'Brien, and said Corson, to recover damages for maliciously prosecuting another suit on a fraud-

ulent claim, and obtaining a writ of attachment thereon, and causing the same to be levied upon the property of the firm of A. Berson & Son. Two demurrers to plaintiff's complaint were filed,—one by defendants Flood and Coleman, and the other by defendants Plum and Corson. Both were sustained, and judgment thereupon entered for defendants. From this judgment, plaintiff appeals. The complaint is, in substance, as follows: The plaintiff and A. Berson were partners doing business in the city and county of San Francisco under the firm name of A. Berson & Son until December 24, 1883, (?) when the said A. Berson died. On or about the 1st day of June, 1885, the defendants other than Corson, who were then and still are partners under the firm name of Ewing, Plum & O'Brien, maliciously, and for the purpose of injuring A. Berson & Son, pretended to have a claim against the latter for a large amount of money, though they (Ewing, Plum & O'Brien) well knew that such claim was fraudulent, and did not in fact exist; and, in order to carry out their malicious intention to injure and oppress A. Berson & Son, they, (Ewing, Plum & O'Brien,) on the date last mentioned, conspired with defendant Corson, whereby the latter took an assignment of the fraudulent claim, and brought suit thereon in his own name, as assignee, against A. Berson & Son, in the superior court of the city and county of San Francisco. In furtherance of his conspiracy with Ewing, Plum & O'Brien, and further intending to maliciously injure A. Berson & Son, he, (Corson,) on the date last referred to, without cause, sued out a writ of attachment in the action brought by him, and caused the same to be levied upon the merchandise of A. Berson & Son; consisting of carpets, upholstery, and furniture, in their store in said city and county, and placed a sheriff's keeper in charge of the same. Thereafter, and before the trial of said action, the plaintiff caused the court, by its order, to bring in Ewing, Plum & O'Brien as proper and necessary parties to the action. On or about June 14, 1887, the said action was tried by the court without a jury, and resulted in a judgment on the said pretended claim in favor of plaintiff and against Ewing, Plum & O'Brien and Corson, by which judgment the attachment was dissolved. The bringing of said action and levying the writ of attachment issued therein damaged A. Berson & Son in their business and credit, and caused them to sustain loss by the stoppage of goods *in transitu* from New York, and by being compelled to pay attorneys' fees in obtaining a dissolution of the attachment, keepers' fees, and costs of other attachments levied upon their merchandise.

The argument of the respondent in support of the ruling of the court below is: *First*, that the action is barred by the provisions of section 389 of the Code of Civil Procedure, because it appears from the face of the complaint that more than two years have elapsed between the date of the issu-

ance of the writ of attachment and the commencement of this action; *second*, that under section 2461 of the Civil Code, the plaintiff has no capacity, as a surviving partner, to maintain this action.

The respondents' counsel, in their first point, have evidently mistaken the scope of the complaint, by confining it to the wrongful issuance and levy of the writ of attachment. The main cause of action is for the malicious prosecution of a civil action; and all the facts necessary to maintain it appear in the complaint, to-wit, that defendants maliciously, and without probable cause, prosecuted an action upon an unfounded claim against plaintiff's firm to their damage, and which action was determined in their favor. *Eastin v. Bank of Stockton*, 66 Cal. 123, 4 Pac. Rep. 1106; *Kinsey v. Wallace*, 36 Cal. 462. The writ of attachment was a mere incident of the action complained of, but the use made of it aggravated the damages which resulted from the prosecution of said action; and it is settled in this state, by *Eastin v. Bank of Stockton*, supra, that the prosecution without probable cause of an unfounded civil proceeding, in which a writ of attachment is not issued, is actionable on the part of any one injured by such a proceeding. One of the essential facts to the maintenance of an action of the kind before us is, as above stated, that the malicious suit terminated in favor of the party against whom it was prosecuted. Were this not so, the plaintiff might recover for the malicious suit, and still have judgment rendered against him in such suit. Now the malicious prosecution complained of in this case did not terminate in favor of plaintiff's firm until June 14, 1887; and, although the record here does not disclose when the original complaint in this case was filed, it does show that the amended complaint was filed November 8, 1887, from which we must infer that the action was commenced on or prior to that date. It is therefore clear that the period of two years prescribed in section 389, subd. 1, of the Code of Civil Procedure, within which actions of this character may be brought, had not elapsed when the amended complaint was filed. *McCusker v. Walker*, 77 Cal. 208, 19 Pac. Rep. 382, and *Sharp v. Miller*, 57 Cal. 431, relied upon by respondents' counsel to show that the cause of action here is barred by the provision of the Code of Civil Procedure above mentioned, do not apply. In the first case, the levy of the attachment complained of was made in an action which was brought by a purchaser of realty at a foreclosure sale against one of the parties to the foreclosure suit, to recover the value of the use and occupation of the realty during the period of redemption, *i. e.*, from the date of the sale until he received his deed from the sheriff. He was entitled to the value of the use and occupation of the premises, (Code Civil Proc. § 707,) but the writ of attachment which he caused to issue and be levied upon some personal property of McCusker was illegal; and it was held that, be-

ing illegal, the right of action for damages sustained thereby accrued when the writ was issued and levied, and that, more than two years having elapsed from that time before the action thereon was commenced, it was barred by section 339, Code Civil Proc. The second case is, in effect, the same as the first, and is commented on in it. It is to be observed that in each of those cases the gist of the action was the wrongful issuance and levy of the writ of attachment, while in the case here the gist of the action is the malicious prosecution of an unfounded action, in which, so far as the record is concerned, a writ of attachment might have properly issued.

Section 2461 of the Civil Code, relied upon by respondents' counsel in their second point, reads as follows: "A partner authorized to act in liquidation may collect, compromise, or release any debts due to the partnership, pay or compromise any claims against it, and dispose of the partnership property." This, they claim, is the measure of the surviving partner's power. Under it, he may collect debts only, but may release or compromise claims against the partnership. Now, while the word "debt," in its legal sense, does not, like the word "claim," include a demand for damages arising from a tort, still we think they were used in the above section synonymously, and probably to avoid repetition, and that the term "debt" was intended to have an application as broad as that of the word "claim." It would indeed be strange if a surviving partner could compromise any claim against the firm, but could neither compromise nor enforce one in favor of it. By section 1585 of the Code of Civil Procedure a "surviving partner has the right to continue in possession of the partnership, and to settle its business * * * without delay." The power to settle gives full authority to the surviving partner to do everything that may be necessary to wind up the affairs of the partnership, but he can do nothing which is not indispensable to this end. *T. Pars. Partn.* 388. The case of *Lawrence v. Martin*, 22 Cal. 174, cited by respondents, simply goes to the point that the claim, being one arising out of a tort, is unassignable. It by no means sustains the proposition that a surviving partner cannot maintain an action on such a claim for damages sustained by the partnership estate.

It therefore follows that the court erred in sustaining the demurrers to the complaint; and we advise that the judgment be reversed, and the cause remanded, with directions to the court below to overrule the demurrers, and grant defendants leave to answer within the usual time.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to the court below to overrule the demurrers, and grant defendants leave to answer within the usual time.

UHLHORN v. GOODMAN. (No. 13,422.)

(Supreme Court of California. May 31, 1890.)

LAND CONTRACT—CONSTRUCTION.

Defendant's testator, G., by writing, made R. his sole agent, for 30 days, to sell certain land on certain terms. Within the 30 days, R. gave a contract by which he agreed to convey the land to B. or order on terms different from those authorized by G. This agreement was signed by R. as "grantee" of G. The next day, G. indorsed on the same paper an agreement to deed to R. or order "the herein-described lands" for a certain sum, and on a certain day. Before that day, G. deeded the lands to a stranger. Plaintiff, claiming that B. and P., to whom B. assigned the contract with R., were his agents, and that the contract inured to his benefit, sued G.'s executor for the breach. Held that, in the absence of proof that plaintiff or his agents obtained an order from R. on G. for a conveyance of the land, a nonsuit was properly granted.

Commissioners' decision. Department 1. Appeal from superior court, Napa county; R. CROUCH, Judge.

King & Saufley and Henry Hogan, for appellants. *F. E. Johnston and A. G. Booth*, for respondent.

GIBSON, C. This is an action for damages for breach of contract. July 9, 1887, and prior thereto, the decedent was the owner of 12,800 acres of land in Fresno county. On the date mentioned, he gave to P. Rothermal a writing. (Exhibit A,) by which he was to have the sole privilege, for a certain time, of selling the land referred to, upon certain terms. The material part of the writing is as follows: "San Francisco, July 9, 1887. I hereby give P. Rothermal the sole privilege, for thirty days from date, to sell my lands in Fresno county for \$3 per acre. Terms, cash, or half cash, balance on mortgage at 7 per cent. interest. * * * JAS. H. GOODMAN." July 30, 1887, Rothermal contracted to sell the same land to H. V. Burner or order for the sum of \$44,800, payable in the following manner: \$2,000 were to be deposited by Burner in the First National Bank of San Francisco, there to remain until September 1, 1887, when Burner was to pay the same to Rothermal, through the bank, together with the further sum of \$13,000, and upon such payment being made the latter was to execute a deed conveying a perfect title to "said Burner or his order," and the latter was in return to execute a mortgage upon the same land, in favor of Rothermal, to secure the remaining \$29,000 of the purchase price, which was to be paid one-half in one year, and the other half in two years, from September 1, 1887, with interest on such deferred payments at 7 per cent. per annum. But, in the event of Burner's failure to make the payment of the \$15,000 as stipulated, then he was to forfeit the \$2,000 on deposit to Rothermal. This agreement to sell was signed: "P. ROTHERMAL, Grantee of James H. Goodman." Burner signified his assent to the terms of the agreement, and compliance with the requirement as to the deposit of the sum of \$2,000, by writing and signing the following on the same paper: "San Francisco, August 1, 1887.

I have this day deposited the above two thousand (\$2,000) dollars in the First National Bank of San Francisco, California, with the foregoing contract and receipt; and I hereby concur in and agree to the terms of said contract and receipt. H. V. BURNER." On the next day, Goodman indorsed the following on the same paper: "San Francisco, August 2, 1887. I will deed to P. Rothermal or order the herein described lands on September 1, 1887, on his paying me the sum of fourteen thousand two hundred (\$14,200) dollars, and execute to me a mortgage for \$20,000 for one and two years, with interest at 7 per cent. per annum. JAS. H. GOODMAN." Thereafter, but at what time does not appear, Burner assigned his interest in the contract to J. W. Pearson, and wrote such assignment upon the contract as follows: "I hereby assign all my right, title, and interest in said contract to Jno. W. Pearson. H. V. BURNER." The instrument made up of the foregoing parts is marked "Exhibit B." After Burner assigned his interest in it, it was by Rothermal and the former delivered to one Coffin for Pearson, who deposited it, together with Exhibit A and a certified check for \$2,000, in the bank last mentioned. Goodman, on August 29, 1887, conveyed all the lands described in Exhibit B to one F. P. Hooper. July 3, 1888, Goodman died, leaving a will, which was subsequently admitted to probate; and the defendant was appointed and qualified as the executor of the same. December 26, 1888, plaintiff presented the claim in suit, for \$61,040 damages against Goodman's estate, to the defendant as executor, who rejected it.

Defendant's counsel, at the trial, upon proof of the fact that Goodman had conveyed to Hooper as above stated, admitted that if J. H. Goodman, by a prior conveyance of the land, had placed it beyond his power to transfer the same to plaintiff or Burner or order, no tender of money, or offer to perform the obligations of the contract signed by Rothermal to be performed upon his part, was necessary. There was testimony introduced tending, in a slight degree, to show that Burner and Pearson, to whom the former assigned his interest in the contract, acted as agents for plaintiff in the matter. At the close of plaintiff's case the court granted a nonsuit upon the grounds: *First*, that no liability on the part of the deceased to plaintiff was shown; *second*, that no order from Rothermal to Goodman to convey the land to any one was shown. From the judgment of nonsuit, and an order denying a new trial, this appeal is taken.

Do the instruments above set forth show any liability on the part of Goodman to plaintiff? Plaintiff claims they do—*First*, because Goodman's indorsement on Exhibit B bound him to convey to Rothermal or his order, and the previous agreement of Rothermal to sell to Burner constituted such an order from Rothermal to Goodman to convey to Burner; and, *second*, because Burner and

Pearson acted for him as his agents in purchasing the lands from Rothermal.

The first contention of plaintiff assumes that Exhibit B is, in effect, but one agreement. In support of it, he cites *Ingoldsby v. Juan*, 12 Cal. 573, as a similar case. That case was not at all similar to this. There the husband, instead of joining in his wife's deed in the usual manner, added at the bottom of the deed, and after the certificate of his wife's acknowledgment: "I have read the foregoing, and fully agree with the conveyance made by my wife. LEWIS, DEPEAUX,"—which he acknowledged before the same officer that certified to his wife's acknowledgment, and it was held that "this was contemporaneous with, and a part of, the execution of the original deed." It is a well-established rule that several contracts between the same parties, in relation to the same subject-matter, and made as parts of the same transaction, are to be construed together, and is embodied in section 1642 of the Civil Code. But in Exhibit B we have several contracts, each between different parties, made at different times, and upon different terms. The thing contracted about in each, it is true, is the same; but the object of each contract is, however, to sell the same thing for a different price, upon different conditions. By the terms of Exhibit A, Goodman simply authorized Rothermal to find, within 30 days from the date thereof, a purchaser for his land at the price fixed therein. But the latter, assuming to be the vendee of the land, made a contract to sell it to Burner for \$44,800, upon different terms, and within a period beyond the limit provided for in Exhibit A. To place Rothermal, who had exceeded his authority, in a position to execute his contract with Burner, Goodman made and signed the memorandum of August 2d, whereby he agreed to sell the same land to Rothermal or order, on September 1, 1887, for \$34,200, or \$10,600 less than Rothermal had agreed to sell the same land for to Burner. This last agreement of Goodman's superseded Exhibit A, and apparently changed the attitude of Rothermal from that of an agent to sell under said exhibit to that of a vendee of the land. Rothermal's contract with Burner, and Goodman's contract with Rothermal, although written upon the same paper, were as separate and distinct as if written upon separate pieces of paper, and without any knowledge on the part of Goodman of Rothermal's contract with Burner. Each is separate and complete in itself, and needs no reference to the other, except that of Goodman's refers for a mere description of the land to Rothermal's contract with Burner. Goodman, at the time he wrote his agreement to sell to Rothermal, had the latter's agreement with Burner before him, which disclosed to him that Rothermal was to receive \$10,600 more from Burner than he (Goodman) was to get from Rothermal. Goodman was apparently satisfied with the arrangement, and willing that Rothermal should

make as much as he could over and above the sum the latter had agreed to pay to Goodman. There was no other mode, as far as the record goes, provided for to compensate Rothermal for taking the land, and disposing of it. Suppose Goodman had construed Exhibit B to mean that Burner was the assignee of Rothermal's interest in the latter's contract with him, and upon such assumption had conveyed to Burner, for either, the price the latter was to pay to Rothermal, or that he (Goodman) was to receive from Rothermal, and thereby deprive the latter of \$10,600, can there be any doubt but what Rothermal could sue Goodman for a breach of their contract? If this be correct, of which we have no doubt, it is evident, then, that the two contracts were separate and independent from and of each other. Burner's assignment to Pearson of his interest in his contract with Rothermal related to that contract alone, and cannot be extended to embrace Rothermal's interest in the latter's contract with Goodman, upon which he was to earn a profit of \$10,600 out of Burner or his assignee; for it is obvious that a person cannot assign any interest in a contract greater than his own.

Now, it may well be, as suggested by defendant's counsel, that, for aught that appears to the contrary, Goodman, who conveyed the land to Hooper prior to the 1st of September, 1887, the date on which he agreed to convey the same to Rothermal or his order, may have done so pursuant to an order from the latter directing that the land be conveyed to Hooper. This consideration, we think, points the necessity of requiring the plaintiff to show that he acquired a right to the land from Rothermal by an order, or by an assignment of his interest in his contract with Goodman, before he can recover damages for Goodman's failure to convey the land to him. He did not offer any evidence to meet this requirement, and consequently failed to prove any liability on the part of decedent to him on the contract of the decedent with Rothermal. He endeavored to show, however, by the testimony of Pearson and one Brown as to the contents of a certain letter, written by plaintiff to Pearson about the middle of July, 1887, which had been lost, to the effect that he had authorized Pearson and Burner to buy the "Goodman land" for him at a price not exceeding four dollars per acre. The testimony of Pearson on this point was properly stricken out, because it appeared by his own testimony that he was interested in the contract forming the basis of the suit to the extent of a certain commission that he expected; and it further appeared, in like manner, that, after the time plaintiff presented his claim in suit to the defendant as executor of the will of decedent, he acknowledged in writing that he was jointly interested with plaintiff in the contract, for the breach of which damages are sought in this action. Brown's testimony, given its utmost weight and force, at most but slightly tends to prove that Burner and Pearson acted as the agents

of plaintiff in purchasing the land from Rothermal. But, assuming that it does show that fact conclusively, still it does not in the slightest degree tend to establish that plaintiff or either of his agents obtained an order for a conveyance of the land, or an assignment of Rothermal's interest in his contract with Goodman. Plaintiff did not make any different or additional showing upon his motion for a new trial. We think it manifest that the court was justified in granting defendant's motion for a nonsuit, and denying plaintiff's motion for a new trial, and therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(33 Cal. 564)

LATHAM v. CITY OF LOS ANGELES *et al.*
(No. 13,612.)

(Supreme Court of California. April 17, 1890.)

APPEAL—PRACTICE—NOTICE OF APPEAL.

The court will not, in advance of a hearing of the appeal on its merits, decide a motion to dismiss for want of service of notice of appeal on all the adverse parties, as provided by Code Civil Proc. Cal. §§ 938, 940, where the determination as to who are adverse parties necessitates an investigation of the whole case.

In bank. Appeal from superior court, Los Angeles county.

Rearden & Daly and *C. McFarland*, for appellant. *Chapman & Hendrick* and *Johnston & Borden*, for respondent.

BEATTY, C. J. This is a suit to quiet title. The decree is that plaintiff and defendant Bigelow own certain separate interests in the property in controversy, and it quiets their title to their respective interests as between themselves and as against the city of Los Angeles. The city of Los Angeles moved for a new trial, but served notice of the motion upon the plaintiff only, and, that motion being overruled, has appealed from the decree "in favor of the plaintiff and against said defendant," (the city,) serving its notice of appeal on the plaintiff only, and omitting to serve its co-defendant, Bigelow. The respondent now moves to dismiss the appeal on the ground that the notice of appeal, not having been served on Bigelow, was not served on all the adverse parties. Code Civil Proc. §§ 938, 940, and Deering's Notes.

We cannot, without going into the merits of the case, see that Bigelow is necessarily an adverse party to the city of Los Angeles on this appeal, or that his interests will be at all affected by a reversal or modification of so much of the decree as is in favor of the plaintiff, and against the city. Of course, on this appeal, there can be no reversal or modification of that part of the decree which is

in favor of Bigelow, but possibly the interest assigned to plaintiff may be held to belong to the city, and the decree may be modified accordingly without in any manner affecting Bigelow. Such a case is certainly supposable, and that is all that need be determined for the purposes of this motion. If it be true, as suggested by counsel, that the peculiar circumstances of this case make any modification of this decree impossible without injuriously affecting the interests of Bigelow, that fact will render the appeal fruitless, but the question cannot be decided in advance of a hearing on the merits. Motion to dismiss overruled.

We concur: FOX, J.; SHARPSTEIN, J.; PATERSON, J.; MCFARLAND, J.

(84 Cal. 100)

MCGEE v. SWEENEY *et al.* (No. 12,713.)

(Supreme Court of California. May 7, 1890.)

EQUITY—JURISDICTION—CANCELLATION OF DEED.

Where a court of equity has acquired jurisdiction of the parties, it may declare void a deed to lands located in another state, and compel a reconveyance.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

J. A. McKenna, for appellant. Smith & Murasky, James F. Smith, and Henly, Swift & Rigby, for respondents.

HAYNE, C. This was an action to have a deed to certain property in Pennsylvania declared void, and for a reconveyance. The trial court gave judgment for the plaintiff, and decreed that the defendant, Rosanna McGee, in whom the title stood, should reconvey the property to the plaintiff, and that in default of such reconveyance a commissioner appointed by the court should execute the conveyance. The defendant, Rosanna McGee, appeals upon the pleadings, findings, and judgment; and the principal point made on her behalf is that the court had no power to make such a decree in reference to property outside of the state. It is well settled, however, that a court of equity has power to compel a reconveyance of property outside of its jurisdiction by reason of its control over the parties before it. The only question that can be raised is whether the court had power to cause the title to property in Pennsylvania to be conveyed by one of its officers. But if the court had no such power the conveyance of such an officer would be void on its face. The title would remain in the appellant, and the deed, being void upon its face, would not constitute a cloud. The appellant would not be injured, and cannot complain. If, therefore, the decree be improper in this regard, the error is immaterial.

The point as to the inconsistency of the findings is without merit. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(84 Cal. 207)

MATTINGLY v. ROACH. (No. 12,825.)

(Supreme Court of California. May 31, 1890.)

BROKER'S COMMISSION—SALE—DELIVERY.

1. Plaintiff alleged that he was employed to sell certain mining stock for \$300,000, clear of costs, he to retain the excess, if any, as his compensation; that he discovered a purchaser for \$425,000, and informed his employer, who thereupon repudiated his agreement. He prayed judgment for \$125,000. The court instructed the jury that their verdict must be for the whole amount claimed, or nothing. There was some evidence tending to show a smaller excess. Held, that the jury should have been permitted to find for the plaintiff whatever amount, if anything, they believed due him under all the evidence in the case.

2. Mining stock is personal property, and its delivery is governed by Civil Code, § 1754, providing that personal property shall be deliverable at the place where it is at the time of the sale, or agreement to sell, unless the seller has agreed to deliver it elsewhere, or an option for its delivery is provided for.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

D. Wm. Douthitt, (Edward J. Pringle, of counsel,) for appellant. John A. Wright, for respondent.

BELCHER, C. C. Plaintiff brought this action to recover the sum of \$125,000, commissions for the sale of mining stocks. The complaint alleges that on the 15th of October, 1882, Thomas H. Blythe executed to the plaintiff two agreements, in writing, whereby he contracted, promised, and agreed that if plaintiff would, within five months thereafter, procure a purchaser for all the capital stock of the Blue Jacket Mining Company, a corporation, who would be willing and ready within that time to pay Blythe \$300,000 therefor, he would transfer all said stock to such purchaser, so as to vest the title in him free from all incumbrances; that Blythe further agreed in and by his said contracts that all sums exceeding \$300,000, for which plaintiff might sell the said stock, might be retained by him as commissions for his services and expenses in making the sale and procuring a purchaser; that upon the faith of the agreements, and in consideration thereof, plaintiff proceeded to London and other parts of Europe for the purpose of procuring such purchaser, and that, within the time named in the agreements, he procured a purchaser or purchasers of the stock in England who were ready, willing, and able to pay therefor the sum of \$425,000, and that he then contracted and agreed to sell and convey the stock to such purchaser or purchasers for the said sum; that within the time named in the agreements, and long before the expiration thereof, plaintiff, being then in London, by and through his agent in San Francisco notified

and informed Blythe that he had procured such purchaser or purchasers who were ready, willing, and able to take the said stock and pay therefor the sum of \$425,000; that Blythe, at the time of such notification, absolutely refused to make the sale or convey the stock to the said purchaser, and thereupon the plaintiff was compelled to rescind his agreement with the purchaser for the stock so procured in England; that Blythe died in April, 1883, and the defendant was appointed the administrator of his estate; that plaintiff duly presented his claim to the administrator for allowance, but the same was rejected. The prayer is that plaintiff have judgment for the sum of \$125,000, with interest and costs, to be paid out of the estate of Blythe in due course of administration. The answer admits that Blythe made the written agreements referred to, and died at the time alleged, that defendant was appointed administrator of his estate, and that plaintiff's claim was presented and rejected, but denies all the other averments of the complaint. The case was tried before a jury, and the verdict and judgment were for the defendant. The appeal is from the judgment, and an order denying the plaintiff a new trial.

The two written agreements relied upon by the plaintiff were executed by Blythe in San Francisco on the same day, and are to be construed and read together as one contract. By the first instrument, Blythe agreed to sell to Mattingly all the stock of the Blue Jacket Mining Company "at any time within four months from the date hereof," provided Mattingly "shall see fit and elect to purchase the same for the sum of \$500,000, and pay said sum in gold coin of the United States within the period aforesaid." It is also provided that, if Mattingly should have an expert on the ground of the company before the expiration of the four months, and the expert should report in writing favorably to Blythe, then Blythe would extend the agreement to sell for the further period of two months. And it is further provided that "time is the essence of this contract, and this contract shall close and be at an end on the expiration of said four months." By the second instrument, after referring to the first, it is agreed that Mattingly "may, within the time limited in said agreement, or within the time of any extension thereof, sell the said stock of said company for a sum not less than \$300,000, which shall be paid to the said Blythe in full payment for all of the stock of said company, free and clear of all commissions and expenses of and pertaining to said sale; and all sums for which said stock shall be sold by the said Mattingly in excess of the sum of \$300,000 shall be retained by the said S. Mattingly as commissions for effecting such sale, or, if excess is paid to me, then I will pay said excess to S. Mattingly or his assigns on demand." There is no pretense that Blythe granted any extension of time; and the authority of Mattingly,

under the agreements, consequently expired on the 15th of February, 1883.

It is urged on behalf of appellant that the court erred in the admission of evidence and in its instructions to the jury, and that the judgment should therefore be reversed. On the other hand, it is earnestly contended for respondent that, looking at the whole case, it is plain that the jury could in no event have found for the plaintiff, and hence that the alleged errors were wholly immaterial. It is said that, taking all the testimony introduced by plaintiff, it cannot be seen therefrom that plaintiff ever effected a sale of the stock, or found a purchaser who was ready, able, and willing to take the stock, and pay therefor the sum of \$425,000, or any other sum, and that "the evidence produced by the defendant sets the whole matter at rest, and stamps the action as wholly unfounded." The testimony is somewhat voluminous, and we do not think it necessary to state it at length. It is enough to say that, in our opinion, plaintiff produced testimony tending to sustain his side of the case, and to show that he did find purchasers who were ready, willing, and able to take the stock, and pay therefor the sum of \$425,000 over and above a commission of \$75,000 to be allowed in England, and that Blythe was so informed about the middle of January, and immediately refused to transfer the stock, saying "that the property was more valuable than what he was getting," and that "if the money was in hand he would not accept it." No motion for nonsuit was made, and the case was properly submitted to the jury for its determination as to the facts. This being so, the only question for consideration is, did the court commit errors which were prejudicial to appellant?

At the request of the plaintiff the court instructed the jury that, if they believed the plaintiff found a purchaser who was able, ready, and willing to purchase and pay for the stock at \$500,000, in gold coin of the United States, before the 15th day of February, 1883, and informed Blythe of that fact in season, so that a sale could have been consummated before the day named, and Blythe refused to make the sale, then the plaintiff was entitled to recover the amount sued for, and that in such case the facts that plaintiff's bargain with the proposed purchaser was merely verbal, and that the purchaser did not actually tender the money, were immaterial, if Blythe refused to make a sale, or expressly repudiated his contract with the plaintiff. The court then gave to the jury the instructions asked by defendant, the last of which reads as follows: "At the request of the defendant, I charge you, further, if you find for the plaintiff, you are limited to the amount sued for by him,—that is, \$125,000 and interest,—as he, (plaintiff,) has brought suit upon a special contract to recover all sums for which the stock of the Blue Jacket Mining Company should be sold in excess of

\$300,000, and the plaintiff claims that he sold the property for \$425,000. You are limited to the amount sued for, and your verdict must be, if for the plaintiff, for the whole amount of \$125,000 and interest, or no sum at all." Under this instruction the jurors were compelled to return a verdict for the defendant, unless they should find that plaintiff was entitled to recover the full amount claimed by him, and though they might be satisfied that he was entitled to recover a less amount. But the defendant, against the objections of plaintiff, and upon the statement of counsel that he offered it for the purpose of impeaching plaintiff's testimony in some respects, had been permitted to introduce in evidence, among other things, the verified claim of plaintiff, which was presented for allowance against the estate of Blythe. This claim was for \$125,000; and, after setting out, in substance, the terms of the contract, it proceeded to state: "That this claimant procured a purchaser who was ready and willing to take said stock in England at the price of \$400,000," etc. Now, if from this, or other evidence in the case, the jurors believed that the plaintiff was entitled to recover the sum of \$100,000, or any less sum than he claimed, they should have been permitted to so find; and the instruction to the contrary was therefore misleading and erroneous.

The other alleged errors do not require extended notice. The Code provides that personal property is deliverable at the place where it is at the time of the sale, or agreement to sell, unless the seller has agreed to deliver it elsewhere, or an option as to the place of delivery is provided for. Civil Code, § 1754 et seq. The stock of the Blue Jacket Mining Company was personal property, and was in San Francisco at all the times named in the complaint. Blythe never agreed to send the stock to Mattingly, or gave him any option as to the place of delivery. It was therefore to be delivered and paid for in San Francisco, and the instructions upon that subject were proper. Of course, when Blythe repudiated his contract, if he did repudiate it, it was not necessary for the plaintiff to take any further steps towards sending or tendering the money to him. And, as to the admission of evidence, it is not clear to us that the court erred in this respect; and, if it did, the errors will probably not be repeated on a new trial. It is not necessary, therefore, to consider them further. For the errors above mentioned, we think the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: GIBSON, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

Ex parte MCCONNELL. (No. 20,662.)

(*Supreme Court of California*. April 11, 1890.)

CRIMINAL LAW—SETTING ASIDE INFORMATION—
HABEAS CORPUS.

In a prosecution for burglary, the objection that the information was filed without a previous preliminary examination and commitment can only be made by a motion to set aside before the trial. Pen. Code, § 995. After conviction, it cannot be urged for the first time in a proceeding on *habeas corpus*.

In bank. *Habeas corpus*.

Hugh J. & Wm. Crawford, for petitioner.
Geo. A. Johnson, Atty. Gen., for respondent.

BEATTY, C. J. The petitioner, who has been tried and convicted upon an information charging him with the crime of burglary, seeks to be discharged from imprisonment in the state-prison under said conviction upon the ground that he was not examined or held to answer by a magistrate prior to the filing of the information. It is too late, after conviction, to raise this objection in a proceeding upon *habeas corpus*. It should have been taken by motion to set aside the information before trial. Pen. Code, § 995. The filing of the information gave the court jurisdiction to proceed in the case, and the section of the Code cited provides the exclusive method of trying the question whether the information was founded on the necessary preliminary examination and commitment. No objection to the information having been made at the proper time, the superior court properly proceeded with the trial. Its judgment is regular and valid, and the imprisonment of the petitioner is lawful. Writ discharged, and prisoner remanded.

We concur: FOX, J.; WORKS, J.; PATERSON, J.; SHARPSTEIN, J.; MCFARLAND, J.

(84 Cal. 441)

PEOPLE v. WOODS. (No. 20,577.)

(*Supreme Court of California*. June 10, 1890.)

CRIMINAL LAW—VOID JUDGMENT—FORMER JEOPARDY.

On a conviction of grand larceny, an order granting a new trial, was, upon appeal, reversed. The trial court, however, was deceived into believing that an order denying a new trial had been reversed, and thereupon accepted a plea of guilty of petit larceny, inflicted a fine, and discharged defendant. Afterwards, discovering the deceit, the court set aside the judgment, ordered the money returned, caused defendant to be rearrested, and entered judgment upon the verdict. *Held*, that this judgment was valid, since the plea of guilty of petit larceny was void, and defendant had never been in jeopardy thereon.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Eugene N. Deuprey, for appellant. Atty. Gen. *Geo. A. Johnson*, for the People.

FOOTE, C. This appeal is from a judgment of conviction of a felony, and an order denying a new trial. The defendant was in-

dicted for grand larceny, and convicted as charged. The trial judge then granted a motion for a new trial. An appeal was taken from the order made in that behalf, and the appellate court reversed the order. Upon the going down of the *remittitur*, the only duty to be performed by the trial court was to render judgment upon the verdict. Instead of doing this, that tribunal was deceived into the belief that the appellate court, instead of reversing an order granting a new trial, had reversed an order refusing a new trial, and that there was no sufficient evidence which could be obtained to convict the defendant, and permitted the plea of not guilty to be withdrawn, and a plea of guilty of petit larceny to be entered. It also appears that, upon such last plea being entered, the court rendered judgment sentencing the defendant to pay a fine of \$100, which fine was paid, and the defendant discharged from custody. Six days after the entry of this judgment, the court, discovering the deceit which had been practiced upon it, set aside the judgment, and ordered the defendant's money to be returned to her which she had paid as a fine. It also ordered a bench-warrant to issue for her arrest, and fixed a day for sentence. A very considerable period of time elapsed between the date of the order setting aside the judgment for the payment of the fine, and that of the day on which the judgment now appealed from was made and entered.

It is very evident that, when the appellate court reversed the order granting a new trial, the only duty left for the performance of the trial court was to render an appropri-

ate judgment and sentence upon the verdict which the jury had returned of guilty of grand larceny, and which the appellate tribunal, by its action, had upheld. The trial court then had no jurisdiction to entertain any other plea than that which had been passed on by the jury, and it appears from this record that its action would have been in accordance with this view had it known the condition of the cause. But, being deceived into the belief that the case stood for retrial, it permitted a plea to be entered which, in such a *status* of the case, had it existed, it would have possessed the power and jurisdiction to do. As the trial court had no jurisdiction to entertain or allow such a plea to be entered, and no power to render judgment on such a plea, but only power, in obedience to the ruling of the appellate court, to make and enter its judgment and sentence on the verdict of the jury as returned by that body, it follows that the judgment on the plea of guilty of petty larceny was null and void, and was properly set aside as such. That being the case, the defendant was never in jeopardy, so far as the proceedings based upon that plea were concerned, and judgment was properly rendered on the verdict of guilty returned by the jury on the trial for grand larceny. For these reasons, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

